IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD COOPER, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC09-1169

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

ANSWER BRIEF OF RESPONDENT
MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Statement of Facts presented by Petitioner for purposes of this appeal, with the following additions, corrections and/or clarifications, or as otherwise argued herein:

On August 25, 2006, the State of Florida charged Petitioner with six counts of sexual abuse of his son. (V1/R46). The information alleged:

On or between January 29, 2002, and January 28, 2005:

COUNT ONE: Petitioner intentionally touched the victim in a lewd and lascivious manner in the genitals, genital area, the buttocks or the clothes covering them.

COUNT TWO: Petitioner forced or enticed the victim to touch in a lewd and lascivious manner Petitioner's genitals, genital area, buttocks or clothing covering them.

COUNT THREE: Petitioner unlawfully engaged in an act which constitutes sexual battery with the victim while Petitioner was in a position of familial or custodial authority over the victim by penetrating or uniting the sexual organ of the victim with the anus of Petitioner.

On or between January 29, 2002, and July 17, 2006:

COUNT FOUR: Petitioner engaged in an act which constitutes sexual battery with the victim while Petitioner was in a position of familial or custodial authority over the victim by

penetrating the mouth of the victim with the sexual organ of Petitioner.

COUNT FIVE: Petitioner engaged in an act which constitutes sexual battery with the victim while Petitioner was in a position of familial or custodial authority over the victim by penetrating or uniting the mouth of Petitioner with the sexual organ of the victim.

COUNT SIX: Petitioner engaged in an act which constitutes sexual battery with the victim while Petitioner was in a position of familial or custodial authority over the victim by penetrating or uniting the sexual organ of Petitioner with the anus of the victim.

One and a half years later, on February 6, 2008, Petitioner's trial commenced. After the jury was impaneled and sworn Petitioner filed a motion in limine in open court. (V1/R77). The motion requested that the court prohibit the state from eliciting testimony or presenting evidence that the Petitioner committed more than one act for each offense charged. (V1/R77). The motion argued because the information charged Petitioner with "an act" for each count the state was limited to evidence of only one act during the three year period alleged. (V1/R77). Petitioner argued any other acts were collateral bad acts and the state did not comply with § 90.404(2)(c), Fla. Stat. requiring the state to provide written notice no less than

10 days before trial of any collateral bad acts the state seeks to introduce. (V1/R78).

The following arguments were heard on the motion:

> MR. DIMMIG: Your Honor, it is axiomatic in criminal law that a single crime is charged in each count of an information. In this case, the state has filed a seven count information, the seventh count now having been nol prossed. So there is before this court a six count information. Counts 1 and 2 each allege one crime of lewd molestation. Counts 2 C I'm sorry Counts 3, 4, 5, and 6 each allege one crime of child sexual battery, in effect, for want of a better engaging a child in a sexual act. Each count alleges a broad period of time over which that particular act could have been committed. Through discovery, the defense knows that the victim in this case speaks about not just one act of each type of act or criminal sexual activity that is alleged in the six counts, but multiple counts of each of those types of sexual activity. Florida Rule - Florida Statute, rather, 90.404 provides, specifically as it relates to crimes of this nature, that if the state wishes to introduce evidence of crimes of sexual molestation not specified or not charged in the charging document, they must file, at least ten days prior to the trial, a notice of intent to rely upon that particular evidence. In this case, the state has filed no such notice. Therefore, the state is authorized and permitted, and we concede, that they are entitled to present evidence of one act of the type of sexual misconduct alleged in Count 1, one act of sexual misconduct as alleged in Count 2, and so forth. One act of the kind alleged in three, one act of the kind alleged in four, one act of the kind alleged in five, and one act of the kind alleged in six. They are not permitted, under because of their failure to comply with 90.404, to introduce evidence of

an ongoing pattern or history or multiple incidents of each of those particular acts. So the motion in limine addresses that and asks the court to enter its order directing that the state, in its opening statement and in its presentation of evidence, limit itself to discussion and evidence relating to the single act that is charged in each of the six counts of the information.

