

IN THE SUPREME COURT OF FLORIDA

JACKIE CORNELIUS WILLIAMS

Petitioner,

v.

Case No. SC06-0594

STATE OF FLORIDA,

Respondent.

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

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

The Information charging Petitioner reads in relevant part:

. . . State Attorney for the Twentieth Judicial Circuit of the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, prosecuting for the STATE OF FLORIDA, in the County of Collier under oath information makes that JACKIE CORNELIUS WILLIAMS,

Count(s)

1. On or about May 29, 2003 in Collier County, Florida, being eighteen years of age or older, did unlawfully commit a sexual battery upon [the victim], a person twelve years of age or older but less than sixteen without the consent of [the victim] by putting his penis inside of or in union with her vagina, and in the process thereof used or threatened to use a deadly weapon or used actual physical force likely to cause serious personal injury, contrary to Florida Statute 794.011(3).

(V1/R40).

The jury was instructed to find Petitioner guilty of Sexual Battery, they must find the following elements proven beyond a reasonable doubt:

1)[the victim] is 12 years of age or older;

2)Jackie Cornelius Williams committed an act upon the victim in which the sexual organ of the defendant penetrated or had union with the vagina of the victim.

3) In the process, Jackie Cornelius Williams

a) used or threatened to use a deadly weapon; or

b) used actual physical force likely to cause serious personal injury.

(V1/R78; V4/T250).

Similarly, the jury was instructed in order to find Petitioner guilty of Lewd and Lascivious Battery, they must find the following elements proven beyond a reasonable doubt:

1) [the victim] was 12 years of age or older, but less than 16 years of age, and

2) Jackie Cornelius Williams committed an act upon the victim in which the sexual organ or the defendant penetrated or had union with the vagina of the victim.

(V1/R81; V4/T253).

At trial, the victim testified Petitioner's sexual organ penetrated her vagina. (V3/T31-32). Moreover, the victim testified she was 15 at the time of the offense. (V3/T25) Furthermore, Petitioner admitted to having sexual intercourse with the victim, although contending it was consensual and claiming he did not know the victim was only 15 years old at the time. (V3/T119-20; 127-67; V4/T214-15, 221, 232).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in giving the Lewd and Lascivious Battery instruction because the Information contained all the essential elements of the offense, and the evidence adduced at trial supported the giving of the instruction.

Furthermore, double jeopardy is not implicated because Lewd and Lascivious Battery would be a permissive, not necessarily lesser-included offense of Sexual Battery with Force or Violence. Finally, the lesser offense of Lewd and Lascivious Battery is not greater in degree and punishment than Sexual Battery with Force or Violence, nor is it the same in degree or punishment as Sexual Battery with Force or Violence. Therefore, this Court should find that it is permissible for the trial court to list the lesser on the verdict form in an order that gives the court the discretion to impose a lesser penalty, even if that order also gives the trial court the discretion to impose an equal or greater penalty.

ARGUMENT

LEWD AND LASCIVIOUS BATTERY CAN BE A PERMISSIVE LESSER-INCLUDED
OFFENSE OF SEXUAL BATTERY WITH FORCE OR VIOLENCE WHERE THE
CHARGING DOCUMENT ALLEGES ALL THE ESSENTIAL ELEMENTS OF LEWD
AND LASCIVIOUS BATTERY AND THE EVIDENCE PRESENTED SUPPORTS THE
INSTRUCTION.

In 1999, the Legislature enacted the current version of § 800.04, which represents a significant departure from the previous versions of the statute. Prior to the 1999 amendment, § 800.04, Fla. Stat. read:

800.04 Lewd, lascivious, or indecent assault or act upon or in presence of child.--A person who:

(1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;

(2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;

(3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or

(4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,

without committing the crime of sexual battery, commits a felony of the second

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section. A mother's breastfeeding of her baby does not under any circumstance violate this section.

(Emphasis added).

Section 794.011(1)(h), Fla. Stat. (1998) defined the act of "sexual battery" as: "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." The statute then differentiates between the types of crimes constituting sexual battery and the respective punishments for each offense depending on the age of the victim, the relationship between the victim and the perpetrator, if any, and whether or not force or violence was used in the commission of the sexual battery. See, § 794.011(2)(a-b); (3); (4)(a-g); (5); (8)(a-c), Fla. Stat. (1998).

