OA 5-5-94

IN THE SUPREME COURT OF FLORIDA

JAMES WALTER HALLBERG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 82,189

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the following additions and corrections:

Petitioner's trial was held on July 8-12, 1991 (R 1, 3). The judgment is found at R 1235-6. The trial court imposed concurrent sentences of 10 years on each of counts 1, 3, 5, 7 and 8 and 27 years on each of counts 2, 4, and 6 (R 1231-2, 1237-45). The guidelines scoresheet is found at R 1246.

The Second District reversed Petitioner's sentences relying on *Karchesky v. State*, 591 So. 2d 930 (Fla. 1992); *Morris v. State*, 605 So. 2d 511 (Fla. 2d DCA 1992); and *Harrelson v. State*, 616 So. 2d 128 (Fla. 2d DCA), *review denied*, 624 So. 2d 268 (Fla. 1993), holding that victim injury points for penetration could not be scored on the sentencing guidelines scoresheet if no actual physical injury was inflicted upon the victim in the course of the sexual batteries in question, despite the legislature's clarification of its intent regarding the scoring of victim injury on category 2 scoresheets and its amendment of Section 921.001(8), Florida Statutes (Supp. 1992), in Chapter 92-135, Laws of Florida.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement of facts with the following additions and corrections:

S[redacted] S[redacted] testified that in December of her 8th grade year, Petitioner started making jokes about her taking his wife's place and becoming his sex slave (R 279). She "just kind of ignored it at first" (R 279). Then, in January, "he would stop me on my way by his class for first period, and he would take me in his classroom" (R 279). Petitioner told her about his marital

problems and said he wanted to become a more important part of her life and to marry her when she graduated from high school because he should be divorced by then (R 280, 299). S[redacted] did not talk to Petitioner about her own problems; Petitioner did most of the talking (R 280, 282-3). The only time S[redacted] ever mentioned a problem with a friend to him was once when she told him that she and G[redacted] had had a fight (R 357). When Petitioner first told her he loved her, she didn't know what to do; she was scared (R 283).

When Petitioner fondled her during these times, S[redacted] told him "that I didn't want him to and that he needed to go home to his wife if that's what he wanted" (R 300) and that she didn't think it was right or that he should be doing it (R 410, 413). Petitioner responded that he didn't love his wife as much as he loved S[redacted] (R 300). S[redacted] didn't tell anyone because she was afraid of Petitioner and of what the reaction of whomever she told would be and afraid that her parents might think it was her fault (R 300-1).

S[redacted] and Petitioner were alone together most of the time when he drove her home (R 282-3). Petitioner made S[redacted] kiss him good-bye in February by grabbing her wrists and refusing to let her go, and it was a French kiss (R 295).

At some point, Petitioner forced S[redacted] to write him notes, using his threat about having to do something he'd regret if she didn't (R 284, 369). S[redacted] gave these notes directly to Petitioner when he asked for them (R 371). Sometimes he would tell her before class to hold the note up when he came over to her desk and he would take it (R 371). Petitioner gave S[redacted] notes as well (R 284).

The day Petitioner touched S[redacted]'s breast in his classroom, he did it for a couple of minutes and French-kissed (a term she had

not used before because no one asked) her again (R 295-6, 379).

S[redacted] took as a threat Petitioner's statement that, if she ever told anyone, he would have to do something he'd regret, which he made about 60% of the times that he did anything to her or wanted her to do something (R 299, 380). Sometimes he said that if she really cared about him, she wouldn't tell anybody (R 381).

When Petitioner approached S[redacted] in May and asked her to help him prepare for the Alpha history course, he said he couldn't go the entire summer without seeing her (R 302). He delivered the course textbook to her at her house in June (R 302-3). He had called and told her that he wanted to see her and to meet him at a park near her house, but S[redacted] didn't respond or go to the park (R 303). About a week later, he came to her house again, saying he wanted to see her (R 304). He started talking about his wife again and said he was sorry that "people wouldn't be able to understand our relationship" (R 304). While he had his finger inside S[redacted], which lasted for a couple of minutes, he said "this is kind of what it feels like to have sex," and S[redacted] started crying (R 305-6).

S[redacted] never invited Petitioner to her house, but he came there about 3 times in June, 4 or 5 times in July, and once in August (R 386, 388-9). He touched her inappropriately on all but one occasion when her father was home (R 313, 316, 387). He fondled her breasts each time and digitally penetrated her vagina all but the first time (R 316). Once G[redacted] was there, and Petitioner "got kind of nervous and he made an excuse about me copying a tape for him" and stayed for only about 5 minutes (R 314).

S[redacted] called Petitioner about 5 or 6 times during the summer of 1988, 2 or 3 times in June (R 373). He called her about 6 times

in June (R 373). He told her he wanted one of the most important people in his life to get him a birthday present and told her what to write on his birthday card (R 377).

Petitioner's ostensible reason for his last visit to S[redacted]s house was to give her a vase he had bought while on vacation (R 307). He sat down on the couch and put his arm around her for a few minutes, then began touching her again (R 307). He then said he "had to go further" (R 308). S[redacted] got up and began crying (R 308). Petitioner picked her up, carried her into her bedroom, laid her on the floor, sat down next to her, and just stared at her for a time (R 308-9). When S[redacted] tried to get up, he pushed her back down (R 309). Then he stood her up, undressed her, pulled back the bedclothes, laid her down, undressed himself, and lay down next to her (R 309). Then he sat up, forcibly put his penis in her mouth, and told her to suck on it (R 309-0). A few minutes later, he got on top of her, kissed her breasts, put his mouth between her legs, and then put his penis in her vagina for 5 minutes (R 310-1). She was not sure whether Petitioner had ejaculated in her mouth and did not know whether Petitioner had ejaculated in her vagina (R 382-3). S[redacted] had been a virgin up to this point (R 328, 407). Afterward, Petitioner picked up his clothes and went into the bathroom; S[redacted] lay there crying for a few minutes, then got dressed and went into the living room (R 311-2). Petitioner came out a few minutes later and said he had done it only because he loved her and now she would know what to do with N[redacted] (her tennis coach) and would thank him for this some day (R 312, 314-5). S[redacted] had told Petitioner in late June that N[redacted] was her boyfriend, which wasn't true, in hopes that Petitioner would leave her alone if he thought she was inter-

ested in someone else (R 312-3). She also told others about N because she didn't want anyone else to tell Petitioner that she wasn't dating N (R 313). When S's mother walked in, Petitioner started stammering, told Mrs. S that S was worried about school starting and to take care of her, and left (R 315).

Petitioner called S about a week later and said that he hoped she wasn't mad and that she would appreciate it some day (R 317). S responded that she hated him (R 317). He called a few more times and told her he still loved her and that she didn't understand, but she told him she hated him and hung up (R 317, 399). She did not believe him when he said he still loved her because he had proven that he didn't by making her have sex with him (R 317).

After school started, S avoided Petitioner as much as possible by not coming into his class until right before the tardy bell rang and leaving as soon after class was dismissed as she could (R 318). She communicated with him in class as little as possible, speaking only when he asked her a question (R 318). Neither of them passed any more notes (R 318-9). S was afraid to avoid Petitioner before the rape but began avoiding him afterward because she was afraid he would do it again (R 405-6).

On the day he called her out into the hall, she had done nothing wrong or anything to precipitate it (R 319, 402). The class had been playing Trivial Pursuit, and she hadn't really been participating (R 403). In the hall, he was almost yelling and said he didn't understand why she was treating him this way, but she did not respond (R 320). One of the other students in the class, D M, had listened at the door and heard what Petitioner said,

and he told his mother, who called principal Ward (R 319-20). When S[redacted] told Ward that Petitioner had called her a bitch, Ward said Petitioner should not have said that, and it was decided that she would spend her history period with another teacher, Ms. Reynolds, who was free that period, for a few days (R 321). S[redacted] did not mention Petitioner's sexual abuse at this meeting with Ward, but a few days later, something she said to Reynolds made Reynolds ask if anything else had happened between her and Petitioner (R 328-9). S[redacted] did not mention the sexual intercourse to Reynolds because that bothered and embarrassed her more (R 329). S[redacted] left the note for her mother because "I didn't know how to say it" (R 330). The next day, her mother called Ward and said she wanted S[redacted] out of Petitioner's class immediately, so S[redacted] was transferred to another history class (R 330).

After being taken to the office at Crystal Lake Junior High, S[redacted] told G[redacted] that Petitioner had kissed and touched her (411-2) and told D[redacted] she knew something that could get Petitioner fired (R 417). During her 9th grade year, other students would joke about her having an affair with Petitioner, draw dirty pictures, and say that S[redacted] enjoyed it and encouraged him (R 403-4, 420-1).

S[redacted] stopped being afraid of Petitioner after she left Crystal Lake Junior High (R 401). She told D[redacted] T[redacted], a boy she "had been going out with," in December of 1989 that a former teacher had overextended his boundaries, and after she broke up with D[redacted] in February of 1990, "he started telling everyone" (R 335). The rumors D[redacted] started got even worse than the rumors spread the year before (R 409).