THE COURT: Ms. McGraw.

MS. McGRAW: Yes, sir. It's certainly true that the state could have filed an information or amended the information charging him with a count for each act that he committed up to, you know, say, for example, ten counts of lewd molestation, ten counts of the sexual acts with a child. But to the defendant's benefit, we did not do that. We chose to be more conservative in our charging. While we were in recess, I did contact my office, and they are unaware of anything that provides that if the state charges something with a range of a date, as we have here over a three year period, that prohibits us from presenting evidence that it occurred more than once. The fact that it is over a range of dates somewhat implies that it could have occurred more than once. Since and the information itself doesn't state he did it once. There's nothing in the information that says, on one occasion only, he touched in a lewd and lascivious manner, anything of that. And since there is nothing that I personally am aware of or that my supervisor that I spoke with is aware of that prohibits us from introducing such information, we should be allowed to.

As far as 90.404, that's, I believe, a Williams Rule, and that is other crimes, other wrongs, other acts of child molestation. This isn't an other act. He's charged with, for example, in Count 1, touching the victim's genital area. If we wanted to introduce information that said he

> touched someone else's genital area or that he touched him in another part of his body that isn't charged, that would be Williams Rule. This is not. This is the same act that just occurred over a long period of time.
>
> THE COURT: Okay. And you're not introducing any Williams Rule testimony?
>
> MS. McGRAW: No, sir.
>
> MR. DIMMIG: Your Honor, if I may respond. I would disagree wholeheartedly with one representation that the information does not indicate that they are proceeding on a single act. Counts 3, 4, 5, and 6 use the word, did unlawfully engage in, quote, an act, singular. They specifically allege that they are charging one act, not a series of acts over a period of time, but one act.
>
> That language does not appear in Counts 1 and 2. But, again, it is axiomatic. It's a requirement of due process that the defendant be on notice as to what he's charged with. A count of an information charges a crime, not multiple crimes that may have occurred over the course of a period of time.
>
> It is Williams Rule evidence that when you attempt to introduce evidence of even similar acts Williams Rule requires that they be similar in some degree that they're not specifically alleged in the information. It is our position that they could have, and as they have conceded, charged multiple counts. That's why we couldn't bring this up before jeopardy attached. But they have charged one act in each count of the information, and their evidence and comment should be limited to that one act.

(V2/T188-94).

The court permitted the testimony. The victim testified

that late one night when he was 13-14 years old he was watching a pornographic movie in the living room of the house he shared with Petitioner - who is the victim's father, the victim's mother and sister. (V3/T217). The living room acted as the victim's bedroom as well. As the victim was watching the pornographic movie Petitioner came in the room. The victim tried to turn the movie off, but Petitioner told him "don't worry about it." (V3/T218). Petitioner asked the victim, "Do you want to try anything?" (V3/T219). The victim testified that he agreed to "try some stuff in the movie." (V3/T219). The victim testified that Petitioner's hand touched the victim's penis and the victim's hand touched the Petitioner's penis. (V3/T220).

When the victim was about to turn 14 he was again watching a pornographic movie and his father walked in. (V3/T221). They again engaged in sexual activity. This time Petitioner and the victim touched each other's penises, Petitioner's mouth touched the victim's penis, the victim's penis touched Petitioner's mouth and the victim's penis penetrated Petitioner's anus. (V3/T221-222).

The victim further testified that when he was 16 years old, and living at a different address, his father continued the abuse described above and also tried to penetrate the victim's anus with his penis. (V3/T224). The victim testified that

although Petitioner tired to put his penis in the victim's anus, the victim tightened up and Petitioner was unsuccessful. (V3/T224).

The victim testified that he did not tell the Department of Children and Families investigator about the abuse because he was afraid of what his father might do if he told. (V3/T227). The victim said he felt safer with the deputies at his house and so he told them what was happening. (V3/T230). The victim testified that he could not remember the exact dates upon which the abuse took place, but he had a good memory of the events themselves. (V3/T243).

