OA 5-5-94

SUPREME COURT
STATE OF FLORIDA

APPEAL CASE NO. 82,~~172~~ 189

JAMES HALLBERG,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT
COURT OF APPEAL

INITIAL BRIEF

Robert L. Doyel
Florida Bar No. 0714429
343 W. Davidson Street
Suite 102
P.O. Box 1476
Bartow, Florida 33830
(813) 533-2646
Attorney for
Petitioner

TABLE OF CONTENTS

STATEMENT OF THE FACTS AND OF THE CASE

On the eighth of January, 1991, James Hallberg was charged by information with five counts of lewd acts on a child and three counts of engaging a child in sexual activity, all alleged offenses being alleged to have occurred between June 1, 1988, and August 31, 1988. The three counts of engaging a child in sexual activity allege acts which were identical to acts alleged in three corresponding counts of lewd acts on a child. (R 1170-77).

The first witness called by the state was the alleged victim, S[redacted] S[redacted]. (R 271). She testified that during her eighth grade school year, Hallberg was her favorite teacher. (R 275-77). She said that in December of that year, Hallberg began making jokes of a sexual nature with her (R 279) and telling her that she was the only one who appreciated him and he wanted her to play a more important role in his life. (R 280).

In February, she began getting rides home from school with Mr. Hallberg because of her parents' work schedules. (R 281-82). She said that in their conversations on the way home, Hallberg talked about his wife and kids a lot and told her that he loved her. (R 283). She said that he started requiring her to write him notes saying how important he was to her and that she was glad that she had met him. (R 284). She then identified state's composite exhibit 2 as a series of written communications from Hallberg to her. (R 285). Although the exhibits contained words of affection and encouragement, they did not include any sexual references. (R 286 - 94).

She said the first time "anything" happened was the second or third week of February when he made her kiss him good-bye before she got out of the car when he took her home. (R 295). She said that she was excused from her class during first period on Fridays because of her grades and that she usually took the attendance to the office. She said that when she went to the office she "had to walk past [Hallberg's] classroom to get there, and his door was open." (R 298). She said that he would stop her on her way back and tell her to come in; she complied because she "was afraid of him." (R 298). She said that from the first time he kissed her, he told her that if she ever told anyone "he would have to do something he would regret." (R 299). She said that when she got inside his classroom, he would close the door and tell her how much he loved her and wanted to marry her and he would kiss her in a French kiss and sometimes he would touch her breasts and sometimes touch her between her legs. (R 299). This kind of activity continued the rest of the school year, she said. (R 300). She said she did not tell anyone because she was afraid of what their reaction would be. (R 300).

She testified that some time in May he asked her if she would help him during the summer because he was going to be teaching "Alpha History" the next year and had never taught the class before. He gave her a book that he would be using and asked her to come up with ideas for the class. (R 302).

She testified that a couple of weeks after school was out that year, he came to her home unexpectedly. While he was there, she

said, he told her he loved her, kissed her, touched her breasts and between her legs, and when he touched her between her legs, he did so under her underpants and put one of his fingers inside her. (R 304-05).

She said that he came to her house for the last time in July or early August of that summer. (R 306). She said that he touched her breasts and between her legs inside her clothing, forced her to perform oral sex on him, performed oral sex on her, and had intercourse with her. (R 308-13).

She said that when he started to leave, he made her hug him. At just that point, her mother walked in, home from work early. (R 315). After Hallberg left, her mother asked her what they had been doing, and she told her mother that Hallberg had just come by to see her. She said that she was embarrassed and that she was afraid of Hallberg and that is why she did not tell her mother what had happened. (R 315).

She said when school started the next year, she avoided him as much as possible, but she was in his class. (R 318). Some time in late October or early November, she said, he called her into the hall and told her she was being a bitch and that he wanted her out of his class. (R 319). She said that the principal heard about the incident and called her into his office to ask what happened, and she told him. She said that she then stayed out of Hallberg's class for a few days. (R 321).

There was a remarkable amount of hearsay testimony elicited throughout this trial with little or no objection from either

party. For example, S[redacted] S[redacted] was asked whether she told anyone else about "the sexual abuse" and she indicated that she told a teacher, Mrs. Reynolds, that something else had happened. (R 328). Stinson testified that she told Mrs. Reynolds that Hallberg had fondled her and had kissed her, but that was all he had done. She did not tell Reynolds anything about sexual intercourse. She said she did not say anything about intercourse because she was embarrassed. (R 329).

S[redacted] said that Reynolds told her that she was going to tell the principal and gave S[redacted] a day to tell her parents. S[redacted] testified that she left her mother a note saying that Mr. Hallberg had fondled her and kissed her. (R 330).

S[redacted] said that she met with the principal (Ward) and the assistant principal (Henson) a couple of days later. She said she did not tell them what had happened because they told her that someone from the county superintendent's office would be coming later that afternoon, and they sent her back to class. Later that afternoon she had a meeting with Ward, Henson, and "Mr. Duncan from the county office." (R 332). S[redacted] said that she "still couldn't tell them because ... it was three men against me and I was afraid of them." (R 332). She told them that Hallberg had touched her but she did not tell them where, so they asked her to write it down. Ward sent her into a nearby office where she said she wrote that Hallberg "had kissed me and that he had fondled my breasts and in between my legs." (R 333). She gave the note to Ward. (R 333). She said that Ward said it was something that

should not have happened and that he was going to call her parents. (R 334). Neither law enforcement nor HRS ever contacted S[redacted], nor did she ever have a physical exam. (R 334).

Nothing else happened until February of the next school year. At that time she told one of her boyfriends that a former teacher had overextended his boundaries. She and the boyfriend then broke up and he started telling people about what she had told him. She got upset and made allegations about a former teacher to current teachers in a letter in May, 1990. She was then at the end of the tenth grade and at highschool, a school different from the one at which Hallberg had been her teacher. (R 335-36). Her vehicle for telling her teacher was an assignment which was introduced as state's Exhibit 3. (R 337). That exhibit is set forth verbatim in the transcript at R 338 to 340. Before turning the assignment in to her teacher, she showed it to another teacher who took her to the principal and then to a guidance counselor. (R 340-42). The principal (Dunn) wrote something on the assignment, gave it back to her, and told her to turn it in. (R 342).

S[redacted] testified that when she was in the office of the guidance counselor (Williams), the principal (Dunn) asked her if she had been raped, and she replied that she had. By the term "rape" she meant forced intercourse. (R 343). Later that day or the next a Mr. Cox from the county office talked to her and asked her to write down what had happened and for her to be specific. (R 343). She wrote it out in the guidance counselor's office (R 344). Her written statement was introduced as state's Exhibit 4 and is

set forth verbatim at R 345 to 349. In this written statement S[redacted] mentioned for the first time that she had had sexual intercourse with Hallberg. Although the statement was in great detail, it included nothing about his having performed oral sex on her or her having performed oral sex on him. (R 348).

S[redacted] testified that between the time she told Ward that she had been fondled and kissed and the time she told Dunn that she had had sexual intercourse, she had become sexually active with a boyfriend, had mistakenly thought she was pregnant, and had told one of her teachers about her fears of being pregnant. (R 350-51).

