

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>	
<u>STATEMENT OF THE CASE AND FACTS</u>	1	
<u>SUMMARY OF THE ARGUMENT</u>	3	
ARGUMENT	4	
<u>ISSUE I</u>		
BY HOLDING THAT PETITITONER WAS NOT ENTITLED TO SIMPLE BATTERY AS A LESSER-INCLUDED OFFENSE TO LEWD AND LASCIVIOUS BATTERY BECAUSE LACK OF CONSENT WAS NOT ALLEGED IN THE INFORMATION NOR TESTIFIED TO AT TRIAL, THE SECOND DISTRICT CONFLICTS WITH THE FOURTH AND FIFTH DISTRICTS WHICH HAVE HELD TO THE CONTRARY.....		4
<u>CONCLUSION</u>	6	
APPENDIX	7	
CERTIFICATE OF SERVICE	8	

TABLE OF CITATIONS

	<u>PAGE NO.</u>
<u>State Cases</u>	
<u>Biles v. State,</u> 700 So. 2d 166 (Fla. 4th DCA 1997	3, 5
<u>Jackson v. State,</u> 920 So. 2d 737 (Fla. 5th DCA 2006	3, 4, 5

STATEMENT OF THE CASE AND FACTS

Petitioner, SAYSINH KHIANTHALAT, was charged by the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, with 9 counts of lewd and lascivious battery occurring between February 12, 2003, and May 15, 2003, in violation of section 800.04(4), Florida Statutes (2002); one count of solicitation to commit perjury and one count of tampering with a witness. Mr. Khianthalat was found guilty of committing six counts of lewd and lascivious battery, the solicitation to commit perjury, and the tampering with a witness charges.

During the jury charge conference, Mr. Khianthalat asked the trial court to instruct the jury on simple battery as a less-included offense of lewd and lascivious battery. The State objected, because the amended information did not allege and the victim did not testify that Mr. Khianthalat touched her against her will. Mr. Khianthalat argued the lesser instruction was proper because the minor victim could not legally consent. The trial court refused to give the simple battery lesser-included instruction.

After Mr. Khianthalat was convicted, he was sentenced to a total of 45 years of prison. He timely filed a notice of appeal of this sentence; and on August 4, 2006, the Second

District Court of Appeal issued an opinion rejecting Mr. Khianthalat's issue on the request for simple battery as a lesser-included offense to the lewd and lascivious battery charges. In rejecting this issue, the Court noted that the Fifth District Court of Appeal supported Mr. Khianthalat's position in footnote 4 of Mr. Khianthalat's opinion. Mr. Khianthalat timely filed a notice to invoke this Court's jurisdiction based on express and direct conflict with a decision of another district court of appeal.

SUMMARY OF THE ARGUMENT

The Second District Court's opinion conflicts with two other District Court's of Appeals - the Fifth in the case of Jackson v. State, 920 So. 2d 737 (Fla. 5th DCA 2006); and the Fourth in the case of Biles v. State, 700 So. 2d 166 (Fla. 4th DCA 1997). While the Second District held that the information had to allege and the testimony had to show a lack of consent in the touching in order to be entitled to the lesser of simple battery in a lewd and lascivious battery charge, the Fourth and Fifth have held to the contrary.

ARGUMENT

ISSUE I

BY HOLDING THAT PETITITONER WAS NOT ENTITLED TO SIMPLE BATTERY AS A LESSER-INCLUDED OFFENSE TO LEWD AND LASCIVIOUS BATTERY BECAUSE LACK OF CONSENT WAS NOT ALLEGED IN THE INFORMATION NOR TESTIFIED TO AT TRIAL, THE SECOND DISTRICT CONFLICTS WITH THE FOURTH AND FIFTH DISTRICTS WHICH HAVE HELD TO THE CONTRARY.

In Mr. Khianthalat's opinion, the Second District held that he was not entitled to simple battery as a lesser included to lewd and lascivious battery, because lack of consent was not alleged in the information and the victim did not testify to a lack of consent. Mr. Khianthalat had asked for this lesser included of simple battery at trial, but the trial court refused to give it as a lesser. The Second District's decision in Mr. Khianthalat's case conflicts with decisions from the Fifth and Fourth District Court's of Appeals.

In Jackson's v. State, 920 So. 2d 737 (Fla. 5th DCA 2006), an opinion the Second District Court of Appeal's acknowledges in footnote 4 as supporting Mr. Khianthalat's position, the Fifth District held that the appellant was entitled to simple battery as a lesser of lewd and lascivious battery even though the information did not allege a lack of consent and the victim did not testify the act was against her will. Contrary to the Second District's position, the Fifth held that a child

of tender years is legally incapable of giving consent to sexual abuse; so the lack of consent is presumed by law which need not be alleged or proved. Id. at 738. The Court held Mr. Jackson "was entitled, upon request, to an instruction on battery as a lesser included offense of lewd and lascivious battery even though the overwhelming evidence favored the State's charge." Id. The Court reversed and remanded for a new trial on the lewd and lascivious battery charge.

In Biles v. State, 700 So. 2d 166 (Fla. 4th DCA 1997), the Fourth District also reversed for a new trial on a lewd and lascivious battery charge; because the trial court denied the appellant's request for battery as a lesser-included offense.

The information did not allege a lack of consent and the child did not say the touching was without consent, yet the Fourth found the trial court should have given the simple battery as a lesser to lewd and lascivious battery, "because the facts alleged in the information and the evidence presented satisfy the elements of that lesser included offense." Id. at 167.

CONCLUSION

Based on conflict between the Second District's opinion in Mr. Khianthalat's case and opinions from the Fifth and Fourth Districts, this Court should grant jurisdiction in this case based on express and direct conflict between district courts.

APPENDIX

PAGE NO.

District Court of Appeal Opinion issued August 4, 2006

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of October, 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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