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IN THE SUPREME COURT OF FLORIDA

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THOMAS WILSON, JR., :

Petitioner, :

v. : CASE NO. 82,187

STATE OF FLORIDA, :

Respondent. :

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The record is consecutively paginated and shall be referred to by the letter "R" followed by the appropriate page numbers. Attached to this brief is an appendix containing the Florida First District Court of Appeal's opinion in this case.

STATEMENT OF THE CASE

By information, Petitioner was charged with the capital sexual battery (Count I) of **S** K (oral, anal or vaginal penetration by, or union with, his penis) on or **about** May 1, **1990**, through July **9, 1990;** the lewd **or** lascivious assault (Count 11) of **S** K on or between the **same** dates; the capital sexual battery (Count 111) of L **K** "by oral, anal or vaginal penetration by, **or** union with, the penis of the **said** Thomas F. Wilson, Jr., or by anal or vaginal penetration with an object" **(a** pen, or a spoon, or his finger) on or between the same dates; the lewd or lascivious assault (Count IV) of L K on **or** between the **same** dates; the capital sexual battery (Count V) of A K by oral, anal, or vaginal penetration or union with his penis, or by anal or vaginal penetration with a **pen** on or between the same dates: the lewd or lascivious assault (Count VI) of **A** K on or between the same dates; the capital sexual battery (Count VII) of **S** K by oral, anal, or vaginal penetration by his penis or by anal or vaginal penetration by a pen on or between the same dates; the lewd **or** lascivious assault (Count VIII) of S K on or between the same dates. (R-1-2).

Count VII was dismissed (nolle prossed) by the State on June **13,** 1991. (R-121).

Petitioner proceeded to jury trial, and on June 26, 1991, was found guilty of capital sexual battery (Count I), lewd or lascivious assault (Count 11), capital sexual battery (Count

III), lewd or lasciviouc assault (Count IV), capital sexual battery (Count V), lewd and lascivious assault (Count VI), and lewd and lascivious assault (VIII). (R-187-188).

On July **29**, 1991, Petitioner was sentenced **as** follows: Count I, natural life, with the minimum mandatory sentence of **25** years **("mms-25");** Counts III & V: natural life, mms-25, consecutive to the first count and each other; Counts 11, IV, VI **&** VIII: 15 years in prison, concurrent with each other, and concurrent with the sentence imposed in Count I. (R-547-548).

Notice of appeal was timely filed on August 12, 1991. **(R- 218).**

On July **7**, 1993, the Florida First District Court of Appeal issued its opinion in this case, rejecting Petitioner's arguments, and certifying the following question **as** one of great public importance to this Court:

> WHERE THE VICTIMS TESTIFY THAT THE DEFENDANT COMPLETED THE CHARGED **OFFENSES** OF CAPITAL **SEXUAL** BATTERY OF **A** VICTIM UNDER 12 AND LEWD **AND LASCIVIOUS ASSAULT, AND** THE DEFENDANT **TOTALLY** DENIES COMMISSION **OF** ANY OFFENSE, IS **A TRIAL** COURT REQUIRED TO INSTRUCT **A** JURY ON ATTEMPT IF REQUESTED TO DO SO **BY THE DEFENDANT?**

STATEMENT OF THE FACTS

S[redacted] K[redacted] testified that she was born on [redacted] [redacted]. **(R-297).**

The year prior to the date in which she testified Petitioner lived in a trailer near her. **A** little **after** Easter, he asked her to come over to his trailer in order to help him unpack. (T-302).

While she was helping him unpack, Petitioner touched or rubbed her on the hip on top of her clothes. **(R-303).** She told him to stop but he continued to rub her. She told him two more times to quit, but he wouldn't so she left and went **back** to her house. (R-303-304). There, she didn't tell anyone about this **because** she was scared. (R-304).

Over the objection of defense counsel, and after the jury was read a "Williams Rule" instruction, she testified that there was another time that he touched her in motel room 107 at the Regency Inn in Panama City. (R-304; 306-307). They were headed **to** Shipwreck Island **and** needed **a** place to change, so they got **a** motel room. He changed in the bathroom and she changed her clothes in the motel room. They then went down to Shipwreck Island and remained there through the rest of the day, returning to the motel room about five in the afternoon. (R-307).