Detective Beymer of the Polk County Sheriff's Office Special Victims Unit testified that he responded to a call regarding alleged sexual abuse. (V3/T246). He arrived at Petitioner's home and there were a number of people in the front yard. (V3/T248). After speaking with the deputy on the scene, Detective Beymer interviewed the victim. (V3/T249). After speaking to the victim, Detective Beymer approached Petitioner who was standing near some pine trees in the front yard of the property. (V3/T252). Detective Beymer told Petitioner what the allegations were and Petitioner agreed to speak to him. (V3/T253). Detective Beymer did not record this initial interview. (V3/T253). Detective Beymer told the jury that Petitioner said he had "monkeyed around with his son."

(V3/T255). When asked to explain what "monkeyed around" meant, Petitioner told Detective Beymer it meant Petitioner "jacked [the victim] off." (V3/T255). Petitioner also told Detective Beymer that the victim stuck his penis into Petitioner's anus, and they has sucked on each other's "dicks." (V3/T256).

Detective Beymer decided to conduct a taped interview. (V3/T257). In response to the prosecutor's questioning, Detective Beymer testified he did not promise Petitioner anything, nor did he threaten Petitioner into making a taped statement. (V3/T257). Petitioner was never told he was not free to leave nor was he handcuffed or restrained in anyway. (V3/T257). The taped interview took place in Petitioner's front yard. (V3/T257).

The taped interview was played for the jury. On it, Appellant confirms that he is in the front yard of his house, that he is not handcuffed or restrained, and that he is giving the statement of his own free will. (V3/T262). On the tape, Petitioner again admitted that he and his son mutually masturbated each other. (V3/T263). He also admitted he had oral sex with his son, both by putting his mouth on his son's penis and his son putting his mouth on Petitioner's penis. (V3/T264). Petitioner told Detective Beymer that his son had penetrated his anus with his penis and "one time he [the victim] ejaculated, and a couple other times, [the victim] just pulled

out and finished." (V3/T266-67).

Specific to count six, Petitioner's statement describes the alleged act as follows:

> Q. How about, did he ever ask you to put your penis in his butthole or –
>
> A. No.
>
> Q. Did you ever attempt to?
>
> A. Yeah. I put it like this, and one time when I went down like this, it just bumped him a little bit but –
>
> Q. Kind of like – when you say bumped him, would you mean – do you think the head of your penis touched his butthole, would you say, and you kind of jumped? Or tell how did that happen?
>
> A. No. The skin.
>
> Q. Oh. The skin? Okay.
>
> A. And some guys don't have it. They get clipped.
>
> Q. Gotcha.
>
> A. That's what I was. That's what my mom told me.

(T268).

On appeal, accepting the argument that evidence of more than one offense for each type of sexual act charged was other bad act evidence subject to the notice requirement of § 90.404(2)(c), the Second District Court of Appeal found error in the state's failure to comply with the statute's notice

requirement. Cooper v. State, 13 So.3d 147, 149 (Fla. 2d DCA 2009). Additionally, the court found that the information did provide Petitioner sufficient notice that he would be tried based on multiple instances of each type of abuse.

Although finding error, the district court then conducted a harmless error analysis. The court stated:

> As to whether the error of allowing the State to present evidence of extensive abuse *did or did not contribute to the verdict*, we note that if the case had been presented as six distinct acts as charged, the State's presentation would have necessarily been different. On the other hand, the jury heard a taped statement where Cooper admitted engaging in sexual acts with the victim. Because the taped statement is strong evidence of Cooper's guilt, *we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case*.

Id. (emphasis added).