S[redacted] testified that she met with HRS investigators Jim Ernst and Renna Seigal and law enforcement officer Tim Ryan. She said she told them what happened but when she got to the part about oral sex she could not talk about it in the presence of the two men. At Ryan's suggestion, the two men stepped out of the room, and she then told Seigal that Hallberg had made her perform oral sex. When the men returned to the room, she repeated the story to them. (R 352-54).

On cross-examination, defense counsel established that in the year before Hallberg became S[redacted]'s favorite teacher, Sandy Reynolds had been her favorite teacher and that she had had a close relationship with her. (R 355-56).

With regard to the Fridays that S[redacted] said she had to go into Hallberg's classroom, defense counsel established that she had gone to his classroom nearly every Friday because her "teacher just decided Fridays is S[redacted]S[redacted]s day to take attendance." (R

361). She said that on those Fridays when she went into Hallberg's classroom, he shut the door and locked it. (R 362). She said he locked her in approximately ten times after January of 1988. (R 362). She said that she always had to walk by Hallberg's classroom on Friday mornings because there was not another way to get to the office. (R 364). She said that Hallberg would come out into the hall and stop her and put his hand on her arm and guide her into his classroom. (R 364). She said that at first she told him that she did not want to go but then after a while she "just kind of went along with it." (R 365).

She admitted that Hallberg gave rides to any student who asked him. (R 369). She testified that the notes Hallberg required her to write he had her pass to him during class where other students could see the note being transferred. (R 371). She said that she would call Hallberg at home and leave messages on his answering machine for him to call back and that she did so because she was afraid of him and sometimes did so because he had called her and left a message. (R 373). She indicated that after Hallberg had started threatening her and making her do things, she nevertheless asked him to begin giving her rides home. (R 374). She said that she got Hallberg a birthday present but did so because he made her. (R 376-77). She admitted that she had bought gifts for other teachers and that she had telephoned other teachers; her parents would, therefore, think that neither activity was unusual. (R 378).

She admitted that she had never told anyone that Hallberg had

French kissed her prior to her trial testimony. (R 378-79). She admitted that when she talked to principal Ward at Crystal Lake Jr. High and "the other gentlemen", she told them only that Hallberg had kissed her and fondled her and did not tell them he had done anything else. Specifically she did not say anything about Hallberg forcing her to have oral sex, about Hallberg performing oral sex on her, or about the alleged sexual intercourse. (R 379-80).

In court, she testified that she did not recall whether Hallberg ejaculated in her mouth, but she admitted having previously said that she thought he might have. (R 382-83).

In court, she testified that 15 or 20 minutes passed between the time the oral sex stopped and he inserted his penis in her vagina. (R 383). She then reread her letter of May, 1990, in which she stated that the whole episode "lasted 10 or 15 minutes." (R 385).

She admitted having testified at deposition that on one of the occasions upon which he was supposed to have inserted his finger into her vagina that he had only touched her on the outside of her clothes. (R 395-96). She admitted that after she had allegedly been raped, she encouraged another female student at Crystal Lake Jr. High School to enroll in Hallberg's class. (R 401-02). She claimed that she became afraid of Hallberg in December of 1987 but in February of 1988 began asking him for rides home after school. (R 405). She admitted not telling Ryan, Ernst, and Seigal that Hallberg had performed oral sex on her. (R 411). She also

admitted that while she testified in court that she did not know whether Hallberg ejaculated when he was supposedly forcing her to perform oral sex on him, she had testified at deposition that she thought he had. (R 415). She denied ever talking to a student named D[redacted] M[redacted] about getting Hallberg fired. (R 417).

The highschool principal, Dunn, testified about state's Exhibit 3. He said when S[redacted] was talking to him, she was having trouble making a statement. Perhaps she was hyperventilating, and she was crying, so he asked her to write everything down. He asked her if she was raped and she answered yes. (R 429-30). It took her about an hour and a half to write her statement. (R 433). On cross-examination, Dunn indicated that when S[redacted] first turned the statement in to him, it contained nothing about rape and that he told her she had to include rape if it really happened, so she added the last three pages. (R 437). He acknowledged that S[redacted] never mentioned any form of oral sex or digital penetration. (R 438-39).

Dunn indicated that he was sure there was a fire regulation that prevented schools from locking classroom doors from the inside. (R 439).

Sandra Reynolds was an English teacher at Crystal Lake Jr. Highschool. (R 449). She met S[redacted] in S[redacted]'s seventh grade. S[redacted] was academically superior, perhaps Reynolds's best student. S[redacted] was her helper, and she gave S[redacted] rides home nearly every afternoon in the ninth grade. However, her relationship with S[redacted] was not as strong during S[redacted]'s eighth grade as it was

during the seventh and ninth grades. (R 451-52).

During S[redacted]'s ninth grade year, S[redacted] seemed quieter and occupied by something, not as buoyant or effervescent as before. (R 454). She testified that Jim Hallberg had called S[redacted] a bitch, that S[redacted] was taken from Hallberg's class and placed in the library, and that from that time forward S[redacted] came by to see Reynolds each morning. During those visits, S[redacted] "disclosed" that she had been kissed and fondled by Hallberg. Reynolds said she told her principal, Ward. (R 455-56). Reynolds did not report the incident to HRS herself. (R 457). She said that several days later Ward came to her classroom and asked her again to repeat what S[redacted] had told her. Ward then said, "Well she's not saying anything down stairs. She's written something down, but she refuses to say it. And can you tell me, you know, did she tell you anything?" (R 458).

Reynolds then testified that a Mr. Duncan from the schoolboard came to the office and she met with Duncan and Ward and again told them what happened. Yet again she repeated that S[redacted] had told her about Hallberg kissing and fondling her. (R 458).

Reynolds testified that Duncan's reaction made her angry because he just tried to "explain it off" as a school-girl crush. (R 459). She was also allowed, without objection, to give her opinion "that something inappropriate had happened." (R 459).

Reynolds related a conversation with Ward in which Ward allegedly told her that Dunn had called him and asked about a letter that S[redacted] had written but Ward could not remember. She

testified that she said to Ward, "I told you. Don't you remember my telling you about S[redacted], S[redacted]s accusation that Jim had kissed and fondled her?" She said that Ward responded, "No, I don't remember a thing." (R 460-61).

Reynolds testified that Duncan arrived at the school and went into conference with Ward before calling her in. She said, "I should have known better than to go in alone, but I went in alone." (R 461). She said that Ward asked her what she had said that she had previously told him, and she testified that her response was that S[redacted] had accused Hallberg of touching, fondling, and kissing her. Reynolds then testified that Ward told her he had never heard those accusations. She said that Duncan told her that he had never seen her and was not present when she had told Ward. She said she told Duncan, "Of course you were there." (R 461-62).

On cross-examination, Reynolds said that she did not report S[redacted]s allegations to HRS because she had told her principal. (R 465). She claimed that when Detective Ryan called her she did not refuse to talk to him but simply did not return any of his several calls. (R 466-67). When asked whether the classroom doors at Crystal Lake Jr. High can be locked from the inside, she responded, "No, no, I would need to go out, put the key in and unlock it." (R 467). She also indicated that it was possible to get to the office without going past Mr. Hallberg's class. (R 469).

On redirect, she testified that she contacted a lawyer who told her that she was not obligated to report the incident to HRS

because her teaching contract did not require her to do so.