With regard to victims 12 years of age or older, the crime of sexual battery with force or violence was defined as: "A person who commits sexual battery upon a person 12 years of age or older, *without that person's consent*, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a

life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." § 794.011(3), Fla. Stat. (1998).

Similarly, the crime of sexual battery without force or violence was defined as: "A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." § 794.011(5), Fla. Stat. (1998).

Therefore, if a person committed an act within the definition of sexual battery, i.e. oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object, on a 15 year old that person committed the crime of Lewd, Lascivious, Or Indecent Assault Or Act Upon A Child, but not *crime* of Sexual Battery without regard to the issue of consent.

In enacting the current version of the statute, the Legislature sought to clarify the distinct types of sexual offense against children under the age of 16 and the punishments for each. Section 800.04 was significantly amended breaking down the former statute into four distinct crimes: Lewd or Lascivious Battery; Lewd or Lascivious Molestation; Lewd or

Lascivious Conduct; And, Lewd or Lascivious Exhibition. Additionally, with respect to Lewd and Lascivious Battery the amended statute specifically applies to victims "12 years of age or older but less than 16 years of age," rather than those "under the age of 16." The statute now reads:

4) LEWD OR LASCIVIOUS BATTERY.--A person who:

(a) Engages in sexual activity with a person 12 years of age or older but less than 16 years of age; or

(b) Encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity

commits lewd or lascivious battery, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) LEWD OR LASCIVIOUS MOLESTATION.--

(a) A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.

(b) An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c)1. An offender less than 18 years of age

who commits lewd or lascivious molestation against a victim less than 12 years of age; or

2. An offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age

commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) An offender less than 18 years of age who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(6) LEWD OR LASCIVIOUS CONDUCT.--

(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, s. 775.083, 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, s. 775.083, or s. 775.084.

(7) LEWD OR LASCIVIOUS EXHIBITION.--

(a) A person who:

1. Intentionally masturbates;
2. Intentionally exposes the genitals in a lewd or lascivious manner; or
3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity

in the presence of a victim who is less than 16 years of age, commits lewd or lascivious exhibition.

(b) An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The amendment also eliminated the language, "without committing the crime of sexual battery." Furthermore, although the cross reference to § 794.011(h) was deleted the definition of "sexual activity" tracks the language used in the definition of "sexual battery" in § 794.011(h), Fla. Stat. (1999).

In Welsh v. State, 850 So. 2d 467 (Fla. 2003), this Court held that under the pre-1999 version of the relevant statutes,

Lewd and Lascivious Conduct was not a permissive lesser-included offense of Sexual Battery on a Child under the age of 12, commonly referred to as Capital Sexual Battery. See, § § 794-011(2)(a); 800.04, Fla. Stat. (1997). In so holding, the Court noted § 800.04, defined Lewd and Lascivious Conduct as, knowingly committing any lewd or lascivious act in the presence of any child under the age of 16 years, "without committing the crime of sexual battery" In 1999, the statute was amended and eliminated the phrase without committing the crime of sexual battery. This Court specifically stated:

Section 800.04 was substantially amended in 1999. The statute both eliminates the cross reference to section 790.011(4) and the language "without committing the crime of sexual battery." We express no opinion as to the effect of these statutory changes on whether lewd and lascivious conduct is a necessary or permissive lesser included offense of capital sexual battery.

Welsh, 850 So. 2d at 471, n5. The Court further stated, "We make clear, however, that the holding regarding permissive lesser included offenses pertains only to the 1997 version of the applicable statutes." 850 So. 2d 471. Notably, the case at bar does not deal with Lewd and Lascivious Conduct as a lesser of Capital Sexual Battery (victim under the age of 12), but rather Lewd and Lascivious Battery as a permissive lesser-included offense of Sexual Battery with Violence (victim 12

years of age or older).

Permissive lesser-included offenses are those offenses that may or may not be lesser-included offenses of the charged offense depending on the nature of the pleadings and the evidence presented at trial. See, Wilcott v. State, 509 So. 2d 261, 262 (Fla. 1981). To determine whether an offense should be permissibly included within a greater offense, the court must examine the following two factors: 1) whether the information specifically alleges all the statutory elements of the lesser offense, and; 2) whether the evidenced presented at trial would support the lesser offense. Welsh v. State, 850 So. 2d 467, 470 (Fla. 2003), citing, Brown v. State, 206 So. 2d 377, 383 (Fla. 1968). Requested permissive lesser-included offense instructions must be given unless there is "a total lack of evidence of the lesser offense." Amado v. State, 585 So. 2d 282, 282 (Fla. 1991), quoting, In Re Use by Trial Courts of Standard Jury Instructions, 431 So. 2d 594, 597 (Fla. 1981).