It took S[redacted] a few hours to write her statement for Dunn

because "I'd write some, and then I'd start crying again, and then I'd get myself collected again and write more" (R 344). S[redacted]s written statement did not go into any detail regarding her rape itself. What it went into detail about was the events that led up to Petitioner's ultimate crime. Respondent requests that this Court read S[redacted]'s written statement, her letter to the teacher, and Petitioner's cards and notes to her in their entirety. Photocopies of these documents are included in the record on appeal in a separate exhibit envelope.

Lakeland High School principal Dunn testified that when he began asking S[redacted] questions about the letter, she was becoming extremely emotionally distraught (R 429). After she had written her statement and again verbally confirmed to Dunn that she had been raped, Dunn called her parents (R 433). The subsequent meeting with her and her parents was highly emotional (R 434).

> The next couple of days were pretty rough. In fact,...that next day, Mrs. Williams buzzed me and said that she had Sarah in her office and she really wasn't doing well emotionally, could she stay there for the rest of that period. And I said certainly....
>
> [A]nd there was another time...maybe the day or two days after that that she was back in there again. And the third occasion I went by a couple days later,...that she was in there on the telephone. I walked by Mrs. Williams' office and put my head in and said hello to her.
>
> Q. On the first occasion what, if anything, did you observe about her demeanor?
>
> A. She was still tearful, still upset emotionally.
>
> Q. How about the second occasion?
>
> A. Same thing.

Q. And the third?

A. To the point where she was wanting to -- crying out for some help, and she was calling a former teacher that she'd had.

(R 434-5)

R[redacted] testified that S[redacted] was very quiet and carefully selected her friends (R 451). She and S[redacted] felt comfortable with each other (R 452). Their relationship waned in S[redacted]'s 8th grade year because S[redacted] was not in one of her classes (R 452-3). During S[redacted]'s 9th grade year, R[redacted] generally saw S[redacted] only momentarily when S[redacted] stopped by to ask for a ride home and during the rides themselves, and S[redacted] did not share any problems with her then (R 453-4). The change in S[redacted]'s demeanor that year led R[redacted] to conclude that "[t]here just seemed to be something wrong...she was either sick or something was wrong" (R 454). When S[redacted] told her that Petitioner had kissed and fondled her, R[redacted] said S[redacted] would have to tell her parents right away (R 456). When R[redacted] told Ward, he said, "Okay, Ms. R[redacted], thank you very much, and I'd take care of it"; R[redacted] therefore didn't pursue it further (R 456-7). Duncan's reaction at the subsequent meeting was: "Oh, that's probably a -- she had a school girl crush and she was trying to get back at him" (R 459). R[redacted] asked Ward later what had happened, and he said, "Oh, we've taken care of it. And Jim has agreed to go get counselling [sic]" (R 459).

L[redacted] S[redacted], S[redacted]'s mother, testified that she saw Petitioner at her house 3 times during the summer between S[redacted]'s 8th and 9th grade years, the first 2 times ostensibly to go over things he and S[redacted] were working on for his class the next year (R 478-9). One of those 2 times, Petitioner was there with S[redacted] and her father when Mrs. S[redacted] got home from work, and the other time

Petitioner arrived after Mrs. S[redacted] had come home (R 479).

The relationship between S[redacted] and Petitioner was a very close one (R 477-8). Petitioner telephoned S[redacted] at home after 7 P.M. at least 15 times during Sarah's 8th grade school year (R 480).

The last time Mrs. S[redacted] saw Petitioner that summer, she came in through the locked front door and found him hugging S[redacted] in the living room (R 481). He was very nervous and started talking right away (R 481-2). He wouldn't look at Mrs. S[redacted], but kept looking at S[redacted] (R 482). He told Mrs. S[redacted] to be very patient with S[redacted] because she was very nervous and upset about starting the 9th grade (R 482). He then left immediately (R 482). Mrs. S[redacted] did not respond to his comment because she was "in shock" at the preposterousness of it (R 482). She could not even smile at Petitioner because she knew he had done something (R 482). She told her husband about the incident and would not have allowed Petitioner in the door if he had come back again (R 483).

After school started, S[redacted] once complained that Petitioner wasn't teaching any more, that all he wanted to do was play games (R 483). Before Mrs. S[redacted] could call the school, Ward called her (R 483). At the meeting with Ward, Mr. and Mrs. S[redacted] said they wanted S[redacted] transferred out of Petitioner's class (R 485). Ward said Petitioner was one of his best teachers, that he hated to see S[redacted] transferred to a "basic" class, and that he would keep an eye on Petitioner if S[redacted] stayed in his class (R 485-6).

In the note S[redacted] taped to her mother's steering wheel, S[redacted]

> wanted me to recall the day that I came home and found Mr. Hallberg in the living room... and reminded me of what I had asked her, if he had touched her. And she said he had, that he had fondled and kissed her, and that she didn't know what to do. And she said she was

sorry and to please not be mad at her.

(R 487)

Mrs. S[redacted] and her husband called Ward (R 487-8). Ward later called her back and said, inter alia, that nothing much could be done, but he would transfer S[redacted] out of Petitioner's class (R 488-9). Mrs. S[redacted] insisted that a record of the matter be placed in Petitioner's file in case this sort of thing happened again with someone else, and Ward assured her that that would be done (R 489). The idea of reporting the matter to HRS or law enforcement did not cross Mrs. S[redacted]'s mind (R 489). She did not tell Ward about Petitioner's last visit to her house because "[i]t never dawned on me to tell him" (R 490).

D[redacted] S[redacted], S[redacted]'s father, testified that S[redacted] had always wanted to be a teacher (R 499, 501). Petitioner once told Mr. S[redacted] that S[redacted] validated his position as a teacher because she was interested in and responsive to what he said (R 502). Mr. S[redacted] was pleased because S[redacted] was beyond him academically in many ways and he felt that Petitioner and S[redacted]'s other teacher friends could be her mentors (R 502-3). During her 8th grade year, Petitioner would give S[redacted] extra work to do, and she was enthusiastic about and proud of it (R 503). Petitioner came to their house a few times the next summer while Mr. S[redacted] was home to deliver some work for the next school year that he wanted S[redacted] to help him with (R 504). Mr. S[redacted] did not report S[redacted]'s fondling allegations to law enforcement or HRS because, based on what Ward had told him, he did not think anything could be done about it (R 509). He did not mention his wife's having seen Petitioner hugging S[redacted] in their home because a hug might not be inappropriate and his wife had not actually seen Petitioner do anything improper (R

511). Mr. S[redacted] sometimes "pushed" S[redacted] to excel but "didn't drive her" because "S[redacted]'s pretty well self-motivated" (R 516).

D[redacted] M[redacted] testified that during the period when he and S[redacted] were on the E-team together, she and Petitioner "seemed to be very good friends, very close" (R 522-3). She called Petitioner by his first name and would call him on the phone; they wrote each other letters; and she referred to Petitioner as her *confidant* in an English paper she let D[redacted] read (R 523). Once, during a school dance, while Petitioner was unlocking the office so D[redacted] could telephone home, Petitioner commented to D[redacted] that S[redacted] had told him that, in 7th grade, D[redacted] had asked her to marry him (R 526-7). Petitioner told D[redacted] that he ([redacted]) had very good taste and that if he were D[redacted]'s age, he would marry S[redacted] (R 527). Petitioner gave D[redacted] a ride home once after an E-team tournament, along with all the other students in the tournament, and went out of his way to take all of the other students home before S[redacted] (R 527-8). S[redacted] and Petitioner were still pretty close at the beginning of her 9th grade school year but grew apart as the year progressed, to the point that S[redacted] began expressing hatred of Petitioner (R 526). That spring semester, Petitioner became depressed and belligerent and discussed his marital problems in class (R 528).

In the 9th grade Alpha history class, S[redacted] was very quiet, not as outgoing as she used to be (R 531). Petitioner allowed her to turn in some assignments for his class very late (R 532-3). No other students did this (R 533). On the occasion of the "bitch incident," S[redacted] was not participating in the game the class was playing, so Petitioner said, "You, outside," and took her out into the hall, where he said, "You've been real bitchy in my class" or

"You've been a real bitch in any class," or something like that, and "Shape up or get out"; D[redacted] heard no response (R 525, 532).

There were many different rumors going around about S[redacted] and Petitioner: that "there had been some inappropriate behavior between them," that she had visited him, that he had visited her (R 536). S[redacted] had herself told D[redacted] that Petitioner had visited her at her house (R 536). D[redacted] himself, however, "was very unaware of the situation" until his 10th grade year when a detective came to see him (R 537).

D[redacted] transferred out of Petitioner's class due to Petitioner's poor attitude, about which nothing was done even after D[redacted]'s mother spoke to school officials about it (R 528-9).

G[redacted] K[redacted] testified that she was in Petitioner's 8th grade history class along with S[redacted] (R 539). S[redacted] and Petitioner became very close that year: they passed notes in class a lot and talked to each other outside of class, and he gave her rides home (R 540-1). He gave G[redacted] a ride home perhaps 3 times, always with S[redacted] as the only other passenger, and always dropped G[redacted] off first (R 541-3). The way to get to the office from S[redacted]'s first period class in 8th grade without going past Petitioner's classroom was to "go out the side of the building" (R 550).