Petitioner sought review in this Court alleging the Second District Court of Appeal misapplied the harmless error rule as set forth in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Lee, 531 So. 2d 133 (Fla. 1988), and Knowles v. State, 848 So.2d 1055 (Fla. 2003), and, thereby, was in conflict with those cases. This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

ISSUE I: The Second District Court of Appeal properly applied the standard in this case. This Court has stated that an examination of the admissible evidence is not only permitted, but required. Although the court did not use the words "beyond a reasonable doubt," the court applied the correct standard in stating the error "*did not affect the verdict* and was harmless in this case." Additionally, the Second District Court of Appeal recognized the correct standard as being whether the error "*did or did not contribute to the verdict* . . ."

Additionally, this case amplifies the erroneous conclusion of the Second District in Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008), rev. granted, SC08-1240 (Nov. 18, 2008), rev. dismissed, (July 2, 2009) and the problems it generates in charging and trying these "sensitive and difficult to define acts of sexual abuse." Although the Second District correctly applied the harmless error analysis in this case, this Court should find that, in fact, no error occurred.

ISSUE II: There is a reasonable inference that on at least one occasion of the several where Petitioner attempted to penetrate the victim's anus, there was, at a minimum, contact between Petitioner's sexual organ and the victim's anus. The jury could reasonable infer that there was contact or union between Petitioner's sexual organ and the victim's anus based on the

victim and Petitioner's description of events. Therefore, the court correctly denied the motion for judgment of acquittal on count six.

ARGUMENT

ISSUE I: THE DISTRICT COURT CORRECTLY APPLIED THE HARMLESS ERROR TEST RECOGNIZING THE STANDARD IS WHETHER THE ERROR "DID OR DID NOT CONTRIBUTE TO THE VERDICT" AND FINDING THE ERROR IN THIS CASE DID NOT HAVE ANY EFFECT ON THE VERDICT.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court set forth the standard for a harmless error analysis. This Court stated:

> The harmless error test, as set forth in *Chapman*[1] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

DiGuilio, 491 So.2d at 1135.

This Court reiterated the standard in State v. Lee, 531 So. 2d 133 (Fla. 1988), and Knowles v. State, 848 So.2d 1055 (Fla. 2003).

The Second District Court of Appeal properly applied the standard in this case. This Court has stated that an

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[1] Chapman v. California, 386 U.S. 18 (1967).

examination of the admissible evidence is not only permitted, but required. Furthermore, contrary to Petitioner's argument, the Second District Court of Appeal did not "omit the beyond a reasonable doubt standard . . . .". Rather, the district court held:

> As to whether the error of allowing the State to present evidence of extensive abuse *did or did not contribute to the verdict*, we note that if the case had been presented as six distinct acts as charged, the State's presentation would have necessarily been different. On the other hand, the jury heard a taped statement where Cooper admitted engaging in sexual acts with the victim. Because the taped statement is strong evidence of Cooper's guilt, *we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case*.

Cooper v. State, 13 So. 3d 147 (Fla. 2d DCA 2009).

Although the court did not use the words "beyond a reasonable doubt," the court applied the correct standard in stating the error "*did not affect the verdict* and was harmless in this case." Additionally, the Second District Court of Appeal recognized the correct standard as being whether the error "*did or did not contribute to the verdict* . . ."

This case is unlike Knowles in that the court did not reduce the state's burden by finding the verdict was not "substantially influenced" by the error. Rather, the court found the alleged error did not affect the jury's verdict *at all*.

As noted in Justice Canaday's dissent in Ventura v. State, (SC08-483, February 18, 2010), (Canaday, J. dissenting), the Supreme Court of the United States recognized that the harmless error analysis must be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Ventura, quoting, Arizona v. Fulminante, 499 U.S. 279, 308 (1991). Because an appellate court mentions particularly strong admissible evidence in reviewing for harmless error does not lead the conclusion that the wrong standard was utilized.

Importantly, the admissible evidence in this case included Petitioner's *confession* to the crimes alleged. Here, Petitioner admits he committed various sexual acts with his son and that admission was properly before the jury. The jury also heard the victim's testimony about the crimes. Under these circumstances, it would be unreasonable to determine that the supposed error in the wording of the charging document, or the failure to strictly comply with a procedural rule, would have contributed to the conviction. As will be discussed more fully, the district court, in conducting its harmless error analysis, identifies the error as one of admission of testimony itself. In actuality, the district court describes what are procedural errors.