The elements of Sexual Battery with a Deadly Weapon or Great Force involving a male perpetrator and a female victim are:

- 1) The victim is 12 years of age or older;
- 2) The defendant committed an act upon the victim in which the sexual organ of the defendant penetrated or had union with the vagina of the victim.
- 3) The act was committed without the consent

of the victim.

4) In the process, the defendant

a) used or threatened to use a deadly
weapon; or

b) used actual physical force likely to
cause serious personal injury.

§ 794.011(3), Fla. Stat. (2003); See also, Standard Criminal
Jury Inst. F.S. 794.011(3).

Similarly, the elements of Lewd and Lascivious Battery where
the victim is a female and the perpetrator is a male are:

1) The victim was 12 years of age or older,
but less than 16 years of age, and

2) The defendant committed an act upon the
victim in which the sexual organ of the
defendant penetrated or had union with the
vagina of the victim.

§ 800.04(4)(a), Fla. Stat. (2003); See also, Standard Crim. Jury
Inst. F.S. 800.04(4)(a).

Applying the permissive lesser-included offense factors in
this case reveals the trial court did not abuse its discretion
in instructing the jury as to Lewd and Lascivious Battery. The
Information alleged all the essential elements of Lewd and
Lascivious Battery. First, the Information alleged the victim
was 12 years of age or older, but less than 16 years of age.
Second, the Information alleged Petitioner's sexual organ

penetrated or had union with the vagina of the victim. Therefore, the essential elements of Lewd and Lascivious Battery were alleged in the charging document.

Further, the evidence adduced at trial supported the giving of the instruction. The victim testified Petitioner's sexual organ penetrated her vagina. (V3/T31-32). Moreover, the victim testified she was 15 at the time of the offense. (V3/T25) More importantly, Petitioner admitted to having sexual intercourse with the victim, although contending it was consensual and claiming he did not know the victim was only 15 years old at the time. (V3/T119-20; 127-67; V4/T214-15, 221, 232). Therefore, the giving of the Lewd and Lascivious Battery instruction was proper, and the Second District Court of Appeal properly affirmed Petitioner's conviction and sentence.

An Instruction On Lewd And Lascivious Battery As A Permissive Lesser Included Offense Of Sexual Battery With Force Or Violence Would Not Violate An Individual's Right To Be Free From Double Jeopardy.

Allowing Lewd and Lascivious Battery to be a permissive lesser-included offense of Sexual Battery with Violence would not implicate Double Jeopardy concerns. The Fifth Amendment to the United States Constitution states, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V. Similarly, the Florida Constitution's due process clause provides, "No person shall . .

. be twice put in jeopardy for the same offense." Fla. Const. § 9.

The standard for determining whether multiple convictions for offenses arising from a single criminal transaction violates Double Jeopardy is whether the Legislature "intended to authorize separate punishments" for the various crimes. Gordon v. State, 780 So. 2d 17, 19-20 (Fla. 2001), quoting, M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996). This standard is codified in § 775.021, Fla. Stat. (2004), which reads in relevant part:

(4) (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of

the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Where the charging document alleges Sexual Battery consisting of one act - penetration - along with the other elements of Lewd and Lascivious Battery - the age of the victim being 12 years of age or older but under 16 years of age - the state, or the defendant can seek a permissive lesser-included offense of Lewd and Lascivious Battery. No Double Jeopardy concerns would be implicated because the defendant could not be found guilty of both offenses.

The intent of the Legislature to make each lewd act a separate offense and independently punishable is clear from both § 775.021, and the significant overhaul of § 800.04. The 1999 Staff Analysis and Economic Impact Statement with respect to amending § 800.04 states: Lewd and Lascivious, or Indecent Assault or Act on a child under § 800.04 F.S, would be amended to provide definitions and to break down the offense to clearly indicate the *different types of criminal behavior* that would be prohibited under § 800.04." Staff Analysis and Economic Impact Statement, CS/SB 170 "Children's Protection Act of 1999", February 2, 1999. (emphasis added).