There, they watched **a** movie. Near the end of the movie he forced her "back on the bed," pulled down her shorts, pulled his shorts to **his** knee-level, and **placed** his "bad spot" on her "**bad** spot." He rubbed her there with his "bad spot" for "about

five minutes." (R-308). After he stopped, she noticed that her "bad spot" was wet. **(R-308).**

They arrived back home around 11:30 in the evening. He told her to lie to her mother, and to tell her that his lawyer "looked like **a** cowboy" (he was supposed to have gone to his lawyer's office that day **but** didn't).[1] **(R-308-309).**

Another incident happened at Turner's landing on a Friday or Saturday night in **June.**[2] They went to Wal-Mart and Petitioner purchased a "Zebco" fishing pole for her brother's birthday. He **asked** her whether she wished to go to Turner's landing "to **see** if anyone was partying." She said **"no"** but he took her there anyway on his motorcycle. (R-309).

Apparently "na one was partying" there. He then forced her down on the motorcycle, pulled her shorts down and unzipped his, and **placed** his "bad spot" on hers. (R-310). He "rubbed up **and** down" for about five minutes before he stopped. It did not **feel** "very good." Afterwards, **the** area was wet. (R-310).

They then went **back** to her house. She didn't tell anyone about this. However, later she told her best friend, and in July, she told her biggest sister (J[redacted] W[redacted] **as** a

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[1]It should be emphasized that the foregoing was supposedly "Williams Rule" evidence, and Petitioner was not on trial for this incident.

[2]According to the witness, Petitioner was going to have surgery on the following Monday or Tuesday.

result of a discussion among the sisters on who they hated. **(R-312)**.

Apparently, on the day of the discussion she talked to her "friend" police officer Sue Ellen Nieves. (R-313).

On cross-examination, she admitted that she had seen an "Oprah Winfrey show" about the improper touching of children. (R-314-315). She **also** admitted that her hip was not **a** "bad **spot." (R-323)**.

On re-direct, she stated that she didn't see the Oprah Winfrey Show until after she had talked to Sue Ellen and Angie (apparently some kind of social worker). (R-327).

A[redacted] K[redacted] testified that she **was** born on [redacted] [redacted] **(R-334-335)**.

After apparently identifykng body parts in court (such **as** the prosecutor's arm, head, chest, and "front part"), she testified about three alleged incidents of improper touching, but without specifying the dates[3]:

1. In Petitioner's trailer, Petitioner touched her "private parts," which she indkcated to the prosecutor as her "front part," while she was on Petitioner's **bed.** He apparently touched her with **his** finger. (R-339-340).

2. The next alleged incident occurred in his **car** while they were going to Alabama, where he bought her "**[s]ocks** and

[3]**She** did indicate that she **was** not in school at the time.

ice cream and gum and bathing suits."[4] (R-340). He touched her "front part" on top of her clothes, which she still wore. (R-341). This happened both going to and coming back from Alabama. (R-341).

3. This last alleged incident also occurred in Petitioner's trailer, when she spent the night with him. Petitioner "stuck a pen" and a pencil in her "back part," as well as "kissed" and touched her "private parts." (R-342).

The bottom end of the pen went inside her, and it hurt enough to make her cry. The eraser end of the pencil was inserted inside her (back part). (R-342-344).

Petitioner once told her that if she told anyone, "he would put the belt on" her. (R-345).

On cross-examination, the child admitted that Mr. Smith (the prosecutor) was her "best, best friend," and that Angela and Sue Ellen (who worked at the police station) were also her friends. (R-349; 358).

After Petitioner was arrested, she saw an Oprah Winfrey Show "about nine-year-olds getting molested by their grandfather and parents and stuff like that and relatives." (R-356).

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[4]On cross-examination, she admitted that the bathing suit was purchased in the local Wal-Mart, not in Dothan, Alabama. (R-348).

She also admitted that she (oniy) looked to her mother and daddy (who were in the courtroom when she testified) to answer one of the questions asked her on cross-examination.[5]

L[redacted] K[redacted] testified that she was born on [redacted] (R-363).

According to her, one time when she was not in school she was in Petitioner's trailer on the bed when Petitioner kissed her on her "privates." (R-367-368). Although she was wearing a nightie, he kissed her underneath that. (R-368). [She pointed to where he allegedly kissed her.] Petitioner indicated that if she told anyone about this, he would spank her. (R-368).

Apparently on another occasion (a Saturday night), she was in Petitioner's trailer and had planned to spend the night with him. (R-369). Her sister S[redacted] was also going to spend the night with her, but she changed her mind. (R-369).

