IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD COOPER,	:	
Petitioner,	:	
vs.	:	Case No. SC09-1169
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

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Petitioner, James Richard Cooper, was charged by information with two counts of lewd and lascivious molestation contrary to Section 800.04, Florida Statutes (2001) and four counts of sexual battery by a person in familial custody contrary to Section 794.011, Florida Statutes (2001). The information alleged six different sexual acts against a single victim. (v1:R46-49)

Prior to the start of evidence a motion in limine was filed seeking to bar the prosecutor from eliciting any other evidence of crimes, wrongs, or acts of child molestation not charged in the information because the State had not given notice required by Section 90.404(2)(c), Florida Statutes. (v1:R77-79) Defense counsel stated that the six counts of the information each alleged commission of one specific type of act. Defense counsel said that through discovery he was aware that the alleged victim had spoken of multiple incidents of each type of sexual activity.(v2:T188-189) Defense counsel argued that because notice was not filed the prosecutor was not allowed to present other incidents of each type of sexual act. (v2:T189-190)

The prosecutor responded that during a recess she had contacted her office and “they are unaware of anything that provides if the state charges something with a range of a date, as we have year over a three-year period, that prohibits us from preventing evidence that it occurred more than once.” (v2:T191)

The judge deferred ruling on the motion until an objection. (v2:T193) Defense counsel was given a continuing objection after objections were made during opening statement. (v2:T201-202)

Petitioner was convicted as charged. (v1:R81-82) The Second District Court of Appeal found the admission of the uncharged acts without the required notice to be error but found the error harmless:

> This case is similar to Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008), review granted, No. SC08-1240 (Fla. Nov. 18, 2008), where we reversed for a new trial because the State did not justify the presentation of evidence of ongoing abuse. Wightman had been charged with two sexual acts, and the victim was permitted to testify to repeated molestation. Id. at 75-76.
>
> Here, as in Wightman, the information does not put the defendant on notice that he will be tried based on multiple instances of each type of sexual act. And, as in Wightman, no pretrial notice was filed under section 90.404(2)(c). In other words, the State could have justified the evidence offered in this case if it had either alleged in the information ongoing sexual acts that occurred "on one or more occasions," see Generazio, 691 So.2d at 611, or given Cooper notice ten days before trial of the State's intent to offer evidence of the other crimes, wrongs, or acts of child molestation, *see* § 90.404(2)(b), (c). But, as in Wightman, the State did neither of these things.
>
> 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 of its case 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. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Cooper v. State, 13 So. 3d 147, 149 (Fla. 2d DCA 2009)

A notice to invoke the discretionary jurisdiction of this Court was timely filed. On January 8, 2010, this Court accepted jurisdiction over this case.

STATEMENT OF THE FACTS

R.L.C. testified that his birthday was January 29, 1989. James Cooper was his biological father. (v3:T214-215) When R.L.C. was 13 he lived on Mount Tabor Road in Lakeland. He lived on Mount Tabor Road for three or four years with his mother, father, and two sisters. (v3:T216) The family moved to Farmette Road. (v3:T217)

R.L.C. said his father did things of a sexual nature to him. R.L.C. was 13 or 14 years old the first time. The first incident happened when he was living on Mount Tabor Road. R.L.C. slept in the living room. (v3:T217) His mother and sisters were sleeping in their rooms. R.L.C. got bored and started to watch a pornographic movie. James Cooper appeared. R.L.C. tried to turn the movie off. James Cooper said not to worry about it. (v3:T218) Mr. Cooper asked "do you want to try anything?" R.L.C. responded, "I guess." (v3:T218-219) R.L.C. said they tried things that were in the movie. (v3:T219)

R.L.C. said they tried oral sex. According to R.L.C., oral sex was when the hands touched the penises. (v3:T219-220) R.L.C.'s hand touched his father's penis. His father's hands touched R.L.C.'s penis. Mr. Cooper told R.L.C. not to tell anyone and left the room. (v3:T220) A second incident took place around the same time. R.L.C. was watching a pornographic movie. (v3:T220) He was about to be 14. They touched each other's penises with each other's hands. R.L.C.'s penis touched Mr. Cooper's butt.

