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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 Review from a Decision of the
First District Court of Appeal
Case No. 88-561

REPLY BRIEF OF PETTTIONER

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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.

Rather than address the clear holdings cited by petitioner in his initial brief, which are controlling in this case,[1] the State advances two theories to argue that the warrantless search and seizure of Mr. Saavedra within his home was lawful. First, it argues that the action of Mr. Saavedra's minor son, in opening the door to the family home in response to repeated police knocking in the early morning hours, constituted "consent" for the warrantless entry and search herein. Second, it argues that the speculative fear of destruction of evidence constituted exigent circumstances excusing the need for a warrant.

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[1] For instance, the State fails to cite, let alone discuss, the Silva v. State, 344 So.2d 559, 562 (Fla. 1977) (where this Court held, "The justification for allowing any person to consent to a search which may result in the seizure of evidence against another is the authority that person has by virtue of his sharing dominion and control over the premises."); Norman v. State, 379 So.2d 643, 648 (Fla. 1980) (holding that a petitioner's "compliance" with a deputy sheriff's request to search "might possibly be deemed acquiescence to authority, but it certainly [did] not rise to the level of free and voluntary consent to search."); Gonzalez v. State, 578 So.2d 729, 733 (Fla. 3d DCA 1991) (holding that the defendant's wife's actions in allowing police to enter her home "was an acquiescence to authority, not a voiuntary consent."); and United States v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (holding in a third party consent case that the State cannot carry its burden "if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry.").

Essentially, it urges this Court to adopt a "rape scene" exception to the warrant requirement. An examination of controlling state and federal law, however, clearly establishes that these arguments are without merit.

The State begins with the patently erroneous assertion that no warrant was required because probable cause existed to arrest Mr. Saavedra, arguing, "[W]arrantless arrests are lawful when police have probable cause to believs that the person arrested has committed a felony." [Respondent's Brief at 13]. This argument was precisely that rejected by the United States Supreme Court in Payton v. New York, 445 U.S. 622 (1980). The Court, in Payton, held "[T]he Fourth Amendment to the United States Constitutian, made applicable to the States by the Fourteenth Amendment...prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Id. at 576.

The State is similarly incorrect in its assertion that this Court is somehow bound by the legal conclusions of the First District that Mr. Saavedra's son consented to a search of the family home. As an initial matter, it should be noted that the trial court never made any findings of fact in denying petitioner's motion to suppress. Instead, it merely stated that the motion was denied. [R.119; Tr.336]. It is important that this Court recognize that petitioner's Motion to Suppress Physical Evidence contested the validity of the warrantless search at issue upon multiple grounds. [R.25-26]. While the respondent's sole response to petitioner's motion was a

memorandum which argued that the warrantless search was valid because petitioner's son had consented to the entry, [R.111-13; Tr.335], the trial court gave no indication of why it found the warrantless search was lawful. [R.119; Tr.336]. Thus, the First District erred in holding that, "[T]he trial court did not abuse its discretion in finding valid consent in denying appellant's motion to suppress." Saavedra v. State, 576 So.2d 953, 959 (Fla. 1st DCA 1991). The record simply does not show whether the trial court even considered the issue of consent.

The respondent cites United States v. Massell, 823 F.2d 1503 (11th Cir. 1987), for the proposition that, "The issue of whether valid consent to search has been given is a question of fact which will be upheld on review unless the lower court's finding is clearly erroneous." [Respondent's Brief at 13]. The Massell court stated, "The trial judge's findings on the issue of consent to search will be overturned only if the reviewing court determines that they are clearly erroneous." Id. at 1507. Likewise, this Court adheres to the practice of not substituting its judgment for that of the trial court on questions of fact and credibility of witnesses. ~~See e.g.~~, Demps v. State, 462 So.2d 1074 (Fla. 1985) (holding, "[T]his Court will not 'substitute its judgment for that of the trial court on questions of fact, llkewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"). However, in this case the record does not indicate that the trial court made any factual findings or findings regarding the credibility of witnesses. Thus, the First District Court of

Appeal below, and this Court presently, must review the record and make factual determinations.

The Eleventh Circuit Court of Appeals in United States v. Tobin, 923 F.2d 1506 (11th Cir. 1991) (en banc), U.S. appeal pending, recently held:

> Review of a district court's denial of a motion to suppress evidence is a mixed question of law and fact. United States v. Alexander, 835 F.2d 1406, 1408 (11th Cir. 1988). The district court's findings of fact are reviewed under the clearly erroneous standard, whereas its application of the law to those facts is subject to de novo review. Id.

