IN THE SUPREME COURT OF FLORIDA

GARY GOULD, :

Petitioner, :

vs. : Case No. 75,833

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, GARY GOULD, was the Defendant and Appellant in the appended Gould v. State, 15 F.L.W. 730 (Fla. 2d DCA March 14, 1990), review granted, Case No. 75,833 (Fla. 1990). Respondent, the State of Florida was the prosecuting authority.

References to the record on appeal will be designated "(R)."

All emphasis, unless otherwise indicated, will be supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

A. Case In Chief

On March 13, 1989, the State Attorney for the Sixth Judicial Circuit, in and for Pasco County, Florida, filed an amended information charging Petitioner, GARY GOULD, with kidnapping contrary to section 787.01, Florida Statutes (1986), five counts of sexual battery contrary to section 794.011(3), Florida Statutes (1986) and section 794.011(4)(a), Florida Statutes (1986), and three counts of battery contrary to section 784.03, Florida Statutes (1986) against T[redacted] S[redacted] (R414-416) The charged offenses occurred in October of 1986. (R414-416)

On March 6, 1987, a notice of Williams Rule evidence was filed. (R426-427) The court denied the defense motion to strike. (R431-432)

Petitioner was tried by jury on the amended information on July 6 and 7, 1987.

T[redacted] S[redacted] and her son lived with Petitioner, Gary Gould, during October of 1986. On the evening of October 25, she returned from work and Mr. Gould left to get beer. (R33-34) He returned home with two six-packs. (R35-36)

T[redacted] went into the bedroom, and a short time later Mr. Gould came into the bedroom yelling and proceeded to tape T[redacted] hands and feet with duct tape. (R38-39) Mr. Gould slapped her five or six times and stated that he hated her and was going to cut off her hair, which he then proceeded to do. (R39-40) Mr. Gould then

made her hop into the bathroom where he began shaving her head. (R40-41) Mr. Gould then removed the tape and tied Ms. S[redacted]'s hands to the bathroom fixtures with bedsheets. (R42)

Mr. Gould tore off her underwear and struck her again. (R42-43) Mr. Gould then left the bathroom and returned with a rubber glove and a package of hotdogs. Mr. Gould inserted the hotdogs into Ms. S[redacted]'s vagina and rectum. (R43) Ms. S[redacted] resisted these activities. She told him to stop and tried to talk to him. (R101) She told Mr. Gould her hands hurt and he loosened the bindings. (R101) Mr. Gould then urinated on T[redacted] and left the bathroom. (R44-46)

Mr. Gould returned and blindfolded T[redacted] He then beat her with a wooden spatula until it broke and inserted the spatula into her vagina and rectum. (R45-47) Ms. S[redacted] resisted the attack "very much." She screamed several times and asked Mr. Gould to "please stop." (R47,106) Ms. S[redacted] was also struck in the face with what she believed was a hammer. (R47) She told Mr. Gould she did not want to die and asked him to stop. (R49) Mr. Gould then untied her and held a knife to her throat, telling her to perform oral sex on him. (R51-52)

He took T[redacted] into the bedroom an approximate distance of five to ten feet, and again made her perform oral sex after binding her hands. (R53,108-109) Mr. Gould then fell asleep on the bed.

T[redacted] stated she was afraid of Mr. Gould and did not resist more because she was afraid for her safety and for her child's. After Mr. Gould fell asleep, T[redacted] got up, got her child,

and went to a neighbor's home and then to the police. (R54) Officer Rickus believed Mr. Gould had been drinking, but did not believe he was intoxicated. (R135-13) After Miranda, Mr. Gould stated had and T[redacted] had gotten into a fight and he had pulled her into the bathroom and pushed her against the shower. (R137) Mr. Gould stated he knew he had committed a serious crime. (R137)

T[redacted] testified Mr. Gould's attack was unprovoked and that while Mr. Gould had been drinking, he was not intoxicated. (R137)