During the 9th grade, G[redacted] and S[redacted] drifted apart because S[redacted] was reclusive and just wouldn't talk to anyone (R 546). G[redacted] and S[redacted]'s other friends all tried to talk to S[redacted] and asked her what was wrong, but S[redacted] wouldn't say anything (R 546). G[redacted] read somewhere about Petitioner's forcing S[redacted] to kiss him before getting out of his car (R 548). G[redacted] found out about what went on between S[redacted] and Petitioner from another girl and by reading

S[redacted]'s journal (R 550). G[redacted] could tell from S[redacted]'s behavior at the beginning of 9th grade that S[redacted] hated Petitioner (R 552).

J[redacted] K[redacted] testified that the conversations he observed between S[redacted] and Petitioner were not teacher-student type conversations but were more personal (R 558). S[redacted] lived too far from school to ride her bicycle to and from school, and the route she would have had to travel was also too dangerous (R 563).

Connie Shelnut, S[redacted]'s 10th grade English teacher, testified that S[redacted] brought State's Exhibit 3, the personal letter assignment, to her during her planning period (R 578-80). S[redacted] was crying while Shelnut read the letter (R 580). Shelnut asked S[redacted] if the contents of the letter were true, and she said they were (R 583). After S[redacted] left her classroom, Shelnut took the letter to Dunn and told him that something had to be done about it (R 580). S[redacted] was depressed all year—she very seldom smiled, was not happy, and hesitated to give oral presentations (R 580-1). Shelnut suggested to S[redacted] early in the year that she get counseling for her depression, and S[redacted] responded "that some things had happened to her in junior high that she didn't want to talk about...[or] deal with...right now" (R 586-7). Shelnut did not question her further about it (R 587). Although girls of this age group may become depressed over all kinds of things, they are not generally chronically depressed, and S[redacted] was chronically depressed (R 587).

Sandra D. King Williams, the Lakeland High School guidance counselor, testified that she first met S[redacted] when S[redacted] was brought in by a teacher, Betty Wesley, as a student with a problem, and the letter assignment was given to Williams at the same time (R 589-90). S[redacted] was solemn, sad, nervous, very upset, and making

very little eye contact (R 590-1). S[redacted] said she had written the letter because she was being harassed by other students and couldn't take it any longer (R 594). When asked, S[redacted] went into the details (R 594). "S[redacted]...appeared suicidal. She appeared to be reaching out. She needed help. She hadn't eaten, she couldn't sleep...." (R 597). S[redacted] told Williams that she and Petitioner had had sexual intercourse, but Williams could not remember whether it was once or more than once (R 606-607, 613-614). When S[redacted] said Petitioner had kissed her, Williams asked, "Did he put his tongue in your mouth?" and S[redacted] said yes (R 615). Williams subsequently spent a great deal of time talking on the phone with S[redacted] about the matter because S[redacted] had a lot of emotional problems and did a lot of crying (R 605).

Renna Seigal, the child protection team (CPT) officer, testified that S[redacted] was extremely quiet and nervous during the initial interview by Det. Ryan, HRS investigator Ernst, and herself, although she wanted to be cooperative (R 624-5). When they reached the point where S[redacted] began relating the events of the day of the rape, she "was having a very hard time and crying" (R 625-626). Because of S[redacted]'s age, she was asked to give a narrative of what had happened, but the investigators had to prompt her by asking "what happened next" and had to be very supportive "because she was very emotional throughout the interview" (R 625, 627). No medical examination was performed because S[redacted] had a sexual relationship with her current boyfriend and had been extremely traumatized by the investigation (R 629). Seigal's testimony that S[redacted] reported that Petitioner had ejaculated in her mouth and in her vagina appears to be based solely on Ryan's written report (R 630-1).

Jim Ernst testified that he and Ryan left the interview briefly because S[redacted] was "having a difficult time talking" and "was losing her composure" (R 637). Specifically, S[redacted] "was very withdrawn, she was trembling, she was crying, held her head down, was basically at a situation in the interview where she was not even able to disclose or discuss with us general facts. She became very withdrawn into herself" (R 638). When he and Ryan returned, S[redacted]

> came very soft-spoken, held her head down and again was having a difficult time discussing matters with us but ultimately came forward in one quick explanation that the, that the alleged perpetrator had performed oral sex with her -- or had her perform or [sic] sex upon himself and then had sexual intercourse with her.
>
> (R 638)

Ernst did not repeat S[redacted]'s story or even any part of it at R 633-7 or 639-40. The only part of S[redacted]'s "story" that Ernst testified to on direct examination is contained in the last quote, supra. On cross-examination, Ernst corroborated much of her testimony as having been related to him at this interview (R 643-4).

Det. Ryan also did not repeat S[redacted]'s "story" on direct examination (R 647-57). He testified that, prior to the interview he conducted, Ernst requested that the police and HRS do a combined interview to save S[redacted] the trauma of separate interviews because "the girl was very traumatized and had a very hard time speaking and telling what happened to her" (R 649). Ryan corroborated Ernst's testimony regarding S[redacted]'s difficulty describing Petitioner's sexual assaults and the need for Ryan and Ernst to leave the interview briefly, noting: "After I returned S[redacted] was holding hands with Renna, it was obvious she'd been crying" (R 649-50). Ryan did not testify as to what the various people he interviewed

had told him at R 654-7 except to say that Ward or Henson had indicated that Petitioner had been given a letter of reprimand regarding [redacted] (R 655). He testified on cross-examination that it was correct that D[redacted] M[redacted] had told him that he had heard Petitioner call S[redacted] "a fucking bitch" (R 662). S[redacted]'s mother corroborated S[redacted]'s statement that she had no way to get home from school other than riding with Petitioner (R 668-9). S[redacted] "adamantly denied" to Ryan having a crush on her tennis coach (R 670).

Ward testified that at his meeting with S[redacted]'s parents about the "bitch incident," Mr. and Mrs. S[redacted] wanted him to transfer S[redacted] out of Petitioner's class, which was done immediately (R 717). Reynolds and Carver subsequently reported that when S[redacted] came into their classrooms and cried, they asked her what was wrong, but she would not respond (R 719-20). After the call from Duncan regarding Mrs. S[redacted]'s call to him, Ward and Henson talked with Petitioner, who said he had talked or tried to talk with S[redacted] regarding the overall situation (R 721-2). Ward sent Petitioner a letter of reprimand stating, inter alia, that S[redacted]'s parents had requested that she be transferred out of his class and that he was to stay away from S[redacted] (R 724). The letter, State's Exhibit 5, which was admitted in evidence (R 823-824) and is included in the record on appeal with the other exhibits, actually includes no such statements, as the prosecutor brought out on cross-examination (R 736-9). Following the "bitch incident," Ward and Henson had a meeting with Petitioner at which Petitioner stated that, at some point, he had put his arm around S[redacted] because he felt that she was depressed and that he called her out into the hall for the same reason, because she seemed depressed and he wanted to talk with her

about it (R 742-3, 755). Ward was not aware at that time that Petitioner had visited S[redacted] at her home during the previous summer (R 744-5, 756). Ward believed that Petitioner had also admitted to "maybe mildly...kissing her on the forehead" (R 747-8, 755). A teacher's kissing a student on the forehead would be inappropriate (R 768-9). S[redacted] was transferred out of Petitioner's class at her parents' request as a result of the "bitch incident" R 748). Ward also told S[redacted]'s parents that the incident would go on Petitioner's permanent record (R 757). Ward never reported anything to HRS or law enforcement because he did not know of any child abuse at the time (R 760). However, he felt S[redacted] was "a troubled young lady" and referred her to the school psychologist "for intervention" (R 764). Petitioner said he was in marriage counseling at the time (R 765).

Jerry Henson testified that the discussion with Mr. and Mrs. S[redacted] regarding the "bitch incident" resulted in a decision to remove S[redacted] from Petitioner's class, which was Ward's recommendation (R 773-4, 782-3). Regarding the subsequent complaint of inappropriate touching, Petitioner's explanation was that he felt S[redacted] was depressed by her tennis coach's "leaving her" by going to college, and Petitioner tried to console her by holding her shoulders and kissing her on the forehead (R 775). This occurred at S[redacted]'s house (R 795). The note S[redacted] wrote about it was 5 or 6 lines (R 788) and was probably more than "He called me a bitch," although Henson did not read it and Ward never told him what it said (R 789, 795). During the interview with Petitioner, Petitioner admitted going to S[redacted]'s home several times during the previous summer to check on her work for the upcoming class (R

792). Henson felt Petitioner shouldn't have done that (R 793). Petitioner didn't mention having given S[redacted] cards and notes, but, if true, that was inappropriate as well (R 793).