(v3:T221-222) R.L.C. said his penis went inside of his father's butt. No other body parts touched during the second incident. (v3:T222)

R.L.C. was asked if the acts included other body parts touching other body parts. R.L.C. said there was mouth to penis touching. (v3:T222) R.L.C. said his mouth touched his father's penis. His father's mouth touched R.L.C.'s penis. There were no other acts until R.L.C. was about 16 years old. (v3:T223) The family had moved to the house on Farmette Road. (v3:T223-224) The conduct was about the same as before but without movies. There was hand to penis contact. There was mouth to penis contact. R.L.C.'s penis touched Mr. Cooper's butt. R.L.C. was asked if Mr. Cooper tried to penetrate R.L.C.'s butt. Mr. Cooper tried. R.L.C. said he tightened up so his father could not penetrate. (v3:T224)

The prosecutor asked if the acts happened on more than one occasion. R.L.C. asked her to rephrase the question. The prosecutor asked how often things would happen. R.L.C. said "maybe once a week, maybe every two weeks." The acts ended when R.L.C. was 17. The acts always happened when the rest of the family as was asleep, or away. (v3:T225) R.L.C. said his father initiated the acts. R.L.C. never initiated the acts. R.L.C. never asked his father to do anything to him. R.L.C. never asked to do anything to his father. R.L.C. was asked how many times in total incidents happened. R.L.C. said maybe 25 times. R.L.C. said each time they did all of the acts talked about. (v3:T226)

R.L.C. told a D.C.F. worker that his father had not done anything to hurt him. (v3:T226-227) The D.C.F. investigator parked outside the fence. The investigator spoke to Mr. Cooper. (v3:T237) R.L.C. stood outside the car next to the investigator. (v3:T238) The investigator told R.L.C. that he could be removed and put into protective custody. (v3:T238-239) R.L.C. told the D.C.F. investigator that nothing sexual happened with his father. (v3:T239) R.L.C. lied to the D.C.F. worker because he was afraid. (v3:T227)

R.L.C. was about 16 years old the first time he told his mother about what was happening. His mother and sisters lived in the house for most of the time. R.L.C.'s mother moved to Jacksonville before the police got involved. (v3:T228) R.L.C. continued to live with his father after his mother went to Jacksonville. No one else lived in the house. (v3:T229)

R.L.C. talked to his mother and Aunt Pat just before police got involved. The police arrived about thirty minutes later. His father, mother, uncle, and two sisters were home. R.L.C. talked to an investigator. R.L.C. told the investigator what was really going on. (v3:T229) R.L.C. said he felt safer because the police were there. (v3:T230)

The utilities were turned off at the house on Farmette Road when R.L.C.'s mother moved out because she stopped paying the bill. R.L.C.'s father got an ice cooler to keep food. (v3:T233) R.L.C.'s mother went to visit family in Jacksonville after the

power had been turned off. (v3:T233-234) D.C.F. came to R.L.C.'s house while his mother was in Jacksonville. (v3:T234)

R.L.C. agreed that he testified that he was sixteen the first time his father tried to penetrate him. (v3:T234) R.L.C. agreed that in a deposition he said his father attempted to penetrate him when he was 14. (v3:T235) R.L.C. agreed that he testified in deposition that his father attempted to penetrate him during each incident after the first two. (v3:T235-236) R.L.C. agreed he said in deposition his father tried to penetrate him every three or four days to a week from the time he was 13 or 14 to when police came out when he was 17. (v3:T236)

R.L.C. said his mother returned from Jacksonville on the morning that police came to the house. He told his mother and Aunt Pat what had taken place with his father. He said he had told them before about what was going on. (v3:T239) The police were called. (v3:T239-240) It was four days after the D.C.F. worker was at the house. (v3:T235)

R.L.C. said he told police there had been sexual activity with his father. R.L.C. went with his mother to her boyfriend's place after Mr. Cooper was arrested. There was electricity and water at the boyfriend's house. (v3:T240) Police came to see R.L.C. when he was in the foster shelter on August 3, 2006. (v3:T241)