Id. at 1510. Moreover, with respect to "factual" conclusions determine by the First District, there exists at least one significant errant finding by that court. In its opinion, it specifically found below that, "In fact, [Tommy saavedra, Jr.] testified that he knew Officer Benfield had no right to enter the house without a warrant. " Saavedra v. State, 576 So.2d 953, 959 (Fla. 1st DCA 1991). In fact, Tommy Saavedra, Jr. never testified that he knew Officer Benfield had no right to enter the house without a warrant. At the suppression hearing, the following exchange occurred:

> Q: Did you ever ask the officers whether they had an arrest warrant?
> A: No, ma'am.
> Q: Did you--do you know the status of the law on whether they can come into your house or not?
> A: No, ma'am.

[Tr.123]. The petitioner has exhaustively reviewed the testimony of Tommy Saavedra, Jr. and finds no factual basis in the record

for the First District's finding. [Tr.113-135; 1087-1115; 1125-27].

Furthermore, when this Court accepts a case for review pursuant to its conflict jurisdiction, it is empowered to consider a case as a whole lncluding the entire transcript. Negron v. State, 306 So.2d 104, 107 (Fla. 1975) ("After the conflict of decisions became apparent in the [co-petitioner's] case we were at liberty to consider the case as a whole, including the transcript."). Accordingly, this Court should review the entire record in this case and makes its own factual determinations.

The respondent next contends, "Given petitioner's son's age and maturity, it was reasonable for the police to beïieve at the time of entry that the son possessed the authority to consent.... [Respondent's Brief at 163. Contrary to respondent's assertion, the officers who effected the entrance, seizure and arrest did not describe Tommy saavedra, Jr. as mature. In fact, Officer Benfield testified that the "young white male" who answered the door appeared to be between 12 and 13 years of age. [Tr.17; 31]. Likewise, Officer McLean testified that Tommy Saavedra, Jr. was a "younger boy." [Tr.73]. Officer McLean estimated that Tommy Saavedra, Jr. was between 12 and 14 years of age. [Tr.75-76]. Additionally, Officer Pease described the young boy who was allegedly holding the door open when he entered the home as being between 11 and 13 years of age. [Tr.95-96]. Thus, the respondent's argument that it was reasonable for officers to believe that Tommy Saavedra, Jr., a

youth who appeared to the officers to be between 11 and 14 years of age, possessed the authority to consent to a search of the home is completely unjustified from the record in this case.

Furthermore, Officer Benfield testified, "I asked him if there were any adults and he said, yes, there were." [Tr.21-22]. Officer Benfield further testified, "I informed him that 1 was Qfficer Benfield with the the sheriff's 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]. Officer Benfield construed this as being "invited" into the residence. [Tr.26]. In response to the question, "After you entered the door and after you stepped over the threshold after the young man opened the door, you in essence were on your own in the house, isn't' that right?", Officer Benfield replied, "That's fair to say." [Tr. 35-36]. Petitioner submits that even if Officer Benfield effected entrance into the petitioner's residence as he testified, it is clear that Tommy Saavedra, Jr. did not consent to Officer Benfield carrying out a search of the house. At most, Officer Benfield's testimony if fully believed might establish that Tommy Saavedra, Jr. had given limited consent for Officer Benfield to enter the premises to speak with an adult.

Petitioner submits that the record of this case establishes that officers never received consent to enter the petitioner's house, but rather effected entrance through a show of official authority. ~~See e.g.~~, Johnson v. United States, 333 U.S. 10 (1948) ("Entry to defendant's living quarters, which was the

beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."); United States v. Edmondson, 791 F.2d 1512, 1515 (11th Cir. 1986) ("A suspect does not consent to being arrested within his residence when his consent to the entry into his residence is prompted by show of official authority."); and United States v. Newbern, 731 F.2d 744, 748 (11th Cir. 1984) ("The Government's witness ... testified that [the defendant], upon pulling back the curtains in his room, was in a position to see the officers' badges and drawn weapons. The fact that [the defendant] then told the officers to come in, under such circumstances, cannot be termed an entry based upon consent."). The record in this case establishes that Tommy Saavedra, Jr. did not consent to open the door to his father's house to the police, but rather did so in acquiescence to a show of official authority after prolonged and repeatad knocking and banging on the doors and windows of his father's house in the early morning hours. Additionally, respondent made no showing that the young Saavedra possessed the authority to authorize the entry of palice into his father's bedroom, let alone his home.