She was on Petitioner's bed, dressed in a niqhtie and bathing suit underneath (she had forgotten to put her underwear on). (R-369). He placed his mouth on her privates (after pulling the bathing suit away) and kissed her there. (R-370-371). She "told him that he could be in jail for that" but he replied that "he wouldn't." (R-371). He also stuck a black and white ink pen inside her "front part," (R-371-372).

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[5] A question about whether her mother had answered truthfully about regarding whether some other kids had been babysitters for her and her sisters. (R-362).

When she cried as a result of this, he told her to stop crying, that "[i]t wouldn't hurt." (R-372).

He also put a plastic fork on her "behind, back part." (R-373). However, he did not place this fork inside her body, even though it hurt. (R-374).

She did not tell anyone about this until after he left Panama City. (R-375). Ultimately, she told both of her parents. (R-375).

Petitioner had given her various presents (pink shoes and a bathing suit). (R-375).

On cross-examination, she admitted that she had talked to a lot of people about these incidents: her parents, sisters, her Aunt and Aunt's boys, Angie Direr, a lady named Sue, a lady named Ann, and the prosecutor. (R-376-378).

She admitted that Aunty [redacted]s boys (B[redacted] and J[redacted]) had been a babysitter for her in the past, and that if her mother denied this, her mother would be telling a lie. (R-378).

Along with her sisters, she had seen the Oprah Winfrey Show, She didn't tell anyone about what Petitioner did to her until <u>after</u> she saw this television show. (R-379). She also agreed that if any of her sisters had claimed that they had told someone about what Petitioner did to them before this show it would have been a lie. (R-379).

Prior to testifying in court, the prosecutor went over the questions and answers that she would give in court. (R-381).

During cross-examination, the witness **denied** that Petitioner stuck **a pen** in her "private parts," but she also indicated that **she** was confused. (R-388-389).

Additionally, **she** indicated that **the** Oprah Winfrey Show that she and her sisters watched showed girls 9-11 years old who had been molested by their relatives, and a **black** girl whose father would pull her panties down and kiss her private parts every time he picked her up. (R-392).

On re-direct examination, she reiterated that Petitioner placed a plastic fork on her back **part,** and **stuck a** pen in her "front parts." (R-396).

S[redacted] K[redacted] testified that she **was** born on [redacted] **(R-397)**.

In response to the prosecutor, she identified **in** court body parts, such as the head, chest, and private parts (which the prosecutor indicated was the vagina area). (R-402-403).

The witness indicated that Petitioner had touched her private parts when she was in Petitioner's bed. (R-403). Although she had on shorts and a shirt, **he** pulled her shorts down **and** touched her. (R-404).

This apparently occurred during a period of time in which she **was** in school. (R-405).

She also testified that Petitioner did this on another occasion, when she **also was** in **his** trailer **and** bed. During this incident he took her clothes off and touched her private **parts** with his hands. (R-406).

She didn't tell her mother about either of these incidents because Petitioner told her that he was "going to whip [her] butt" if she did. (R-406).

On cross-examination, she admitted that she had seen the Oprah Winfrey Show with her sisters, and it was the reason that she decided to say something about Petitioner. (R-411). Hef sisters, "Sue Ellen" and her mother helped her with what she was going to testify to in court. (R-419).

On re-direct examination, she indicated that she did not see the two events that happened to her that she testified to, and that they "really happen[ed]", in the prosecutor's leading words. (R-423).

S[redacted] K[redacted] was recalled, and she was shown a male, then a female, doll. (R-424). She used the dolls to demonstrate what happened to her, and indicated how the male doll's "bad spot" touched her body [in the vaginal area, according to the prosecutor]. (R-425).

On cross-examination, she admitted that she didn't know whether Petitioner had placed his "bad spot" inside hers, and agreed that as far as she knew, no one had ever done that. (R-426-428). Although she was on the motorcycle when he did this to her, it didn't fall over. (R-429).

APPELLANT'S CASE

Petitioner testified that while he bought the children shoes and other gifts (because he felt sorry for them), he specifically denied ever molesting (in any manner) S, L, A and S K. (R-445; 448-450). He did admit that he previously had been convicted of two felonies. (R-450).

Pediatric physician James Mitchell testified that he was a member of the HRS "Child Protection Team," and that he had examined S, L, A, and S K for evidence of sexual abuse. He found no medical evidence to support sexual abuse of any of the children. (R-466).

