IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| RUSSELL OWEN INSKO, | : | |
| Petitioner, | : | |
| vs. | : | Case No. SC06-1619 |
| STATE OF FLORIDA, | : | |
| Respondent. | : | |
| | : | |

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

# INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

On December 10, 2001, the State Attorney for the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, filed an Information charging Appellant, RUSSELL INSKO, with one count of lewd or lascivious conduct (solicit), in violation of section 800.04(6)(a)2 and (b)(6), Florida Statutes (2001). The Information alleged three victims. On February 17, 2003, the State Attorney filed an Amended Information charging Appellant, RUSSELL INSKO, with one count of lewd or lascivious conduct (solicit), in violation of section 800.04(6)(a)2 and (b)(6), Florida Statutes (2001). The Information alleged one victim: Justin Stokes. The events giving rise to the charges occurred on November 12, 2001. (V1/R18-19)

On February 17, 2003, Mr. Insko filed "Defendant's Motion to Strike State's Notice of Intent to Rely on Williams rule evidence and Defendant's Motion in Limine." (V1/R48-58) Written objections to the Introduction of Williams rule evidence were filed on February 19, 2003. (V1/R61-67) The motion was denied by the trial court on February 19, 2003. (V1/R70-71)

A jury trial was held on February 20, 2003. On that date, the jury found him guilty of a lesser charge, specifically

lewd and lascivious conduct (solicitation) of a person under 16 years of age by a defendant under 18 years of age. (V1/R86) The Honorable Barbara Fleischer, Circuit Judge, sentenced Mr. Insko to five years FSP on February 20, 2003. The trial court found Mr. Insko qualified to be a sexual predator and sentenced him as such. The trial court imposed a fine of $5000 as a judgment lien, as well as $500 for his attorney's fees, a $40 application fee, and $261 in court costs. (V1/R93-100)

Mr. Insko filed a timely notice of appeal and the case proceeding in the Second District under appeal number 2D03-1490. On August 27, 2004, the Second District Court reversed and remanded the cause for a new trial. The Second District held Williams rule evidence could not be used against Mr. Insko. The Mandate was issued on November 23, 2004.

On remand, the instant case came before the Honorable Barbara Fleischer, Circuit Judge. A hearing was held before the Honorable Barbara Fleischer, Circuit Judge, on February 14, 2005. (V2/R174-220) At the hearing before a retrial, defense counsel argued that Mr. Insko could not be convicted of lewd and lascivious conduct (solicitation) by a person under the age of 18 upon a person under the age of 16 because Mr. Insko was absolutely older than 18 at the time of the criminal incident. (V1/R179) The State argued the age requirement is not an element of the offense, but rather a

necessity for punishment purposes only. The defense argued Mr. Insko was convicted by a jury of the specific crime of lewd and lascivious conduct (solicitation) by a person under the age of 18 upon a person under the age of 16. The trial court ruled Mr. Insko could be tried again but with the age requirement completely "left out" of the trial and if convicted, only be sentenced under third degree felony restrictions. The parties stipulated this issue was dispositive. Mr. Insko's birth certificate was entered into evidence. (V2/R174-220)

On February 14, 2005, Mr. Insko pled no contest to the charge of lewd and lascivious conduct (solicit) by a person under 18 upon a person under 16, in violation of section 800.04(6)(c), Florida Statutes (2001). Mr. Insko specifically pled reserving his right to appeal the dispositive ruling argued at length on that date. (V1/R153-155; V2/R210-217) The Honorable Barbara Fleischer, Circuit Judge, sentenced Mr. Insko to 3.2 years state prison with credit for time served. (V1/R159-165)

A timely notice of appeal was filed on March 2, 2005. (V1/R167)

On July 14, 2006, the Second District Court of Appeal affirmed the lower court's ruling. In its opinion, the Second District did certify a this question of great public importance:

IN LIGHT OF THE RULING IN GLOVER V. STATE, 863 So. 2d 236 (Fla. 2003), IS THE AGE OF THE OFFENDER AN ELEMENT OF THE OFFENSE OF LEWD OR LASCIVIOUS CONDUCT UNDER SECTION 800.04(6), FLORIDA STATUTES?

A Notice to Invoke Discretionary Jurisdiction was filed on August 11, 2006, and this Court accepted jurisdiction on September 13, 2006.

## SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. Insko's motion for discharge by ruling that age is not an element in lewd and lascivious conduct. The jury convicted Mr. Insko of a lesser-included offense, making this an acquittal of the charged offense. Double jeopardy principles preclude the State from retrying Mr. Insko on the original offense. The Second District relied on Desbonnes v. State, 846 So. 2d 565 (Fla. 4th DCA 2003), which held age was not an element in the lewd and lascivious statute, but rather necessary for punishment purposes only. In Desbonnes, the Fourth District likened the lewd and lascivious statute to the sexual battery statute, and relied on Jesus v. State, 565 So. 2d 1361 (Fla. 4th DCA 1990) as precedent for the proposition that age was not an element of the offense. However, this Court, in Glover v. State, 863 So. 2d 236 (Fla. 2003) overruled Jesus v. State, specifically finding that age was an element in sexual battery cases. Because the instant case is analogous to Glover, the trial court erred in ruling age was not an element of Mr. Insko's lewd and lascivious conduct charge.