Although, as Petitioner states, this question is not

directly at issue in this case, the Second District Court of Appeal's decision in this case notes:

Issues concerning the 1999 amendments to section 800.04 seem to be arising with some frequency. See, e.g., *Robinson v. State*, 919 So. 2d 623, 31 Fla. L. Weekly D 245 (Fla. 2d DCA 2006) (holding that defendant could not be convicted of both sexual battery and lewd or lascivious battery based on the same conduct; the State argued that the 1999 amendments to section 800.04 permitted that result); *Gresham v. State*, 908 So. 2d 1114, 1115 (Fla. 1st DCA 2005) (discussing Welsh and the 1999 amendments to section 800.04 in the context of a requested jury instruction, but not reaching the issue because the defendant failed to preserve it). For this reason, we certify that our decision in this case passes on the following question of great public importance:

Williams v. State, 922 So. 2d 418, 422 (Fla. 2d DCA 2006).

The Second District Court of Appeal's parenthetical notation regarding Robinson v. State, 919 So. 2d 623 (Fla. 2d DCA 2006) stating that case held, "[a] defendant could not be convicted of both sexual battery and *lewd or lascivious battery* based on the same conduct; the State argued that the 1999 amendments to section 800.04 permitted that result," (emphasis added), either is simply a misstatement or an example of the district courts' misreading of the amended § 800.04.

In Robinson, the defendant was charged with Sexual Battery and Lewd and Lascivious *Molestation*. The Robinson opinion does

not recite the language of the charging document, but does state:

The victim, who was thirteen years old at the time of the crime, testified that the only sexual act Robinson perpetrated was a digital penetration of her vagina. *She did not describe any fondling or other sexual activity.* For example, when asked "how [Robinson] used his hand under your shorts," she replied that he "put them in my vagina." When the prosecutor asked the victim "whether [Robinson's fingers] went just on the inside or the outside," she answered "the inside."

919 So. 2d at 623. (emphasis added).

The court then goes on to speak of the offenses in the general term "lewd and lascivious conduct," and cites a number of cases, including this Court's holding in State v. Hightower, 509 So. 2d 1078 (Fla. 1987), for the proposition that Double Jeopardy prohibits convictions for both Sexual Battery and Lewd and Lascivious Molestation.

While the result might be correct in Robinson, the rationale is not.¹ Double Jeopardy would not bar a conviction for both

¹ Assuming the evidence with regard to the molestation charge was solely the testimony of the victim that the only touching involved was the defendant's fingers penetrating her vagina, there would be insufficient evidence to support the charge of Lewd and Lascivious Molestation. If there was evidence

Sexual Battery and Lewd and Lascivious Molestation if the molestation charge alleged touching of the genitals other than that necessary to accomplish penetration, and the state presented evidence of such touching. Furthermore, if there was evidence presented of lewd touching of the breast, buttocks, or genital area or clothing covering them, an independent charge and conviction for Lewd and Lascivious Molestation would not be barred by Double Jeopardy.

Similarly, the result in Johnson v. State, 913 So. 2d 1291 (Fla. 2d DCA 2005) may be correct under the facts of that case, but the blanket assertion Double Jeopardy prohibits convictions for both Sexual Battery on a Child Under 12 and Lewd and Lascivious Molestation is incorrect. There, the defendant pleaded no contest to, and was convicted of both Sexual Battery of a Child under 12 and Lewd and Lascivious Molestation. He appealed alleging the dual convictions violated Double Jeopardy. The state did not address the Double Jeopardy issue because it conceded that there was an insufficient factual basis to support the Lewd and Lascivious Molestation conviction. In reciting the factual basis, the state merely alleged Johnson "committed a

presented of touching the genital area sufficiently distinct from that necessary to accomplish penetration a conviction for Lewd and Lascivious Molestation could stand.

sexual battery by putting his penis inside the vagina of the nine-year-old victim." No other acts were alleged.

This Court has recently addressed the Double Jeopardy issue with regard to the amended version of § 800.04. In State v. Paul, SC05-656 (June 22, 2006) this Court reviewed the Fourth District Court of Appeal's decision which held there was "no legislative authorization for 'separate convictions and sentences for each of the cumulative acts occurring in the course of one continuous and almost simultaneous act of lewd and lascivious activity on a minor, particularly where each lesser act leads up to the most serious of the charges.'" Quoting, Paul v. State, 912 So. 2d 8, 11 (Fla. 4th DCA 2005).