SUMMARY OF THE ARGUMENT

During the jury conference, defense counsel objected to the court's announced intention not to instruct the jury on attempted sexual battery and attempted lewd or lascivious assault. This was wrong, because the Committee Note on jury instructions indicates that an attempt instruction should be given except in certain circumstances, and attempted sexual battery is a necessarily lesser included offense of sexual battery. The question certified by the Florida First District Court of Appeal ignores the facts supporting an "attempt instruction". Even so, it should be answered in the affirmative, so as not to deny a defendant's right to a jury pardon, and right to present inconsistent defenses.

The charges involving each child were improperly consolidated, and Petitioner was forced to defend against the charges that he sexually battered and lewdly assaulted four different victims, at different times, and under different circumstances. This unfairly denied Petitioner a right to a fair trial, and synergistically strengthened the State's case at Petitioner's expense. This case is virtually indistinguishable from the recent case af Roark v. State, 18 Fla. L. Weekly D1489 (Fla. 1st DCA 1993).

There were originally eight counts filed against Petitioner. Count VII charged that Petitioner had committed sexual battery on S[redacted] K[redacted]. However, on June 13, 1991, the State dismissed this count when it realized that the evidence didn't support the charge. Defense counsel requested

the court to take judicial notice of this dismissal, and requested the court to publish it before the jury and to allow him to argue the dismissal as evidence for Petitioner's innocence. At first the court agreed to do this, but under pressure from the prosecutor, reneged on its agreement.

This was wrong, because the document in question was subject to judicial notice, and was relevant to the proceedings. Any prosecutorial complaints about this document went to the weight, not the admissibility, of this evidence.

The evidence was insufficient to convict Petitioner, especially on Counts I, 11, & 111. The medical evidence did not support penetration, and the testimony on the victims on these three counts was especially ambiguous.

ARGUMENT

ISSUE I: THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON ATTEMPTED SEXUAL BATTERY AND ATTEMPTED LEWD AND LASCIVIOUS ASSAULT.

Defense counsel specifically requested that the jury be instructed on attempted sexual battery and attempted lewd and lascivious assault. (R-474-477). The trial court refused, pointing out that "attempts" were listed in the Standard Jury Instructions in Criminal Cases as "Category 2" lesser included offenses, and that its understanding was that it didn't have to instruct on those unless the evidence supports them. (R-474).

The "Comment on Schedule of Lesser Included Offenses", note 4, provides:

> "Except as stated above, attempts to commit crimes generally are included unless the evidence conclusively shows that the charged crime was completed. In such case, attempt should not be instructed."

According to at least one case, attempted sexual battery on a child under the age of [12] is a necessarily lesser included offense to sexual battery on a child under the age of [12]. Firkey v. State, 557 So.2d 582 (Fla. 4th DCA 1989), cert. den. 574 So.2d 140. If co, attempted sexual battery under the age of 12 is a necessarily lesser included offense, and should have been given under the circumstances.

In this case, directly contrary to the Florida First District Court of Appeal's assertion otherwise, there was evidence that supported the attempt instructions. At the very least, there was no or questionable evidence to support the

sexual battery of L K by penetration of an object (final issue), and the lack of medical evidence supporting penetration, and the ambiguity of the alleged victims' testimony (such as their use of the generic term "bad spot") supported the charging of the jury with attempt instructions as requested.

At the risk of being repetitious (and out of fear that the Court will not read Issue IV in this case), Petitioner will review the evidence for an attempt instruction.

Count three of the information charged that Petitioner committed sexual battery on L K by oral, anal or vaginal penetration by, or union with, the penis of Petitioner or by anal or vaginal penetration with an object (a pen, spoon, or his finger).

The evidence clearly did not show that Petitioner committed penetration or union with his penis, so the prosecution was limited to showing the Petitioner penetrated the anus or vagina of the alleged victim with a pen, spoon, or his finger. See, Firkey, supra, and section 794.011(1)(h), which does not provide for proof of sexual battery with an object by union,

On direct and re-direct examination, the child L K was led by the prosecutor to testify that Petitioner placed a plastic fork (not a spoon) on (not "in") her "back part", and that he stuck a pen in her "front parts". (R-371-372; 396). On cross-examination, however, she denied that Petitioner stuck a pen in her "private parts" but

indicated that she was confused. (R-388-389). The medical evidence did not support penetration. (R-466). As in Firkey, supra, the jury was forced to "guess" as to whether penetration (which was required, as opposed to "union") had occurred. Firkey at 586. See also, Tillman v. State, 559 So.2d 754 (Fla. 4th DCA 1990).