Nancy Jennings Carver Stanfel, S[redacted]'s 9th grade English teacher (R 825), testified that S[redacted] "was a very quiet student, sometimes removed, sometimes depressed a great deal" that year (R 826). Later in the year, S[redacted] would show up "just very upset" and crying about twice a week (R 827). Once in April or May, S[redacted] came down the hall crying and upset and told Stanfel that she had just seen Petitioner in the hall, but she did not explain why this had upset her (R 829). The note that S[redacted] wrote for Stanfel stated that "it really bothered her where [Petitioner] had touched her," although it gave no specifics (R 830). Petitioner was extremely upset at times and, at one point at the end of S[redacted]'s 8th grade year or the beginning of her 9th grade year, told Stanfel that he and his wife were having some problems (R 833-4).

Loretta Rarick testified that S[redacted] worked in the library the period after she had Petitioner's class (R 836). The day S[redacted] told D[redacted], "I could have him fired," she came into the library very angry, went directly over to D[redacted], and started talking to him (R 836). During their conversation, S[redacted] repeated that "she could have him fired" loudly about 4 times (R 836-8). Then, very, very angry, S[redacted] asked Rarick for a pass to the office, received one, and went to the office (R 836). Rarick did not know who S[redacted] was referring to at the time (R 837). Rarick could not remember when or how she learned that S[redacted] had been referring to Petitioner (R 839). Rarick did not hear any of the rest of the conversation in question (R 840). She later mentioned it to Petitioner, saying

something like "You really had one your students mad. I heard her say she could have you fired," and he replied, "'Yeah, she was mad,'" (R 840). Rarick never asked Petitioner why S[redacted] had been angry (R 841). S[redacted]'s statement to D[redacted] was made before S[redacted] spent second period in the library for a few days (R 841-2).

Robert C. Denesha testified that Sarah was in his media productions class in the library during her 9th grade year (R 843-4). One day S[redacted] came "storming" into the room and said to D[redacted], "I'll have his job for this" (R 844-5). She had been "having trouble" with Petitioner "over grades" (R 845).

> And I think Jim gave her a bad mark, and I just assumed that he gave her a bad mark and that she was steamed about it and walked in and sounded off to D[redacted].
>
> (R 845)

Denesha had never heard any allegation that Petitioner had "called her a name" in the hall or had touched her improperly and wouldn't believe such a thing (R 845).

H[redacted] H[redacted] testified that Petitioner was S[redacted]'s favorite teacher in 8th grade (R 847-9). "It was pretty obvious": "she stayed after school, she wrote him notes, he gave her rides home" (R 849). H[redacted] had ridden with Petitioner to the E-team competition, and S[redacted] rode in the front seat (R 849). During the 9th grade, S[redacted] expressed dislike for Petitioner, which H[redacted] found unusual, but she didn't ask S[redacted] about it because:

> we never really talked about it with her, we never, you know, it was just kind of understood that she was -- it was never out in the open that she was friends. I mean it was just understood. We never talked about it with her ever. And when she didn't, we were just surprised, and we never really said anything to her, though, directly.
>
> (R 851-2)

S[redacted]'s special friendships with teachers, at least with Reynolds and Petitioner, were a closed subject with S[redacted] (R 852).

> You know, I mean with just the teachers, you know, we'd make comments. But with the one -- I said Mrs. Reynolds and Mr. Hallberg, we, you just -- I don't know, it's hard to describe. We just, we knew that there was, you know, like a special friendship, and we just didn't talk about it.
>
> (R 852)

There was bad talk about S[redacted] around school in the 9th grade:

> [T]here were just the rumors that since Mr. Hallberg was,...since they were opposite sex, that something might be going on between them just because of the fact that she obviously had this preference,...to be around him. And then when she got mad,...we were just like "aha." It was, you know, that they were lovers and something. I think a lot of it was just talk, though, because, you know how kids are. They're out to make fun of somebody. And when this happened, it was just something, you know, to talk about.
>
> (R 853)

The picture concerning Petitioner and S[redacted] was seen by 5 kids in one class (R 853-4). "[I]t was just stick figures, and it showed them lying down together, and there was some writing on it. I really don't remember exactly what it was" (R 854). H[redacted] never talked to S[redacted] about the rumors or the picture and didn't know about the "bitch incident" (R 854).

R[redacted] H[redacted] testified that, in 8th grade history, S[redacted] was real quiet and "[s]omewhat cold, but not real cold" and seemed indifferent to Petitioner (R 857-8, 860). The day Petitioner called her out into the hall, S[redacted] was playing the game with the class, and "I think that they got into an argument or something, and she had gotten real smart, and he took her out of class to reprimand her" (R 860). R[redacted] heard no part of that (R 860). R[redacted] did not talk to S[redacted] about the incident, heard nothing about it, and

heard no rumors about S[redacted] and Petitioner that year (R 862).

Petitioner testified that S[redacted] did not stand out for him as a student until just before Christmas break, when S[redacted], along with a few other students, dropped a Christmas card on his desk during her 8th grade year (R 884). Her card read, "I crawled up on Santa's lap, and he asked me what I wanted. And when I told him, he told me to get off his lap and never come back again" (R 884). Petitioner chuckled, and S[redacted] said she and her mom had picked out the card (R 884-5). This was the first "friendly contact" between him and S[redacted] (R 885). He subsequently allowed himself to get close to S[redacted] because a lot of kids' parents both work and he wanted to make himself available to talk to kids who had problems (R 996-8). He would not have paid S[redacted] any particular mind had she not reached out to him with her Christmas card (R 998). She consistently pushed for a closer relationship with him throughout that school year (R 1030). Petitioner and his wife were receiving marriage counseling during that time (R 1030). Sometimes he and his wife didn't relate well to each other, but he did not feel unloved by his wife, and she did not stop loving him until about 1990 (R 1031).

S[redacted] joined the E-team in January (R 885-7). Some of the students, including S[redacted], asked Petitioner to take them home from practice, and he did so (R 888). He never touched S[redacted] at all on any of these rides (R 897). S[redacted] sometimes told him she wanted to talk to him, and she didn't feel comfortable doing so when the other E-team kids were around (R 890-1). The first thing she talked about was that D[redacted] kept making sexual innuendoes, which upset her (R 891). She also complained about this in a note (R

905-6). She also sometimes talked about her parents, complaining that they pushed her, gave her too many responsibilities, and were too strict (R 891-2). Petitioner, who had 2 children near S[redacted]'s age, told her how it was tough to be a parent and tried to give her a parent's perspective (R 892). At that time, Petitioner was constantly on his children's case about cleaning their rooms, etc., and his wife thought he was too strict (R 893). He was divorced a few months before trial, but this case had nothing to do with it (R 893). He mentioned his problems with his own children to S[redacted] to show her that she was not the only kid who had problems with her parents (R 894). He did not discuss his own extremely personal issues with S[redacted] the way she discussed hers with him (R 1049).

S[redacted] would write Petitioner notes about what she wanted to talk about on the way home from school (R 894-5). She also told him in a note that D[redacted] had proposed to her 6 or 7 times during 7th grade (R 906). She gave Petitioner a note nearly every school day, leaving it at his desk on her way out to lunch (R 912, 915). The notes were sometimes comments about his being a good teacher and sometimes "G[redacted]" or "D[redacted]" is "bothering me" or whatever S[redacted]'s problem happened to be at the moment (R 917). Petitioner did not ask, force, or encourage S[redacted] to write him notes; did not tell her what to write in her notes; and did not save them (R 894-5, 917). He did not *discourage* her note writing because he did not want to cut off her communication with someone important to her (R 917).

S[redacted] continued asking him for rides home after the E-team competition was over (R 898). She talked to him about her problems on virtually all of these rides, complaining about her parents pushing her too hard and yelling at her about studying for a spel-

ling bee and that she had no time to watch TV (R 898-9). Around the middle of April, S[redacted] won the first level of the spelling bee but didn't win any of the money prizes at the second level, although she may have gotten a small trophy (R 902, 923). She told Petitioner afterward that she was afraid that her father "would be very mad at her for not doing any better than that" (R 903) and asked Petitioner for a ride home (R 921-2). Petitioner said OK, and as he and S[redacted] were heading out the door, he said, "I love you kid" (R 922). What he meant was

> I respect you, and I think you're great, and I don't think you're as bad as what you're making out to be, and I don't think you have anything to worry about, I think you got a lot to look forward to in life, and I cared about how she functioned as a person.
>
> (R 922)

He did not mean it romantically (R 922). However, the next day, S[redacted] dropped a letter which was full of "I knew you loved me. I love you, too" and "I know that you love me because I could tell all along" on his desk (R 922-3). He immediately called her in and told her "that is not how I meant it. I meant it as if I were an uncle or a brother to you, not like the way you're taking it" (R 922-3). Petitioner thought he had "squelched it there" (R 923). S[redacted] having told him beforehand when her birthday was, he gave her a card and a sachet for her birthday (R 923-4). His card meant that he was "not thinking of her in anything less than...a high moral sense" and that she was a very special person to him in that he saw her potential and was honored by her willingness to share her problems with him and to let him help her (R 924-5). What he meant by saying that it had not been easy to relate to her as both a teacher and a friend was that he had to be careful not to favor

her gradewise due to their friendship, so, if anything, he "graded her down a little bit" and was "super careful" about giving her latitude in turning in assignments late because he didn't want anyone saying that S[redacted] had a high grade average because she was a friend of his (R 925-6). The other birthday card, in which he told S[redacted] she was a "gift," was saying that he would not betray any of her confidences, some of which were "extremely sensitive" (R 926-7). Petitioner put the quotation from Lake Wobegon in one of his cards to her to boost her self-esteem because she didn't seem to think much of herself unless she "did something good" or performed at a certain level (R 1000). She was one of those occasional rewarding students who had blossomed and grown under his tutelage (R 103). He also had very few real friends and considered a real friend, as S[redacted] was, a gift in the sense that a person who "appreciates how hard you work for them, listens to your counsel, cares about you, too, as a person" is a gift (R 927-8). He signed the card "Jim" mainly because he never signed a card "Mr. Hallberg," though S[redacted] was sometimes on a first name basis with him (R 928).