B. Williams Rule Testimony

Over defense counsel's continuing objection, Mr. Gould's former girlfriend, K[redacted] K[redacted] testified that eleven months previously in November of 1985, she and her child were living with Mr. Gould. (R151) On November 21, she came home and could tell Mr. Gould had been drinking, but was not intoxicated. (R152) She and Mr. Gould had been fighting during the day; and earlier, she had hung up on him. Mr. Gould wanted to talk and she refused. (R169-173)

Ms. K[redacted] went into the bedroom and Mr. Gould dragged her into the living room, pushed her into a chair, and began yelling at her. (R154-155) He then returned her to the bedroom where he handcuffed her and tied her legs with strips of cloth. (R155-156) Mr. Gould then got a sword, a pocket knife, and a hatchet, and at one point threatened to kill her if she made noise. (R157) Mr. Gould cut off a piece of her hair with a knife and threatened to cut off her legs. (R159-160) Mr. Gould then untied Ms. K[redacted] and

they sat and talked. (R164) Mr. Gould ate, then went to bed. (R164) Ms. K[redacted] got her child and went to the police, where she was interviewed by Officer Rickus. (R165,192) Rickus interviewed Mr. Gould who stated that he and Ms. K[redacted] had argued and he had tied her. (R245-246) He might have slapped or threatened her. (R246)

Mr. K[redacted] was not sexually assaulted on November 231. She also stated that she had allowed Mr. Gould to restrain her previously as part of their sexual relationship. The weapons, restraints, and photos of Ms. K[redacted] were admitted into evidence over defense counsel's objection. (R156,196-198,248)

Defense counsel moved for a judgment of acquittal, arguing the evidence showed Ms. S[redacted] was not physically helpless as defined under section 794.011, Florida Statutes (1986). The motion was denied. The court, the State, and defense counsel agreed the only applicable lesser included offense to Counts II and III, sexual battery on a physically helpless victim, was simple battery under the Schedule of Necessary Included Offenses. (R284-286) Defense counsel requested that other lessers be given on the counts, but the court specifically denied that request. (R286) The jury was instructed on Counts II and III as charged and instructed the only applicable lesser was simple battery. (R367,368,372,375, 440-444)

Mr. Gould was found guilty as charged on all counts. (R439-447) On October 26, 1987, Petitioner was sentenced to 27 years incarceration. (R401,453-467) The recommended guidelines

indicated a presumptive sentence of 22 to 27 years incarceration. (R468) On October 28, 1987, Petitioner timely filed a notice of appeal. (R469)

Petitioner's brief was filed in the Second District on May 17, 1989, and the State's response was filed on June 22, 1989. (See Appendix A) On October 16, 1989, the Second District ordered supplemental briefs to be filed addressing the applicability of section 924.34, Florida Statutes (1985) to the instant case. (See Appendix B) Those supplemental briefs were filed by Petitioner on November 14, 1989, and by the State on November 16, 1989. (Appendix C)

On March 14, 1990, the Second District issued an opinion in Petitioner's case. Mr. Gould's convictions for kidnapping, three counts of sexual battery, and simple battery were affirmed. The court reversed Mr. Gould's convictions on Counts II and III by utilizing section 924.34, Florida Statutes (1987).

Petitioner appealed to this Court for review and filed a jurisdictional brief on April 5, 1990. On July 19, 1990, this Court granted review.

SUMMARY OF THE ARGUMENT

Issue I: Section 924.34, Florida Statutes (1987) cannot be used to direct a conviction for sexual battery against Petitioner as defined in section 794.011(5), Florida Statutes (1985), be entered against Petitioner because sexual battery is not a degree offense and because it is not a necessarily lesser included offense to sexual battery under section 794.011(4)(a), Florida Statutes (1987). Neither may sexual battery subsection (5) be a Category 2 permissive lesser in the instant case, as the pleadings do not support the charge.