S[redacted]s mother testified that she was very proud of her daughter for having been asked to assist Hallberg in the curriculum. She said that the last time Hallberg came to her house, she came home from work early and found him there. He was very nervous and very jumpy. She said he told her to be patient with her daughter because she was nervous and upset about starting the ninth grade. She then testified that her daughter had never been nervous about school in her life. Without objection, she testified, "deep inside I knew he had done something, I just knew. I don't know how I knew, but I asked S[redacted] right away, I said, 'S[redacted], did he touch you?' and she ... said no." (R 482). She said her daughter got very defensive and angry with her. (R 483). She testified that her daughter had been very happy-go-lucky before the ninth grade, but after the ninth grade started all she wanted to do was study and had no social life any more. (R 484).

She said that she and her husband were called by Ward to the school and had a meeting with Ward and Henson and Hallberg to discuss allegations that Hallberg called S[redacted] a bitch. All that was discussed at the meeting was the "bitch" incident and S[redacted]s complaints that Hallberg did not teach any more. She said that Hallberg was very nervous, alternately sitting down, standing up, and pacing. She said that Ward recommended that her daughter should stay in the class, and they agreed under the condition that things would change. (R 484-86).

She testified that about two weeks later she got into her car

one morning and discovered a note from her daughter in which her daughter said that Hallberg had fondled and kissed her. She said she called Ward and eventually went to the school and told him what her daughter had said, but Ward said it was Stinson's word against Hallberg's and that nothing could be done. The mother did not consider calling HRS. (R 487-89). She did not tell Ward anything about coming home and finding Hallberg at her house. (R 490).

Stinson's father testified that his daughter had gotten rides from teachers before and that she always had a close relationship with a lot of teachers. (R 501). He said that after the allegations of fondling came to light, he called Ward and asked Ward what would be done. He said Ward told him that he could move his daughter out of Hallberg's class but that not much more could be done because it was her word against his. Mr. Stinson testified that since he could not get anything done through Ward, he decided to deal with Hallberg himself, so he called Hallberg's house. Hallberg's wife answered the phone, and Mr. Stinson asked to speak to Hallberg. After a pause, Hallberg's wife came back on the phone and told him Hallberg did not want to talk to him at the moment but would talk to him at a later time. According to Mr. Stinson, he then responded, "Well, do you know that your husband molested my daughter?" (R 507-08). According to Mr. Stinson, Mrs. Hallberg's reaction was, "Just silence, she didn't say anything." (R 508).

Mr. Stinson acknowledged that he did not report anything to HRS. (R 509). He admitted that he never mentioned to Ward that Mrs. Stinson had said anything about coming home and finding

Hallberg hugging their daughter. (R 511). And he said that his daughter told him that she had a crush on N[redacted] B[redacted], the man who was giving her tennis lessons during the summer before the ninth grade. (R 515).

D[redacted] M[redacted], another student, testified that during the eighth grade S[redacted] and Hallberg were very close to each other. (R 523). He told his version of the "bitch" incident by saying that Hallberg told S[redacted] to go outside the classroom. M[redacted] listened through the grating in the door and heard Hallberg say to S[redacted] either that she had been real bitchy or that she had been a real bitch. (R 525). M[redacted] said that at the beginning of the ninth grade school year S[redacted] and Hallberg were still very close but that they grew apart as the year progressed. (R 526).

On cross, M[redacted] stated that S[redacted] had never mentioned to him that Hallberg had touched her improperly. (R 530). M[redacted] said that S[redacted] first started expressing hatred for Mr. Hallberg during the middle of the ninth grade. He said that there were rumors going around about S[redacted] and Hallberg, but no one was quite sure what they had done. He said that he never saw any ugly pictures of stick figures representing Hallberg on top of Stinson. (R 536).

Another student, G[redacted] K[redacted], confirmed that there was a way to get to the office without going by Hallberg's classroom. (R 550). She became aware from S[redacted]'s behavior at the beginning of the ninth grade that S[redacted] no longer liked Hallberg. (R 552).

James Kelly, another student, indicated that during the eighth

grade, Stinson and Hallberg became close and that all the students in the special program became somewhat of a friend with their teachers. S[redacted] was somewhat closer with Hallberg. She would get rides with him. K[redacted] saw her with Hallberg in Hallberg's classroom, but they were just having a conversation. (R 557-58).

S[redacted]'s tenth grade English teacher indicated that S[redacted]'s grades did not diminish after she wrote her summary of allegations in state's Exhibit 3. Instead, her next assignment was a perfect paper. (R 585).

Sandra Williams was the Lakeland High School guidance counselor. (R 588). Williams indicated that S[redacted] had told her that she and the teacher had had sex more then once, but had detailed only one particular incident to her. (R 606-08). Williams's testimony about the number of times S[redacted] had said she had had sex with Hallberg was confusing and perhaps different from her deposition testimony. (R 613). She did not recall S[redacted] ever mentioning being forced to perform oral sex or having oral sex performed on her. (R 616). She thought that the incident complained of occurred during the school year. (R 617).

Seigal was a child protection team officer with HRS who interviewed S[redacted]. (R 623). With male officers present, S[redacted] was not able to say any more than kissing and fondling had occurred, so Seigal talked to S[redacted] alone and S[redacted] told her that Hallberg had forced her to perform oral sex and had had intercourse with her. (R 626). S[redacted] then told Seigal and the other investigators that Hallberg had ejaculated in her vagina

after first ejaculating in her mouth. (R 631). S[redacted] also told them that Hallberg had penetrated her vagina with his fingers the very first time he visited her house. (R 631).

S[redacted]s story was repeated yet again by Jim Ernst, the HRS investigator. (R 633-40). On cross-examination, he said that S[redacted] had told him that there had been no actual sexual contact until the summer after school was out. (R 641). He said S[redacted] told him that Hallberg had made her perform oral sex on him and had ejaculated in her mouth and that ten minutes later he ejaculated in her vagina. (R 642-43).

The state took one last opportunity to present S[redacted] S[redacted]s story in the form of hearsay testimony by Detective Timothy Ryan. (R 647-50). He also testified that Ward refused to talk to him without having Henson present. Without objection, he testified in detail about his investigation, who had talked to him, and what they had told him. (R 654-57).

On cross-examination, Ryan testified that S[redacted] had indicated that she had written a note to Ward and Henson about what Hallberg had done but that he was told by Ward that no such note existed. (R 664-65). S[redacted] did not mention that, before the summer of the alleged incident, Hallberg had taken her from the hallway into his classroom where he kissed her or that he locked her in the classroom or that he forced her to buy presents. (R 667). She never told Ryan that Hallberg had performed oral sex on her. (R 670). Ryan confirmed that Stinson had told him that Hallberg had ejaculated in her mouth and then five or ten minutes

later had ejaculated in her vagina. (R 673). Ryan said that S[redacted] told him that in November of 1988 she had written a half page letter to Ward and that Ward, Duncan, and Henson all read the letter and questioned her about it. (R 680).