S[redacted] called Petitioner an average of about twice a week during April and May of her 8th grade year (R 906). She began calling him just to chat right after E-team competition ended, and he told her to talk to her parents (R 907-8). She said she felt like *she* was the mother in her relationship with her mother and couldn't go to her father (R 908). When S[redacted] first began calling, she was not very specific about any problems, and it seemed to him that she was "feeling me out to...see if I would listen to her" (R 1032-3). He did not see it as an infatuation (R 1033). He could not tell whether he was a father image to her; she said he was her confidant

(R 1038). He telephoned her only when she had called him first and left a message (R 909, 911). She voluntarily came to his classroom during his free period; he did not force her (R 989).

Petitioner wanted S[redacted] to dissect the chapters of the Alpha class textbook into themes and give him her point of view because he had never taught an Alpha class before, teaching gifted students is very difficult and is done differently from the way he had been trained, and S[redacted] had been in gifted classes since elementary school (R 929-36). He had originally arranged to meet her at the park to give her the course textbook "because it was more convenient for me and I didn't really want to drop the book off at the house...I don't know why" (R 936). S[redacted] didn't show up at the park, but, a few hours later, called "wondering where I was" and said, "Well, I'm waiting to the house, drop it by the house," so he did (R 937). S[redacted] was happy to help Petitioner because she was bored (R 937).

In July, S[redacted] said she wanted to go to the University of Michigan Law School and be a lawyer, and he said he had friends in Michigan and would try to combine seeing them and attending her law school graduation (R 938-9). She said she needed to improve her public speaking, "come out a little bit more," and he felt that one of the reasons she liked him as a teacher was that he could articulate very well (R 1071-2). The first he heard about her wanting to be a teacher was at trial (R 1084).

When school let out for the summer, S[redacted]'s telephone calls to Petitioner increased in frequency to one or two a day (R 940). He also went to her house 6 or 7 times during the summer (R 1034). About 10 days after he brought her the textbook, around the end of

June, she called and asked him to come to her house, and he went (R 939-40). It was late afternoon, and her father was there (R 940-1). S[redacted] wanted clarification on the project Petitioner had given her (R 941). She indicated to Petitioner that she was proud to be asked to do it, although "[s]he was at times up, at some times down about the thing. I couldn't tell all the time how she felt about it" (R 941-2). Petitioner's next visit to her house, on the morning of July 5, was just "a drop by" to say hi (R 942). Other girls were there, and he stayed for only 5 or 10 minutes (R 942-3). He did not know S[redacted]'s parents wouldn't be home then (R 943). Her father was home during his first 2 visits to her house, and when S[redacted] was home alone, her parents knew he was coming because he was coming specifically to pick something up (R 1045).

The next time Petitioner went to S[redacted]'s house was around July 15 after she telephoned him, said she wanted to talk, and asked him to come over (R 943-4). When he arrived, she said she really liked her tennis coach, N[redacted] B[redacted], who was 7 years older than she, and was really going to miss him when he went back to school (R 944). She called Petitioner about B[redacted] sometimes once or twice a day that summer (R 104). When she called and asked him to come over this time, Petitioner got the impression that she didn't want to discuss B[redacted] over the phone this time (R 1070). Petitioner cautioned her about the "huge" age gap between them (R 944). S[redacted] also said she didn't want her parents to know of her interest in B[redacted], and Petitioner advised her to begin letting her parents know about it by dropping first subtle and then heavier and heavier hints if she intended to continue the relationship (R 945). This visit lasted 30-45 minutes (R 1070). During this conversation,

when Petitioner said it would be unreasonable for her to expect B[redacted] to wait till she finished high school or college before they got married, S[redacted] started to cry, and Petitioner put his arm around her, hugged her, kissed her on the forehead, and left (R 945-6). This was the first time he had ever touched her (R 946). He later admitted having put his hand on S[redacted]'s hand once in the car when she "was upset about her dad" (R 1059).

Petitioner stopped by S[redacted]'s house again about a week later, about July 22, at her request (R 948). She had told him about arranging to meet B[redacted] as she and her parents were taking a stroll and, a few days later, about going to B[redacted]'s house and sleeping there for a few hours (R 948-9). Petitioner's response was "keep the relationship vertical, not horizontal" (R 949). So, on this next visit, he gave her the card that read "Please don't rush away from your youth..." (R 947-8). Petitioner did not know B[redacted] and did not feel jealous of him or feel he was a threat to Petitioner's relationship to S[redacted] as a teacher and mentor (R 949).

The next time Petitioner saw S[redacted] was on or about July 21, a few days before his 40th birthday, in response to her telephone request that he come over and pick up his birthday card and gift (R 949-50). She gave him a set of chocolate dentures and a little blue doll that had written directions to "Take a deep breath, squeeze three times and rest ten minutes" that she said her parents had helped her pick out (R 950-1). He laughed and thanked her but did not touch her (R 951).

Petitioner went on vacation from July 29-August 4 and brought S[redacted] back a green glass vase as a reward for her work for his upcoming class (R 951-3). He didn't deliver it to her till August 10

or 12 (R 953). When he brought it to her, he asked her if she had finished her work on the project and learned that she hadn't done anything on it (R 953). It was late afternoon, and just as he was reaching for the doorknob, S[redacted]'s mom arrived home (R 954). Petitioner was surprised—shocked to find the doorknob moving as he went to turn it (R 954). He was not hugging S[redacted] when her mother walked in (R 954). He was not physically capable of ejaculating twice within 10 minutes (R 1018). When S[redacted]'s mother came in, he said, "S[redacted] seems upset. Why don't you talk to her," then left immediately (R 1076, 1078, 1080).

S[redacted] never told Petitioner that she hated him (R 954-5). She continued to telephone him, and during one call, he asked her to help him set up his classroom on Friday, August 19 (R 955). S[redacted] and G[redacted] did help him on that date (R 955). S[redacted] told him that day that she wanted to get J[redacted] B[redacted] to join his Alpha history class because she thought J[redacted] would like his teaching (R 1072). S[redacted] knew before her 8th grade school year ended that R[redacted] H[redacted] was going to be in the Alpha history class that fall (R 1084).

The following Sunday afternoon, as Petitioner was having an argument with his wife, S[redacted] called, and Petitioner said, "I cannot talk you [sic] right now. I'll talk to you tomorrow in school" (school started the next day) (R 956-8). He was agitated with his wife and therefore spoke to S[redacted] in a harsh tone (R 958).

The Alpha class would often play Risk or Trivial Pursuit (R 964). S[redacted] initially participated somewhat, but her attitude was a little distant and she got quieter (R 965). Her depression became progressively worse (R 1083). She appeared to be "coasting" in her schoolwork, not doing the work she should have been doing (R 1083).

Her telephone calls had also stopped (R 965). The only time she called Petitioner after the call on August 21 was a quick call on August 29 or 30 during which she was "real quiet" (R 971-2). Petitioner was surprised; he did not think she was upset with him, but thought she was depressed over B[redacted]'s leaving (R 965-6). On cross-examination, in response to the question whether he was saying that S[redacted] had begun to hate him and later accused him of fondling and rape because he was "short" with her in a phone call, Petitioner testified:

> A. I'm saying, yes, her attitude changed radically toward me. I'm saying, like I said in my written deposition, that when I said that I was wasn't [sic] going to take her home any more, that she slammed the car door and nearly -- and I said right there, "Okay, I'll take you home."
>
> (R 1065)

It was back in April of S[redacted]'s 8th grade year that Petitioner told her he did not want to give her rides home any more because it was an inconvenience for him, but she got upset, so he agreed to continue the rides (R 1074). When reminded of the reason he had given on deposition, that "I didn't want the people to talk and think that something was going on. I didn't want any hassle," he testified that that was also one of his reasons (R 1075).