Count II of the information charged that Petitioner made an assault upon S[redacted] K[redacted] in a lewd, lascivious or indecent manner. The only evidence presented for this was that Petitioner allegedly rubbed her on top of her clothes on the hip. (R-303). S[redacted] K[redacted] admitted that she did not consider her hip a "bad spot". (R-323). By the victim's admission, this conduct did not constitute lewd or lascivious assault, and Petitioner does not believe that it even constitutes attempted lewd or lascivious assault (which is a crime: Rubin v. State, 578 So.2d 331 (Fla. 3d DCA 1991) and Davis v. State, 527 So.2d 962, 964 (Fla. 5th DCA 1988)), and which if it does, goes to support Petitioner's argument that the trial court should have instructed the jury on attempt for the lewd and lascivious assault charges.

Finally, Count I charged that Petitioner committed sexual battery on S[redacted] K[redacted] by oral, anal or vaginal penetration by, or union with, Petitioner's penis. The "evidence" for this was that Petitioner placed his "bad spot" on hers but not inside hers. (R-310; 426-428). The medical evidente failed to support penetration. (R-466). This evidence

failed to prove penetration, and was at least ambiguous as to union.

Notwithstanding this paucity of evidence **as** to the "completed" crimes charged, the District Court of Appeal framed its question to this Court **as** follows:

> WHERE THE VICTIMS TESTIFY THAT THE DEFENDANT COMPLETED THE CHARGED OFFENSES OF **CAPITAL SEXUAL** BATTERY **OF A VICTIM UNDER 12 AND** LEWD **AND** LASCIVIOUS ASSAULT, AND THE DEFENDANT TOTALLY DENIES COMMISSION OF ANY OFFENSE, IS **A** TRIAL COURT REQUIRED TO INSTRUCT **A** JURY ON **ATTEMPT** IF **REQUESTED TO** DO **SO** BY THE DEFENDANT?

Petitioner has two answers to this question.

The first answer is that this question does not reflect the factual circumstances presented at trial. As explained above, for Counts I, 11, and 111, there was evidence of an "attempt" presented. Moreover, the state presented this evidence, and the state is bound by it. Compare Holmon v. State, 603 So.2d 111 (Fla. 4th DCA 1992) (where the state presented conflicting evidence of guilt).

On Count 111, evidence of attempt was presented when the witness testified that Petitioner placed a plastic fork (not a spoon) on (not "in") her "back part", and that he stuck a pen in her "front parts". Evidence of attempt was further presented when, on cross-examination, she denied the Petitioner had stuck a pen in her "private parts" and indicated that she was confused. (R-388-389). Further evidence of an attempt was presented by the medical evidence, which did not support penetration (even **if** the Florida First District Court of Appeal

confusedly thinks that the fact that the medical evidence did not rule out penetration is somehow supportive of the state's **case).**

Under Count 11, evidence of attempt was presented when S[redacted] K[redacted] testified that the Petitioner rubbed her on top of her clothes on the "hip", a body **part** which **she** did not consider a "bad spot".

Finally, under Count I, S[redacted] K[redacted]'s testimony that Petitioner placed his "bad spot" on hers, but not inside hers, was ambiguous as to union, and failed to prove penetration.

Notwithstanding the Florida First District Court of Appeal's characterization to the contrary, this evidence was evidence of "attempt".

Second, to answer the question posed by **the** First District Court of Appeal in the negative would deny Petitioner his constitutional and/or common law right to a "jury pardon". **See**, State **v.** Wimberly, **498 So.2d 929 (Fla. 1986) and** Jones v. State, **492** So.2d 1124 (Fla. **3d DCA**), rev. den., 501 So.2d **1282 (Fla.** 1986). To **answer** it in the negative would also deny the defendant the right to present inconsistent defenses, and to deny that any crime(s) ever took place.

ISSUE 11: THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION **FOR** SEVERANCE,

Prior to trial, Petitioner filed **a** motion to sever the respective counts of the information which, in effect, requested that the counts related to each child be tried as separate **cases.** (R-106). The motion indicated that the cases had been improperly consolidated because they were not "based on the **same** act or transaction or on two or more cannected acts or transactions," that the offenses were improperly charged in the same information, **and** that severance was necessary "to promote **a** fair determination of the defendant's guilt or innocence of each offense." (R-106).