The state now also argues that an emergency justified the warrantless entry and search of petitioner's home and his warrantless arrest in his bedroom, although the State did not raise this argument in the trial court. [Respondent's Brief at 13; 18-19; R.111-13; Tr.335]. The State now contends, "Here, the entry to arrest was motivated by exigent circumstances to prevent

the destruction of evidence of the offenses which occurred only shortly before." [Respondent's Brief at 17]. Significantly, it fails to inform this Court that petitioner's home was surveilled by police for over twenty minutes prior to their entry into the home. [Tr.57-59; 72; 87; 746]. If time was of the essence, it certainly did not appear to concern the arresting officers.

Additionally, the record of this case shows that subsequent to petitioner's arrest, his home was left unattended by police for a period of approximately four hours. [Tr.797]. This fact evidences that the authorities were not concerned with the destruction of evidence. Additionally, the respondent's current position on what the officers intended bears on the merits of the State's exigency argument. The respondent now argues that the record does not support petitioner's statement that police had intended all along to enter petitioner's bedroom and arrest him. [Respondent's Brief at 2]. However, elsewhere in respondent's brief respondent asserts, "It is important to note that, contrary to petitioner's assertion, the police only entered petitioner's home to arrest him and his co-defendant, not to search the premises." [Respondent's Brief at 18]. Likewise, respondent further asserte, "Again, the police entered for the sole purpose of arresting the suspects based on probable cause, and not to conduct a wholesale search of the premises." [Respondent's Brief at 20]. The respondent's own contradictory assertions thus undermine its contention that an exigency justifying a warrantless entry to effect an arrest existed.

In Alvarado v. State, 466 So.2d 335 (Fla. 2d DCA 1985), an argument akin to the respondent's exigency argument was rejected under facts similar to those present in this case. In Alvarado, following the report of a sexual battery, officers knocked on the defendant's home at approximately 11:30 in the evening. Id at 336-37. Getting no response to the knocking, the officers then entered Alvarado's apartment through a window and effected his arrest. Id. at 337. In Alvarado, the State argued that exigent circumstances justified the warrantless arrest. The Alvarado court rejected the State's argument, holdfng:

> [E]xigent circumstances arise only when there is a very short time between the incident giving rise to probable cause and the warrantless entry into the defendant's premises. In this case, sufficient time elapsed between the officer's conversation with the victim and the arrest of Alvarado for the police to have made at least a minimal attempt to obtain a warrant. The officers did not know when the appellant was supposed to leave town; they had four men covering three exits to the apartment; and the appellant could easily have eradicated blood stain evidence between the time of the afternoon assault and the arrest early the next morning. The conditions were, indeed, less than exigent. Furthermore, law enforcement officers cannot be permitted to convert self-imposed delay into a circumstance of exigency when the elapsed time is sufficient to seek a warrant.

Id. at 337 (citations omitted). As in Alvarado, no exigency justified the warrantless search and seizure which occurred in this case.

The respondent's exigency argument has also been expressly rejected by the United States Supreme Court in Mincey v. Arizona, 437 U.S. 385 (1978), where the Court held that the warrantless

search of a murder scene was not constitutionally permissible. In doing so, it defined an exigent circumstance as an "emergency situation," which demands "immediate action," such as where police have reason to believe that a "...person within is in need of immediate aid." Id. at 392 (emphasis added). In the present case, the victim was in police custody and there was no basis to believe anyone within the Saavedra home was in need af assistance. Thus, there was no need to "protect or preserve life or avoid serious injury." Id. See also, Johnson v. State, 386 So.2d 302 (Fla. 5th DCA 1980); Grant v. State, 374 So.2d 630 (Fla. 3d DCA 1979). The Court also rejected the notion that the seriousness of the offense necessitated the need for prompt action, holding:

> Third, the State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? "No consideration relevant to the Fourth Amendment suggests any point of rational limitation" of such a doctrine. Chimel v. California, supra, at 766, 23 L.Ed.2d 685, 89 S.Ct. 2034.

Mincey at 342.