After Ryan's testimony, the state rested. (R 684). Defense counsel moved for directed verdict of acquittal on counts two, four, and six, arguing that there was no custodial or familial relationship present in this case. (R 699-708). The court denied that motion on the ground that "this is an issue that is properly presented to the jury." (R 708). Defense counsel also moved to strike S[redacted] S[redacted]'s testimony as incompetent because it was based on inconsistencies and falsehoods. The motion was denied. (R 709). Defense counsel then moved to strike counts one, three, and five, claiming that those counts were lesser included offenses of counts two, four, and six. (R 709). That motion was likewise denied. (R 710). Defense counsel argued that the jury should be instructed that the lewd act offenses were lesser included offenses of the charges of engaging in sexual activity. After discussion of how many counts and what they would be if such an instruction were given, the court concluded, "I'll still adhere to my original ruling." (R710-711).

The defendant called several witnesses, beginning with principal Ward. (R 713). During S[redacted]'s ninth grade year, Ward received a report from the parent of another student who said the student had overheard Hallberg call S[redacted] a bitch. (R 714-15). Ward asked assistant principal Henson to check into the matter, and

the two of them had a meeting with Mr. and Mrs. S[redacted]. (R 715-16). Ward indicated that in about October or November of that school year, Reynolds and another teacher, Nancy Carver, reported to him that S[redacted] was being very emotional, coming into their classrooms early and crying. He kept asking the teachers if there was any report as to what was wrong, but no one seemed to know. He sent S[redacted] to the school psychologist, Mrs. Taylor, who was unable to get any information from S[redacted].

Ward said that at some point during the year he received a call from Duncan, a deputy superintendent of school, about Mrs. S[redacted] complaining that Hallberg was hassling her daughter. (R 721). Ward indicated that he and Henson asked S[redacted] to tell them about the problems and gave her a legal pad to write down the complaints she might have had. As Ward recalled it, all the pad said when Stinson gave it back to him was, "He called me a bitch." (R 723). Ward said he "foolishly ... discarded" the note. (R 723). He said that Henson asked S[redacted] if she had anything else she wanted to tell them and she said she did not. (R 724). Ward said that there "absolutely" had never been a meeting of himself, Henson, Duncan, and S[redacted] S[redacted]. He also said that he "did not hear another word from the family or S[redacted] S[redacted] for the rest of the year" after the "bitch" incident. (R 724). Prior to May of the following school year, when S[redacted] was at the high school, he never heard any allegation by S[redacted] or anyone on her behalf that Hallberg had committed any sexual offense. (R 725).

Ward indicated that when the allegations were made by S[redacted]

at the high school, Ward and Duncan talked to Reynolds, and Reynolds told them that she had told them initially that S[redacted] had been fondled. He and Duncan were taken aback by her statement. She also indicated that Henson had been present. Ward called Henson in, and he denied hearing anything from Reynolds about S[redacted]. (R 727-28).

Henson testified that Ward informed him that there was a complaint about Hallberg saying something dirty to S[redacted] and instructed him to interview the students and find out what happened. All students said they heard nothing except for D[redacted] M[redacted] who said he heard Hallberg call S[redacted] a bitch. After the investigation, Ward, Henson, and Mr. and Mrs. S[redacted] had a discussion. (R 772-73). Henson said Reynolds never made any complaints to him about S[redacted].

After the "bitch" incident, Ward told Henson that Hallberg had been accused of inappropriate touching, so they called Hallberg to the office for a conference. Hallberg told them that he was trying to console S[redacted] and kissed her on the forehead. (R 775). Ward and Henson then had S[redacted] come in and tell her story. S[redacted] was not saying very much, so Ward asked her to write out an explanation. She wrote something on a sheet of paper and handed it back to Ward. It was only two or three lines. S[redacted] said Ward then asked her if there was anything else, and she shook her head no. (R 775-76).

According to Henson, he could not recall any conversations with Reynolds about S[redacted]'s problems during that school year. (R

777-79).

Duncan, an executive assistant to the school superintendent, testified that Mr. and Mrs. S[redacted] complained to him about their daughter being harassed. There were no allegations of sexual abuse at the time. (R 802-03). There were never any allegations of sex abuse that Duncan was aware of until charges against Hallberg came out in the newspaper. (R 804). Duncan denied being present at the meeting Reynolds said he had attended during which Reynolds allegedly reported to him, Ward, and Henson that S[redacted] had made allegations of fondling. (R 805).

Nancy Carver, another teacher, testified that S[redacted] was very depressed during her ninth grade year as are a lot of ninth grade girls. S[redacted] would not talk about what was bothering her and refused to write it down for Carver. (R 826-27). At some point, however, S[redacted] apparently did write for Carver that Hallberg had ordered her out of his class and had improperly touched her. S[redacted] did not write that Hallberg had fondled her. (R 828-30).

Loretta Rarick, the assistant librarian at Crystal Lake Jr. High, testified that S[redacted] worked in the library. (R 835-36). Rarick testified that she overheard S[redacted] tell M[redacted] that S[redacted] could have Hallberg fired. (R 836). Robert Denesha, a media specialist at Crystal Lake Jr. High School, testified that he overheard S[redacted] tell M[redacted] that "I'll have his job for this." (R 843-45).

Pam Taylor, the school psychologist at Crystal Lake, testified that S[redacted] had been referred to her by Denesha. Although S[redacted]

was "troubled" she would not tell Taylor about anything that was bothering her, and Taylor never heard allegations against Hallberg. (R 863-65).

Hallberg was the final witness. He had a degree in education and another degree from a theological seminary. He had experience as a minister at two churches. (R 874-75). He denied generally and specifically the allegations made against him.

After Hallberg testified, the defense rested (R 1086) and renewed the motions for directed acquittal, which were again denied. (R 1089-90). Defense counsel again raised the argument that school teachers were not persons in familial or custodial authority, and the court ruled that it was the legislature's intent to extend the description to school teachers and that under the facts of this case that issue was properly to be submitted to the jury. (R 1091-92). The jury then returned verdicts of guilty as charged on all counts. (R 1180-87).

Hallberg filed a timely motion for new trial (R 1188-91) which was denied. (R 1192). Hallberg then filed a second, untimely motion for new trial on the basis of newly discovered material evidence, including a male student who allegedly had been falsely accused by S[redacted] of raping her. Other important new evidence included the testimony of a secretary at Crystal Lake High School who had come forward and told of seeing the note which S[redacted] said contained her allegations of sexual abuse but which Ward testified contained only the statement, "he called me a bitch." This new witness, the motion said, would testify that when she saw the note,

it contained only the statement, "he called me a bitch." (R 1193-94).

At a hearing on this motion, B[redacted] M[redacted], a seventeen year old at the time of the hearing, testified that S[redacted] had accused him of flashing her by exposing his sexual organs to her. (R 1202-03). He denied ever doing anything of the sort. (R 1203). M[redacted] said that S[redacted] did not accuse him of rape. (R 1204). Defense counsel, however, represented to the court that a girl named A[redacted] M[redacted] had stated that S[redacted] told her that M[redacted] had raped S[redacted]. (R 1211).

Betty Glatzau, who had been principal Ward's secretary, testified that she had seen a note on Ward's desk. (R 1207). She did not recall when she had seen the note. (R 1207-08). She said that she read the one line that was on the note. It said "he called me a bitch." (R 1208). There was no indication of any sexual activity in the note. She said that she heard people talking about this case and informed them what she had seen. (R 1210-11). The motion was denied. (R 1221).

