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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 77,886

TOMMY SAAVEDRA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari from a
Decision of the First District Court of Appeal
Case No. 88-561

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Tommy Saavedra, will be referred to in this **brief as "petitioner"** or Mr. **Saavedra."** Respondent, the State of Florida will be referred to **as "respondent,"** "the state," **or** "the prosecution." References to the pleadings contained in this Record OB Appeal will be designated as **"R,"** followed by the appropriate page number(s), set forth in brackets (Example: [R.1]). References to the transcripts of the pre-trial, trial, sentencing and post-trial proceedings in this **case** will be referred to **as "Tr.,"** followed by the appropriate page number(s), set forth in brackets (Example: **[Tr.1]).**

STATEMENT OF THE CASE AND FACTS

During the early morning hours of June 25, 1987, K A, her cousin, and her younger sister were asleep in the mother's bedroom. [Tr. 387]. Her mother was at work. [Tr. 3601. K, who is black, awoke to find two white men dressed in black karate outfits in the room. [Tr. 387-388]. One of the men, held a sharp object to her side and told her to remain quiet or she would be killed. [Tr. 388, 424, 537, 542-5431. The other man was wearing a black hood over his head. This hood fell away when he attempted to knock out a porch light outside Miss A's home. [Tr. 390, 402, 5321.[1]

She was led from her home to a park next door, where she was made to have vaginal intercourse three times with each of the men. [Tr. 415, 418-432]. During this time, the t-shirt worn by Miss A was wrapped around her head but, according to her, it did not prevent her from observing her assailants. [Tr. 556-5571. The record shows that all of the alleged acts of vaginal penetration occurred directly next to the park's fence and within two adjacent settings in the park. [Tr. 413-17; 419-32; 466-69; 561-80; 1130-31; State's Exh. Nos. 2, 6 & 7; Defendant's Exh. No. 7, 13]. The slide and cement area - the second and third sites at which Miss Ai was allegedly sexually battered - were very close to each other as evidenced by State's Exh. No. 7, which depicts both the slide and the cement

[1] This individual was later identified by the victim to be petitioner's co-defendant, Donald Teater. [Tr. 4021.

area. [Tr. 468-69; State's Exh. No. 7]. The State did not adduce any evidence for the jury as to how long the entire criminal transaction or episode lasted. The only factual indication in the record of how long the entire criminal transaction or episode lasted is contained in the testimony of Miss A . who stated that each act of vaginal penetration lasted for only two or three minutes and was promptly followed by another sexual act. [Tr. 422-32].

Afterward, Miss A , was instructed to lay on the ground for ten minutes so the assailants "could flee in their car." [Tr. 432]. She did so for approximately three to four minutes and then ran to her home. [Tr. 432, 451]. She told her brother what had happened and the police were called to her home. [Tr. 452]. They arrived there at approximately 3:30 a.m. [Tr. 745].

When Miss A told the officers that she believed her assailant lived next door, they proceeded directly to petitioner's home. Lacking either an arrest or search warrant, the officers nonetheless entered the home, searched it and arrested both Mr. Saavedra and Donald Teater, an acquaintance Mr. Saavedra had permitted to stay at his home on a temporary basis. [Tr. 11351. Items of clothing were also seized and both men were immediately displayed to the victim, who was told "...to see if those were the people who had assaulted her." [Tr. 323-3241. After she identified them as her assailants, they were arrested and charged with her assault.

By its third amended information the State charged Mr. Saavedra with burglary, armed kidnapping and three counts of sexual battery. [Tr. 176-1801. He pled not guilty to all charges. [Tr. 176]. Prior to trial, counsel for petitioner filed several motions, including a motion to suppress the fruits of the warrantless arrest of Mr. Saavedra within his home and a motion to suppress Miss A 's identification of Mr. Saavedra as one of her assailants. [R. 25-26, 95-96].

Specifically, Mr. Saavedra's motion to suppress sought suppression of any and all evidence, obtained as the result of the warrantless entry and subsequent search by police into Mr. Saavedra's home and his warrantless arrest within it. The items sought to be suppressed included but were not limited to "the body" of Mr. Saavedra, items of clothing seized from his home and the show-up identification made of Mr. Saavedra by the victim immediately following his arrest. [R. 14-15].

At the hearing on petitioner's motion, the State called as its witnesses Officers Robert Benfield, John E. McLean, Jr., and Michael G. Pease of the Jacksonville Sheriff's Office. [Tr. 14-112]. Officer Benfield testified that he was first to respond to a call, in the early morning hours of June 25, 1987, from Avenue, reporting a sexual battery. [Tr. 15]. He was told by K . A , a twelve-year old back girl, that she had been raped by her next door neighbors. [Tr. 16]. Based upon this information, he went to the residence next door and observed that all the lights were off. [Tr. 16]. He knocked on the front and back doors, but received no response. [Tr. 16]. Shortly thereafter, Officers Pease and McLean arrived. [Tr. 16].

Upon his arrival, officer McLean looked inside a bedroom window and saw someone in the bed. [Tr. 17]. Thereupon, Officer Benfield went to the rear **door** and commenced knocking on that **door,** while the other two officess remained in **a** position to observe the interior of the bedroom. These officers began knocking on the side of the house. [Tr. 17, 60]. Officer McLean observed two people in the bed and saw one of them, a young boy estimated by the officess to be 12 or 13 yeass old, get out of the bed and turn in the direction of the rear door. [Tr. 17, **60].**

The boy, later identified to by Tommy Saavedra, Jr., answered the door. According to Officer Benfield, he informed the boy that, **"[I]** was Officer Benfield with the sheriff office, **was** there to--and I needed to speak to an adult inside the residence. And if I may come in and he said, yes, **and** he opened **the** door **and** I went inside." [Tr. 18] (emphasis added). The young Saavedra **was** never told he need not allow the officers into the home, nor **was** he given **any** option other than to open the **door** for the officers. None of the other officers **saw any** contact between Officer Benfield and the young man, nor did they hear any conversations between the two. [Tr. 61, 89].

Officer McLean did hear Officer Benfield call **for** him to come around to the **back,** which he did. [R. 61]. When Officer McLean arrived at the back door, both officers entered the premises, **as** did officer Pease **shortly** thereafter. [Tr. 20, 61-63]. They entered the bedroom they had previously observed and handcuffed and arrested Donald Teater. [Tr. 20, 23].

Immediately thereafter, Mr. Saavedra was removed from his bed, located in another **bedroom,** and likewise was arrested. [Tr. 24-25, 64-66]. Neither suspect was asked whether the officers could enter the home. [Tr. 70]. Nor did any of the officers attempt to merely **"speak"** with petitioner. Instead the officers did precisely what they **had** intended to **do** all along. They entered Mr. Saavedra's bedroom arrested petitioner and removed him from his home.