In Ventura the prosecution commented on the defendant's right to remain silent. This Court, and others, has viewed

those types of errors as “high risk errors because there is a likelihood that meaningful comments will vitiate the right to a fair trial.” Comment on a defendant’s right to remain silent violates a fundamental constitutional right rather than an evidentiary principle. While the rules involving the sufficiency charging documents and the admissibility of other bad acts or crimes are based on due process concerns there is no evidence that due process was actually violated in this case.

There was never any argument in this case that the evidence was not relevant or that it was overly prejudicial. See § 90.404(a)(“Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue . . .”); § 90.404(b)(“. . .evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible . . .”) § 90.403 (“Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . “). The basis of the argument at trial and on appeal was two-fold. First, the information charged multiple offenses in one count and did not provide sufficient notice. Second, the state failed to comply with the notice requirements of 90.404(2)(c).

Citing its recent decision in Wightman, 982 So.2d 74, rev. granted, SC08-1240 (Nov. 18, 2008), rev. dismissed, (July 2, 2009) the Second District Court of Appeal agreed with Petitioner

and found that the information did not put Petitioner on "notice" of multiple instances of each type of abuse because it did not allege "ongoing sexual acts that occurred 'on more than one occasion'" or words of that sort. Further, the court found error in the state's failure to abide by the notice requirement of 90.404(2)(b),(c) regarding evidence of "other crimes, wrongs, or acts of child molestation."

Courts must view violations of rules of procedure and evidence in pari materia with the harmless error analysis. Richardson v. State, 246 So.2d 771, 774 (Fla. 1971). Evidentiary and procedural rules were "never intended to furnish a defendant with a procedural device to escape justice." Richardson, 246 So.2d at 774. In Richardson, this Court long ago determined that procedural errors should not vitiate a conviction unless the procedural error resulted in actual prejudice. The Court stated:

> . . . we hold that the violation of a rule of procedure prescribed by this Court does not call for a reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant. All of the four District Courts of Appeal have now so held and we now place our stamp of approval upon this principle. See Howard v. State, Fla.App., 239 So.2d 86; Wilson v. State, Fla.App., 220 So.2d 426, 427; Buttler v. State, Fla.App., 238 So.2d 313; Rhome v. State, Fla., 222 So.2d 431; Ramirez v. State, Fourth District Fla., 241 So.2d 744, Opinion filed October 14, 1970. This is

> particularly true in view of the purpose of the Florida Rules of Criminal Procedure. As stated in Rule 1.020 of the rules themselves: 'These rules are intended to provide for the first determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration.' Furthermore, the Rule in question must be considered by an appellate court in pari materia with the provisions of our harmless error statute, viz, F.S. 924.33, F.S.A. which provides that rulings or proceedings in criminal cases that are not prejudicial or harmful do not require reversal.

Richardson, 246 So.2d at 774.

Florida Rules of Criminal Procedure provide safeguards to protect criminal defendants' due process rights. Specific to this case Florida Rule of Criminal Procedure 3.140 provides protections from being tried on "vague, indistinct, and indefinite" charging documents. The rule states:

> (3) Time and Place. Each count of an indictment or information on which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged in the act or transaction or on 2 or more acts or transactions connected together, provided the court in which the indictment or information is filed has jurisdiction to try all of the offenses charged.
>
> (n) Statement of Particulars. The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to

> enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.
>
> (o) Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

In the two years that trial was pending, counsel never sought a statement of particulars in order to narrow down the time frame in which these supposed various "single" acts of abuse occurred nor did counsel otherwise challenge the information. Additionally, in those almost two years discovery was exchanged and deposition, including a deposition of the victim, were conducted. Defense counsel admitted he was aware of the other acts of abuse and that he waited until jeopardy had attached to file the motion in limine seeking exclusion of evidence regarding those acts arguing the state failed to comply

with the notice requirement of 90.404.