On June 21, 1991, filed June **24**, 1991, the trial court denied this motion in a written order, using the following arguments:

1, The acts were found to to be connected in an "episodic sense" because they were committed during a two-to-three month time period by an individual who lived across from where the alleged victims lived.

2. The acts were geographically centered around Petitioner's home, **or** the "public swimming place" near his home.

3. The acts were all of the same **(broad)** nature, to wit: sex acts, and the alleged victims were all under 12 yearc of age.

4. The manner of committing the acts was the **same:** Petitioner allegedly established a friendship with each alleged

victim by giving each gifts, committing the act alone, and then telling the child not to tell.

5. The acts ceased when the alleged victims, all at the same time, told their parents about them. (R-176-177).

Three rules of criminal procedure are arguably relevant: Fla.R.Crim.P. 3.150, which allows joinder of offenses triable in the same court, Fla.R.Crim.P. 3.151, which allows consolidation of related offenses, and Fla.R.Crim.P. 3.152, which allows severance of improperly joined offenses.

The latter Rule allows **the** severance of even properly joined offenses, if the defendant shows that **a** severance is necessary to ". . . achieve a fair determination of [his] guilt or innocence of each offense."

Here, the offenses were felonies, and triable in **the** same court. So far, so good from the State's standpoint. The offenses against **each** alleged victim were <u>not</u> based on the same act or transaction, **so** any justification for consolidation in the first place must be founded on "two or more connected **acts** or transactions."

The offenses were not committed at the same time, even if they were allegedly committed on or between **May** 1, 1990, and July 9, 1990. This is an excuse to consolidate the offenses for the prosecution's convenience, with its sole purpose to "shotgun" the jury with all the alleged crimes in a "united the charges stand, divided they fall" strategy. It is not a valid reason for consolidation.

In **State** v. Williams, 453 So.2d **824** (Fla. 1984), nine informations were consolidated and involved acts or transactions over eight different days (as opposed to the period of months involved here). The offenses were connected only because they were allegedly committed by the same defendant and were similar in nature. In reversing the defendant's convictions, the Court reaffirmed the validity of **Paul** v. State, **385** So.2d 1371, 1372 (Fla. 1980), which held that consolidation was improper if "based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt. . . ." [As quoted in Williams at 825.]

This is the situation that obtained below. The defendant was the same, and while the charges were similar, the victims were different, and the times were different. The only "connection" was the similar circumstances.

None of the reasons given by the trial court were sufficient to have supported consolidation in the first place.

As mentioned, the times were not the same. The geographical area where the crimes allegedly occurred was irrelevant. The type of crimes committed **(sex)** and the **age** of the victims were likewise irrelevant, from the standpoint of consolidation. To a priori **(as** the court below did in its order) conclude that gifts were given by Petitioner in order to "get the child alone and commit a ***sex*** act" is presupposing the "accused's alleged guilt," which was the same mistake the Florida Supreme Court warned against in Paul and Williams.

The fact that the alleged acts ceased when the victims told their parents has nothing to do with whether the alleged crimes should have been consolidated (whether guilty or innocent, under those circumstances the acts by necessity would have had to cease).

These are the reasons why the charges should not have been consolidated in the first place. There is an additional reason why they should have been severed: they prevented Petitioner from having a fair trial,

Probably the only thing worse than being tried for capital sexual battery (other than first degree murder) against one victim, is to be tried for that crime in the same trial for having committed it against three victims. When (as here) the charges were weak in each individual case, they took on a collective strength in numbers.

The victims were little girls, all of whom testified. The crimes were abhorrent, judged by our society second in seriousness only to murder. The prosecutorial cards were stacked in the State's favor before the trial began. They were overwhelmingly so when the prosecution got to try all of the charges in one trial--so much so that the jury ignored the lack of medical evidence to support the charges, and the lack of evidence to support Count III (argued below).

Finally, the error of improper consolidation and refusal to sever was not rendered harmless because the State might have attempted to introduce the excluded evidence as "similar fact evidence." This is so because there is no proof that this

evidence would have qualified as similar fact evidence, and even if it did, it would have been limited by the caveat that such evidence cannot become a feature of the trial, **and** the jury would have been instructed with (at least) the statutory warning [Section **90.404(2)(b)2,** Florida Statutes].