At sentencing, defense counsel objected to double sentencing for the same act and objected to the allocation of victim injury points for each alleged incident. (R 1226-30). The court attempted to use the "permitted range" of the score sheet proposed by defense counsel and the score sheet prepared by the probation officer, and in so doing imposed a sentence of 27 years. (R 1231).

On direct appeal the second district affirmed the convictions but reversed the sentence.

SUMMARY OF THE ARGUMENT

Hallberg was not a person who stood in a position of familial or custodial authority with Stinson, and the district court erred in finding existence of such a relationship. Such relationships require family-type ties, and school teachers do not have such ties by virtue of their jobs. Furthermore, although Hallberg was her teacher during the school-year, the incidents alleged in the information occurred during the summer while school was out. Hallberg was present in S[redacted]s home, according to her testimony, against her will and without the knowledge of her parents. Thus, if the incident occurred at all, he was an intruder and obviously not a person in a position of familial or custodial authority at the time of the alleged incident.

Multiple punishments for offenses of non-fondling lewd act on a child and for engaging a child in sexual activity by a person in familial authority constitute double jeopardy. A Blockburger analysis shows that the only real difference between the two offenses is the additional element of familial or custodial authority in the engaging a child offense. The district court's rationale that another element exists in the lewd act offense is circular reasoning.

Hallberg was entitled to an instruction that lewd act was a permissive lesser included offense of engaging a child in sexual activity, but it was not given. If the convictions are not reversed for any other reason, failure to give the instruction requires reversal. (Note: This issue has not been previously

raised on appeal; it is based on a case cited in the district court's opinion and not available to counsel at the time of oral argument in the district court).

The testimony of the alleged victim was so inconsistent, so contradictory, and impeached so many times and in so many ways by the state's own witnesses and evidence that it cannot withstand careful scrutiny, as required. The district court erred by, in effect, finding this strict scrutiny rule does not exist.

The trial court should have granted Hallberg's motion for new trial because the evidence presented at the hearing implicated Stinson in making previous false accusations of sexual impropriety and established the falsity of her claim of having written out allegations to her school principal when what she actually wrote was that Hallberg "called me a bitch." The newly discovered evidence probably would have changed the verdict and was therefore adequate grounds for granting a new trial.

ARGUMENT

I. The three counts of engaging a child in sexual activity by a person in familial or custodial authority must be reversed because Hallberg did not stand in such a relationship to the alleged victim.

Hallberg was convicted of three counts of engaging a child in sexual activity as a "person who stands in a position of familial or custodial authority to a child" between the ages of 12 and 18. Fla. Stat. § 794.041. Hallberg was not such a person under the common understanding of the terms "familial" and "custodial" nor under any of the previous cases which have interpreted the

statutory language and the language of its predecessor statute.

The first such case was Coleman v. State, 485 So. 2d 1342 (Fla. 1st DCA 1986). Coleman, before the date of the alleged sexual activity, had been married to and then divorced from the victim's mother. After that divorce Coleman moved back in with his ex-wife and her daughter, and while living with them he allegedly committed a sexual battery on the ex-wife's daughter. She testified that during the time Coleman lived with her mother, although they weren't married, she loved, trusted, and obeyed him. Id. at 1345. Interpreting the term familial or custodial in this context, the court stated that the legislature intended "by its use of the word 'familial or custodial', to include within the statute's proscriptions any person maintaining a close relationship with children of the ages specified in the statute, and who lived in the same household with such children." Id. In a footnote, the Coleman court expressed the legislative intent of the statute thus: "on a broad basis to protect minor children from the predatory influences of older persons who establish close famiy-type ties..." Id. at 1346 n.2.

The First District was also the author of the second case explaining the meaning of this critical term. Stricklen v. State, 504 So. 2d. 1248 (Fla. 1st DCA 1986). Only one sentence in that opinion describes the relationship between alleged perpetrator and alleged victim: "The testimony indicated that Stricklen had cultivated a very close relationship to the victim over a considerable period of time, assuming responsibility for his care

practically every weekend." Id. at 1250. The court concluded that, "although Stricklen did not reside in the victim's home, as was the case in Coleman, we are persuaded that the circumstances were such as easily to characterize the relationship as one establishing 'close family-type ties'." Id. (quoting Coleman). With these words, the First District eliminated the apparent requirement of Coleman that the perpetrator live in the home of the victim but retained a requirement of "close family-type ties."

One month after Stricklen, a divided panel of the Fifth District Court of Appeal adopted Stricklen's reasoning. Collins v. State, 496 So. 2d 997 (Fla. 5th DCA 1986). In Collins the court gave only a sketchy description of the relationship between the victim and the defendant: "the victim had many contacts with the defendant, she had ridden in his truck many times, the defendant had daily contacts with the victim's mother, and in fact, the mother of the child knew, and approved, that the child was in the care of the defendant on the day the crime was committed." Id. at 999. Before trial, the state had specified that "The defendant's custodial authority was his giving the victim a ride from the bus stop to the location of the incident." Id. at 998. The majority opinion concluded that the "living in the same household with such children" requirement of Coleman had been held in Stricklen not to be an essential factor in the definition of "custodial". "Rather," the majority said, "such custody can occur on a temporary basis, as in Stricklen and the instant case." Id.

Judge Dauksch dissented, stating:

> I do not agree with the majority opinion which gives such a broad definition of the word "custodial." I do not consider one who gives a child a ride in a car to be in custody of that child for the purpose of the criminal sexual activity statute. I agree with the definition in Coleman ..., but I would not extend it.

Id. at 999 (Dauksch J., dissenting).

The fourth case, D.A.O. v. Dept. of H.R.S., 561 So. 2d 380 (Fla. 1st DCA 1990), was not factually or legally on point for our discussion here. The court there made the comment, however, that "the term 'familial or custodial authority' in the criminal statutes cited in these cases [Stricklen, Coleman, and Collins] has a broader meaning than the phrase 'legally responsible for the child's welfare'", which was the phrase at issue in D.A.O.. In the present case, the district court seized upon this unfounded dictum as the basis for its decision.

In Vandiver v. State, 578 So. 2d 1145 (Fla. 4th DCA 1991), the defendant's daughter and her friend, both wards of the state and in the custody of HRS, ran away from their placements. The daughter's friend, the alleged victim, stayed with the defendant for two days. It was during those two days that the alleged offense occurred. Id. at 1146. The state rested its case "solely upon the fact that the defendant lodged and fed the victim for a two-day period and made her 'feel at home' during her brief stay." Id. at 1147. The court concluded that this evidence was insufficient to support a conviction for sexual battery on a child by a person in familial or custodial authority because it would be unreasonable to extend the application of the statute to the facts of the case. Id. Ironically, the Vandiver court referred to the offense as "familial

sexual battery." Id. at 1147 (emphasis added).

The last case before Hallberg's was the third district's opinion in Bierer v. State, 582 So. 2d 1230 (Fla. 3rd DCA 1991). The question arose in Bierer in the context of the admissibility of similar fact evidence. The defendant was accused of sexual battery on two stepdaughters and their neighborhood friend. Id. at 1230. The evidence indicated that the defendant exercised parental-type supervision of the neighborhood child on a daily basis at his home. Id. at 1232. After reviewing Coleman, Stricklen, and Collins, the court concluded that the incident involving the neighborhood child occurred within a "broad familial context" and would, therefore, be admissible under the similar fact evidence rule.

