IN THE SUPREME COURT OF FLORIDA

ROGER LEO DAUTEL, :

Petitioner, :

v. : CASE NO. ~~88,848~~ 84,848

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

ISSUE I THE TRIAL COURT ERRED IN SCORING DAUTEL'S OHIO CONVICTION FOR GROSS SEXUAL IMPOSITION AS A SECOND DEGREE FELONY.

The district court affirmed the scoring of Dautel's Ohio conviction for gross sexual imposition as equivalent to lewd assault under section 800.04, Fla. Stat., although the age of the victim is an element of the crime under section 800.04 and is not an element of the Ohio crime. This affirmance was based on the district court's belief that there was undisputed evidence the victim of the Ohio crime was fourteen years old, and the district court's holding that this fact could be used to determine what Florida crime the Ohio crime should be scored as. Petitioner's initial brief asserted that the affirmance was in error because: (1) courts may look only to the elements of the out-of-state crime, not to the underlying facts, and courts must score the Florida crime that is implied by the out-of-state crime, using an included offense analysis; (2) there was no evidence that the Ohio victim was fourteen, only the prosecutor's assertion, and

the trial court never made a finding that the victim was fourteen; and (3) even if the victim were established to have been fourteen and this could be considered, the version of section 800.04 in effect at the time of the Ohio conviction required that the victim be under fourteen, so the Ohio conduct did not constitute the Florida crime.

The state's responses to these arguments are intermingled. This brief will address each state argument, but only roughly in the order presented in the state's brief. It should be noted, first, that the state has not disputed petitioner's assertion that the elements of the Ohio crime do not establish the Florida crime.

In its Statement of the Case and Facts, the answer brief notes that the presentence investigation report (PSI) prepared in this case stated that the victim of the Ohio crime was fourteen. This addition to the facts is the state's only response to petitioner's assertion that the age of the victim was never established or found in the trial court. It is true that the PSI contains this statement, although this part of the PSI was not referred to at sentencing. During argument on the specific issue raised here, the prosecutor asserted that the victim was fourteen but the defense did not concede this. Rather, defense counsel responded by pointing out that the Ohio conviction resulted from a no contest plea, not a trial, which was pertinent only because it showed there had been no determination of what the facts were. Defense counsel asserted that underlying facts could not be

considered, and, as stated in the initial brief, the judge appears to have said he was not considering the underlying facts, but that he found the two crimes equivalent based on the statutory elements alone. The state's brief fails to address at all how the trial court's ruling can be justified based on a purported fact that was never established or found by the judge.

In its argument proper, the state asserts that Fla. R. Crim. Proc. 3.701's "analogous or parallel" language does not mean that the out-of-state and Florida statutes must be identical or that the Florida statute must be included in the out-of-state crime. This is so, the state contends, because the dictionary defines "analogous" to mean a correspondence between otherwise dissimilar things. In the state's understanding of "analogous," the statutes do not need to match, and a difference like the age of the victim does not contradict analogousness.

As the state recognizes, its argument prompts the question of how it is to be determined that crimes are analogous. The state says:

> If statutes (crimes) are to be compared, and if no exact duplication of statutory "elements" is present, how can an <u>analogy</u> be drawn? Since, again, the concept of "analogy" involves "dissimilar" things, the only things left to compare besides statutory elements are the facts of the crimes, to see if they are "parallel."

Answer Brief, 6. What the state seems to be saying is that there is no way to determine that statutes with different elements are analogous, so the court must look to the facts.

This does not make sense. First, the state fails to say

what it means by analogous. Second, the state does not explain why analogousness cannot be determined by comparing statutes. Third, the state does not say what the underlying facts of an out-of-state crime are supposed to be parallel or analogous to, and does not say how it is to be determined that facts are analogous or parallel to whatever it is about the Florida crime that is to be considered.[1]

Determining what a defendant actually did to get convicted of an out-of-state crime would be necessary if trial judges were to decide what out-of-state conduct to score based on evidence rather than convictions. In parts of the state's brief, it appears that this is the procedure the state is seeking. The state does not make it clear, however, how this squares with its notion that analogous means something other than that the out-of-state conduct would have constituted the Florida crime. Nor does the state give any reason why this interpretation is closer to the meaning of "analogous" than the included offense approach.