Petitioner had problems with the class during the first few months of the school year (R 967-8). Many of the students, including S[redacted], were turning assignments in late (R 969). When this happened, Petitioner deducted points for lateness, for S[redacted] as for the other students (R 969-70). S[redacted]'s attitude grew progressively worse as the weeks wore on (R 970). Petitioner was concerned and asked her Spanish teacher to speak to her and find out what the matter was (R 970). He also spoke to Carver and asked her if she

knew Brenner, but she apparently didn't (R 970-1). Carver later mentioned to him the letter assignment [redacted] had written (R 971). On the day of the "bitch incident," S[redacted] was participating only a little or not at all (R 972-3). Petitioner was playing against the entire class and was winning, and S[redacted] said to him something like "You really know it all, don't you" or "You really think you're smart, don't you" in front of the class (R 973). It was at this point that he called her out of the room (R 973). In the hall, he asked, "What is matter [sic] with you, what has changed? What is the problem?" (R 974). However, it was the end of the period, and the bell rang (R 974). D[redacted] was upset with Petitioner because he had given D[redacted] a "disciplinary step" that day (R 974-5). D[redacted]'s corroboration of S[redacted]'s allegation was not mentioned to Petitioner (R 996). S[redacted] never came back to his class, and he had no further contact with her (R 977). A week after the "bitch incident," on November 7, Ward called him in regarding the allegation that he had attempted to fondle S[redacted] (R 978). The accusations "came as a total shock" to Petitioner (R 1067). S[redacted] was originally supposed to return to his class on November 8 after a "cooling off period" but did not and was transferred out of his class as a result of the fondling allegation (R 977-9, 995-6).

Mr. S[redacted] telephoned Petitioner's home that night (R 980). Petitioner did not talk to S[redacted] because he "thought it would be a bad idea...to talk to anybody at this point" (R 980). He had not yet told his wife about this latest allegation, and she found out when S[redacted] said, "Do you know that you're married to a child molester?" (R 979-80). However, Ward said the next day that S[redacted]'s parents would not be pursuing the matter (R 1073-4).

At the hearing on Petitioner's second motion for new trial, held on September 12, 1991 (R 1198), Robert Mohler testified that S[redacted] had once accused him of "[f]lashing her" (R 1203). This apparently happened when S[redacted] and Robert were in the 6th grade, at which time Robert was about 12 years old (R 1202, 1205). The accusation was investigated only by the principal and a secretary, who questioned Robert about it (R 1203). Robert and S[redacted] "hung around with each other" that year (R 1202), and "I guess she got tired of me hanging around with her so she said something to get rid of me" (R 1204). A man, whom the witness indicated as being present at the hearing, had come to Robert's house about a month before the hearing and asked him about the incident (R 1205).

Defense attorney Mars explained that April Mullins, now an FSU student, who had read about the instant case in the newspaper, had told a girl named Monica at a party that S[redacted] had said that Robert Mohler had raped her (R 1206). Mars told his investigator to find Robert Mohler, which he did, and that was how this new evidence came to light (R 1206). Defense counsel did not state when this party occurred, how or when he learned of Mullins or Monica, or when he first directed his investigator to find Mohler.

Betty Glatzau testified that she did not know whether the note she saw was signed because "I did not read it" (R 1208). She never saw the note again and did not know where it was (R 1209). No one had ever asked her about the note before (R 1209). On an unstated date, as she was preparing to leave the office for home, Henson, Joel Whitten, the other secretary in the office, and possibly one or two other people were talking about this case and said something about a note, and Glatzau said she had seen that note (R 1210).

Asked why she hadn't said something before, she responded that no one had asked her and it was none of her business (R 1210-1).

Defense attorney Mars then argued that this new information had not been available at the time of trial "and didn't come to light until some rumor was actually run down by my private investigator" (R 1213). The prosecutor argued that Robert Mohler's testimony was completely irrelevant and therefore would not have been admissible at Petitioner's trial and that any discrepancy concerning the contents of the note in question was immaterial and would not have affected the outcome of the trial (R 1214-5). The trial court then denied the motion (R 1216).

SUMMARY OF THE ARGUMENT

Petitioner, as a teacher, had custodial authority over the victim. Even if, under the circumstances of this case, the mere fact of his being her teacher would not give rise to this status, the additional factors that he had had prior involvement with her outside school hours, at which times she was in his physical custody and control, and that he had access to her house at times when she was there alone, which access was with her parents' knowledge and consent on the basis of his teacher-student relationship with her, are unquestionably sufficient to establish this element of Section 794.041, Florida Statutes (1987).

The three counts of lewd acts on a child charged in counts 1, 3, and 5 of the information are not lesser included offenses of the three counts of sexual activity with a child by a person in familial or custodial authority. Each contains at least one element

that the other does not. The *Blockburger*[1] test is met, and multiple punishments imposed upon Petitioner do not constitute double jeopardy violations.

The trial court's failure to give a lesser included offense instruction was not preserved for appellate review or review by this Court where Petitioner neither requested such an instruction nor objected to the trial court's failure to give it and did not raise the issue on direct appeal.

The victim's testimony was not significantly inconsistent, contradictory, or impeached by other State witnesses. There were some inconsistencies between her testimony and that of other State witnesses, but the same was true for the defense's witnesses. The victim's testimony is neither unreasonable nor improbable, and the jury obviously found it credible. Her testimony and the jury verdicts predicated upon it must stand.

Petitioner's "newly discovered" evidence was, in the first place, not shown to be newly discovered in that it was not established when the defense actually became aware of this information or that it could not have been discovered prior to the end of trial with the exercise of due diligence. Even if Petitioner could get past that hurdle, this "evidence" would not entitle him to a new trial. Robert Mohler's testimony would be inadmissible, and both his and Betty Glatzau's testimony, even taken together, would not have changed the verdict in this case.

Although an excessive number of victim injury points were scored and Petitioner's guidelines score should fall in the next

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[1]*Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

lower cell, Petitioner's sentence is within the permitted range for that cell and should be affirmed. Although points could not be scored for both the penile penetration of the victim's mouth and the penile penetration of the victim's vagina because they occurred during the same criminal episode, acts of digital penetration of the victim's vagina, fondling of the victim's breasts, and fondling of the victim's vaginal area occurred on other occasions as well as on the date of the rape itself, and victim injury for these offenses could be scored. The cases upon which the Second District relies for the contrary proposition are predicated upon a misinterpretation of the intent of the Legislature by this Court, which the Legislature has subsequently disavowed.

ARGUMENT

ISSUE I: WHETHER THE EVIDENCE WAS SUFFICIENT TO PROVE THE REQUIRED ELEMENT THAT PETITIONER BE IN A POSITION OF CUSTODIAL AUTHORITY OVER THE VICTIM AS TO THE COUNTS CHARGING A VIOLATION OF SECTION 794.041, FLORIDA STATUTES (1987).

Petitioner clearly was in a position of custodial authority over the victim under the statute.

In the first place, Petitioner was Sarah's teacher. Teachers stand, to a limited extent at least, in loco parentis to their students and exercise control over them. 68 AM. JUR. 2D Schools 242 (1973). By statute in Florida, "each teacher...shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other places in which he is assigned to be in charge of students." § 232.27, Fla. Stat. (1987). *D.A.O. v. Dep't of H.R.S.*, 561 So. 2d 380 (Fla. 1st DCA 1990), recognized that school employees are legally responsible

for a child's welfare and that the term "custodial authority," as used in the statute in issue here, has an even broader meaning than the phrase "legally responsible for a child's welfare."

It is true that, at the time of at least two of the charged offenses in issue, Petitioner did not have legal control over Sarah in that sense inasmuch as school was not in session and these offenses did not occur on school premises or at a school function or during transportation to or from any such function. Nevertheless, in a very real sense, Petitioner did have the requisite degree of custodial authority over Sarah.

The relationship between Petitioner and S[redacted] was and always had been one of teacher and student. Their relationship began with S[redacted]'s enrollment in and attendance of one of his classes. Their direct contact prior to the end of that school year (other than telephone calls) was limited to school functions and transportation to and from school or school functions. S[redacted] was entrusted to Petitioner's care and control during these times by the school administration, her parents, or both. Her parents were well aware before he ever began transporting her home of his importance to her as a teacher and mentor, and, based on their direct contact with Petitioner and S[redacted]'s avowed trust in and admiration for him, her rides home with Petitioner were with their knowledge and consent.

During most of the time period during which the charged offenses occurred, S[redacted] was scheduled to be a student in one of Petitioner's classes during the upcoming school year, and S[redacted], her parents, and Petitioner were all well aware of this. Indeed, Petitioner had asked S[redacted] to help with the planning for that very class, and her parents were under the impression that his visits to

her home that summer were all related to that project. Thus, his visits to S[redacted]'s home, during which at least the most serious offenses occurred, were with the knowledge and consent of her parents based on the relationship of student and teacher that was, in a very real and practical sense, ongoing. Until the day of the rape, when S[redacted]'s mother's intuition told her that Petitioner had done something improper, her parents trusted him to be alone in their home with their young teenage daughter.