Paul was convicted of four of the six crimes for which he was charged. The jury found Paul (1) intentionally touched the victim's genital area or the clothing covering it, contrary to section 800.04(5), Florida Statutes (1999); (2) intentionally touched the victim in a lewd or lascivious manner by kissing the victim's neck, contrary to section 800.04(6), Florida Statutes (1999); (3) intentionally touched the victim in a lewd or lascivious manner by rubbing his penis on the victim's stomach area, contrary to section 800.04(6), Florida Statutes (1999); and (4) intentionally exposed his genitals in a lewd or lascivious manner in the presence of the victim, contrary to

section 800.04(7), Florida Statutes (1999).

The offenses occurred in two different rooms of the victim's house. Paul rubbed the victim's genital area over his clothing and kissed the victim's neck in the living room. Paul and the victim then went into an empty bedroom of the house where Paul touched the victim's penis underneath his clothing; exposed his own penis; and rubbed it on the victim's stomach until he (Paul) ejaculated.

The district court found that the events were two distinct crimes because they were spatially and temporarily separated by the act of taking the victim from one room of the house to another. The district court also held, though, that the offenses that occurred in each room were a series of lesser acts leading up to the most serious of the charges. Therefore, Paul's Double Jeopardy protection was violated by the multiple convictions for each act. Paul, 912 So. 2d at 11. The Fourth District Court of Appeal certified conflict with the Fifth District Court of Appeal's decision in Hunsicker v. State, 881 So. 2d 1166 (Fla. 5th DCA 2004), which held that because of the new statutory scheme of § 800.04 convictions for Lewd or Lascivious Molestation, Lewd and Lascivious Conduct, and Lewd and Lascivious Exhibition do not violate Double Jeopardy.

Initially, this Court noted that the Double Jeopardy Clause

consists of three separate constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Quoting, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072 (1969), overruled on other grounds by, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

This Court then employed the Blockburger² test as codified in § 775.021, Fla. Stat. (2005) to determine whether the multiple convictions violated Paul's right to be free from being twice placed in jeopardy.³ In applying the test to the convictions for Lewd and Lascivious Conduct (kissing the victim's neck) and Lewd and Lascivious Molestation (touching the

² Blockburger v. United States, 284 U.S. 299 (1932).

³ Respondent respectfully disagrees with this Court's finding that there is no clear statement of Legislature's intent to create separate offense for each of the acts committed. The separation of the previous version of § 800.04 into four distinct crimes clearly indicates the Legislature's intent to create separate offenses that can be punished independent of one another. It is unclear whether this Court had the benefit of the Staff Analysis and Economic Impact Statement the makes explicit the Legislature's intent to criminalize each act committed.

victim's genitals over his clothing) occurring in the living room, this Court found there was a Double Jeopardy violation because while Lewd and Lascivious Molestation has an element that Lewd and Lascivious Conduct does not, Lewd and Lascivious Conduct does not have an element that Lewd and Lascivious Molestation does not. This Court stated,

In other words, any violation of subsection (5)(a), which prohibits the lewd touching of particular body parts of a person under sixteen years of age, will also violate subsection (6)(a), which simply prohibits any lewd touching of a person under sixteen years of age. Thus, one cannot say "each offense has an element that the other does not." While subsection (5)(a) has an element that subsection (6)(a) does not, the converse is not true-that (6)(a)(1) has an element (5)(a) does not. Therefore, dual convictions and punishments are not permitted for these violations.

State v. Paul, SC05-656 (Fla. 2006).