The state believes that its suggested interpretation of

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[1] The state cites Mohammed v. State, 561 So.2d 384 (Fla. 1st DCA 1990), as demonstrating an approach that is "similar," assumedly to the state's proposed test for analogousness. What Mohammed held is that private, consensual oral or anal sex does not violate section 800.02, Fla. Stat., so Mohammed's Georgia conviction for committing private, consensual oral sex had no analogous Florida crime, and could not be scored. Mohammed is an example of a case considering underlying conduct, although the its conclusion could have been reached based on the Georgia statute alone. Mohammed does not demonstrate the state's analogousness test, however. In Mohammed, the Florida statute was held not analogous simply because establishing the Georgia crime did not establish any Florida crime. This is the test of analogousness petitioner believes is correct.

analogous or parallel would lead to higher scoring of out-of-state crimes than would the included offense method.[2] If this is true, then it is an additional reason to reject the state's notion of analogousness, as the rule of strict construction requires adopting the interpretation that favors the defendant. The terms analogous and parallel, in this context, are unclear. Petitioner's interpretation is a reasonable one, and adopting it construes the rule strictly in favor of the accused. Also, included offense analysis has the advantage of being a workable concept that Florida courts have experience using. If the analogous Florida crime were the crime that is identical to the out-of-state crime, or included in it, then there is no question that statutes can be compared and the analogous Florida crime determined.

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[2] The state's brief says that an included offense method of comparing crimes benefits defendants. The state appears to overstate its case, however, when it asserts that pursuant to an included offense analysis, no out-of-state crime could be considered unless its elements were identical to a Florida crime. Commission of an out-of-state crime with all the elements of a Florida crime and some additional elements would of course imply commission of the Florida crime.

The answer brief is also misleading in its description of included offense analysis as rejecting a match if the out-of-state and Florida element are not set forth precisely the same way. If the foreign element implies the Florida element, this is sufficient. For example, gross sexual imposition has the element of touching another's erogenous zone, including thighs and buttocks, with intent to sexually arouse or gratify either person. Section 800.04 does not use the same language, but it is clear that touching the victim's erogenous zone with the intent to arouse would constitute lasciviousness under section 800.04. The difference in the language used is immaterial. On the other hand, the complete lack of any element on the victim's age in Ohio section 2907.05(A)(2) means a person can commit a violation of that section without committing a violation of Florida's section 800.04.

Taking a different tack, the state argues that if gross sexual imposition is not scored as lewd assault, it should be scored as attempted sexual battery. To support this idea, the state cites one Ohio case to the effect that gross sexual imposition can be a lesser included offense of sexual battery, and another Ohio case referring to gross sexual imposition as an "allied offense of similar import" to attempted rape. Moreover, the state argues, the element of the Ohio crime of giving intoxicants that substantially impair the victim's judgment is comparable to the sexual battery element of administering a substance that incapacitates the victim.[3]

Neither gross sexual imposition under section 2907.05(A)(2) nor attempted sexual battery is defined by the age of the victim. It seems clear that giving an adult victim enough intoxicant to substantially impair the victim's judgment is less serious than administering a substance that physically or mentally incapacitates the victim. Impaired judgment is one thing; inability to resist is another altogether. It seems even more

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[3] The Ohio committee note relied on by the state, referring to section 800.04, Fla. Stat., as a comparable statute, relates to section 2907.05 as a whole, not just section 2907.05(A)(2), the subsection Dautel was convicted of. Section 2907.05 includes the subsection prohibiting sexual contact with a child under age thirteen, discussed above, so the reference to section 800.04 does not necessarily relate to subsection (A)(2) at all. In any event, it is not clear that the Ohio committee note, drafted assumedly without the interpretation of Florida's sentencing guidelines in mind, should have any bearing on the issue in this case. Nor is it clear why an Ohio holding that Ohio's crime of gross sexual imposition may under some circumstances be a lesser included offense of Ohio's sexual battery should be pertinent here.

clear that touching a person's thigh, even if that person's judgment is impaired, is minimal compared to engaging in actual sex or attempting to engage in sex with an incapacitated victim. Attempted sexual battery is a much more serious crime, and the elements are quite different.