## ARGUMENT

### ISSUE I

IN LIGHT OF THE RULING IN GLOVER V. STATE, 863 So. 2d 236 (Fla. 2003), IS THE AGE OF THE OFFENDER AN ELEMENT OF THE OFFENSE OF LEWD OR LASCIVIOUS CONDUCT UNDER SECTION 800.04(6), FLORIDA STATUTES?

The issue presents a question of law, which is subject to a de novo standard of review. Mansfield v. State, 911 So. 2d 1160 (Fla. 2005).

The trial court erred in its ruling that the age requirement of section 800.04(6)(a)(2) and (c), Florida Statutes (2001) was not an element of the offense. The case presents unique facts since Mr. Insko was originally charged with violating section 800.04(6)(a)(2) and (b), Florida Statutes (2001) (Lewd and lascivious conduct (solicitation) by a person older than 18 years of age upon a person under 18 years of age. However, at trial, a jury convicted Mr. Insko of lewd and lascivious conduct by a person under 18 years of age upon a person under 16 years of age, in violation of section 800.04(6)(a)(2) and (c), Florida Statutes (2001). This is a third-degree felony. §800.04(6)(c), Fla. Stat. (2001). After the Second District Court of Appeal reversed his conviction and remanded for a new trial, this is the charge Mr. Insko was set to go to trial on.

Section 800.04(6), Florida Statutes (2001) states:

(a)A person who:

1. Intentionally touches a person under 16 years of age in a lewd or lascivious manner; or
2. Solicits a person under 16 years of age to commit a lewd or lascivious act
commits lewd or lascivious conduct.

(b) An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree, punishable as provided in s. 775.082, s775.083, or s. 775.084

(c) An offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree, punishable as provided in s. 775.082, s775.083, or s. 775.084.

Mr. Insko faced retrial under section 800.04(6)(a)(2) and (c), Florida Statutes (2001), a third-degree felony. Mr. Insko had specifically been acquitted of lewd and lascivious conduct (solicitation) of a person under 16 years of age by a person over 18 years of age, a second-degree felony. Mr. Insko moved for discharge, when, upon entering his birth certificate into evidence, it was impossible for the State to prove he was under age 18 when the crime occurred. The trial court erred in ruling the age of the perpetrator was not an element of the offense. A thorough reading of the statute evidences that it is an element. A jury must decide age, as the jury instructions at the original trial did specify, otherwise it is unclear which crime had been committed, as well as which subsection of the statute is appropriate for sentencing purposes.

The trial court's solution of proceeding with the trial but "leaving the age out" of the trial is improper and

violates double jeopardy. Specifically, the trial court proposed the State prove only two elements of the crime, and then, if the jury convicted Mr. Insko, the trial court would only sentence him based on the third-degree felony (under 18) limitation, plus any applicable enhancements. Essentially, the State wanted to fool the jury into convicting Mr. Insko of a "blanket" crime of lewd and lascivious solicitation, when in reality they were trying to convict him of the original crime for which he had already been acquitted. Double jeopardy precludes the State from retrying Mr. Insko by proving only two elements: 1) that the victim was under age 16 and 2) Mr. Insko solicited the victim to commit a lewd or lascivious act. This violates both the Federal and Florida Constitution Double Jeopardy Clauses which protect individuals against a subsequent prosecution for the same offense after acquittal. The jury specifically convicted Mr. Insko of the lesser crime. It is evident upon reading the statute that the crime of lewd and lascivious solicitation by a person over 18 years of age upon a person under 16 years of age is a <u>different crime</u> than the crime of lewd an lascivious solicitation by a person under 18 years of age upon a person under 16 years of age. One major difference is the degree each felony holds.

Mr. Insko's original information specifically charged him with lewd and lascivious conduct (solicitation) by a person over 18 years of age upon a person under 18 years of age. The

verdict form included this crime, as well as the one the jury convicted Mr. Insko of committing. Now upon retrial and realizing the charge is one the State absolutely cannot prove, the State is willing to drop the age requirement in order to obtain an otherwise impossible conviction.

This Court's decision in Glover v. State, 863 So. 2d 236 (Fla. 2003) supports the proposition that age is an element of the crime. Glover dealt with the sexual battery statute section 794.011. Section 794.011(2) provides:

> (a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony…
>
> (b) A person less than 18 years of age who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a life felony…

Glover argued his conviction for capital sexual battery was invalid because the trial court did not instruct the jury that the age of Glover was an element of the crime. Had the jury found Mr. Glover was under 18 years old at the time of the incident, Mr. Glover could be convicted of no greater a crime than sexual battery carrying a life felony, not capital sexual battery. This Court held age was an element of the crime and stated:

> Indeed, it seems that if the age of the victim (under twelve) is an element of the offense (and this is recognized by the

> Standard Jury Instruction on sexual battery of a victim under twelve which was given by the court in the instant case), then the age of the defendant, set out in the same section of the statutes creating the offense, should also be.

