

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RONNIE J. KNIGHTON, )  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

CASE NO. SC16-1426

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RESPONDENT’S BRIEF ON JURISDICTION

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## PRELIMINARY STATEMENT

Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the lower tribunal. Respondent, Ronnie J. Knighton, was the respondent and the defendant, respectively. In the brief, the parties will be referred to by name.

## STATEMENT OF THE CASE AND FACTS

Mr. Knighton was convicted of one count of lewd or lascivious battery based on allegations that he had sexual intercourse with the minor victim. On direct appeal, the Fourth District Court of Appeal reversed his conviction on the grounds that the trial court reversibly erred when it refused to instruct the jury on the permissive lesser included offense of committing an unnatural and lascivious act. The prosecution had objected to Mr. Knighton's request for the instruction on the grounds that "there is nothing 'unnatural' about traditional penile-vaginal intercourse." The appellate court identified the questions surrounding this issue as:

- (1) whether Knighton committed an unnatural and lascivious act; and
- (2) if so, whether the offense of unnatural and lascivious act is a permissive lesser included offense to lewd or lascivious battery.

The District Court answered both these questions affirmatively and ordered that Mr. Knighton be given a new trial. The District Court denied the State's motion for rehearing and/or rehearing en banc on June 30, 2016, and denied the State's motion to stay or recall the mandate.

The State timely noticed its intent to seek review in this Court on August 1, 2016.

## SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case does not directly and expressly conflict with a decision of another district courts of appeal on the issue of whether sexual intercourse between an adult and a child is unnatural, so that committing an unnatural and lascivious act is a permissive lesser included offense of lewd or lascivious battery. Even if the decision of the District Court in this case does conflict with a decision of another court of appeal, the issue in this case does not present the kind of significant conflict in the law which requires review by this Court.

## ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

Mr. Knighton was convicted of one count of lewd or lascivious battery based on allegations that he had sexual intercourse with the minor victim. On direct appeal, the Fourth District Court of Appeal reversed his conviction on the grounds that the trial court reversibly erred when it refused to instruct the jury on the permissive lesser included offense of committing an unnatural and lascivious act. The prosecution had objected to Mr. Knighton's request for the instruction on the grounds that "there is nothing 'unnatural' about traditional penile-vaginal intercourse."

In arriving at its holding to the contrary, the District Court recognized that in *Harris v. State*, 742 So.2d 835 (Fla. 2d DCA 1999), the Second District Court of Appeal had held that a defendant charged with lewd or lascivious battery is not entitled to an instruction on the lesser included offense of unnatural and lascivious act regardless of whether the offense is supported by the evidence at trial. The Second District based its conclusion on its belief that "the legislature must have intended for section 800.02 [unnatural and lascivious act] to be applied to different factual situations than would fall under section 800.04 [lewd or lascivious battery]."

The term ‘unnatural’ in 800.02 distinguishes 800.02 from 800.04, and implies something more than what is covered by 800.04.” *Id.* at 838.

The Fourth District Court of Appeal did not follow *Harris*, relying instead on *Funciello v. State*, 179 So.3d 388 (Fla. 5<sup>th</sup> DCA 2015), which held that “digital penetration and sexual intercourse between an adult perpetrator and a child victim constitute unnatural and lascivious acts in that such conduct is not in accordance with nature or normal feelings or behavior and are lustful acts performed with sensual intent on the part of the defendant.” *Funciello*, 179 So.3d at 390). *See also* Fla. Standard Jury Instructions in Criminal Cases 11.1(a) (listing unnatural and lascivious act as a lesser included offense of lewd or lascivious battery). Mr. Knighton, held the Fourth District Court of Appeal, was therefore entitled to have the jury instructed on the lesser included offense of unnatural and lascivious act.

The State now argues that *Harris* and the instant case are in direct and express conflict. The State overlooks *Harris*’s observation that “The history of section 800.02, which proscribes ‘unnatural and lascivious acts’ indicates that it has been applied to homosexual acts, bestiality, digital sex, and oral sex – anything other than **adult** male and female sexual intercourse.” 742 So.2d at 838 (emphasis added). This statement is consistent with the holding of *Funciello* that “digital penetration and sexual intercourse between an adult perpetrator and a child victim constitute

unnatural and lascivious acts in that such conduct is not in accordance with nature or with normal feelings or behavior and are lustful acts performed with sensual intent on the part of the defendant.” 179 So.3d at 391. *Harris* and this case are not in direct and express conflict.

The State nevertheless maintains that there is some confusion in the area of sex crimes which must be resolved by this Court. But it is a fact that *Harris v. State*, 742 So.2d 835, has not been cited by any court in this state for the proposition on which the State relies. On the other hand, the standard jury instructions and cases on this issue in the State uniformly find that Section 800.02, Fla. Stat. (unnatural and lascivious act) describes a crime which is a permissive lesser included offense of those offenses described in Section 800.04, Fla. Stat. *See Sherrer v. State*, 898 So. 2d 260, 261 (Fla. 1<sup>st</sup> DCA 2005) (“[U]nnatural and lascivious act is a permissive lesser-included offense of lewd and lascivious molestation”); *see also Williams v. State*, 627 So. 2d 1279 (Fla. 1<sup>st</sup> DCA 1993) (unnatural and lascivious act was a permissive lesser included offense of lewd, lascivious or indecent assault on a child under 16 years of age); *Horn v. State*, 120 So. 3d 1 (Fla. 1<sup>st</sup> DCA 2012) (holding unnatural and lascivious act was a permissive lesser offense of lewd or lascivious molestation).

Consequently, the direct and express conflict between *Harris* and the decision in this case does not exist. And even if there were some inconsistency between the two cases, it has been substantially resolved by the decisions of the Fifth District in *Funiciello* and the decision in the instant case. Consequently, this Court should exercise its discretion and find that it does not have jurisdiction to review the instant case.

CONCLUSION

Based on the foregoing argument and the authorities cited, Respondent requests that this Court exercise its discretion and DENY review.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Tatjana Ostapoff  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically provided to this Court and furnished to Jeanine M. Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-mail at [CrimAppWPB@myfloridalegal.com](mailto:CrimAppWPB@myfloridalegal.com) this 29<sup>th</sup> day of AUGUST, 2016.

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