Petitioner's **son,** Tommy **Saavedsa**, Jr., who **also** testified at the suppression hearing, stated that he was awakened in the middle of the night by **a** lot **of** banging and knocking at the front and back doors. [Tr. 114]. He went to the back door **"...**and the cops were standing there **and** pushed the **door** opened and moved me and my cousin...and he went in and me and **my** cousin went **outside."** [Tr. 144]. According to the teenager, the offlcers never **asked him** to **go** and ***get*** his father, nor did they ask him to get any other adult that might be inside. [Tr. 122]. He further testified that he did not deny police entry into **the** home, **"[b]ecause I** was too shooken **up** from what was **happening."** [Tr. 143]. Appellant's son did not witness the arrest of his father.

Minutes after their arrest, both Mr. Saavedra and Mr. Teater **were** placed in a patrol car. [Tr. 322]. The victim was asked to leave her residence to see if the people in the car were her assailants. [Tr. 3231. The victim began to walk toward the car, but upon seeing the men, became hysterica1 and could not continue to the vehicle. Nonetheless, **she** identified them **as** the assailants. [Tr. 324]. Thereupon, both men were transported to the Police Memorial Building, where petitioner executed a written consent to search his home, [Tr. 795; State's Exhibit 20]. Among the items seized from the home were a black hood and two pair of wet black pants. [Tr. 801, 803, 805; State's Exhibit 21-23].

Upon conclusion of the evldentiary hearing and after the submission of legal memorandum, the trial court denied petitioner's motion without written opinion or findings of fact. [R. 120]. Thereafter, the challenged evidence was admitted at trial and numerous references were made to it by the State and its witnesses. [State's Exhibits 21, 22, 231.

As its first witness, the State called K A to describe the events of the evening of June 24, 1987, and the early morning hours of June 25, 1987. [Tr. 358]. According to Miss A , she had neither met Tommy Saavedra or Donald Teater prior to the evening of June 24, 1987. [Tr. 382]. On that evening, after her mother had gone to work, there was a power failure. [Tr. 360-361]. Her older brother and cousin went to the next door neighbor's house, where they stayed in the yard until the power was restored. [Tr. 362]. According to Miss A , she and her younger sister remained on the porch, where she observed Donald Teater, Tommy saavedra, Sr., Tommy Saavedra, Jr., and a cousin talking to her brother and cousin. [Tr. 276, 363]. After 15 to 20 minutes, the power was restored, and she went to the patio of Mr. Saavedra's home to tell her brother ta return to their house, where she again observed Mr. saavedra and Mr. Teater. [Tr. 385].

The children returned to their house and eventually went to bed, with Miss / , her younger sister and her cousin sleeping on pallets in the mother's room. [Tr. 387]. The next thing she remembered was being awakened by something hard in her side. [Tr. **387]. She** observed one of her aesailants, who she identified as petitioner, kneeling on the side of her **bed. [Tr. 387]. Ms. A** testified that he told her to get **up** or he would kill **her, [Tr. 388].** Both individuals were **wearing** black karate suits and one of them was wearing a black hood. [Tr. 388-390].

As she was being led from her home, the man wearing the **hood** jumped up and knocked a light bulb out fram the porch light. **[Tr. 401]. In** doing **so, his** hood fell off, revealing his identity to be that of Donald **Teater.** [Tr. **402].** She was led to **a** nearby park, and assaulted. **[Tr. 415-432].** According to Miss **A** she did not **scream** because Mr. Saavedra told her he would kill her if she did. [Tr. **424].** She was also told **that** her **"next** door neighbors couldn't help her now" and was instructed to stay there for for ten minutes until the assailants got to their car. **[Tr. 432]. She observed** the men running out of the gates of the park. [Tr. **432]. She** stated that **she** saw her assailants **"running...**out the gates **we** had came in." **[Tr. 432].** Yet, **Miss a also** testified that she and her assailants had entered the park through an opening underneath the fence. [Tr. 582]. Ms. **A** . further testified that after three to four minutes, she ran home and the police were called. [Tr. **451-4521.**

The remainder of the State's **case** consisted of corroborative witnesses and evidence to substantfate the facts af the power shortage, the victim's observation of Mr. Saavedra **and** Mr. Teater on the night of June 24 and the victim's disheveled and emotional state upon returning to her home. [Tr. 601-643]. Both the arresting officers **and** the investigating detective testified **as** about petitioner's arrest and subsequent events. [Tr. 744-8301. Additionally, the State called Dr. Charles Rosche, the physician who treated the victim after the assault. [Tr. 8311. He testified that Miss Addison's appearance and injuries were consistent with the acts she described. [Tr. **840-8481.** He **also** testified about performing a "rape test" upon the victim, which **was** positive for the presence of semen. [Tr. 845-846].

Part of the evidence introduced at trial also included two pair of black pants and a black hood seized Erom the Saavedra residence, **as** well **as** a crowbar, alleged to be the instrument of entry into the victim's home and a screwdriver bearing the inscription **"T-Tom,"** petitioner's nickname. [Tr. 649-659; State's Exhibits 12 and 13]. These items had been seized in the driveway outside the victim's home. [Tr. 650].

In his defense, petitioner called **a** number of character witnesses, many of whom had known him since chilähood. They testified concerning their knowledge of Mr. Saavedra as a peaceful, non-violent person with **a** reputation for honesty. [Tr. 989-993, 1023-1032, **1054-1073].**

Petitioner's son, Tommy Saavedra, Jr., also testified. According to him, on the evening of the incident he and his cousin Robbie went to bed about the same time as his father. [Tr. 10911. He observed his father enter the bedroom and shut the door. [Tr. 1091]. The next thing Tommy recalled was being awakened in the middle of the night by the sounds of Donald Teater in the shower. [Tr. 1092-1093].[2] After observing Mr. Teater in the shower, he went to his father's room, where he observed his father asleep in his bed. [Tr. 1095]. Tommy then went back to sleep and was awakened some time later when the police began "beating on the house." [Tr. 1096]. He and his cousin ran and jumped in bed with Donald Teater, who instructed them to "...just lay down and be quite [sic]." [Tr. 11011.

Petitioner also testified at trial. [Tr. 11281. He readily admitted that as a carpenter he possessed numerous tools, including the screwdriver found in the victim's driveway. [Tr. 1129-1130]. According to Mr. Saavedra, many of his tools were stored in his car. [Tr. 1129]. He denied raping K

A and recounted his activities on the evening of June 24th. [Tr. 1136-1137]. He stated that he had gone to sleep at approximately 11:30 p.m. [Tr. 1138]. The next thing he recalled was being handcuffed by the police. [Tr. 1138]. He identified the black clothing as clothing that had been left at his home by a friend months earlier. [Tr. 1138, 1145-11461.

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[2] Upon the objection from Mr. Teater's counsel, Tommy's testimony that he saw an unidentified pesson in his dining room during this time, who was saying, "hurry up, Teater, hurry up Teater" and who ran upon seeing Tommy, was stricken by the Court. [Tr. 1102]. The jury was instructed to disregard the statement. [Tr. 1102].