The state's effort to equate the two crimes based on comments in Ohio opinions fails, also, because of the state's failure to come up with any explanation of what it means by analogous. Gross sexual imposition and attempted sexual battery are analogous in roughly the same way that battery and aggravated battery are analogous. The guidelines surely did not mean to score an out-of-state crime as a Florida crime it is analogous to in this sense.

The state also argues that the use of underlying facts of out-of-state convictions is established by case law. First, the state reads Forehand v. State, 537 So.2d 103 (Fla. 1989), as indicating that the facts underlying out-of-state convictions should be used. As the initial brief noted, Forehand did not actually deal with the underlying facts issue. Forehand's statement that the equivalent crime should be determined from the elements of the foreign crime implies, however, that when Forehand was decided, this Court viewed the elements of the out-of-state statute as determinative.

The language of Forehand the state relies on came in a discussion of preservation. A Texas murder conviction was scored as a life felony. There had been no objection to the scoring at

sentencing, and the record showed nothing about the Texas crime except the sentence. This Court pointed out, and this is the language the state relies on, that Forehand could have "introduced facts" showing that the Texas conviction was not for a life felony. Apparently, the state interprets the reference to facts to mean that Forehand could have shown, for example, that he killed with provocation, or in imperfect self-defense, so that his conduct would not amount to a life felony in Florida. Even if the elements of the Texas murder statute were the same as those of Florida's second degree murder, a life felony, under the state's reading, Forehand could still have shown that what actually happened constituted manslaughter under Florida law. The state's reading of Forehand would put defendants with out-of-state convictions in a better position than defendants with Florida prior convictions. A defendant with a prior Florida second degree murder conviction does not have the opportunity to show that his prior conduct is really different, and less serious, than indicated by the conviction itself.

Dautel understands Forehand to mean not that the defendant could have offered evidence of his conduct underlying the Texas murder conviction, but rather that Forehand should have shown which Texas statute he was convicted under, so the elements of the Texas crime could have been compared with the various degrees of murder in Florida. Read this way, the language of Forehand relied on by the state is consistent with the opinion's earlier language that assumed analogousness was to be determined from the

elements of the out-of-state crime.

The state also cites district court opinions that appear to endorse the use of underlying facts. The initial brief acknowledged that some district court opinions had considered the underlying facts of the out-of-state crime, while others had relied only on the elements of the out-of-state statute. The state is incorrect to put Rotz v. State, 521 So.2d 355 (Fla. 5th DCA 1988), and Jenkins v State, 556 So.2d 1239 (Fla. 5th DCA 1990), in the former category, but petitioner does not dispute that some district courts have considered underlying facts.

This Court should reject the use of underlying facts. First, the "analogous or parallel" language of rule 3.701 implies that it is the out-of-state statute that should be compared, because it makes sense to speak of two statutes being analogous or parallel, but it does not make sense to speak of foreign facts being analogous to a Florida statute. A statute can be analogous or parallel to another statute. Conduct is not analogous or parallel to a statute. Conduct either establishes violation of the statute or it does not. Second, this Court should reject the state's reading of rule 3.701 because of the rule of strict construction in favor of the accused. Finally, this Court should reject underlying conduct because of the practical consideration of burdening sentencing hearings in routine cases by the necessity of finding the facts underlying out-of-state crimes.

The state's notion that because capital sentencing involves a determination of whether the conduct underlying prior

convictions involved violence, scoring out-of-state convictions in non-death cases should also involve a determination of the underlying facts of prior convictions, is misguided. Capital sentencing demands, as a constitutional matter, a higher degree of reliability based on more knowledge about the defendant. That capital sentencing involves a second trial is part of the way that capital cases are different. That things are done differently in capital cases is not itself a reason to imitate capital procedure in non-death cases.

Finally, the state's brief deals with the fact that at the time of petitioner's Ohio conviction, section 800.04 only criminalized lewd conduct if the victim was under fourteen years old, not sixteen as in the current version of the statute. Since petitioner's Ohio conduct, even if the age of the victim had been established to be fourteen, would not have violated the Florida law in effect at the time, scoring the Ohio crime as equivalent to that Florida crime was error.