Ironically, Petitioner's argument on this issue has been recently vindicated by the Florida First District Court of Appeal in Roark v. State, **18 Fla. L.** Weekly D1489 (Fla. 1st **DCA** 1993), where the defendant in that case was charged with two counts af capital sexual battery on one sister and lewd and lascivious assault upon another. The facts in Roark are remarkably close to the facts **in** this case. The offenses "were related only in that they were ***sex*** offenses occurring within the same seven-month period, the victims were related to **each** other, and the [defendant] allegedly was guilty". Id. at **D1490.**

The Florida First District Court of Appeal made this interesting observation on the law:

> When the charges are based upon similar but separate episodes which are connected only by the accused's alleged guilt, joinder (or consolidation) is improper. State v. Williams, 453 So.2d **824,** 825 (Fla. 1984); Fotopoulous, supra [Fotopoulous v. State, **608** So.2d **784 (Fla.** 1992)]. Thus, in child sexual molestation cases, motions to sever should be granted where offenses occurred at different times and **places** [as in this case], involving different victims **[as** in this case]. Id. at 1490.

The Florida First District Court af Appeal went on to note that:

> ...[T]he standard for determining whether offenses are properly consolidated for trial is vastly different from the standard of when evidence of a second collateral crime may be introduced. If it [were] determined that misjoinder would constitute harmless error in all familial sexual battery cases where the misjoined offenses would be admissible as collateral crime evidence, then the distinctive legal standards concerning each would begin to blur. Prosecutors and courts could be improperly inclined to join offenses in the interest of time and efficiency. Such practices could be prejudicial to defendants in light of the different legal consequences flowing from jointly trying separate offenses as opposed to admitting collateral crime evidence.
>
> When collateral crime evidence is introduced, evidence of the separate crime may not become a feature of the trial. [Citations omitted]. The amount of testimony which may be introduced as to the additional crime is thus limited, many times resulting in only the second victim being able to testify. No such limitation occurs when offenses are joined for trial, where all relevant evidence as to each crime being tried would be admissible. Additionally, if collateral crime evidence is introduced, the defense is entitled to have the judge read a limiting instruction. No such instruction is available in consolidated trials. [*Id*. at D1490, emphasis added.]

In light of *Roark*, it is clear that the Florida First District Court of Appeal improperly summarily dismissed this issue. In effect, it was swept under the judicial rug, and as a result, Petitioner is entitled to a reversal of his convictions below.

ISSUE 111: THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF THE PROSECUTION'S DISMISSAL OF COUNT VII, AND IN REFUSING TO ALLOW DEFENSE COUNSEL TO ARGUE ITS DISMISSAL BEFORE THE JURY.

On June 13, 1991, the State filed a "nolle prosequi" of Count VII of the information, citing its reason as: "Further investigation of what the Defendant did to this child indicates there was unlawful handling, fondling **or** an assault, but **that** no sexual battery occurred." (R-121).

At first, the trial court was **"glad"** to grant defense counsel's request for judicial notice of the dismissal of this count and to publish it to the jury. (R-472). Under the heavy-handed pressure of the prosecutor, the court wilted by stages. The first wilting-stage occurred when the court changed its ruling, and indicated that while it would take judicial notice of this dismissal, it would not allow defense counsel to comment upon it. (R-482). Having got half of what he wanted, the prosecutor was emboldened, and then whined that he didn't think it "appropriate to announce it to the jury because it is not part of this trial." The court completed its cave-in to **the** prosecutor, **and** refused to announce to the jury the existence of this court document. **(R-482).** Defense counsel promptly reserved his objection. (R-482).

Section 90.203, Fla.Stat. requires compulsory judicial notice where timely written notice is served upon the opposing party and filed with the court, and sufficient information is provided to the court for it to take judicial notice.

Section 90.204 provides for judicial notice either by the court or by request of a party. Section 90.202 provides matters which may be judicially noticed, and records of a court are included among the subject matter which may be judicially noticed. Section 90.206 provides for the court to instruct a jury on a matter judicially noticed,

The document in question was filed in the court file under the case number in which Petitioner was being tried. (R-121). It was relevant because Count VII charged that Petitioner had committed sexual battery by anal or vaginal penetration with an object (a pen) or by oral, anal or vaginal penetration by or union with his penis against S[redacted] K[redacted] but this document constituted an admission that those charges were unsupported. As the State chose to charge each of the crimes against each of the victim's in one information, and try them all together, it should have been admissible, with its weight to be determined by the jury.