After closing argument, the jury returned verdicts of guilty as to all five counts. [R. 121-125]. Petitioner was sentenced pursuant to the sentencing guidelines. [R. 145]. At sentencing, however, Mr. Saavedra's counsel objected to tripling the points under the category of victim injury due to the fact that penetration occurred three times. [Tr. 1397-1399]. This objection was overruled: petitioner was thus assessed 120 points instead of 40 points for penetration of the victim. [R. 140-145]. He was sentenced to 27 years imprisonment, the maximum sentence available under the sentencing guidelines.

A timely Notice of Appeal was filed to the First District Court of Appeal. That court affirmed the petitioner's conviction, concluding that valid consent to enter and search the home had been given to the police officers by petitioner's teenaged son. Saavedra v. state, 576 So.2d 953, 958 (Fla. 1st DCA 1991).[3] Although acknowledging that within the context of third party consent, "[j]oint dominion or control provides valid consent only when the other person is absent," the court employed a "totality of circumstances test" to find that consent to enter and search had been given. Id. at 958-959. In doing so, the court disregarded the fact that the officers knew Mr. Saavedra was in his home and failed to ask for him. It also specifically rejected the reasoning of Padron v. State, 328 So.2d 216 (Fla. 4th DCA 1976). Saavedra, at 959.

The court's original opinion was issued November 8, 1990. Its corrected opinion was issued on April 14, 1991.

Similarly, the court rejected petitioner's claim that separate punishment for the same transaction involving vaginal intercourse was violative of his double jeopardy rights. In reaching this conclusion, the court again rejected the reasoning adopted by this court in Carawan v. State, 515 So.2d 161 (Fla. 1987), and by two district courts of appeal in Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979) and Roberson v. State, 517 So.2d 99 (Fla. 1st DCA 1978), choosing instead to adopt the reasoning contained in a 1975 Tennessee Court of Appeal decision of Lillard v. State, 528 S.W. 2d 207 (Tenn. Ct.App. 1975). Upon filing a timely motion for rehearing, a corrected opinion was issued, again affirming petitioner's convictions for the reasons listed above.

Judge Barfield dissented from the panel opinion, finding that the State had failed to meet its burden to show "...that the consent was freely and voluntarily given." Id. at 964. He further faund that the State had failed to establish that petitioner's son had the authority to permit "...full scale entry and search" and noted the conditions under which the consent was alleged to have been obtained. Id. He concluded, "A young boy, awakened at 3:00 a.m., to the presence of police officers banging on the side of his home and seeking entry at the back door does not reflect a situation where free and voluntary consent can be provided." Id. Finding that the subsequent identification and consent to search were tainted by the illegal entry and search, he concluded they should likewise have been suppressed.

Petitioner filed a timely notice of intent to invoke this court's certiorari jurisdiction as well as a jurisdictional brief. On August 28, 1991, this Court granted review of this case and these proceedings followed.

POINTS ON APPEAL

I.

WHETHER THE FIRST DISTRICT COURT OF APPEAL DISREGARDED ESTABLISHED PRECEDENT OF THIS COURT AND OTHER COURTS OF THIS STATE WHEN IT HELD THAT THE WARRANTLESS ENTRY INTO PETITIONER'S HOME, MADE FOR THE PURPOSES OF ARRESTING HIM AND SEARCHING HIS HOME, WAS LAWFUL,

II.

WHETHER THE DISTRICT COURT'S HOLDING THAT THE PETITIONER WAS CORRECTLY CQNVICTED AND SENTENCED ON EACH OF THREE COUNTS WHICH CHARGED THE SAME OFFENSE WAS ERROR WHICH DIRECTLY CONFLICTED WITH PRIOR DECISIDN OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

SUMMARY OF THE ARGUMENT

I.

WHETHER THE FIRST DISTRICT COURT OF APPEAL DISREGARDED ESTABLISHED PRECEDENT OF THIS COURT AND OTHER COURTS OF THIS STATE WHEN IT HELD THAT THE WARRANTLESS ENTRY INTO PETITIONER'S HOME, MADE FOR THE PURPOSES OF ARRESTING HIM AND SEARCHING HIS HOME, WAS LAWFUL.

In the decision below, the First District Court of Appeal in Saavedra v. State, 576 So.2d 553, (Fla. 1st DCA 1991), held that petitioner's fifteen year old son had voluntarily consented to law enforcement authorities entering the petitioner's house, searching it, and arresting him in his bedroom without a warrant. Id. at 958. The district court further found that petitioner's son had the authority to consent to law enforcement officers entering the petitioner's house. Id. at 959.

In reaching its decision, the district court expressly disregarded the reasoning of the Second District Court of Appeal in Padron v. State, 328 So.2d 216 (Fla. 4th DCA 1976), as well as this Court's decision in Silva v. State, 344 So.2d 559 (Fla. 1977). In Padron, the Second District Court of Appeal held that a sixteen year old child does not share common authority over the premises of a common dwelling which a parent provides and shares with his child. Additionally and alternatively, the Padron court held that even if a child succeeds to and has authority over the premises in the parent's absence, where the father was present and asserted his rights, his sixteen year old son had no authority to override that assertion.

The First District Court of Appeal below applied a general consent analysis and found that petitioner's fifteen year old son gave valid consent to police who sought entry to petitioner's home. It did not engage in the two-part inquiry required where the State seeks to justify a warrantless entry, search and seizure on the basis of third party consent. First, it failed to determine whether petitioner's son had the authority to permit a warrantless search of the home and indeed, failed to require the State to meet its burden of proof to establish that the teenager had the "common authority" to effectively consent, as required by Illinois v. Rodriguez, ___ U.S. ___, 111 L.Ed.2d 148 (1990). Second, it failed to determine whether the teenager's action in opening the door in response to police knocking and stepping aside for their entry constituted unlimited consent to search petitioner's home and effect a warrantless arrest. Its analysis was clearly contrary to the opinions of this Court.

II.

WHETHER THE DISTRICT COURT'S HOLDING THAT THE PETITIONER WAS CORRECTLY CONVICTED AND SENTENCED ON EACH OF THREE COUNTS WHICH CHARGED THE SAME OFFENSE WAS ERROR WHICH DIRECTLY CONFLICTED WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The district court below disregarded this Court's holding in Carawan v. State, 515 So.2d 161 (Fla. 1987), and prior holdings of other District Courts of Appeal, by failing to apply the double jeopardy analysis established in Blockburger v. United States, 284 U.S. 299 (1932), and by declining to apply the doctrine of lenity. Instead of applying established rules of construction the district court fashioned a new law by holding that if one has "time to pause and reflect and form a new criminal intent between acts of penetration" then that person has committed a separate crime, Id. at 958. The district court erred by holding that one can be convicted multiple times for committing the same offense more than one time during the course of one criminal transaction or episode.

The district court thus erred by ignoring the legislature's mandate that criminal statutes be strictly construed. The district court justified its "new intent" rule by relying on a decision of a Tennessee appellate court. The court erred by applying that rule, howeves, even under the "new intent" sule enunciated in Lillard v. State, 528 S.W.2d 207 (Tenn. Ct.App. 1975), the facts of this case do not justify finding that the petitioner committed separately punishable acts of sexual battery. The facts of this case show that the alleged sexual battery likely transpired, if it occurred at all, over a very short period of time and wlthin a limited space. Neither temporal or spatial considerations justified finding that the petitioner had formed a "new intent" to commit a crime between sexual acts.