The decisions in Coleman, Vandiver, Bierer, and, perhaps, Stricklen make sense because in all of those cases the defendant exercised familial authority, responsibility, or supervision of the child victim either in the child's home or in the defendant's home. It is hard to justify the Fifth DCA panel majority's opinion in Collins in which the custodial situation arose from the defendant's having given the victim rides home. Hallberg submits that the dissenting opinion in Collins is the better view. But even in Collins, the facts were that "the defendant had frequent contact with the child, she had ridden in his truck many times, the defendant had daily contact with the victim's mother, and the defendant's care and control of the child was with the mother's approval at the time the crime was committed." Beirer v. State, 582 So. 2d at 1232 (emphasis added).

Two recent cases not considered by the second district in Hallberg's appeal, Saffor v. State, 625 So.2d 31 (Fla. 1st DCA 1993), and Thomas v. State, 599 So.2d 158 (Fla. 1st DCA 1993), also deal with the admissibility of similiar fact evidence. Though not factually on point, even these cases emphasize the "family" focus of the statute. Both the majority and the dissent in Saffor indicate that the statutory purpose or intent was "on a broad basis to protect minor children from the predatory influences of older persons who establish close family-type ties with them." 625 So.2d at ____.

The relationship between Hallberg and S[redacted] is very different from any of those in the cases described above. True, Hallberg was S[redacted]'s teacher. But teachers do not stand in a position of familial or custodial authority just because they are teachers. The teacher-student relationship is missing the critical characteristic of "close family-type ties." Furthermore, the incident which forms the basis of the state's case was alleged to have occurred during the summer when school was out. Moreover, it was alleged to have occurred in the victim's home, not at school. Accordingly, this is not simply a teacher-student situation as the district court tried to simplify it into being. A more accurate view is that the situation involves an isolated incident or two away from school, in the victim's home (rather than the defendant's) where the victim herself said the defendant was unwelcome, at a time when the victim's parents did not even know Hallberg was there. Thus, it is clear that there was no close

relationship with the child who lives in the same household as in Coleman. Nor was this a situation in which the defendant had assumed responsibility for the child's care on weekends as in Stricklen or had exercised parental-type supervision of a neighborhood child on a daily basis at his home as in Bierer. Furthermore, it is not even like Collins because the incident here did not occur, as in Collins, in the defendant's vehicle while he was giving her a ride nor did the defendant have daily contact with the victim's mother or have care and control of the victim with the mother's approval at the time of the alleged crime. Finally, the facts of this case do not even rise to the level of the facts in Vandiver in which that defendant was found not to be a person in familial or custodial authority although the victim stayed in his home for two days.

The district court's majority opinion, by use of an incomplete phrase from Coleman, unfounded dictum in D.A.O., and inapplicable child abuse statutes, comes to the erroneous conclusions that the term "person who stands in a position of familial or custodial authority to a child" refers to anyone in a "close relationship" with the child or anyone who occupies a "position of authority" in relation to the child, whether or not the person acts within the scope of the position. The district court's definitions would make the statute applicable to a nineteen year-old boyfriend and an off-duty policeman. Manifestly, therefore, the district court's analysis is defective.

Contrary to the other district courts' opinions, the second

district expressly finds there is no linkage between the words "custodial" and "familial," Hallberg v. State, 621 So.2d 693, 701 (Fla. 2d DCA 1993), so the authority does not have to be "family type" as in the other cases. Furthermore, the second district says the key words in the definition are "position" and "authority," and, without any citation whatsoever, expressly "concludes" that the statute was intended to apply to anyone in "a position of authority in relation to the child..." Id. at 702. In one fell swoop the second district marjority has eliminated two restrictive terms from the statutory definition -- making it unnecessary for the authority to be either custodial or familial. That surely cannot be the legislature's intent.

The first, third, fourth, and fifth districts have found, either expressly or by implication, that the authority had to arise from living "in the same household;"[1] from "close family-type ties,"[2] where there were daily contacts and the mother knew and approved of the child being in the defendant's care;[3] or in "a broad familial context;"[4] but not where the adult defendant "lodged and fed the victim" for two days.[5] All the other districts, therefore, read "custodial or familial authority" to require a family-like context, and their reading makes sense. The

---

[1] Coleman v. State, 485 So.2d at 1345 (1st DCA).

[2] Stricklen v. State, 504 So.2d at 1250 (1st DCA).

[3] Collins v. State, 496 So.2d at 999 (5th DCA).

[4] Bierer v. State, 582 So.2d at 1232 (3d DCA).

[5] Vandiver v. State, 578 So.2d at 1147 (4th DCA).

legislature was surely aiming the proscription at predatory step-fathers and other typical familial child abusers -- not nineteen year old boyfriends, off-duty policemen, or school teachers.

After eliminating the "linkage" between "familial" and "custodial," indeed, after eliminating "familial" and "custodial" from the definition all together, the second district then eliminates any linkage between the position of authority and the offense. Citing statutory language giving teachers authority over pupils "during the time [the pupil] is being transported" or "attending school" or "on the school premises" or "in other places in which [the teacher] is assigned to be in charge of students," 621 So.2d at 702-03, the second district concludes that a teacher stands in a position of authority to a child who is a student of the teacher. 621 So.2d at 703. Then, the majority makes a giant leap to conclude that the definition applies to an off-duty teacher in the summer who is in the student's home uninvited and without the parents' knowledge. 621 So.2d at 702.

The dissent correctly opines that strict construction principles mandate a finding that such a person is not in a position of custodial authority at those times and places. Though the dissent does not say so, the majority's own statutory citations would exclude a teacher from authority when not on school time, at school, or en route. The majority's conclusion on this aspect of the question is simply illogical. Furthermore, as the dissent points out, the majority's real conclusion is that any person who has a "close relationship" falls under the statute, and virtually

all consensual sex is between people with a close relationship. The statute could not have been intended to make such consensual sex a first degree felony just because it was committed by an adult and a minor between whom there happened to be a close relationship. The dissent has the better, more logical argument, and it should be adopted by this court in its disposition of this case.

Here, if the alleged victim's testimony is accepted, the incident occurred in her home when she did not want Hallberg to be there and when he was there without her parents' knowledge or approval. Clearly, if this incident occurred at all, it did not occur between a child and a person who exercised familial or custodial authority over the child, for two reasons: (1) school teachers do not exercise family-type authority and as a class are not included in the proscription by the statute, and (2) Hallberg at the time of the alleged offenses was not exercising any family-type authority. Accordingly, the convictions on the three counts of engaging a child in sexual activity by a person in a familial or custodial authority must be reversed because the evidence of familial or custodial authority is insufficient. Retrial on those counts is barred by double jeopardy precepts. Vandiver v. State, 578 So. 2d at 1147.

II. Three counts of lewd act on a child are lesser included offenses of the three counts of engaging a child in sexual activity, so the multiple punishments imposed upon Hallberg constitute double jeopardy.