Finally, based on the relationship between them, the extraordinary extent of which had been deliberately cultivated by Petitioner and which continued despite Sarah's misgivings concerning Petitioner's kissing and fondling of her, she felt constrained by his authority and power over her to put up with it and not to report the ultimate inappropriate act, the rape, until she had completely escaped his sphere of influence by being promoted out of the school where he taught. Even then, she did so only when the stress and depression became too much for her to bear. How much of her reluctance was due to his potential ability to prevent or seriously jeopardize achievement of her academic and career goals and/or to her belief or fear that his story would be given more credence than hers due to his position as a teacher is unquantifiable, but she did specifically testify to a fear that the male school officials would not believe her, and Ward's handling of the matter certainly justified that fear. She also testified to a general fear of Petitioner that she could not explain or specifically describe but which clearly was related to the authority he had over her as a teacher.

As Petitioner acknowledges, *Collins v. State*, 496 So. 2d 997

(Fla. 5th DCA 1986), *rev. denied*, 506 So. 2d 1040 (Fla. 1987), upheld a conviction of a violation of the statute in question on far less compelling facts than those sub judice. Even if this Court should agree with the dissent in that case as regards the facts in that case, the relationship between victim and perpetrator in the instant case goes far beyond that in *Collins* and is more analogous to that in *Stricklen v. State*, 504 So. 2d 1248 (Fla. 1st DCA 1986). The Second District correctly concluded that the relationship here was clearly one of custodial authority within the meaning and intent of Section 794.041.

Thomas v. State, 599 So. 2d 159 (Fla. 1st DCA 1992), did not involve the instant statute at all, and *Saffor v. State*, 625 So. 2d 31 (Fla. 1st DCA 1993), discussed the "family" focus because a family-type relationship was involved in the case. Neither of these cases has any applicability to the instant case.

> ISSUE II: WHETHER PETITIONER'S CONVICTIONS AND SENTENCES FOR THREE COUNTS OF LEWD ASSAULT UPON A CHILD BASED ON THE SAME ACTS AS THE THREE COUNTS OF SEXUAL ACTIVITY WITH A CHILD BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY, FOR WHICH PETITIONER WAS ALSO CONVICTED AND SENTENCED, CONSTITUTE DOUBLE JEOPARDY VIOLATIONS.

Each of the offenses in question requires proof of two elements that the other does not. Firstly, as the Second District correctly held, the element of familial or custodial authority is required for the offense of sexual activity with a child by a person in familial or custodial authority under Section 794.041(2), but not for the offense of lewd assault upon a child under Section 800.04(2), Florida Statutes (1987). On the other hand, lewd assault upon a child under Section 800.04(2) requires that the act committed be defined as sexual battery under Section 794.011(1)(h),

Florida Statutes (1987), but yet not constitute the *crime* of sexual battery, whereas Section 794.041(2) does *not* require that the proscribed "sexual activity" (defined exactly as "sexual battery" is defined in Section 794.011(1)(h)) not constitute the crime of sexual battery.

In addition, one of the elements of the offense of lewd assault upon a child is that the child assaulted must be "under the age of 16 years," § 800.04, and one of the elements of sexual activity with a child by a person in familial or custodial authority is that the child must be "12 years of age or older but less than 18 years of age," § 794.041(2). Application of the *Blockburger*[1] analysis requires that only the elements of the crime charged be compared, not the facts in the particular case in question. *State v. Crisel*, 586 So.2d 58 (Fla. 1991). Thus, the fact that Sarah met both age requirements is irrelevant.

The crime of lewd assault on a child is not a lesser included offense of sexual activity with a child by a person in familial or custodial authority under the *Blockburger* test. Furthermore, the *Carawan*[2] analysis, applying the rule of lenity, is inapplicable in the instant case because the offenses in question were committed after the July 1, 1988 effective date of the amendment to Section 775.021, Florida Statutes (Supp. 1988), which abolished the use of the principle of lenity to determine legislative intent. *State v. Smith*, 547 So.2d 613 (Fla. 1989). Petitioner's convictions and sentences on all of the crimes charged do not violate double jeopardy principles.

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[2]*Carawan v. State*, 515 So.2d 161 (Fla. 1987)

ISSUE III: WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE AN UNREQUESTED LESSER INCLUDED OFFENSE INSTRUCTION.

Pursuant to Rule 3.390(d), Florida Rules of Criminal Procedure, a defendant must formally object to the denial of a jury instruction he has requested in order to preserve the issue for appeal. *Sochor v. Florida*, 504 U.S. ____, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Jackson v. State*, 575 So. 2d 181 (Fla. 1991); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991); *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1988); *Washington v. State*, 392 So. 2d 599 (Fla. 1st DCA 1981). Inasmuch as Petitioner neither requested the instruction he now claims should have been given nor objected to the trial court's failure to give such an instruction, the issue was never preserved for appellate review.

This Court should also refuse to review this issue based on Petitioner's failure to raise this issue in the Second District. *Jackson; Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1983). The fact that the case that he relies on in this Court had not been decided at the time he filed his appellate brief is not sufficient excuse. *Tillman v. State*, 471 So. 2d 32 (Fla. 1985).

ISSUE IV: WHETHER THE EVIDENCE, INCLUDING THE VICTIM'S TESTIMONY, WAS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTIONS.

As the Second District recognized, much of Sarah's testimony was corroborated by other witnesses. Furthermore, her testimony is reasonable and consistent and contains no material contradictions. A thorough review of the record, with the testimony taken as a whole and in context, establishes that S[redacted]'s testimony is *materially* inconsistent only with that of Petitioner and certain of the junior high school officials who had a motive to downplay her fond-

ling allegations.

Petitioner wishes to ignore the fact that the victim here was only 13-14 years old and sexually inexperienced at the time of her relationship with Petitioner. S[redacted] gave the only explanation she could give for asking for rides home from Petitioner despite not being altogether comfortable with him. The chronology of events must also be kept in mind, as well as the fact that S[redacted] apparently never really wanted to report this matter, although she did ultimately break down and do so.

Petitioner's implied contention that a person cannot be coerced to do something unless the coercer is present at the time the coerced person is doing it is ridiculous. And the fact that Petitioner's threat was vague in the extreme does not render it nugatory. In fact, its very vagueness may have been more threatening to S[redacted], particularly given Petitioner's position of direct and indirect authority and influence over her, than a specific threat would have been.

S[redacted]'s testimony that she had to walk past Petitioner's classroom every Friday and that of three or four other witnesses that there were alternate routes to the office are easily reconcilable. Firstly, no one was cross-examined on this issue. Secondly, the class attendance sheets were processed, according to Petitioner's own testimony, within the hour. Obviously, S[redacted] was expected to take the sheet directly to the office. Taking an alternate route would have required S[redacted] to walk in the opposite direction upon leaving her classroom, which would probably be noticed and, if it were, would almost certainly lead to unwanted questioning. Thus, there was, as a practical matter, only one

route S[redacted] could take.

S[redacted]'s testimony that Petitioner locked his classroom door before fondling her was not refuted. Granted, the door had to be locked by a key placed on the lock on the hall side of the door, but the door did not have to be closed for the lock to be turned. Otherwise, how could Petitioner have locked himself out of his classroom?

S[redacted] did not testify that she hated Petitioner at the time she bought his birthday gift and card, but only after he raped her.

The denial by three male administrators that they had been told about the fondling was refuted by a female teacher who had reported it to them. Moreover, it is clear from even their own testimony, as well as that of Petitioner himself and S[redacted]s parents, that they were told at the time S[redacted] said they were.

S[redacted]s failure to report the oral sex when she initially "went public" is adequately explained by the facts that (1) the rape, i.e., the penetration of her vagina by Petitioner's penis, overshadowed all of his other sexual acts in her mind; (2) she had difficulty all along in coming out and saying the words explicitly describing Petitioner's acts; and (3) she had to be questioned using a lot of yes or no questions and nobody asked about oral sex initially. The same principles apply to her failure to mention French kissing, with the addition that there is corroboration of her story by an adult that she reported it to fairly early on, and to her allegations of rape.

The time interval between the fellatio and the vaginal intercourse is not significant. This point is hardly likely to have been uppermost in S[redacted]s mind at the time, and she had no reason

to try to quantitate it until nearly two years later. As for her equivocation as to whether Petitioner ejaculated either time, that is not surprising in light of S[redacted]'s virginal state at the time of these offenses.

There *is* an inconsistency between the reason S[redacted] gave for encouraging J[redacted] B[redacted] to join the 9th grade Alpha history class, i.e., that there was no other girl in the class, and the testimony from other witnesses that there was one other girl in the class and that the kids scheduled to be in the class all knew in advance who their classmates would be. However, S[redacted]'s problematic relationship with Petitioner, which had not yet culminated in the rape, was no reason for her not to encourage another student to join a class taught by a teacher whose teaching she had enjoyed to that point. This issue is highly tangential, irrelevant, and immaterial.

The testimony of two school faculty members that S[redacted] said something to D[redacted] M[redacted] about having "him" fired is totally at odds with S[redacted]'s failure to follow through with her threat by revealing the rape and pursuing the matter at the time she made only vague fondling allegations and is therefore not particularly significant.

Finally, Petitioner's argument that the testimony of all the adult witnesses to whom she reported Petitioner's fondling in late October or early November of her 9th grade year is incredible because they all failed to report it to HRS is itself incredible. Several of these adults were defense witnesses, and those who were not had indisputably reported S[redacted]'s allegations to the school principal, who they had reason to believe would take whatever further action was appropriate.