ARGUMENT

I.

THE FIRST DISTRICT COURT OF APPEAL DISREGARDED ESTABLISHED PRECEDENT OF THIS COURT AND OTHER COURTS OF THIS STATE WHEN IT HELD THAT THE WARRANTLESS ENTRY INTO PETITIONER'S HOME, MADE FOR THE PURPOSES OF ARRESTING HIM AND SEARCHING HIS HOME, WAS LAWFUL.

There is no factual dispute that the police officers in this case entered petitioner's home without a warrant, searched it, seized him while he was in his bedroom and arrested him. Immediately thereafter, he was displayed to the crime victim for identification and transported to the police station, where he executed a written consent for the further search of his home. At issue here is whether the actions of petitioner's son, in responding to uniformed police knocking on the door at four o'clock in the morning, constituted consent such as to authorize the officers to enter the home without a warrant, search it, locate petitioner in his bedroom and arrest him.

There can also be no dispute that absent a finding of valid consent to search the premises, this case is governed by the decisian of Payton v. New York, 4 5 U.S. 573 (1 80). In Payton, the United States Supreme Court held that the warrantless entry into an individual's home for the purpose of arresting him is unlawful, noting that "the freedom of one's house" is one of the "most vital" of our constitutional rights. Id. at 597.

The Payton decision resolved two consolidated cases. The case of the second consolidated appellant, Riddick, presents virtually identical facts to those in the present case. These facts are as follows:

> [Riddick] had been identified by the victims...and the police learned his address. They did not obtain **a** warrant **for** his arrest. [The officers] knocked on the door of the Queens house where Riddick **was** living. When his young son opened the door, they could see Riddick sitting in bed covered by **a** sheet. They entered the house and placed him under arrest.

Id. at **578** (emphasis added).

The Court held **that** an individual's right to privacy in the home prevents warrantless entries made for the purpose of effecting **an** arrest. **Id.** at **590.** It stated that never is the **"zone** of privacy more clearly defined than when bounded by the ambiguous physical dimensions of an individual's home." Id. at **589.** The Court continued, **"[a]t** the very core [of the Fourth Amendment] stands the right of **a** man to retreat **into** his own home and there be free from unreasonable governmental **intrusion."** Id. at **589,** citing Silverman v. United States, 365 U.S. **505, 511 (1961).** The Court thus drew **a** line at the entrance of the home beyond which police may not go without **a** warrant absent exigent circumstances. Payton, **445** U.S. at **590,**

The court was not misled into finding consent by the fact that the petitioner's son opened the **door** for police. The Court expressly stated: **"[W]e are** dealing with entries **into** homes made without consent of any accupant. ...[I]n Riddick, although his 3-year old son answered **the** door, the police entered before **Riddick had an opportunity either to object or consent."** **Id. at 583 (emphasis added).**

Thus, it is clear that absent a finding of valid consent, the entry, search and seizure at issue here cannot be justified. Additionally, because the consent at issue is that of Mr. Saavedra's son, it is governed by the third party consent analysis broadly set forth in United States v. Matlock, 415 U.S. 164 (1972). According to the Matlock decision, the State can rely on third party consent to search anly if it establishes that, "...permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Id. at 171. In concluding that valid third party consent was obtained, the district court examined the "totality of the circumstances," finding that Mr. Saavedra's teenaged son "...voluntarily allowed the police to enter the premises." Saavedra v. State, 576 So.2d 953, 958 (Fla. 1st DCA 1991) (emphasis added). Although agreeing that "[j]oint dominion or control provides valid consent only when the other person is absent," it nonetheless concluded that because the teenager had joint control over the premises, valid consent was obtained. Id. at 958 (emphasis added).

The analysis adopted below is clearly erroneous for a number of reasons. First, the "totality of circumstances" analysis is only part of the question to be answered. Where the consent of a third party is at issue, the court must determine whether the State has met its burden of proving that the consenting party had the authority to consent, particularly where the target of thé search is present Silva v. State, 344 So.2d 559, 562-63 (Fla.

1977). Second, the State must establish that actual consent, as opposed to the mere acquiescence to police authority was in fact obtained. Norman v. State, 379 So.2d 643, 648 (Fla. 1980). Consent is voluntary if, under the totality of the circumstances, it was freely and voluntarily obtained. Under the facts of this case, it cannot be said either that the State established the teenager's authority to consent to a full-scale search of petitioner's home or that his opening the door in response to the knocking of police constituted "consent," as defined by controlling precedent.

According to the officers who arrested petitioner, they approached his home for the purpose of arresting him in the early morning hours of June 25, 1987. According to one of the arresting officers, the entry occurred as follows:

> A: I went to the rear door and knocked on it.
>
> Q: okay. Did anything happen?
>
> A: Yes, ma'am. A young white male answered the door.
>
> Q: okay. Did you get the identity of that person wha answered the door?
>
> A: No, ma'am.
>
> Q: Can you describe what the approximate age was of this young white male?
>
> A: Age is probably between about 12 and 14, somewhere in that area.
>
> Q: okay. Did you say anything to him?
>
> A: I informed him that I was Officer Benfield with the Sheriff [sic] office, was there to -- and I needed to speak to an adult inside the residence. And if I

> may come in and he said, yes, and he opened the door and I went inside.

[Tr. 17-18] (emphasis added).

Immediatély upon entering the home, however, the officer proceeded to the bedroom of the home, located petitioner and arrested him. [Tr. 762]. The only "speaking" they did with him was to notify him of his arrest.

According to the petitioner's teenaged son:

> A: There was a lot of banging and knocking at the door, the front and the back door. And I opened the back door and the cops were standing there and pushed the door opened and moved me and my cousin.
>
> * * *
>
> Q: Did you tell them that they could come in?
>
> a: No, sir, they just pushed the door opened [sic] and I had it halfway opened and they pushed it the rest of the way opened.
>
> Q: And did they go passed [sic] you?
>
> A: Yes, sir, they pushed us out of the way.
>
> * * *
>
> Q: Do you remember talking to any of the police at the door?
>
> A: No, sir.
>
> Q: Do you remember them saying anything to you at the door?
>
> A: No, sir.
>
> * * *
>
> Q: All right. What happened after you said that they pushed you and what happened after they pushed you aside?

A: They went in our house.

Q: Okay. Did you take them to any bedrooms?

A: No, sir.

Q: Did you ever talk to them at the door?

A: No, sir.

* * *

Q: And the back door that they came in, could you describe to the court what kind of door that is?

A: A wooden door with a glass pain [sic] in the middle of it.

Q: All right. So you could see the policeman outside, is that correct?

A: Yes, sir, but I didn't look at them, I just went and opened the door, <u>I was kind of scared because of waking me up in the middle of the night and being woke up, I just went and opened the door and they came in</u>.