Hallberg was convicted and sentenced for both a lewd act on a child and engaging a child in sexual activity for one incident of

alleged sexual intercourse. Likewise, he was convicted and sentenced for both lewd act and engaging a child in sexual activity for a single act of alleged digital penetration. Finally, he was convicted and sentenced for both a lewd act and for engaging a child in sexual activity for a single act of allegedly having Stinson perform oral sex on him. The district court majority, applying a Blockburger analysis, concluded that two convictions and sentences for each of these three acts do not violate double jeopardy precepts. The majority's Blockburger analysis is fatally flawed.

The second district majority cited Blockburger v. United States, 284 U.S. 299 (1932), and Section 775,021, Florida Statutes, and concluded that these convictions do not constitute double jeopardy because "each offense [§ 800.04 (3) and § 794.041 (2) (b)] requires proof of an element that the other does not." 621 So.2d at 704. Hallberg agrees with one-half of the second district's logic: §794.041(2)(b) requires proof of familial or custodial authority; §800.04(3) does not require proof of such authority. However, the second district was wrong on the other half of its analysis. The error comes from trying to make the absence of sexual battery an affirmative part of the 800.04 offense without recognizing that an absence of sexual battery is established under both statutes by limiting their application to children over the age of 12.

Consider the following comparison of the two offenses:

§800.04(3)	§794.041(2)(b)
ACT: "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object" Fla. Stat. §794.011(1)(h) as incorporated by §800.04(3).	ACT: "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object" Fla. Stat. §794.041(1).
AGE OF CHILD	AGE OF CHILD
Maximum: 15 Minimum: 12 (§800.04 implicitly establishes minimum age by saying "without committing the crime of sexual battery" -- the described act would be sexual battery if the child was under 12)	Maximum: 17 Minimum: 12 (§794.041 expressly establishes mimimum age)
IDENTITY OF DEFENDANT	IDENTIFY OF DEFENDANT
"any person"	"any person...in a position of familial or custodial authority"

This comparison shows that the legislature used identical language in §§794.041 and 794.011 to describe the actus reus: having genital, anal, digital or oral sex. Thus the act is the same for both.

The legislature made the maximum age of the child 17 in §794.041 but 15 in 800.04. Clearly, any child who is not too old for §800.04 is also not too old for §794.041.

The legislature expressly made the minimum age of the child 12 in §794.041. Likewise, by saying that the §800.04 offense shall not be sexual battery, the legislature has implicitly set the

minimum age at 12 for the child victim of such §800.04 offense. This is so because the very same consensual sexual acts with a child less than 12 constitutes sexual battery, therefore not violations of §800.04.

If an adult standing in a position of familial or custodial authority to a 12, 13, 14, or 15 year-old child has consensual genital intercourse with that child, that act will always be a violation of both §800.04(3) and §794.041920(b). If the same adult has consensual anal sex with the same child, the act will always be a violation of both §800.04(3) and §794.041(2)(b). If the same adult has consensual oral sex with the same child, the act will always be a violation of both §800.04(3) and §794.041(2)(b). If the same adult has consensual digital penetration of the same child, the act will always be a violation of both §800.04(3) and §794.041(2)(b).

This court paraphrased the Blockburger test in Bell v. State, 437 So.2d 1057, 1058 (Fla. 1983), thus:

> For double jeopardy purposes lesser included offenses are tantamount to the greater offense charged if all the constitutent essential elements of such lesser offenses are included within the elements of such greater offenses.

As the table and argument above irrefutably establish, every act which constitutes a violation of §800.04(3) will always constitute a violation of §794.041(2)(b) with the addition of one element: familial or custodial authority. Thus, §794.041(2)(b) requires the proof of one fact (authority) that §800.04(3) does not require. But §800.04(2) does not require proof of any fact not included in

the proscription of §794.041(2)(b). Accordingly, the second district's confusingly expressed observation that "section 794.041 does not require ... that such act not constitute the crime of sexual battery" 621 So.2d at 704 (emphasis by the second district) obscures, by use of a double negative, the fact that an act that is not a sexual battery always violates both statutes if the other elements of §800.04(3) are present. Clearly, the second district's Blockburger analysis is flawed, for "merely labeling statutes does not, and cannot, make the offenses distinct when in fact they are identical." Bell, 437 So.2d 1058-59. The legislature labeled the minimum age elements of these two offenses differently but in fact they are the same. Accordingly, convictions for both offenses for the same act constitute a violation of the double jeopardy clauses of the fifth amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

III. The convictions should be reversed for denial of requested lesser offense instructions.

An ironic twist on the double jeopardy analysis is seen in trying to apply Kolaric v. State, 616 So.2d 117 (Fla. 2d DCA 1993), which was cited by the second district. Kolaric holds that a §800.04(3) offense (which then fell under subsection (2)) is at least a permissive lesser included offense in §794.041(2)(b), entitling Mr. Kolaric to a lesser included offense jury instruction. 616 So.2d at 118-19. If Kolaric were applied in this case, Hallberg could have been convicted of lewd act for an act charged as a lewd act and he could have been convicted of lewd act for exactly the same act as a lesser included offense of a charge

of engaging a child in sexual activity. For example, if the jury found him guilty of the genital sexual activity charged as a lewd act and found him guilty of a lesser included offense of lewd act for the same genital sexual activity, he would be convicted twice under the same statute for the same act. There is no greater proof that convictions under both §§800.04(3) and 794.041(2)(b) constitute double jeopardy.

Related to the double jeopardy issue is the trial court's failure to instruct the jury, as Hallberg requested, that lewd act is a lesser included offense of the crime of engaging a child in sexual activity. Kolaric, which the undersigned counsel for Hallberg did not know about until the second district's Hallberg decision and which was not decided at the time of Hallberg's trial, requires the giving of such instruction if requested. It was requested. It was not given. Therefore, Kolaric requires reversal of all six duplicative counts.

This issue was not raised in the district court because counsel did not have the benefit of Kolaric and because of the anomalous situation such instruction would create: double convictions for the same lewd act if the jury did not find familial or custodial authority. Nevertheless, Kolaric requires the requested instruction and it was not given. If this court elects not to find double jeopardy, it should reverse the convictions under Kolaric.

IV. When properly scrutinized, the testimony of the alleged victim is insufficient to support the jury verdict.

Although changing attitudes have resulted in changed rules, such as the rape shield law, one rule remains unchanged: "where the sole witness is the prosecutrix, her testimony must be carefully scrutinized so as to avoid an unmerited conviction." Thomas v. State, 167 So. 2d 309, 310 (Fla. 1964). As the First District Court of Appeal has recognized, "No corroborative evidence is required in a sexual battery case when the victim can testify directly to the crime and can identify her assailant, although it should be carefully scrutinized so as to avoid an unmerited conviction." Robinson v. State, 462 So. 2d 471, 475 (Fla. 1st DCA 1984). The Supreme Court in Thomas described the quality of testimony which "survives such scrutiny" as follows: "It is reasonable, consistent with corroborating evidence on other points ..., and is not in anywise contradictory." Thomas v. State, 167 So. 2d at 310. (emphasis added). The district court did not attempt to apply Thomas, instead electing to rely on Tibbs v. State, 397 So.2d 1120 (Fla. 1991). Tibbs is this court's comprehensive decision spelling out the difference between the "weight" of the evidence and "sufficiency" of the evidence. The district court erroneously applied weight-of-the-evidence principles to the petitioner's sufficiency-of-the-evidence argument. The petitioner is entitled to a review on the principle set forth in Thomas, but the district court miscontrued that principle. This court should now make a Thomas review and reverse

these convictions.