Due process, as provided by both the federal and state constitutions, which guarantee an accused the right to notice of a criminal charge and trial upon that charge if desired, prohibits the entering of a judgment against Petitioner for sexual battery using physical force and violence not likely to cause serious personal injury when Petitioner was charged with a sexual battery on a physically helpless victim and no instruction or verdict was made available to the jury for the offense of sexual battery using force and violence not likely to cause serious personal injury.

Issue II: The failure of the trial court to give a Category 1 or a Category 11 lesser instruction is reversible error requiring a new trial. It is not an appropriate remedy for the appellate court to enter a judgment for the lesser offense.

Issue III: The appellate court is precluded from assuming the role of the State in determining what offense Petitioner should have been tried upon and directing a judgment be

entered for that offense. The State, by failing to file an information alleging sexual battery with physical force and violence not likely to cause serious personal injury and successfully objecting to the giving of a jury instruction or verdict form to the jury on that charge, waived its right to a conviction for that offense.

Issue IV: A judgment of acquittal should have been granted on the count of kidnapping due to the failure of the evidence to establish that the movement to the bathroom or confinement therein was anything other than incidental to the sexual batteries.

ARGUMENT

ISSUE I

THE SECOND DISTRICT COURT OF APPEAL IN ITS APPLICATION OF SECTION 924.34, FLORIDA STATUTES (1987), VIOLATED THE DUE PROCESS OF RIGHTS OF PETITIONER AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE XIV OF THE FLORIDA CONSTITUTION.

Petitioner, Gary Gould, has been deprived one of our most fundamental freedoms -- the right to a trial by jury and an opportunity to defend against a criminal charge by the ruling of the Second District Court of Appeal. In its application of section 924.34, Florida Statutes (1987), the Second District held that an appellate court may "examine the evidence presented in a criminal trial and make its own independent evaluation of that evidence" and then enter a conviction against a defendant regardless of the proceedings of the trial court.

In the instant case, Petitioner was charged with 2 counts of sexual battery on a physically helpless victim, T[redacted] S[redacted], contrary to section 784.011(4)(a), Florida Statutes (1986). At trial, the evidence presented established that Ms. S[redacted] was not physically helpless, nevertheless, the trial court denied a motion for judgment of acquittal. Defense counsel, the State Attorney, and the trial court then discussed which lesser included offenses the jury would be instructed on. All were in agreement that the only lesser provided for under the Schedule of Necessary Lesser Included Offenses was simple battery. (R284-286) Defense counsel

specifically requested that other lessers, including sexual battery as defined by section 794.011(5), Florida Statutes (1987) be given. The State objected to the giving of any lessers other than simple battery, and defense counsel's request was denied by the court. (R286) The jury was instructed only on the charged offense and simple battery. (R367-368,372,375,440,444) The facts of the instant case do not support the entry of a conviction for sexual battery by the Second District under the auspices of section 924.34, Florida Statutes (1987) because sexual battery is not a degree crime nor is subsection (5) a necessarily lesser included offense, and such an act violates the principal of due process.

A. Inapplicability of Section 924.34, Florida Statutes (1987)

Section 924.34, Florida Statutes (1987) provides that:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty, but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter a judgment for the lesser degree of the offense or for the lesser included offense.

The offenses of sexual battery as defined by section 794.011, Florida Statutes (1985), do not meet either alternative of section 924.34, Florida Statutes (1987).

The first instance when section 924.34, Florida Statutes (1987) may be used deals with offenses divided into statutory degrees. Sexual battery is not divided into degrees, but rather into different level felonies by such determining factors as the age, physical and mental condition of the victim, and by the amount

of force used by the perpetrator; but there is no such thing as first, second, or third degree sexual battery. Homicide, arson, and theft are examples of crimes defined by statutory degree. The decision of this Court in Brown v. State, 206 So.2d 377 (Fla. 1968), supports this result -- that sexual battery is not a degree offense; and this was correctly interpreted by the Second District to exclude sexual battery as defined under section 794.011(5), Florida Statutes (1985), as a possible conviction which could be entered against Petitioner. Thus, section 924.37, Florida Statutes (1987) is not applicable under subsection (1).