The specific issue of failure to strictly comply with § 90.404(2)(c)'s notice requirement was addressed in Barbee v. State, 630 So.2d 655 (Fla. 5th DCA 1994). There, the state did not give the defense notice of intent to use other bad act evidence until 9 days before trial. The defense admitted no prejudice had occurred as a result of the state's late notice, but on appeal argued noncompliance with the statute was fatal per se to the admissibility of the evidence. The Fifth District Court of Appeal held that the rationale in this Court's Richardson decision applied to § 90.404, which is, to the extent it has been adopted by this Court, procedural. Therefore, failure to strictly comply with the procedure does not automatically result in exclusion of the evidence absent a showing of prejudice or a finding of an actual due process violation. Barbee, 630 So.2d 655.

This case amplifies the erroneous conclusion of the Second District in Wightman and the problems it generates in charging and trying these "sensitive and difficult to define acts of sexual abuse." State v. Generazio, 691 So.2d 609, 611 (Fla. 4th DCA 1997).

Prior to the Wightman decision it was acceptable and common to charge multiple acts of sexual abuse that occur over a period of months or years in one representative count. If the period

of time alleged is lengthy “a defendant would be entitled to a hearing on the issue where counsel makes allegations in a proper motion that, if true, would support the existence of prejudice in preparing a defense attributable to the length of time stated in the charging instrument.” Dell'Orfano v. State, 616 So.2d 33, 36 (Fla. 1993).

This Court has routinely acknowleged that an information need not specify the exact date of the offense if such date is not known. Additionally, an information may allege a crime occurring between two dates. State v. Garcia, 511 So.2d 714, 716 (Fla. 2d DCA 1987)), citing, Lightbourne v. State, 438 So.2d 380 (Fla. 1983)) and Skipper v. State, 153 So. 2d 853 (Fla. 1934). Furthermore, the date a crime occurred is generally not an element of the offense that the state is required to prove beyond a reasonable doubt. See Perlman v. State, 269 So.2d 385, 388 (Fla. 4th DCA 1972))(a variance between the date pleaded and the date proved is no longer considered fatal to a conviction, at least where time is not an essential element of the crime);Wheeler v. State, 72 So.2d 364 (Fla. 1954))(while some date or time must generally be stated in the indictment upon which the offense was committed such time need not be stated accurately, except in those cases where the allegation of the precise time is material.”)

More specifically, this Court recognized that “young

children often are unable to remember the specific dates upon which they were abused." Dell'Orfano, 616 So.2d, 35. In doing so this Court noted the strong public policy of eliminating the sexual abuse of children through vigorous enforcement of child abuse laws. Id. Therefore, filing an information alleging a period of time within which the abuse occurred is proper although subject to a motion for statement of particulars, and, potentially, to a motion to dismiss. See Dell'Orfano, Dell'Orfano, 616 So.2d 33. Where the state, through the victim or otherwise, is able to specify distinct dates upon which the abuse occurred, it could then file an information charging multiple counts for each offense if it elected to do so. Where the state cannot so specify, ". . . common sense dictates that admitted wrongdoing should not be shielded from prosecution merely because the state is unable to provide greater specificity in an information or indictment.' Dell'Orfano, 616 So.2d at 35.

In this case, the Second District, citing Wightman and State v. Generazio, 691 So. 2d 609 (Fla. 4th DCA 1997), stated that the alleged defect in the information could have been cured by including the language "on more than one occasion." In Generazio, the Fourth District Court of Appeal held that the use of the phrase "on more than one occasion" was not per se duplicitous. The court recognized that, *generally*, the state is

not permitted to charge separate and distinct offenses in a single count. Generazio, 691 So.2d at 609, citing, Fountain v. State, 623 So.2d 572 (Fla. 1st DCA 1993). Nonetheless, the court also recognized that child sexual abuse cases present a unique challenge to prosecutors. The court stated:

> In Dell'Orfano[2], this court examined the approach taken by other state courts in resolving the problem of how to properly charge the offense of ongoing sexual abuse of a child. With the notable exception of New York, the courts of our sister states have recognized that child molestation is, by its very nature, a continuous course of criminality rather than a series of successive crimes. They have allowed the matter of how to charge these sensitive and difficult to define acts of sexual abuse to rest in the discretion of prosecutors. See, e.g., State v. Covington, 711 P.2d 1183 (Alaska 1985) (where a victim cannot differentiate between various incidents it is harmless error to allow the state to charge multiple offenses in a single count); Baine v. State, 604 So. 2d 258 (Miss. 1992) (acts of child molestation may be perpetrated in multiples, and may be charged as a continuous course of criminal conduct); State v. Little, 260 Mont. 460, 861 P.2d 154 (Mont. 1993) (where a continuing course of conduct is alleged, further specificy [sic] in the time of the occurrences is not required); State v. Altgilbers, 109 N.M. 453, 786 P.2d 680 (N.M. App. 1989), cert. denied, 785 P.2d 1038 (N.M.1990) (the charging pattern that best reconciles the community's interest in proper enforcement of the laws and the interest of the community and the defendant in fairness to the defendant may well be a charging pattern

[2] State v. Dell'Orfano, 651 So.2d 1213 (Fla. 4th DCA 1995).

> fitting between the two extremes of charging one count for the entire period of time or charging a count for every possible infraction); and State v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (Wash. 1984) (en banc) (whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion).

Generazio, 691 So.2d at 611.

There is nothing in Generazio that requires the state to use the phrase "on more than one occasion" or any other specific charging language. In fact, Generazio acknowledges it is within the state's discretion to charge these types of offenses in a manner that balances the community's interest in proper enforcement of the laws with providing the defendant a fair trial. "[A] charging pattern fitting between the two extremes of charging one count for the entire period of time or charging a count for every possible infraction" strikes the correct balance. See State v. Altgilbers, 109 N.M. 453, 786 P.2d 680 (N.M. App. 1989).

Wightman essentially establishes an "per se error" rule where the charging document does not contain the words "on more than one occasion" or the like even where no prejudice has been shown. Additionally, Wightman denies the state an opportunity to provide discovery, give a statement of particulars, or amend the charging instrument as otherwise allowed by law or rules of court. Dell'Orfano, 616 So.2d at 35. Moreover, this flaw is

compounded by Wightman's erroneous assumption that failure to comply with the notice requirement in 90.404(2)(c) - when actually applicable - results in the automatic exclusion of otherwise relevant evidence.

The affect of the Wightman decision on criminal case charging sexual abuse of children is significant. The Second District Court of Appeal has unintentionally created a "procedural loophole" for defendant's charged with child molestation. Relying on Wightman defendants charged with sexual abuse of children are encouraged to not utilize the rules of criminal procedure. Rather, Wightman encourages criminal defendants in child molestation cases to wait until jeopardy has attached to challenge the wording of the charging document. Even more unjustly, there is the potential for reversal of a conviction based on previously unchallenged wording of the charging document regardless of whether actual prejudice was established.

Furthermore, the Wightman decision creates an automatic rule of inadmissibility of otherwise relevant evidence due to a failure to abide by a procedural notice requirement even where a defendant has actual notice and his or her due process rights were not violated.

Sexual abuse of children because of its nature and the circumstance surrounding the commission of the offense often

occurs over months or years. By charging each type of sexual act in one representative count the state accepts the risk that acquittal on the representative count would likely bar subsequently prosecution on similar charges involving "the same defendant, and the same crimes against identical victims, and periods of time overlapping or subsumed within those periods included in the prior charging instrument." Dell'Orfano, 616 So.2d at 36.

In conclusion, the Second District Court of Appeal applied the correct harmless error test. Although, Respondent would urge this Court conclude that the decision in Wightman is incorrect and, in fact, no error occurred.