[Tr. 114-118] (emphasis added). Although the boy believed the officers should have a warrant, he did not relay this belief to the officers because he "...was too shooken [sic] up from what was happening." [Tr. 143].

Based on the record before this Court, it was unquestionably the State's burden to establish valid consent was given by the teenage son. Indeed, in <u>Illinois v. Rodriguez</u>, ___ U.S. ___, 111 L.Ed.2d 148, 156, 110 S.Ct. 2793 (1990), the United States Supreme Court recently held, "The burden of establishing that [there exists a] common authority [to consent] rests upon the State." This ruling is, of course, in line with established precedent of this court, although such burden was not acknowledged by the court in its opinion below. An examination of the facts clearly establishes that the State did not meet this burden.

Initially, it should be noted that this Court does not write on a clean slate. Well over ten years ago this Court, in plain language stated **"sons** cannot consent for fathers." Silva v. State, 344 So.23d **559**, 562 (Fla. 1977). Moreover, the Silva court held **that** where the **target** of the search is present, the question of third party consent is irrelevant, noting, "It is only reasonable **that** the person whose property is the object of a search should have controlling authority." Id.

Similarly, in Pinyan v. State, 523 **So.2d** 718 (Fla. 1st DCA 1988), the First District court of Appeal itself held, **"...[A]** joint occupant or one sharing dominion or control over the premises, may provide valid consent only if the **other** party is not **present**." Id. at 721 (emphasis added).

Here, the officers believed petitioner was in **his** home. Such belief **was** the very reason they went to his home. Mr. Saavedra's minor son answered the door in response **to** police knocking, which the court below construed **as** an invitation to enter. Saavedra at **958**. Employing the logic of the opinion below would permit officers to circumvent the warrant requirement merely by summoning the children of individuals sought to be seized to the family door. If the child answers the door, they have **"voluntarily"** allowed the police to enter to search the home and **arrest** their parent. Such logic is ludricrous and circumvents the entire purpose of the warrant requirement. One's expectation of privacy should not diminish merely by the opening of a door. Simply put, "Answering a knock at the door is not an invitation to come in the **house."** United States v. Herrold, ___ F.Supp. ___, 1991 W.L. 155516 (M.D. Penn. **July** 23, 1991). This is particularly true where the person opening the door is a minor, who has been awakened at four o'clock in the morning by police beating on the sides of his home.

Mare significantly, however, the decision below concludes that Mr. Saavedra's son had the authorlty to permit **a** wholesale search of the home even given the fact that his father was present in his home. In the seminal case of Padron v. State, 328 So.2d 216 (Fla. 4th **DCA 1976),**[4] the Fourth District Court of Appeal held that the consent of a sixteen-year old to the search of **a** family home was invalid. In Padron, the defendant was arrested at his home shortly after **a** shooting. After he refused the police permission to enter the home, permission was sought and obtained from his teenaged son. Analyzing the issue, the court concluded that the consent analysis under these circumstances requires **a** two-prong inquiry: (1) whether the minor has authority to consent; and (2) whether voluntary consent, as opposed to mere submission to authority, was obtained. Id. at 217. **As** to both prongs af this analysis, it concluded that the State had failed to **meet** its burdan of proof:

> Common authority derives from the mutual use of the **property** in question "by persons

[4] Padron was cited by this Court with approval in Silva v. State, 344 So.2d **559, 562 (Fla. 1977).**

> generally having joint access or control," id., at 171, 94 S.Ct. at 93. Applying this rule to the facts of the instant case, it seems clear to us, in the first instance, that a sixteen year old child does not share "common authority" with his father over the premises of a common dwelling place provided by the latter, see, May v. State, 199 So.2d 635 (Miss. 1967), and even if it could be assumed that the son would succeed to a tantamount authority over the premises in the father's absence, where the father was present and asserted his rights, the son had no authority to override that assertion. Lawton v. State, 320 So.2d 463 (Fla.App. 2d 1975); see also, Davis v. United States, 327 F.2d 301 (9th Cir. 1964).

Id. at 217-18. Accord, LaFave, 3 Search & Seizure: A Treatise on the Fourth Amendment, §8.4(c) (1987) ("...It would seem as a general proposition that under the Matlock "common authority" formula it cannot be said that a child has the authority equivalent to that of his parents to permit a full police search of the family home.")

The District of Columbia Court of Appeals recently examined the authority question under slightly different facts. In United States v. Whitfield, 939 F.2d 1071 (D.C. Cir. 1991), the adult defendant, who was a suspect in the theft af a large sum of money, resided at his mother's home. While he was gone, law enforcement agents went to the home and asked his mother if they could search her son's room, to which she agreed. A portion of the stolen money was recovered and defendant was charged with the theft. Although the trial court held the mother's consent was valid, this conclusion was reversed on appeal. Initially, the appellate court noted that the police made no effort to determine the extent of the mother's authority to consent, holding, "As a factual matter, the agents could not have believed Mrs. Whitfield had authority to consent to this search. They simply did not have enough information to make that **judgment."** Id. at **1074.** It then held:

> It is the government's burden to establish that a third party had authority to consent to **a** search. Rodriguez, 110 **S.Ct.** at **2797.** The burden cannot be met **if** agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. IE the agents **do** not learn enough, if the circumstances make it unclear whether the property about to be search is subject to **"mutual** use" by the person giving consent, then warrantless entry" is unlawful without further inquiry," Rodriguez, 110 S.Ct. at **2801** (emphasis added). ~~See also~~ W. LaFave Search and Seizure **§8.3(g),** at **p.267** (1987).
>
> The government has not carried its burden in this case. The agents' superficial and cursory questioning of Mrs. Whitfield did not disclose sufficient information to support a reasonable belief that she had the authority to permit this search.

Id. at 1075. Accord, United States v. Gonzalez, **729 F.Supp. 248, 257-258 (E.D. N.Y. 1990).**

In the present case, the police officers made absolutely **no** inquiry into the teenager's authority to allow them into the home. Nor **did** they **ever ask** for consent to search the home. **The** only **thing** they told him was that they needed to speak with an adult **and** then moved past him to the **bedrooms.** The facts of this type entry are virtually identical to **those** of People v. Sena, **267 Cal.Rptr. 186 (Cal.App.** 6 Dist. 1990). In **Sena' a** police officer went to an apartment where earlier drug activity was known to have occurred. He, **"...**asked whether defendant **was** there. **The** woman said 'sure,' stepped back from the **door,** and walked toward a bedroom." Id. at 187. The officer followed her and found defendant in possession of cocaine in the bedroom. On appeal, the court held it was "...unreasonable as a matter of law for the officer to have inferred or assumed that the visitor had consented to his entry and observation of the bedroom, if it was even reasonable to assume he was invited to cross the threshold of the apartment." Id. at 188.