Id. It is important to note this Court's decision in Glover was consistent with the Fifth District's holding in D'Ambrosio v. State, 736 So. 2d 44 (Fla. 5th DCA 1999), and the Third District's holding in Baker v. State, 604 So. 2d 1239 (Fla. 3d DCA 1992), which both state that age is an element in sexual battery offenses.

More importantly, in Glover, this Court specifically overruled the Fourth District's holding in Jesus v. State, 565 So. 2d 1361 (Fla. 4th DCA 1990), wherein the Fourth District found age not to be an element of sexual battery. Later, in Desbonnes v. State, 846 So. 2d 565 (Fla. 4th DCA 2003), the Fourth District held age not to be an element in the crime of lewd and lascivious molestation. In doing so, the Fourth District relied on Jesus v. State, 565 So. 2d 1361 (Fla. 4th DCA 1990), because it found the structure and the language of the sexual battery statute in Jesus to be "compellingly analogous to section 800.04(5) governing lewd and lascivious molestation". Desbonnes, 846 So. 2d 565 at 566. The Fourth District also found the structure and language of the sexual battery statute and lewd and lascivious molestation statute to be "virtually identical". Id. While the Fourth District was

correct in its comparison of the sexual battery statute 794.011 and the lewd and lascivious molestation found in 800.04, the Fourth District reached the wrong result.

In order to support its argument that age is not a requirement of the lewd and lascivious statute at issue, the trial court in the instant case relied on Desbonnes. In affirming, the Second District also relied on this Desbonnes in order to rule Mr. Insko's age was important only for punishment purposes and was not an element of his offense. The Second District acknowledged Mr. Insko's argument that Desbonnes has been implicitly quashed by Glover, but found "Glover is distinguishable in that it is dealing with a different statute and does not specifically address the holding in Desbonnes." Insko v. State, 933 So. 2d 679 (Fla. 2d DCA 2006).

The Fifth District recently addressed this issue in State v. D.A., 31 Fla. L. Weekly D2422 (Fla. 5th DCA Sept. 22, 2006). In D.A., the State appealed an order dismissing the delinquency petition charging D.A. with lewd and lascivious molestation. Id. The trial court dismissed the petition pursuant to the speedy trial rule because the State amended the petition during the recapture period to correctly charge the juvenile under section 800.04(5)(d), Florida Statutes, which applies to a defendant under age 18. The State had originally charged D.A. under section 800.04(5)(c)(2), which

applies to a defendant over the age of 18. Id. The trial court ruled that age was an element of the offense, and therefore, this amendment to the petition charged a different, and new, crime. As such, under State v. Clifton, 905 So. 2d 172, 178 (Fla. 5th DCA 2005), the trial court was compelled to dismiss the amended petition because after expiration of speedy trial, upon proper motion, the court must dismiss any new charge arising from the same criminal episode as the one charged in the original information. State v. D.A., 31 Fla. L. Weekly D2422 (Fla. 5th DCA Sept. 22, 2006), citing State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001).

The Fifth District agreed with the trial court, specifically holding age is an element of the offense of lewd and lascivious molestation. Id. The Fifth District acknowledged it was relying on the precedent set by this Court in Glover. In its decision, the Fifth District addressed the instant case:

> Interestingly, the Second District recently elected to follow Desbonnes, holding that the age of the defendant is not an element of the charge of lewd or lascivious conduct. Insko v. State, 933 So. 2d 679 (Fla. 2d DCA 2006). The court reasoned that because Glover dealt only with the crime of sexual battery, it did not apply. Id. While we agree with the Second District's conclusion that under a 'plain reading' of the statute, the age of the defendant is probably more properly viewed as a sentencing consideration, and not an element of the offense, we do not believe that Glover can be distinguished. The very reason that the Fourth District applied its

> analysis and holding from Jesus in Desbonnes was that the two statutes are 'virtually identical.' This being true, we believe that we are compelled by Glover to conclude that the age of the defendant is also an element of the crime of lewd or lascivious molestation. Therefore, we certify conflict with Insko.

Id.

The Second District's decision in the instant case is based on Desbonnes, which blatantly relies on Jesus. Glover specifically overruled Jesus. The Second District erred in relying on Desbonnes when the instant case is more closely analogous to Glover and D.A.. As such, the Second District should have ruled age to be an element of the lewd and lascivious conduct (solicitation) by a person under 18 years of age upon a person under 16 years of age.

The trial court erred in denying Mr. Inkso's motion for discharge since it was impossible for the State to prove he committed the crime while under age eighteen. Likewise, the Second District erred in holding age was not an element of the offense of lewd and lascivious molestation. Accordingly, the Appellant respectfully requests this Court reverse this cause and discharge him from his conviction.

## CONCLUSION

Based on the foregoing arguments and authorities, Mr. Insko respectfully requests this Court reverse this cause and discharge him from the conviction.

# APPENDIX

PAGE NO.

1. Second District’s Opinion July 14, 2006
A1-A10

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of November, 2006.

## CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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