A careful and full review of the trial testimony and exhibits in this case must convince this Honorable Court that Petitioner was properly convicted as charged on all counts in this case.

ISSUE V: WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

The trial court correctly denied Petitioner's second motion for new trial because Petitioner failed both prongs of the applicable test: he established neither that his "new evidence" could not reasonably have been discovered through due diligence prior to trial nor, as the Second District held, that this new evidence, had it been before the jury in the instant case, would probably have changed their verdict. *Jones v. State*, 591 So.2d 911 (Fla. 1991).

As to the first prong, Petitioner did not establish by either sworn testimony or counsel's representation when A[redacted] M[redacted]' information first came to the attention of the defense or, if it came to their attention before the defense had rested its case at trial, why it took another two weeks to locate R[redacted] M[redacted]. Similarly, the date Mrs. Glatzau first revealed her purported knowledge of S[redacted]s note to Ward is nowhere mentioned. Moreover, it would seem to Respondent that due diligence on the part of the defense, which could not produce the note itself, would dictate questioning the principal's office personnel to at least some minimal degree concerning any knowledge they might have of it. Had Glatzau been timely asked about it, one can only conclude from her testimony that she would have come forward immediately.

M[redacted]'s testimony would not have been admissible because it was too dissimilar to the facts in the instant case to qualify as similar fact evidence under Section 90.404(2)(a), Florida Statutes

(1987), and was not otherwise admissible as impeachment evidence.

Even if M[redacted]'s testimony were admissible, it was hardly of such a nature that it would probably "have been determinative of [S[redacted]'s] credibility."

Glatzau's testimony is of even less value because S[redacted]'s testimony that the junior high school administrators were informed of her fondling accusation shortly after the "bitch incident" was corroborated by, among other witnesses, Petitioner himself.

ISSUE VI: WHETHER PETITIONER'S SENTENCES WERE IMPROPER.

In *State v. Lanier*, 464 So. 2d 1192 (Fla. 1985), this Court held that, where the legislature acts to correct a misguided interpretation of the legislative intent contained in a recent court opinion, the courts should show great deference to the subsequently stated and express intent of the legislature, particularly where, as here, the enactment of an amendment to a statute is passed merely to clarify existing law. Similarly, *Lowry v. Parole & Probation Commission*, 473 So. 2d 1248 (Fla. 1985), states:

> Where reasonable differences arise as to the meaning or application of a statute, the legislative intent must be the polestar of judicial construction....
>
> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

Id. at 1249-1250.

This Court should reconsider *Karchesky* in light of the recent express statement by the Legislature in Chapter 92-135, Laws of

Florida[3], of its intent regarding the scoring of victim injury in

[3]Chapter 92-135, Laws of Florida, provides in pertinent part:

> WHEREAS, in adopting and implementing Rules 3.701 and 3.988, Florida Rules of Criminal Procedure, relating to sentencing guidelines, the Legislature intended and still intends that victim injury includes sexual contact or penetration in the calculation of a guidelines sentence regardless of whether there is ascertainable physical injury apart from such contact or penetration, and
>
> WHEREAS, the Legislature manifested its intent by approving Rule 3.988(b), which clearly and unambiguously requires the scoring of sexual contact or penetration as victim injury on the "category 2" scoresheet form, and
>
> WHEREAS, the Florida Supreme Court has recently found "that penetration, which does not cause ascertainable physical injury, does not result in victim injury as contemplated by the rule for which victim injury points may be assessed" in the case of Karchesky v. State...,
> NOW THEREFORE,
>
> Be It Enacted by the Legislature of the State of Florida:
>
> Section 1. Subsections (8), (9), (10), and (11) of section 921.001, Florida Statutes, are renumbered as subsections (9), (10), (11), and (12), respectively, and a new subsection (8) is added to said section, to read:
>
> 921.001 Sentencing Commission.-
>
> (8) For purposes of the statewide sentencing guidelines, if the conviction is for an offense described in chapter 794, chapter 800, or s. 826.04 and such offense includes sexual penetration, the sexual penetration must receive the score indicated for penetration or slight injury, regardless of whether there is evidence of any physical injury. If the conviction is for an offense described in chapter 794, chapter 800, or s. 826.04 and such offense does not include sexual penetra-

sexual offenses when it adopted, back in 1984[4], and readopted in 1986[5], 1988[6], and 1991[7] the sentencing guidelines, Rule 3.701, Florida Rules of Criminal Procedure, and the guidelines scoresheets, Rule 3.988, Florida Rules of Criminal Procedure, including Rule 3.988(b), the special scoresheet for sentencing guidelines category 2 crimes, i.e., sexual offenses, which, *from the inception of the guidelines*, included scoring of victim injury points for contact or penetration *as well as* for slight or serious injury or death.

Karchesky also makes what amounts to a revision to Rule 3.988(b), despite the fact that the sentencing guidelines, including the scoresheets promulgated for each category of offense, at least where a proposed change would affect the severity of the penalty for a crime or crimes, are substantive law, any changes to which must be approved by the legislature before they become effective. *Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988)*, 576 So. 2d 1307 (Fla. 1991). This

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> tion, the sexual contact must receive the score indicated for contact but no penetration, regardless of whether there is evidence of any physical injury....

[4]Chapter 84-328, Laws of Florida, adopted Rules 3.701 and 3.988, Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court on May 8, 1984.

[5]Chapter 86-273, Laws of Florida, created Section 921.0015, Florida Statutes (Supp. 1986), which adopted Rules 3.701 and 3.988(a)-(d), (f)-(i), Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court on December 19, 1985.

[6]Chapter 88-131, Laws of Florida, amended Section 921.0015, Florida Statutes (Supp. 1988) to adopt Rules 3.701 and 3.988, Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court on April 21, 1988.

[7]Chapter 91-270, Laws of Florida, adopted Rules 3.701 and 3.988, Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court.

Court there stated in pertinent part:

> [W]e can only conclude that section 921.001, Florida Statutes, and the doctrine of separation of powers...require legislative involvement....With regard to the issues of victim impact and legal status offenses, the rules previously proposed by the Commission and adopted by the Legislature are admittedly and self-evidently vague. Yet this is the way they were proposed and adopted. We are in no position now to say, by judicial ukase, exactly what the Legislature did or did not intend at the time of adoption.
>
> Moreover, the statute authorizing the guidelines expressly states that "[t]he provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature." § 921.001(1), Fla. Stat. (1989). The spirit of the law can only be honored if the Legislature is aware of the changes it is enacting, not by attempting to judicially "clarify" a vague provision after it has been enacted by a legislature that may or may not have believed the provision to mean something quite different.

Id. at 1308. See also *Amendments to Florida Rules of Criminal Procedure—Sentencing Guidelines (Rules 3.701 and 3.988)*, 613 So. 2d 1307 (Fla. 1993).

Additionally, under the rules of statutory construction, "a more specific statute covering a particular subject is controlling over one covering the same subject in general terms." *Adams v. Culver*, 111 So. 2d 665 (Fla. 1959). Thus, Rule 3.988(b)—being a more specific statute on the subject of victim injury scoring for sexual offenses than Rule 3.701d7, which covers the general subject of victim injury without specifically mentioning sexual offenses—would control over Rule 3.701d7 to the extent of the conflict.

At the time the instant crimes were committed, the rule on scoring victim injury read: "Victim injury shall be scored for

each victim physically injured *during a criminal episode or transaction*." Rule 3.701d7 (emphasis supplied). This rule was changed twice between the time Petitioner's crimes were committed and the time of trial. The rule in effect at the time of trial *did* allow scoring of victim impact points for each offense; the revision proposed in *Florida Rules of Criminal Procedure re Sentencing Guidelines (Rules 3.701 and 3.988)*, 576 So.2d 1307 (Fla. 1991), became effective on May 30, 1991, pursuant to Chapter 91-270, Laws of Florida, and Petitioner's trial began on July 8, 1991 (R 3). Nevertheless, because the rule change was not retroactive, the scoring rule quoted above applies to the instant case.

Points for each of the acts of penile penetration of the victim's vagina (counts 1 and 2) and of the victim's mouth (counts 3 and 4) should not have been scored. However, because acts of fondling of the victim's breasts and vagina and of digital penetration of her vagina occurred on multiple other occasions during separate criminal episodes, they could be separately scored. Thus, Petitioner's victim injury score should be reduced by 40 points. This score reduction would drop him into the next lower cell. However, his sentence is within the permitted range for that cell and should therefore be reinstated, although this Court may wish to remand for correction of his guidelines scoresheet.

CONCLUSION

Based upon the foregoing facts, argument, and citations of authority, Respondent respectfully requests affirmance of Petitioner's convictions and reinstatement of his original sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert L. Doyel, Esquire, 343 W. Davidson Street, Suite 102, P.O. Box 1476, Bartow, Florida 33830, this 22nd day of February, 1994.

OF COUNSEL FOR RESPONDENT