Thus, even assuming the States met its burden of proving that petitioner's son had authority to consent to the police entry and search of the home, it cannot be said his actions constituted valid consent rather than mere acquiescence to police authority. In Gonzalez v. State, 578 So.2d 729 (Fla. 3d DCA 1991), the defendant's wife was confronted at the marital home at 9 o'clock p.m. by armed police. They told her they wanted to speak with her, to whlch she agreed. Upon entering the house, they conducted a room-to-room search of the house. Thereafter, they obtained consent for a more thorough search. On appeal, the Third District held the latter search to be tainted by the initial entry and search. It held:

> Under these circumstances, we think a reasonable person might well have interpreted this statement as an order, not a request, to let the police enter her house so they could speak to her, if this be the case, her subsequent "invitation" to enter the house was an acquiescence to authority, not a voluntary consent. See, e.g., Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436, 440 (1948); Talavera v. State, 186 So.2d 811 (Fla. 2d DCA 1966).

Id. at 733. It concluded that there was no need to resolve the question of the lawfulness of the initial entry, however, because it held that immediately upon entering the home, the police turned the entry into an unlawful search. It further held, "at best, Mrs. Gonzalez had voluntarily 'invited' the police in her home solely for the purpose of speaking to the police about a narcotics investigation; she had not consented to a search of her home." Id. at 733.

Similarly, petitioner's son was never asked if his home could be searched. His act in opening the door can in no way be canstrued as consent. Thus, he not oniy lacked authority to consent to such search, he never consented to the unlimited search of the premises that occurred here. For this reason, the fruits of the searches and seizures that occurred thereafter, as well as the victim's identification of petitioner as her sssailant were "fruits of the poisonous tree" and should have been suppressed. Taylor v. Alabama, 457 U.S. 698 (1982); Wong Sun v. United States, 371 U.S. 486 (1963).

Similarly, the district court's conclusion below that §901.19(1), Fla. Stat. (1989), was not violated when the officers failed to knock and announce their purpose, because they were voluntarily admitted, ignores the plain fact that the admission came in response to their knocking on the door. The door would not have been opened but for the acts of the officers. For this reason, it cannot be said that the boy somehow "consented" to a violation of the knock and announce" statute after it had already occurred. By focusing upon the actions of the teenager, rather than those of the police, the district court misconstrued the purpose and effect to be given this statute.

For these reasons, the opinion below was in error and should be reversed.

II.

THE DISTRICT COURT'S HOLDING THAT THE PETITIONER WAS CORRECTLY CONVICTED AND SENTENCED ON EACH OF THREE COUNTS WHICH CHARGED THE SAME OFFENSE WAS ERROR WHICH DIRECTLY CONFLICTED WITH PRIOR DECISION OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The petitioner was charged and convicted of burglary, arm a kidnapping and three counts of sexual battery for an event which allegedly transpired during the early morning hours of June 25, 1987. The district court erred by holding that the petitioner could be convicted on each of multiple charged counts of sexual battery for acts of sexual intercourse which occurred during one criminal transaction or episode. The court below reasoned that three separate offenses occurred during one transaction or episode and that double jeopardy principles were thus not implicated. The district court erred by failing to apply the analysis, and reach the result mandated by the Fifth Amendment to the Constitution of the United States and by Art. I, §9, Fla. Const. (1989). The district court relied on a number of cases holding that different types of criminal acts under §794.011(1)(g) Fla. Stat. (1987), may justify multiple sexual battery convictions for acts occurring during one criminal transaction or episode. Saavedra v. State, 576 So.2d at 957. The court below further reasoned that, "[s]patial and temporal aspects are equally as important as distinctions in character and type in determining whether multiple punishments are appropriate." Id.

The petitioner was found guilty of the Third, Fourth and Fifth counts of the Third Amended Information. **Each** one of those counts charged - with **the** Third and Fourth Counts alleging that the charge was for a subsequent act - that:

> **TOMMY** SAAVEDRA and DONALD L. TEATER on the 25th day of June, 1987, in the County of Duval and the State of Florida, did each commit sexual battery upon K A by coercing K A, a person 12 years of age or older, to submit to sexual battery by threatening to use force or violence likely to cause serious personal injury to her, and that K A reasonably believed that **TOMMY** SAAVEDRA and DONALD L. TEATER did each insert their penises upon or within the vagina of K A I, one after the other, without her consent, contrary to the provision of Florida Statutes 794.011(4) **and 794.023**, Florida Statutes.

The district court erred by holding petitioner could be convicted on each of three counts which charged **the** petitioner with alleged identical criminal acts.

At the time of the alleged crime, the Florida Legislature mandated that all criminal statutes were to be strictly construed. Section **775.021**, Florida Statutes (1987), provided:

> (1) The provisions of this code **and** offenses defined by other statutes **shall** be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.
>
> * * *
>
> **(4)** Whoever, in **the** course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced

> separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate lf each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(emphasis added). Under the legislatively mandated rule of strict construction which the court below should have applied the alleged multiple acts of sexual battery which occurred during "one criminal transaction or episode" were not separate criminal offenses.

Section 775.021(4), Florida Statutes (1987), expressly provided that offenses were separate "if each offense require[d] proof of an element that the other [did] not, without regard to the accusatory pleading or the proof adduced at trial." In this case, the Third, Fourth and Fifth counts of the Third Amended Information all required proof af the identical elements, namely vaginal penetration without consent. Furthermore, §775.021(4), Fla. Stat. (1987), expressly provided that courts were to determine whether offenses were separate "without regard to the accusatory pleading or the proof adduced at trial." The district court thus clearly erred by looking to the facts of this case and creating and applyfng a "new intent" rule based on spatial and temporal considerations. The district court acted in derogation of the legislature's mandats by creating a judicial definition of separate acts.

In Carawan v. State, 515 So.2d 161 (Fla. 1987), this Court set forth the principles of statutory construction which are to be applied when carrying out a double jeopardy analysis. The Carawan court stated that the central question before it was, "the proper method of construing criminal statutes in light of the prohibition against double jeopardy contained in the state and federal constitutions." Id. (footnote omitted). In Carawan, the defendant was charged with attempted first degree murder, aggravated battery and shooting into an occupied space. Id. at 162-63. All of the charges stemmed from the defendant having discharged a shotgun four times into a structure. Id. at 163. The Carawan defendant was convicted of attempted manslaughter, aggravated battery and shooting into an occupied structure. Id. This Court, in Carawan, held that the defendant could not be convicted of both attempted manslaughter and aggravated battery. Id. at 171. This Court, in Carawan, held, "The two double jeopardy clauses forbid not only successive trials for the same offense, but also prohibit subjecting a defendant to multiple punishments for the same offense." Id. This Court further stated that, "[b]efore reaching the question of any possible constitutional violation, courts necessarily must first determine what the legislature intended to punish and precisely how." Id. at 164. This Court further stated that, "The present confusion in the law results from the perception that courts are inconsistently applying these rules of construction, or perhaps, on occasion, are failing to apply any rule at all." Id.