The Court then went on to analyze the acts that were committed in the bedroom - Lewd and Lascivious Conduct (Paul's exposure of his penis), and Lewd and Lascivious Molestation (Paul rubbing his penis on the victim's stomach). Under the same elements test, this Court found that each offense requires elements the other does not. Finally, the Court applied the last exception in § 775.021, which applies to "offenses which are lesser offenses the statutory elements of which are subsumed

by the greater offense." The Court held:

As this Court recently stressed in [State v. Florida, 894 So. 2d 941, 947 (Fla. 2005)], "subsection (4)(b)(3) applies only to necessarily lesser included offenses," which have been defined as "those [offenses] in which the elements of the lesser offense are always subsumed within the greater, without regard to the charging document or evidence at trial." Id. In this case, lewd or lascivious conduct does not necessarily include lewd or lascivious exhibition. The only reason why the two were charged based on the one act in the bedroom is because Paul conducted the prohibited touching with his genitals, therefore also exposing his genitals in the process of touching the victim. However, if he had simply touched the victim's stomach in a lewd manner with any other portion of his body, he would have only violated 800.04(6). Because the determination regarding a necessarily lesser included offense is confined to the statutory elements of the crime and does not consider the evidence at trial, double jeopardy is not violated by these two convictions.

The state's argument before this Court is that Lewd and Lascivious Battery is a permissive lesser-included offense, not a necessarily lesser-included offense. Therefore, Double Jeopardy principles are not affected. In comparing the statutory elements of both offenses, it becomes apparent they are not necessarily lesser-included offenses. The most obvious difference in the elements of the two offenses is the elements of age and consent. Lewd and Lascivious Battery is a lesser included offense of Sexual Battery only where the charging

document and the evidence show that the victim is over the age of 12, but less than the age of 16. Likewise, where the charging document might allege lack of consent, the permissive lesser-included offense of Lewd and Lascivious Battery is appropriate where the evidence is conflicting with regard to the issue of consent.

It Is Permissible For The Trial Court To List The Lesser On The Verdict Form In An Order That Gives The Court The Discretion To Impose A Lesser Penalty, Even If That Order Also Gives The Trial Court The Discretion To Impose An Equal Or Greater Penalty

In addressing Petitioner's argument the jury was misled with regard to the descending order of the lesser-included offenses, the state would call this Court's attention to the following issues. First, Petitioner did not object to the order in which the lesser were instructed. Therefore, this alleged error was not preserved and must be shown to be fundamental. Further, Petitioner fails to point out how he was prejudiced by this alleged error. The jury was given the option, and apparently seized it, to exercise it so-called "pardon power" by finding him guilty of the lesser offense of Lewd and Lascivious Battery, a second degree felony, as opposed to Sexual Battery with Force or Violence, a life felony. Because the degree of offense and the available punishment for both Lewd and Lascivious Battery and Sexual Battery without Force or Violence are the same, (level eight second degree felonies) Petitioner was

not prejudiced. Finally, in Sanders v. State, 912 So. 2d 1286 (Fla. 2d DCA 2005), rev. granted, 919 So. 2d 436 (Fla. 2006)(pending before this Court in case number SC05-2115) the Second District Court of Appeal addressed a similar issue with regard to the order in which lesser-included offenses are listed in jury instructions and verdict forms. The court stated:

We conclude that the offenses listed on the verdict form were all appropriate lesser offenses of the main charge and that the order in which they were listed was also appropriate. This is not a situation like Franklin⁴ in which a "lesser" offense was actually greater in degree and punishment than the offense that immediately preceded it on the verdict form, and the same both in degree and punishment than the main offense charged. Especially in the absence of any objection, we conclude that it is permissible for the trial court to place lesser offenses on the verdict form in an order that generally gives the trial court the *discretion to impose a lesser penalty*, even if that order also gives the trial court the *discretion to impose an equal or greater penalty*.

Sanders, 912 So. 2d at 1289 (emphasis added).

Likewise, here, the lesser offense of Lewd and Lascivious Battery is not greater in degree and punishment than Sexual Battery with Force or Violence, nor is it the same in degree or

⁴ Franklin v. State, 877 So. 2d 19 (Fla. 4th DCA 2004).

punishment as Sexual Battery with Force or Violence. Therefore, this Court should find that it is permissible for the trial court to list the lesser on the verdict form in an order that gives the court the discretion to impose a lesser penalty, even if that order also gives the trial court the discretion to impose an equal or greater penalty.

Based on the foregoing, this Court should affirm Petitioner's conviction and sentence for Lewd and Lascivious Battery because the jury was properly instructed that under the facts of this case Lewd and Lascivious Battery is a permissive lesser-included offense of Sexual Battery with Force or Violence.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to DEBORAH K. BRUECKHEIMER, Assistant Public Defender, Office of the Public Defender, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831 this ____ day of July, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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