The second alternative available under section 294.34, Florida Statutes (1987), permits the appellate court to direct that a conviction be entered for a necessarily lesser included offense if the evidence supports the necessarily lesser included offense. The schedule of lesser offenses pertinent to sexual battery lists only simple battery as a Category 1 necessary lesser included offense of sexual battery as defined in subsection (4)(a). Sexual battery subsection (5) is listed as a permissive lesser offense included provided the evidence and pleadings support its being given.

In order to determine if sexual battery subsection (5) is a necessary included lesser offense to subsection (4)(a), the elements of each must be examined. A necessary lesser included offense is one in which "the burden of proof of the major crime cannot be discharged without the proving of the lesser crime as an essential link in the chain of evidence." Brown, supra at 382.

The elements of sexual battery under subsection (4)(a) are: (1) that a sexual battery be committed [sexual battery is defined by section 1(h) as "oral, anal, or vaginal penetration by or union with, the sexual organ of another, or the anal or vaginal penetration of another by any object"]; (2) that the act was not consented to; and (3) that the victim was physically helpless to resist. Conversely, sexual battery under subsection (5) requires proof of (1) a sexual battery (2) without consent and (3) the use of physical force and violence by the perpetrator not likely to cause serious personal injury. Because subsection (5) requires proof of one element that subsection 4(a) does not -- the use of force not likely to cause serious personal injury -- it cannot be said that subsection (5) is a necessarily lesser included offense. See Brown, supra.

Under subsection 1(h), the definition of sexual battery does not require the act to involve any degree of force whatsoever -- it merely requires union or penetration with a sexual organ. Under subsection (5), sexual battery clearly contemplates the use of some force and violence beyond that encompassed in the actual act itself while subsection 4(a) does not require any additional force beyond that needed to achieve the union or penetration which defines a sexual battery. The argument is supported by the Florida Standard Jury Instructions in Criminal Cases, which did not adopt sexual battery (5) as a necessarily included lesser offense in Category 1.

This interpretation is not unique to sexual battery as an analogous situation is present in the crimes of robbery and theft. It has been held that there must be force beyond that actually needed to take possession of an article during a theft in order to elevate the crime to a robbery. See Walker v. State, 546 So.2d 1165 (Fla. 3d DCA 1989); Santiago v. State, 497 So.2d 975 (Fla. 4th DCA 1986). Every sexual contact in Florida, is by definition, a sexual battery. What makes the act criminal is the age of the victim, the lack of consent, the physical or mental condition of the victim, or the amount of force beyond that actually required to perform the union or penetration, either likely or unlikely to cause serious personal injury.

In Grange v. State, 371 So.2d 723 (Fla. 1st DCA 1979), the district court determined that sexual battery under subsection (5) was not a necessary lesser included offense to sexual battery as defined by section 794.011(4)(b), Florida Statutes (1977), under a similar analysis. The court ruled that since there was no element of force likely to cause serious personal injury in the lesser offense, the major offense was not dependent upon proof of the lesser to establish that the crime was committed. The court ordered that a discharge on the count in question be entered.

As in Grange, the proof of a sexual battery under subsection (4)(a) is not dependent upon the proof of subsection (5) to establish that the crime occurred because of the additional element of force present in subsection (5).

The Second District reliance on Gallo v. State, 491 So.2d 541 (Fla. 1989) is misplaced. In Gallo, an instruction was given on sexual battery subsection (5) when the charged offense was not sexual battery subsection (5), but rather some other type of unnamed sexual battery. This Court affirmed and held that the instruction was proper.