This Court also stressed that its holding applied, "only to separate punishments arising from one act, not one transaction. Id. at 170, n.8. Additionally, this Court stated, "An act is a discrete event arising from **a** single criminal intent, whereas **a** transaction is **a** related series of acts." Id. The district court in this **case** found Carawan was inapplicable because it dealt with a single act. Saavedra, **576** So.2d at **958.** However, while this case deals with a criminal transaction involving one allegedly repeated act, rather than **a** single act this Court's double jeopardy analysis in Carawan is **still** applicable to the issue now **before** this Court. This Court should apply the same analysis it applied in Carawan in determining whether the legislature intended, at the time of the alleged offense, identical **acts** committed during one criminal transaction **or** episode to constitute and be punished **as** a single offense. This Court should hold that the established rules of statutory construction delineated in Carawan apply to this case because if lower courts are allowed to determine what constitutes an offense on an ad hoc basis - as the district court did in this **case** - the entire concept of notice and due process will be eviscerated.

In Carawan, this Court also delineated the three main rules of statutory construction which were to be applied in **a** systematic manner. **The** rules of construction enunciated in Carawan were succinctly summed **up** by this Court in State v. Smith, **547** So.2d 613 (Fla. 1988). The Smith court stated:

> The **first** is that "specific, clear **and** precise statements of legislative intent control" and **"courts** never **resort** to rules of construction where the legislative intent is plain **and unambiguous."** Id. at 165. The second step, absent **a** specific statement of legislative intent in the criminal offense statutes themselves, is to apply section 775.021(4), codifying Blockburger v. United

> States, 284 U.S. 299, 52 S.Ct. 180, 75 L.Ed. 306 (1932), to the statutory elements of the criminal offenses. We added judicial gloss by assuming that the legislature "does not intend to punish the same offense under two different statutes," and that the courts should not mechanically apply section 775.021(4) so as to obtain "unreasonable results." Carawan, 515 So.2d at 167. Subsection 775.021(4) was to be treated as an "aid" in determining legislative intent, not as a specific, clear, and precise statement of such intent. Ta assist in this analysis, courts are to make a subjective determination of whether the two statutory offenses address the "same evil." Id. at 168. The third rule or step is the application of the rule of lenity codified as section 775.021(1), Florida Statutes (1985). We recognized that application of the rule of lenity in subjection (1) might lead to a result contrary to that obtained by applying statutory elements test af the offenses per subsection (4). We opined that the two rules only come into play when there is no specific statement of legislative intent in the criminal offense statute itself, i.e., when there is doubt about legislative intent. Thus we concluded that, by its terms, the rule of lenity controls and prohibits multiple punishments for the two offenses, even if each contains a unique statutory element and are separate offenses under subsection 775.021(4).

Id. at 615 (footnote omitted).

Applying the Carawan analysis to the facts of this case, it is apparent that the legislature has not made a "specific, clear and precise statement" of whether it intended charged identical offenses arising from one criminal transaction or episode to be punished individually. Under the second prong of the Carawan analysis, applying the Blockburger test which was codified in §775.021(4), Fla. stat. (1987), it is clear that identical charged offerises arising in one criminal transaction or episode do not have different elements. In this case, the identical sexual battery charges were equivalent based on a presumption that the charged offenses were in fact one and the same and that the legislature did not intend to punish the same offense twice. **Finally,** under the rule of lenity, codified in **5775.021** Fla. Stat. (1987), the district court clearly should have resolved any doubt as to the legislature's intention in favor of petitioner. In Carawan, this Court held that, **"[W]here** there is **a** reasonable basis for concluding that the legislature did not intend multiple punishments, the rule of lenity contained in section 775.021(1) and our common law requires that the court find that multiple punishments are **impermissible."** Carawan, **515** So.2d at 168. **The** principle of strict construction mandated that the district court construe the criminal statute at issue to have only allowed one punishment for identical acts which occurred during one criminal episode **or** transaction.

In State v. Graydon, ***506*** So.2d 393 (Fla. 1987), this Court held that state correctional officers are not encompassed wfthin a statute which penalizes the act of resisting an officer with violence. Id. at 394-95. This Court reasoned that the statute **"enumerate[d]** specific categories of law enforcement officers **but** not state correction officers." Id. at 394. Further reasoning that penal statutes are to be strictly construed this Court held:

> We are not going to speculate why the legislature did not include state correctional officers within the statute. This Court does not have the autharity to legislate, and only the legislature can include state correctional officers within the provisions of section 843.01.

Id. at 394-95. This Court, in Graydon, thus upheld the lower court's stsict construction of the penal statute at issue. See also, State v. Jackson, 526 So.2d 58 (Fla. 1988) (holding mandatory strict construction of penal statutes prohibited courts from interpreting statute providing for increased sanctions for repeat petit theft offenders to include grand theft as a prior offense justifying an increased sanction). As in Graydon, the district court in this case should have strictly construed the criminal statute which the petitioner was charged with having violated. The district court's failure to have done such constitutes error which necessitates that two of petitioner's convictions be vacated.

The district court's rejection of two Florida District Court of Appeal cases which are on point with this case exemplifies its errant reasoning and demonstrates the express conflict between the district court in this case and Carawan v. State, 515 So.2d 161 (Fla. 1987); smith v. State, 539 So.2d 601 (Fla. 3d DCA 1989); and Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979). In Wade v. state, 368 So.2d 76 (Fla. 4th DCA 1979), the court reversed one of two convictions for sexual battery which stemmed from a single attack. The Wade court held that, "[T]he attack constituted only a single violation of the statute." Id. at 77. The Wade court vacated the sentences on both convictions and remanded the case to the trial court for resentencing for a single violation of the statute. In this case the First District panel contended that the Wade decision had no precedential value because that court did not elaborate on the facts of the case before it. Saavedra, 576 So.2d at 957. However, it is apparent from the face of the Fourth District's holding that the facts in Wade were akin to those presented in this case. The Wade court correctly applied the statutorily mandated rule of strict construction which applied at the time of the instant offense.

Likewise, the opinion below also rejected Roberson v. State, 517 So.2d 99 (Fla. 1st DCA 1987), as having any precedential value because that panel of the that court did not relate the underlying facts. Saavedra, 576 So.2d at 957. The Roberson court vacated a sexual battery conviction, finding:

> The facts establish that appellant's conduct constituted one continuous sexual battery. The situation is therefore distinguishable from that found in Grunzel v. State, 484 So.2d 97 (Fla. 1st DCA 1986), in which the defendant committed two separate acts that violated the sexual battery statute.

517 So.2d at 99. As in Wade, it is apparent that the Roberson court was dealing with a factual scenario akin to that present in this case. The Roberson court correctly applied the rule of lenity mandated by 5775.021, Fla. Stat. (1987). Likewise, in Smith v. State, 539 So.2d 601 (Fla. 3d DCA 1989), the Third District Court of Appeal held that a defendant could not be convicted of both second degree murder with a firearm and possession of a firearm in commission of a felony where both convictions arose out of the same criminal episode. The Third District Court of Appeai explicitly recognized in Smith, that, "[t]he conviction for possession of a firearm in the commission of a felony is duplicitous of and may not be permitted to stand

in addition to the conviction of the **same** substantive crime, in this case, second degree murder with **a** firearm." Id. at 602.