As in Mincey, the mere fact that a sexual battery had allegedly occurred earlier in the evening did not create an "emergency," nor did the fact that the crime was sexual battery create any reasonable basis to believe that evidence was in

danger of imminent destruction. The following exchange occurred with Officer Benfield at the suppression hearing:

> **Q:** And you had the house surrounded, is that correct?
> **A:** Yes, sir.
> Q: okay. So there was no -- so you had an opportunity to get a warrant, is that correct, because they couldn't leave, right?
> *A:* That's true.

[Tr.29-30]. Likewise, Officer McLean testified at the suppression hearing that he surveilled the petitioner's house while other officers spoke with the alleged victim. [Tr.57-59; 72-73;87]. Officer McLean further testified that no furtive action was occurring wlthin the house during the time he had the house under surveillance. [Tr.73]. Specifically, Officer McLean testified, "[T]he first movement that I saw within the house was the younger boy exiting the bed, that's the first movement I saw." [Tr.73]. Likewise, Officer Pease testified that, "There was absolutely no activity at all," in petitioner's house when officers arrived at the scene. [Tr.102-03].

Similarly, examining the state's speculative claim that the officers had a reasonable fear that evidence would be destroyed,[2] it is clear that controlling case law within this State forecloses such a claim. In Hornblower v. State, 351 So.2d 716 (Fla. 1977), a case not cited by the State, this Court set out at length the parameters of the emergency exception to the warrant

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[2] Here, none of the officers testified that they entered the home because they believed its occupants were in the process of destroying evidence.

requirement. In that case, the State sought to justify the warrantless search at issue on the grounds that they believed drugs were being destroyed within the home. In language directly on point with the rationale advanced by the State in this case, this Court held:

> The State submits that the scurrying around by the occupant when the police knocked at the door and announced their presence supplied justification for a warrantless search. It speculates that evidence might have been destroyed had the police taken time to obtain a warrant. We reject this rationale. In his testimony, the officer acknawledged that he intended to enter and search the trailer before he ever approached the mobile home. To sustain respondent's argument would be to endorse the precise kind af conduct which the Fourth Amendment seeks to proscribe.

Id. at 718 (emphasis added). It further held:

> Lying at the heart of the "hot pursuit" and "destruction of evidence" exceptions is the element of urgency **and** immediate, responsive action by police. Additionally, the "emergency exception" permits police to enter and investigate private premises to preserve life, property, or render first aid, provided they do not enter with an accompanying intent either to arrest or search. Johnson v. United States, supra; United States v. Barone, 330 F.2d 543 (2d Cir. 1964), cert. denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964). Again, the need to act expeditiously is essential.

Id. (emphasis added). Accord, Merrick v. State, **338** So.2d **77**, **78** (Fla. 4th **DCA** 1976) (**"And** a mere speculative claim, particularly one made only at the appellate level, that the contraband 'might' have been removed if it had not been seized without a valid warrant, is just **as** plainly an insufficlent basis upon which to

justify the search as arising out of an 'emergency' or from 'exigent circumstances.'") (emphasis added).

As in Hornblower, in this case no circumstances justified the warrantless arrest of the patitioner. Of particular significance in this case is the fact that Officer Benfield testified that in his twelve years of experience on the police force he had never procured a single arrest warrant in all of those years. [Tr.41-42]. Thus, any testimony regarding the difficulty of obtaining a warrant at 3:00 a.m. must be severely weighed against Officer Benfield's track record of never having obtained a single arrest warrant in twelve years as a police officer. ~~See e.g.~~, Hornblower v. State, 351 So.2d 716, 718 (Fla. 1977) (finding that no exigent circumstances existed to justify a warrantless search in which it considered the fact that, "There [was] no demonstrated attempt to secure [a search warrant] which was frustrated, thereby compelling action without a warrant.").

The case of Walker v. State, 433 So.2d 644 (Fla. 2d DCA 1983) also lays to rest the State's argument that because the crime had recently occurred, it should have been excused from the warrant requirement. In Walker, upon arriving at the scene of a theft, the police traced footprints fsom the crime scene to a trailer where the defendant was residing. They then entered the residence and arrested the defendant without a warrant. Although the State argued that the police were in "hot pursuit" of the defendant when he was arrested, such argument was soundly rejected by the court. Id. at 645. Significantly, the court also held that since the defendant's arrest was unlawful,

everything that flowed from it was illegally obtained and inadmissible. Id.