The state asserts that petitioner waived the right to point out the correct version of section 800.04 by not doing so before. For this proposition, the state cites Forehand. As discussed above, in Forehand, the defendant made no objection to the scoring of his Texas murder conviction, and all the record showed about the Texas conviction was the sentence. Here, petitioner's trial counsel specifically objected to the scoring of this Ohio conviction, and the specific Ohio statute was cited and quoted. The trial judge knew very well that he was scoring gross sexual

imposition as a second degree felony over the strenuous objection of petitioner. In order to preserve an objection for appeal, trial counsel needs to make the nature of the objection known, but does not need to cite every case and statute and make every variation of the argument that will be asserted on appeal. The objection made here was sufficient to preserve the issue, and this Court should consider all sources necessary to make a correct ruling. The Florida statute in effect at the time of petitioner's Ohio crime is one of those sources.

The state also asserts that petitioner is making an ex post facto argument, and that scoring petitioner's 1983 conviction by reference to 1993 law is not an ex post facto violation. Petitioner never argued that using the current version of section 800.04 would be an ex post facto violation. Petitioner's contention is that the point of scoring out-of-state prior convictions is to treat defendants whose prior crimes were committed outside Florida the same as defendants whose prior crimes were committed here. When Florida law has changed, scoring based on the current law rather than on the law at the time of the out-of-state offense treats defendants with out-of-state convictions differently than if they had engaged in the same conduct in Florida. As pointed out in the initial brief, if petitioner had touched the erogenous zone of a fourteen year old in Florida in 1983, he could not have been charged with lewd assault, and there would have been no lewd assault conviction to be scored when petitioner was sentenced in this case.

The state's brief says that in comparing an out-of-state conviction with repealed or amended statutes, "bizarre complications could arise," (Answer Brief, 14). The state cites Mohammed v. State, 561 So.2d 384 (Fla. 1st DCA 1990). Mohammed held that section 800.02 would not be construed to apply to private, consensual oral sex, in part because of the changes in societal sexual attitudes and practices that made the term "unnatural" not clearly applicable to anal or oral sex. The state does not spell out the bizarre complication it means, but assumedly, it is referring to the possibility that at the time of Mohammed's Georgia conviction, section 800.02 would have been properly applied to his conduct, as the changes in attitudes and practices relied on by the court might not yet have taken place. This is a complication, though not particularly problematical. Determining what the law was at a particular time is part of what courts do.

The state also refers to the problem resulting from scoring robberies committed when Florida did not separate robberies into degrees of felony. As discussed in the initial brief, Florida courts have generally scored prior convictions, whether out-of-state or Florida, based on the law at the time of the crime. In any event, defendants with old out-of-state robberies should be treated the same as defendants with Florida robberies from the same time.

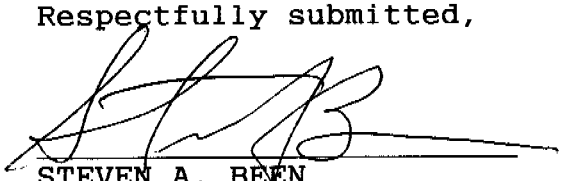
In sum, the most appropriate way to score out-of-state convictions is as the Florida crime the out-of-state conduct,

whether shown by evidence or by the elements of the foreign statute, establishes. If a defendant's out-of-state crime must establish the Florida crime it is scored as, then the scoring of petitioner's Ohio conviction was error if this Court holds any of the following: (1) it is improper to consider the facts underlying out-of-state convictions in order to establish criminal conduct not established by the conviction; or (2) the age of the Ohio victim may not be considered in this case because it was never established or found in the trial court; or (3) out-of-state criminal conduct is to be scored as analogous to the Florida criminal statute in effect at the time of the foreign crime.

CONCLUSION

Petitioner's sentence must be reversed and the case remanded for resentencing.

Respectfully submitted,



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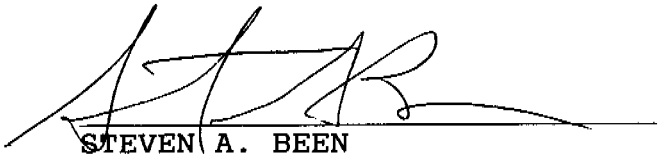
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Mr. Mark Menser, Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 10th day of March, 1995.



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