The Schedule of Lessers does permit the giving of an instruction on subsection (5) as a Category 2 lesser to all of the other sexual battery subsections, including subsection 4(a). However, in order to qualify as a needed instruction under Category 2, the accusatory pleading and the evidence must support the giving of the instruction. It is likely in Gallo that the instruction was approved as a Category 2 lesser after it was determined that both the information and evidence supported the charge. The information filed against the Petitioner does not support the giving of a Category 2 lesser as it fails to allege the element that physical force and violence not likely to cause serious personal injury was used in the commission of Counts II and III. Thus, Gallo cannot be used to necessarily support the giving of an instruction on subsection (5) in this case and then using that conclusion to permit the Second District to utilize section 924.34, Florida Statutes (1987), to enter a conviction against Mr. Gould for sexual battery subsection (5). Thus, the Second District was incorrect in determining that subsection (5) was a necessarily lesser included offense because it requires proof of a element subsection 4(a) does

not and, therefore, the second avenue under section 924.34, Florida Statutes (1987) is not available in the instant case.

B. Constitutional Considerations

Even if subsection (5) were a necessary lesser, in the instant case the entry of a judgment against Petitioner for sexual battery under subsection (5) cannot be done by an appellate court. To do so violates the most fundamental component of due process as guaranteed to all citizens by the Fifth Amendments to the United States Constitution -- that a person may not be convicted of a crime that the has not been charged with or had the opportunity to defend against at a trial before a jury, should he so desire. The opinion of the Second District ignores the principal that notice of a specific charge and the chance to be heard at trial belong to every accused in all courts, state and federal.

The Office of the State Attorney elected, by the filing of an information, to charge Petitioner Gould with 2 counts of sexual battery on a physically helpless victim. The State further chose not to charge Mr. Gould on those two counts, in the alternative, with sexual battery by use of physical force and violence not likely to cause serious personal injury. It could have done so by there mere addition of that language to the information. Petitioner then proceeded to trial, defending against the charge that Ms. Slezak was physically helpless. Petitioner sought an instruction on sexual battery (5) and the State objected, obviously wishing for a conviction of a more serious felony and believing that it was unlikely that a jury would convict Petitioner of only simple

battery. Petitioner's request for an instruction was denied and the jury was instructed on the charged offense and simple battery. Mr. Gould's second trial was held in the Second District Court of Appeal, where that court determined that it could sit as the trier of fact and convict Mr. Gould of sexual battery under subsection (5). The due process rights guaranteed by both our federal and state constitutions do not permit this second type "trial" Mr. Gould received.

Section 924.34, Florida Statutes (1987), is not unconstitutional on its face -- it permits the appellate court to enter a conviction for either a lesser degree of crime or for a necessarily lesser included offense. In either situation, the original jury would be instructed and would presumably deliberate on the charges for which the accused is ultimately convicted, and there would be no due process violation. For example, in Randolph v. State, 503 So.2d 958 (Fla. 1st DCA 1987), the appellate court, after reviewing the record, directed a judgment for petit theft be entered against the defendant after he was convicted of robbery in a jury trial. The petit theft charge was a lesser included offense and, presumably, the jury had been instructed on it, and the evidence supported the conviction. To circumvent the jury, as did the Second District, does not pass constitutional muster. The Second District is wrong to conclude that Petitioner "would stand in the identical posture before this court as he does now" had the jury been instructed on subsection (5). If an instruction had been given on subsection (5), Petitioner would have received a trial on

all charges and would have had a jury consider that charge also. The Second District's opinion ignores the concept of a jury pardon and presupposes that a jury would have done what the court did. The appellate court is not in the business of independently evaluating the evidence and convicting an accused of a crime he was not charged with or tried upon. The jury in Petitioner's case was not instructed that it could find him guilty of the crime of sexual battery subsection (5) and this precludes the appellate court from doing so.

In Osborne v. Ohio, 495 U.S. __, 109 L.Ed.2d 98, 110 S.Ct. ___ (April 18, 1990), the United States Supreme Court held that, although they found Osborne's constitutional challenge unpersuasive, he was entitled to a new trial on charges he had in his possession sexually explicit photographs of children. The jury was improperly instructed on the elements of the offense in that no instruction on lewdness was given and that in order to obtain a conviction it was necessary for the State to establish that the photographs depicted a "lewd exhibition." The court held that a new trial was necessary to ensure a conviction was obtained after a finding that the State had proved all the required elements. Surely, it is no less imperative under the Due Process Clause that the jury receive an instruction on the offense as a whole before a conviction is entered against him if a new trial is required when the omission is just one element.