ISSUE II: THE TRIAL COURT DID NOT ERROR IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE WHETHER OR NOT PETITIONER'S PENIS UNITED WITH OR HAD CONTACT WITH THE VICTIM'S ANUS WAS A QUESTION OF FACT TO BE DETERMINED BY THE JURY.

A motion for judgment of acquittal should be denied unless the evidence, taken in the light most favorable to the state, is such that no view the jury may lawfully take of it can be sustained under the law. Boyd v. State, 910 So.2d 167, 180 (Fla. 2005). Additionally, in moving for a judgment of acquittal the defendant admits not only the facts adduced at trial, but every reasonable inference based on those facts that the jury could make in favor of the state. Washington v. State, 737 So.2d 1208, 1211 (Fla. 1st DCA 1999), citing, Lynch v. State, 293 So.2d 44, 45 (Fla. 1974).

> Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

Id.

Union, for purposes of the sexual battery alleged in count six, merely requires contact between Petitioner's sexual organ

and the victim's anus. See Stone v. State, 547 So.2d 657, 658 (Fla. 2d DCA 1989); Seagrave v. State, 802 So.2d 281, 287 (Fla. 2001), citing, Richards v. State, 738 So.2d 415, 418 (Fla. 2d DCA 1999). (the term "union" and the term "penetration" are used with some precision. Union permits a conviction based on contact with the relevant portion of anatomy, whereas penetration requires some entry into the relevant part, however slight.); Fla. Stat. Jury Inst. §11.6 *Sexual Battery Upon Child 12 Years Of Age Or Older But Under 18 Years Of Age By Person In Familial Or Custodial Authority*("'Union' means contact.")

The testimony regarding count six must be taken in context. Just prior to being asked whether Petitioner's penis penetrated the victim's "butt", the victim had described sexual acts where his penis would penetrate Petitioner's anus. (T224). The victim answer affirmatively when asked, "you say your penis touched your father's butt?" (T222). In response to another question the victim testified that his penis penetrated Petitioner's "butt." (T222). The victim seemed to be able to distinguish acts that constituted touching and those involving penetration. Additionally, the term "butt" was used when describing actual penetration; therefore, the jury could infer that the term "butt" was the equivalent of the term "anus."

Additionally, Petitioner's statement describes the act as follows:

> Q. How about, did he ever ask you to put your penis in his butthole or –
>
> A. No.
>
> Q. Did you ever attempt to?
>
> A. Yeah. I put it like this, and one time when I went down like this, it just bumped him a little bit but –
>
> Q. Kind of like – when you say bumped him, would you mean – do you think the head of your penis touched his butthole, would you say, and you kind of jumped? Or tell how did that happen?
>
> A. No. The skin.
>
> Q. Oh. The skin? Okay.
>
> A. And some guys don't have it. They get clipped.
>
> Q. Gotcha.
>
> A. That's what I was. That's what my mom told me.

(T268).

In context, while certainly not clear, it appears Petitioner was referring to the skin on his penis rather than the skin on the victim's butt as is argued by Petitioner. The offense requires that any part of Petitioner's "sexual organ" come in contact with the victim's anus. A fair interpretation of Petitioner's statement is that the skin on his penis touched the victim's "butthole." Because the state is entitled to any reasonable inference from the testimony, the court was correct

in not granting the judgment of acquittal and allowing the jury to resolve any factual disputes.

There is a reasonable inference that on at least one occasion of the several where Petitioner attempted to penetrate the victim’s anus, there was, at a minimum, contact between Petitioner’s sexual organ and the victim’s anus. The jury could reasonably infer that there was contact or union between Petitioner’s sexual organ and the victim’s anus based on the victim’s and Petitioner’s description of events. Therefore, the court correctly denied the motion for judgment of acquittal on this charge.

CONCLUSION

Appellee respectfully requests that Petitioner's convictions and sentences be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to WILLIAM SHARWELL, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831 this ___ day of February, 2010.

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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