The testimony of S[redacted] S[redacted] is not reasonable, is not "consistent", and is riddled with "contradict[ions]." It cannot, therefore, survive the careful scrutiny required by Thomas and Robinson. Defense counsel used every vehicle imaginable to point out to the trial court the inadequacy of S[redacted]'s testimony. Counsel moved to strike her testimony; counsel moved for a judgment of acquittal; and, after the trial, counsel moved for a new trial. All such efforts were rebuffed by the trial court.

Casual, let alone careful, scrutiny of S[redacted]'s testimony reveals improbability after improbability, impossibility after impossibility, and inconsistency after contradiction. She said that she became afraid of Hallberg in the fall but began asking for rides home in the spring. She said that she hated him and was afraid of him, but she joined forces with her mother to get him a birthday present and a card. Without any explanation of how the coercion was supposed to have worked upon her, she claimed that Hallberg forced her when he was not even with her to write notes to him telling him how important he was and to deliver them to him in class in front of other students. She claimed that when another teacher sent her to the office every Friday morning she had to walk past Hallberg's classroom to get to the office, but every other witness who was asked about this issue said there were other ways for her to get to the office. She claimed that after she entered his classroom, he locked the door behind her before he began fondling and kissing her. Unfortunately for her story, her

favorite teacher and apologist, Reynolds, testified that the door could not be locked from the inside; furthermore, the highschool principal admitted that there was a fire code that prevented the installation of locks on the inside of classroom doors.

With regard to the incident which was the focus of the charges in the information, she testified that in late July or early August Hallberg touched her breasts and between her legs, forced her to perform oral sex, performed oral sex on her, and had intercourse with her. She claims she told three administrators (two from Crystal Lake Jr. High and one from the County Superintendent's Office) about the fondling, but they all denied under oath having been told. When she finally went public, almost two years after the alleged incident, she said only that Hallberg had touched her and had had intercourse with her. She said nothing about his performing oral sex or her performing oral sex. When she was finally interviewed by law enforcement and HRS investigators, she claimed to have been forced to perform oral sex on Hallberg but did not mention his performing oral sex on her. Of all the many statements introduced at trial, only her courtroom testimony mentioned Hallberg having performed oral sex on her.

When she finally claimed for the first time that Hallberg had forced her to perform oral sex, she told the investigators that Hallberg ejaculated in her mouth and only moments later ejaculated in her vagina. In her trial testimony, she equivocated about whether there had been any ejaculation, and she said 15 to 20 minutes passed between the oral sex and the intercourse. In still

another version, given before trial, she said the whole encounter had lasted only about 10 to 15 minutes.

At trial, she testified that Hallberg had French kissed her. She admitted, however, that she had not mentioned French kissing to anyone prior to her trial testimony. Even her courtroom version of what she told the Crystal Lake administrators (which they denied) was inconsistent with her courtroom testimony of the alleged actual event.

Despite claiming she hated Hallberg after the alleged incident, she encouraged another female student to join his class. She denied ever saying that she could have Hallberg fired, but two school administrators testified to having heard her say that. Even her statement to the high school principal, Dunn, which was supposed to have finally let the cat out of the bag, was handed to Dunn without any indication of the most serious allegations that she made at trial. Only after Dunn told her that if she claimed she had been raped she had to write something down did she write down the allegation of sexual intercourse.

Obviously, it cannot be said as in Thomas that S[redacted]s story "is not in anywise contradictory," nor is it reasonable, as the testimony in Thomas. Neither can it be said to be "consistent with corroborating evidence on other points ..." as in Thomas. The state's own corroborative evidence, almost entirely hearsay versions of S[redacted]s story, is fatally crippled by inconsistencies and contradictions. Furthermore, the corroborating testimony that S[redacted] made some form of contemporaneous allegations to adult

witnesses is incredible because none of these adult witnesses complied with their legal obligation to report allegations of child abuse to HRS. The corroborating witnesses themselves, especially the school teachers who obviously know their obligations in this regard, are incredible. Even the district court acknowledged the existence of "contridictions and inconsistencies" in her testimony. 621 So.2d at 700 n.1.

In most cases, an appellate court is not permitted to review the credibility of witnesses. But the wisdom of the Thomas rule requiring appellate scrutiny of this prosecutrix's allegations is self-evident. Her testimony does not survive the careful scrutiny required by Thomas. The failure of the district court to apply this scrutiny compels reversal of that court's decision.

V. It was reversible error to deny Hallberg's motion for new trial based on newly discovered evidence.

When a defendant files a motion for new trial on the basis of newly discovered evidence, Rule 3.600(a)(3), Florida Rules of Criminal Procedure, requires the trial court to grant a new trial if the new evidence could not reasonably have been discovered through due diligence before trial and if the new evidence would probably have changed the verdict. Williams v. State, 570 So. 2d 376 (Fla. 4th DCA 1990). The trial court is authorized to grant a new trial, even if the motion is untimely filed as in this case, where the new evidence shows that fraudulent testimony has been introduced against a defendant in a criminal case. State v.

Glover, 564 So. 2d 191 (Fla. 5th DCA 1990).

This case turned entirely on the credibility of S[redacted]S[redacted]. Sworn testimony of a witness discovered after trial shows that S[redacted] S[redacted] falsely accused a male student of "flashing" her. Unchallenged representations by defense counsel indicated that a witness who was unavailable for the hearing alleged that S[redacted] told her that the same male student had "raped" her. This evidence may well have been determinative of S[redacted]'s credibility had it been introduced at trial.

Standing alone, this new evidence of false allegations by S[redacted] may not have warranted a new trial. But an even greater piece of evidence was presented by a secretary who saw the note in which S[redacted] falsely claimed to have informed principal Ward that she had been fondled. The secretary said the note she saw stated only, "he called me a bitch." Those are exactly the words that Ward said were included in the note. Introduction of the secretary's testimony would have added a dimension not otherwise present in the evidence. Teacher Reynolds made comments to the jury that suggested that there was a conspiracy of silence among three male administrators. The testimony of this female secretary cannot be criticized for failure to report child abuse to HRS. Thus it proves beyond any doubt that the testimony of the three administrators was true and S[redacted]'s testimony was false.

When coupled with proof that S[redacted] falsely accused another person of a sexual transgression, this evidence confirms the falsity of S[redacted]'s claim that she reported sex abuse while she

was still at Crystal Lake Jr. High and undermines the state's strategy of bolstering S[redacted] with hearsay testimony about what she said and to whom at other times. The new evidence "would probably have changed the verdict", Williams v. State, 570 So. 2d at 376, and is therefore sufficient to make the trial court's refusal to grant a new trial reversible error.

CONCLUSION

The second district court of appeal's decision should be reversed.

Robert L. Doyel
Florida Bar No. 0714429
343 W. Davidson Street
Suite 102
P.O. Box 1476
Bartow, Florida 33830
(813) 533-2646
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by US Mail to Robert Butterworth, Attorney General, 2002 N. Lois Avenue, Tampa, Florida this 14 day of February, 1994.

Robert L. Doyel