Indeed, this nolle prosequi constituted "reverse" Williams Rule evidence, and was clearly admissible. ***See,*** Ehrhardt, Fla.Evid. Section 404.9, at 149 (1992), and Brown v. State, 513 So.2d 213, 214-215 (Fla. 1st DCA 1987). [Note that the problem, in Brown, unlike here, was that the evidence was not similar enough, not that "reverse" Williams Rule evidence is NOT available to the defense.]

This was a close case, with only the testimony of the children to support the State's case (remember, there was no

medical evidence to support the charges). The error was not harmless, and Petitioner is entitled to a new trial.

ISSUE IV: THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CHARGES.

At the close of all the evidence, Petitioner moved for a judgment of acquittal on the basis that the evidence was insufficient to support the charges. (R-471; 483). His motion was denied. (R-471; 483).

Petitioner believes that his Statement of the Facts, which was written in the light most favorable to the State, shows that the evidence was insufficient to support all of the charges. However, Petitioner will concentrate on Counts I, 11, and III.

Count I charged that Petitioner committed sexual battery on S K by oral, anal or vaginal penetration by, or union with, Petitioner's penis. The "evidence" for this was that Petitioner placed his "bad spot" on hers, but not inside hers. (R-310; 426-428). The medical evidence failed to support penetration. (R-466). This evidence failed to prove penetration, and was ambiguous as to union.

Count II charged that Petitioner made an assault upon S K in a lewd, lascivious or indecent manner. The only evidence presented for this was that Petitioner rubbed her on top of her clothes on the hip. (R-303). S K admitted that she did not consider her hip a "bad spot." (R-323). By the victim's admission, this conduct does not constitute lewd or lascivious assault, and Petitioner does not believe that it even constitutes attempted lewd or lascivious assault (which is a crime: Rubin v. State, 578 So.2d 331 (Fla.

3rd DCA 1991) and Davis v. State, 527 So.2d 962, 964 (Fla. 5th DCA 1988), and which if it does, goes to support Petitioner's argument that the trial court should have instructed the jury on attempt for the lewd and lascivious assault charges),

Count III charged that Petitioner committed sexual battery on L[redacted] K[redacted] by oral, anal or vaginal penetration by, or union with, the penis of Petitioner or by anal or vaginal penetration with an object (a pen, spoon, or his finger).

The evidence clearly did not show that Petitioner committed penetration or union with his penis, so the prosecution was limited to showing that Petitioner penetrated the anus or vagina of the alleged victim with a pen, spoon, or his finger. See, Firkey, supra, and Section 794.011(1)(h), which does not provide for proof of sexual battery with an object by union.

On direct and re-direct examination, the child L[redacted] K[redacted] was led by the prosecutor to testify that Petitioner placed a plastic fork (not a spoon) on (not in) her "back part", and that he stuck a pen in her "front parts." (R-371-372; 396). On cross-examination, however, she denied that Petitioner stuck a pen in her "private parts" but indicated that she was confused. (R-388-389). The medical evidence did not support penetration. (R-466). As in Firkey, supra, the jury was forced to "guess" as to whether penetration had occurred. Firkey at 586. See also, Tillman v. State, 559 So.2d 754 (Fla. 4th DCA 1990).

Petitioner does not believe that this testimony even supports attempted sexual battery, but if it does, it. strengthens his earlier argument that the trial court erred in refusing to instruct the jury on attempt.

Petitioner is entitled to an acquittal on all counts, but especially Counts I, 11, & III.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner is entitled to a reversal of his convictions in a new trial below (Issues I-III) or a discharge (Issue IV).

Respectfully submitted,

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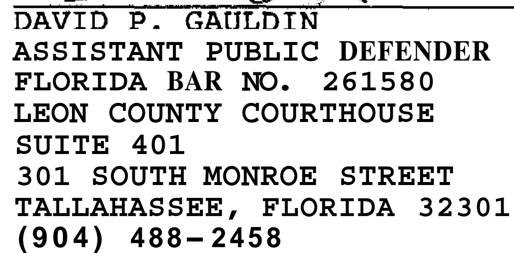

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to James W. Rogers, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 10th day of September, 1993.

DAVID P. GAULDIN