In sum, the State's ad hoc justification for the warrantless action here simply must fail. First, the police clearly intended to arrest Mr. Saavedra when they entered his home without a warrant. Second, none of the arresting officers testified that they had a reasonable fear that evidence was in imminent danger of destruction. Finally, no "emergency" was presented to the officers, nor was this justification even presented to the trial court below. It is, therefore, nothing more than an after the fact attempt to justify the patently unlawful entry into and search of petitioner's home and his warrantless arrest. Such argument should be soundly rejected by this Court.

The State next argues that no warrantless search of petitioner's residence occurred. This statement is incorrect. First, in order to locate petitioner, who was asleep in his bedroom, a search of his home was necessary. [Tr.64-65; 100]. Second, a subsequent search of his home occurred after the initial entry into his home. This search occurred after Mr. Saavedra had been arrested and taken to the police station for interrogation, where he executed a written consent to search form. As stated previously by this Court in Norman v. State, 379 So.2d 643, 646-647 (Fla. 1980), yet another case not cited by the State in its brief, "[W]hen consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search." (Emphasis added). With respect to its

burden to overcome the presumption of taint, the State presented no "clear and convincing proof of an unequivocal break in the illegality sufficient to dissipate the taint of prior official illegal action." Id. at 647 (emphasis added). Since the second, more comprehensive search of Mr. Saavedra's home accurred after his tainted consent, its fruits were also subject to suppression.

Additionally, the respondent speciously asserts that even if the arrest of petitioner was improper that the harmless error doctrine "further demonstrates that reversal of the district court's opinion is unwarranted." [Respondent's Brief at 19]. The respondent argues that even if it was error to admit testimony regarding the show-up identification which followed petitioner's arrest that such evidence was harmless, "because the victim had already identified her neighbors as the rapists." [Respondent's Brief at 19]. Additionally, respondent argues that, "[T]he physical evidence collected from the house was collected pursuant to petitioner's validly executed written consent to search given after his arrest." [Respondent's Brief at 20]. Not surprisingly, the respondent has failed to cite a single case in support of its proposition that the harmless error doctrine applies in this case.

In State v. DeGuillio, 491 So.2d 1129 (Fla. 1986), this Court dealt with the doctrine of harmless error in the context of improper comment by a prosecutor. Id. at 1130. The DeGuillo court held:

> The harmless error test, as set forth in [Chapman v. California, 386 U.S. 18 (1967)], places the burden on the State, as the

> beneficiary of the error, to **prove** beyond **a** reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See Chapman, **386** U.S. at **24, 87** S.Ct. at **828.** Application of the test requires an examination of the entire record by the appellate court including a close examination of permissible evidence on which the **jury** could have legitimately relied and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at **1135** (emphasis added). **In** this case, the jury heard extensive and emotional testimony regarding Ms. A. post-arrest identification of petitioner. **[Tr.453-54; 754; 762-63; 782-786; 829-30].** Likewise, the clothing items seized from the defendant's home also played a significant evidentiary role at trial. [Tr.801-05]. In light of the significance of the evidence, and the testimony regarding that evidence, which petitioner sought to exclude at trial, it is clear that the State cannot now prove beyond a reasonable doubt that the error cornplained of did not contribute to the verdict, or that these is no reasonable possibility that the error contributed to the conviction.

Accordingly, this Court should hold that the trial court erred in denying petitioner's motion to suppress and petitioner's conviction 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 AND IT DIRECTLY CONFLICTED WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The respondent now contends that §775.021(4)(b), Fla. Stat. (1989), justifies the petitioner's multiple convictions. [Respondent's Brief at 22]. However, respondent fails to acknowledge this Court's holding, in State v. Smith, 547 So.2d 613 (Fla. 1989), that the amendment to §775.021(4), Fla. Stat. (1987), contained in Chapter 88-131, section 7, Laws of Florida, which was effective July 1, 1988, will not be retroactively applied to offenses which occurred prior to the effective date of that chapter.

Significantly, even under the current version of §775.021, Fla. Stat. (1989), which courts have utilized to justify multiple convictions under different statutes for the same act, the petitioner could not properly be convicted of multiple identical counts based on the same act having occurred multiple times within one criminal transaction or episode. Section 775.021(1), Florida Statutes (1989), states the identical rule of lenity as that mandated in 1987. However, §775.021(4), Fla. Stat. (1989), has been modified and provides:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense...