The United States Supreme Court has affirmed that the 14th Amendment to the United States Constitution guarantees that an

accused has the right to notice of the crimes with which he is charged and an opportunity to be heard at trial on the issues raised by the charge. See In re Oliver v. State, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Even though the crime of sexual battery (5) may be closely related to the crime of sexual battery (4)(a), the Florida Constitution does not permit Petitioner to be charged with subsection (4)(a) and convicted of subsection (5). See Penny v. State, 191 So. 190, 193 (Fla. 1939).

Because sexual battery as defined under section 794.011-(5), Florida Statutes (1985) is not a necessarily lesser included offense nor, in the instant case, did the accusatory pleading support it as a Category 2 lesser, the constitutional principals of due process embodied in the United States and Florida Constitutions preclude the entries of convictions for that charge against Mr. Gould by either the trial court or the appellate court. An entry of a conviction of simple battery, a Category 1 lesser which the jury was instructed on is the only appropriate conviction. Petitioner's constitutional rights mandate this result.

ISSUE II

THE DISTRICT COURT ERRED IN FAILING TO REMAND FOR A NEW TRIAL AFTER HOLDING THAT SEXUAL BATTERY AS DEFINED UNDER SECTION 794.011(5), FLORIDA STATUTES (1985) IS A NECESSARILY LESSER INCLUDED OFFENSE TO SECTION 794.011(4)(A), FLORIDA STATUTES (1985).

The Second District Court of Appeal ruled that section 924.34, Florida Statutes (1987) permitted a conviction for sexual battery with force and violence not likely to cause serious personal injury under section 794.011(5), Florida Statutes (1985) to be entered against Appellant, reasoning that it was a necessarily lesser included offense to the crime of sexual battery upon a physically helpless victim as defined in section 794.011(4)(a), Florida Statutes (1985). While Petitioner strongly disagrees that subsection (5) is a necessarily lesser included offense of subsection (4)(a), if this Court holds it to be so, the remedy required in this case is a new trial.

In Wilcott v. State, 509 So.2d 261, 161 (Fla. 1987), this Court held that when the evidence and pleadings support the giving of a Category 11, or permissive lesser included offense, which is the next lower lesser, the failure to instruct as to that offense is reversible error. Thus, the failure of the trial court to give an instruction on sexual battery subsection (5) requires reversal for a new trial in this case, as subsection (5) is the next lower offense in the sexual battery statute. Likewise, if sexual battery subsection (5) is determined to be a Category 1 necessarily lesser included offense, remand for a new trial is also required. In

State v. Wimberly, 498 So.2d 929 (Fla. 1986), this Court held that a trial judge has no discretion on whether to instruct on a necessary lesser included offense. Further, the failure to instruct on a necessarily lesser included offense is not harmless error. See, State v. Abreau, 363 So.2d 1063 (Fla. 1978); Hayes v. State, 15 F.L.W. 1678 (Fla. 2d DCA June 20, 1990); Crapps v. State, 15 F.L.W. 2179 (Fla. 5th DCA August 30, 1990).

Should this Court determine that subsection (5) sexual battery is a lesser included offense, either a necessary Category 1 lesser or a permissive Category 11, lesser to sexual battery (4)(a), remand for a new trial is required.

ISSUE III

THE DISTRICT COURT ERRED IN ENTERING A JUDGMENT AGAINST PETITIONER FOR SEXUAL BATTERY PURSUANT TO SECTION 794.011(5), FLORIDA STATUTES (1985), WHEN SUCH ACT PREEMPTS THE POWER OF THE STATE IN SELECTING WHICH CRIMINAL CHARGES IT WILL BRING.