In Smith, the Third District Court of Appeal expressly relied on the Carawan decision, **and** recognized that the amendment **to §775.021(4)** Fla. Stat. (1987), should not be applied retroactively. **Id.** The holding below thus expressly and directly conflicts with the holding of the Third District Court of Appeal in Smith. This Court should reverse the district court **for** having failed to col-rectly interpret and apply the relevant statutes and principles of statutory construction in conflict with prior decisions of this Court, other District Courts of Appeal and a different panel of the First District Court of Appeal.

This Court should reverse the district court because it failed to **apply** the principĺes of statutory construction **delineated** by this Court in Carawan **to** the double **jeopardy** analysis which the facts of this case necessitated. This Court held in State v. Smith, 547 So.2d 613 (Fla. 1989), that the legislature **had** abrogateà the holding of Carawan for offenses that occur after the effective date of chapter 88-131, section **7.** **Id.** at 617. Be that **as** it may, the Carawan decision controls analysis of the petitioner's **claim** and the district court committed reversible error by failing to apply the **proper** analysis. The district court ignored the Carawan decision, **and** the requirement that **a** court must **determine if** separate **elements are** present in **the** charged offenses **"without** regard to the accusatory pleadings or the proof adduced at **trial."** Carawan, 515 So.2d at 167. In derogation of controlling law, the district court fashioned its own "new intent" rule to create a separate element for each offense to justify petitioner's multiple convictions and sentences for identical charged offenses.

In creating its "new intent" rule the district court relied on Lillard v. State, 528 S.W.2d 207 (Tenn.Ct.App. 1975). The Lillard decision does not in any fashion purport to be a double jeopardy analysis. The defendant in Lillard, challenged whether he could be twice sentenced for two separate rapes of one woman. Id. at 210. The Lillard defendant conceded that two separate rapes had occurred in that case. Id. The court specifically noted, "[The defendant] does not contend that only one rape of Mary Myers occurred, but argues that the punishments should have been set to run concurrently." Id. The Lillard court further stated: "Certainly what happened on each of these occasions was found to be rape, and either would have been if the other incident had not occurred. It was in fact two separate rapes, and we believe that it also was as a matter of law." Id. Contrary to the facts of Lillard, the petitioner contends that if sexual battery occurred in this case it constituted only one punishable offense.

In Lillard, the defendant gave two women a ride in his automobile from downtown Nashville to a rural area. Id. at 209. The defendant then forced one of the women to perform sexual intercourse with him. Id. The defendant then drove to another location and forced the other woman to have sexual intercourse with him during which time his first victim hit him on the head with a rock. Id. The Lillard defendant then apprehended his first victim, drove around with her for some time, and then again had forced intercourse with her. Id. Based on the facts of that case the Lillard court held:

> [W]e do not agree that **a** man who has raped a woman once may again assault and ravish **her** with impunity, at anothes time and at another place, as was **done** here. An intent was formed to **rape** her again. The evidence of the second rape is entirely additional to that of the first. Additional orders were given to the captive female, and intent to have her again **was** formed and manifested, and the **crime** committed. Certainly there **was** separate and additional fear, humiliation and danger to the victim.
>
> We **hold** that separate acts of **rape,** committed at different times and places and the product of several intents, are severally punishable.

Id. at 211. The Lillard court gave no credence to double Jeopardy principles nor did it purport to carry out any **type** of structured statutory interpretation.

Following Lillard, the district court in this case held:

> [S]aavedra **had** time to pause and reflect and form **a** new criminal intent between **acts** of penetration. We **so** find and, therefore, hold that the acts for which appellant was convicted **and** sentenced constituted separate offenses.
>
> * * *
>
> Since Saavedra committed three separate and distinct acts, multiple punishments were proper.

Saavedra, **576** So.2d at **958.** **The** district court clearly erred in following **a** Tennessee decision which **was** not a **proper** double jeopardy analysis, nor was it **a** proper application of **Florida's** rules **of** strict construction.

Even if this Court were to hold that the district court's "new intent" rule **was** a proper statutory interpretation, the facts of this case do not justify finding that the petitioner formulated separate intents during the alleged criminal transaction or episode. The facts of thfs case show that the alleged victim's testimony was none too credible. **At** trial, F ι A admitted that she had previously testified under oath that one alleged sexual act had not occurred at the place and in the manner she described if at trial. [Tr. 499-500]. Miss A did not have any explanation for her divergent stories. [Tr. 501].

Contrary to the facts in Lillard, the facts of this case show that all of the alleged sexual acts took place within a very short distance of each other. The alleged victim stated that her assailants first forced hes to have sex immediately adjacent to a fence demarcating a park. [Tr. 414-15; 419-24; State's Exhibit **Nos.** 2, 6 & 7; Defendant's Exhibit No. 13]. **The** record further shows that all other alleged acts of vaginal penetration occurred within two adjacent settings in the park. [Tr. 413-17; 419-32; **466-69**; 561-80; 1130-31; State's Exh. Nos. 2, **6** & **7**; Defendant's Exh. No. 7, 13]. The slide and cement area in which the second and third sites at which Miss A was allegedly sexually battered were very close to each other **as** evidenced by Defendant's Exh. No. **7**, which depicts both the slide **and** the cement area, [Tr. **468-69**; State's Exh. No. 7]. Since the victim's testimony reflects that she believed that each act of sexual intercourse lasted for only two or three minutes and **was** immediately followed by another act of sexual intescourse - while the last assailant restrained her - it cannot be said that the petitioner formed a "new intent" to commit a criminal act in between the acts of sexual activity which gave rise to criminal charges.

The State did not adduce any evidence for the jury as to how long the entire criminal transaction or episode lasted. The only factual indication in the record of how long the entire criminal transaction or episode lasted is contained in the testimony of Miss I who stated that each act of vaginal penetration lasted for two or three minutes and was promptly followed by another sexual act. [Tr. 422-32]. It is apparent from the facts of this case that the alleged criminal transactian or episode likely occurred in a very short period of time. Additionally, no testimony in the record indicates that the petitioner ever completed any act of sexual intercourse with the alleged victim during any time at any of the three alleged sites of criminal activity. The record of this case does not support the conclusion that the petitioner ever formed a "new intent" to commit sexual battery between any of the three alleged acts of vaginal penetration. The district court thus erred in holding that the charged criminal acts were "sufficiently separated by time and location so that double jeopardy [was] not involved." Saavedra, 576 So.2d at 956. Accordingly, this Court should vacate two of the petitioner's sexual battery convictions and remand this case for resentencing.

CONCLUSION

This Court should reverse the petitioner's convictions because the court below erred in holding that petitioner's Fourth Amendment rights had not been violated. Alternatively, if this Court does not find a Fourth Amendment violation this Court should vacate two of petitioner's convictions for sexual battery and remand this case for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, by United States Express Mail, this 16th day of October, 1991.

ATTORNEY

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