> (b) The intent of the Legislature is to convict and sentence for each criminal affense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elernents of which are subsumed by the greater offense.

(emphasis added). Thus, even under the current provision - which has been interpreted to mean that a single act which constitutes more than one criminal offense under different criminal statutes may be punished by multiple convictions - an individual may still nat be convicted multiple times for identical criminal offenses occurring during one criminal transaction or episode when the charged offenses "require identical elements of proof."

The respondent relies on Bass v. State, 380 So.2d 1181 (Fla. 5th DCA 1988), apparently for the proposition that multiple sexual battery convictions for the same repeated act during one criminal transaction were proper in petitioner's case. [Respondent's Brief at 23-24]. The Bass court dealt with the question of whether the trial court erred in sentencing the defendant separately for two counts of sexual battery. Id. at 1182. The Bass court construed the issue on which the question before it turned as, "whether this activity was a single criminal transaction, or episode." Id. Section 775.021, Florida Statutes

(1979), which was in effect at the time the Bass defendant committed the offense with which he was charged, focused on whether an individual committed an act or acts constituting a violation of two or more criminal statutes during the course of one criminal transaction or episode. Id. at 1182, n.1. The Bass court thus could not have upheld the multiple convictions for sexual battery if it had determined that only one criminal transaction or episode occurred. The Bass court cited no authority for its novel position that the time interval between one act and the other, though minimal, "nevertheless was sufficient to separate one episode or criminal transaction from the other." Id. at 1183.

All of the other Florida cases on which the respondent relies, as support for its proposition that multiple convictions for the same repeated act were justified, all deal with different offenses having occurred during one criminal transaction or episode. The First District panel below relied on the Bass case for the proposition that sexual battery of a separate character and type requiring different elements of proof warrants multiple punishments. Saavedra, 576 So.2d at 957. The First District panel in this case also relied on Bass as support for its "new intent" rule.

Likewise, the First District panel also relied on Bartee v. State, 401 So.2d 890 (Fla. 1981), which followed Bass, as support for its "new intent" rule which it felt justified multiple punishments for the same act repeatedly committed during one criminal episode or transaction. The First District panel below

cited Bartee for the proposftion that, "Spatial and temporal aspects are equally as important as distinctions in character and type in determining whether multiple punishments are appropriate." Saavedra, 576 So.2d at 957. This proposition served as the basis for the court's formulation of its "new intent" rule.

In Bartee, the court dealt with the question of whether an individual was twice placed in jeopardy by first being tried and convicted of unlawful use of a license and subsequently convicted of possession a blank, farged, stolen, fictitious, counterfeit or unlawfully issued operator's license. Bartee, 401 So.2d at 892. The Bartee court stated:

> Most problems under [Article I, Sec. 9, Fla. Const.] relate to i€, when, how and why "jeopardy" attaches; some involve the word "twice"; others, as here, involve the meaning of "same offense." These latter words may raise two basic questions: (1) whether a particular factual circumstance constitutes one or two separate and distinct factual events (an identify of acts); (2) whether certain statutory crimes, in form or in substance, constitute the "same offense" or constitute two separate and distinct áffenses. Time, space and transactional aspects of factual events may raise questions as to whether or not, as a factual matter, one or two separate and distinct acts are involved. Such questions may inhere in the facts themselves or in the description of the facts as alleged in a charging document.

Id. at 892 (citation omitted). In a footnote the Bartee court added, "E.g., whether multiple factual events, such as repeated blows or knife stabbings, constitute separate offenses or but one offense in the aggregate, may depend on whether they are different in quality or are sufficiently separated by time or

place to be different factual events and therefore 'separate and distinct' offenses in fact." Id., n.4.

The petitioner submits that the First District panel below and the Bartee and Bass courts were both wrong in creating a rule of interpretation which abrogates the application of Blockburger v. United States, 284 U.S. 299 (1932) and the legislative mandate of strict construction. Regardless, even if this Court were to hold the First District panel's "new intent" analysis was correct, the facts of this case do not support finding that "separate and distinct offenses in fact" occurred in this case.

Accordingly, if this Court this Court does not find that petitioner's right to be free from unreasonable searches and seizures was violated, this Court should vacate two of petitioner's convictions of 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 5th day of December, 1991.

ATTORNEY

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