According to the opinion of the Second District, a conviction of sexual battery with force and violence not likely to cause serious personal injury under section 794.011(5), Florida Statutes (1986) may be entered against Petitioner even though the State chose not to charge him with that offense. Not only did the State not charge him in the alternative by the simple addition or the language "and in doing so used physical force and violence not likely to cause serious personal injury" to the Information, when defense counsel requested a jury instruction on subsection (5), the State objected, insisting only simple battery was required.

In Bean v. State, 469 So.2d 768, 771 (Fla 5th DCA 1983), the defendant was charged with two counts of felony murder, the underlying felonies being robbery and kidnapping. There was only one death. After being convicted of both counts, the defendant was sentenced for the homicide with the robbery as the underlying felony. The court rejected the State's argument that the defendant should also be sentenced for kidnapping. In doing so, the court reasoned that not only had the State not charged kidnapping, but it did not request jury verdict forms for the offense of kidnapping or any other applicable lessers. The court held that "the State waived any right it may have had to have the lesser included

offenses of kidnapping and/or attempted kidnapping considered below as possible verdicts, and it cannot now obtain a judgment for either from this Court."

The State clearly made a decision at the trial level that it wished an "all or nothing" verdict against Petitioner. They should not then, if they are not unsuccessful on appeal, be able to receive what was forfeited in the trial court and get two bites at the same apple.

ISSUE IV

IT IS ERROR TO ENTER A CONVICTION AGAINST PETITIONER FOR KIDNAPPING WHERE THE MOVEMENT DID NOT MAKE THE CRIME EASIER TO COMMIT OR SUBSTANTIALLY LESSEN THE RISK OF DETECTION, BUT WAS INHERENT IN THE SEXUAL BATTERIES.

The District Court ruled that Petitioner's conviction for kidnapping should stand. This ruling is erroneous. The victim was in the bedroom when approached by Petitioner. He tied her there, struck her and began to cut her hair; he then forced her to hop to the bathroom, a distance of between five and ten feet. Four of the five counts of sexual battery were committed in the bathroom. The he took Ms. S[redacted]back to the bedroom and committed the fifth sexual battery.

In order for a kidnapping conviction to stand, the resulting movement or confinement

> (a) must not be slight, inconsequential, and merely incidental to the other crime; (b) must not be inherent in the nature of the other crime; and (3) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So.2d 963, 965 (Fla. 1983), quoting State v. Briggs, 219 KAN 203, 216, 547 P.2d 720, 731 (1976). This Court reaffirmed this three-prong test in Ferguson v. State, 533 So.2d 763 (Fla. 1988). The facts in the instant case fail to meet the three-prong test. There is no evidence to show that the movement to the bathroom facilitated the commission of sexual battery --

sexual batteries were committed in both rooms and oral sex was committed in both rooms. The victim was bound for each act. No evidence was presented that the binding in the bathroom made those particular acts any easier to commit than if the victim had remained in the bedroom. The movement was slight -- across the bedroom, a distance of five to ten feet. The movement clearly had no significance independent of the sexual batteries and was only incidental to those offenses. There was no showing that Ms. S[redacted] could not have been just as easily bound in the bedroom and each of the acts committed there. The facts in the instant case are much different from those in Faison, supra, where the victim was dragged from a window to a back room and in Bush v. State, 526 So.2d 992 (Fla. 4th DCA 1988) where the victim was taken from a highway to a woods by the side of the road. Even in Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984), where the victim was driven by the defendant to an isolated area of town which facilitated the sexual battery and supported a kidnapping as an abduction, the court rejected the idea that the confinement in the car during the sexual batteries was a kidnapping because it was incidental to those acts.

Because the State cannot meet the three-prong test of Faison, discharge on the count of kidnapping is required.

CONCLUSION

Based on the foregoing arguments and citations of authorities, Petitioner requests this Honorable Court to reverse the conviction against Petitioner for sexual battery with physical force and violence not likely to cause serious personal injury and enter a conviction for simple battery, and to discharge Petitioner on the conviction for kidnapping.

Respectfully submitted,

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