R.L.C. recalled talking with police. R.L.C. did not recall speaking to a detective about why he stayed with his father after

his mother moved out. (v3:T241) R.L.C. did not “really recall” telling the detective that things would be bad and that he would not get things he wanted if he moved with his mother. (v3:T241-242) R.L.C. recalled saying that he learned living with his father meant it would be in a house with no money, water, power and full of fleas, but with his mother he had a nice place to stay with water and power so he could shower. (v3:T242)

Detective Andrew Beymer of the Lakeland Police Department was assigned to the Special Victims Unit. (v3:T246) Detective Beymer interviewed R.L.C. at a foster care facility after Mr. Cooper was arrested. R.L.C. said he did not move out with his mother because he didn’t think he would be able to get the same stuff as if he stayed with his father. (v3:T295) R.L.C. said he later learned that staying with his father meant no power, no water, and a room full of fleas. (v3:T296)

On July 30, 2006, Detective Beymer responded to a sexual battery investigation involving Mr. Cooper on Farmette Road on Lakeland. Beymer spoke to Deputy Sheriff Tomlin on arrival. (v3:T247) Several other people were at the scene. Patricia Kent, James Richard Cooper, R.L.C., Crystal Cooper and Jamie Cooper were also present. (v2:T248) Lee Cooper and James Richard Cooper were married to each other at some point. R.L.C. was their child. Patricia Kent was R.L.C.’s aunt from Jacksonville. Crystal and Jamie Cooper were sisters of R.L.C. (v3:T248-249)

Detective Beymer learned that Lee Cooper, her two daughters,

Pat Kent and an uncle had just returned from Jacksonville. They arrived at the house on Farmette Road where Mr. Cooper and R.L.C. were living. Detective Beymer said Mr. Cooper thought law enforcement was at the house due to a civil matter about occupancy of the house. (v3:T283) Lee Cooper and Patricia Kent thought there was an agreement that Mr. Cooper would not be living at the house on July 30th. (v3:T284)

Beymer interviewed R.L.C. inside of his police car with the windows closed and the air conditioner running. R.L.C. was shy and tentative. (v3:T250) Beymer knew that R.L.C. previously denied the allegations to someone else. (v3:T251)

Beymer spoke to Mr. Cooper after interviewing R.L.C. The initial pre-interview was not recorded. (v3:T251) Beymer typically conducted a pre-interview to decide whether or not to conduct a taped statement. Mr. Cooper was reserved and spoke softly. Beymer said he explained what was going on to Mr. Cooper. (v3:T252) Beymer said he used a calm tone of voice. Beymer did not threaten or make promises to Mr. Cooper. (v3:T253)

Beymer was asked what Mr. Cooper said during the pre-interview. Beymer said he did not make any promises to Mr. Cooper. Mr. Cooper was not in handcuffs. Beymer did not take his gun from the holster. Deputy Tomlin did not make promises or threats to Mr. Cooper. Detective Beymer did not tell Mr. Cooper he wasn’t free to go. Beymer said that to his knowledge Deputy Tomlin did not tell Mr. Cooper he wasn’t free to go. (v3:T254-255)

The prosecutor asked Detective Beymer what Mr. Cooper said during the pre-interview. (v3:T255) Mr. Cooper told Detective Beymer that he had monkeyed around with his son. Mr. Cooper explained that it meant to "jack off." Mr. Cooper said that R.L.C. also asked if he could have anal sex with Mr. Cooper. (v3:T255) Mr. Cooper said that his son put his penis into Mr. Cooper's anus once or twice. They had also performed oral sex on each other. (v3:T256)

The Taped Statement

Mr. Cooper agreed he had previously told Detective Beymer that he "monkeyed around" with his son. Mr. Cooper said he meant acts like "jacking off." Mr. Cooper said jacking off meant "you put your hand on it and move it back and forth." Mr. Cooper thought R.L.C. had done it to Mr. Cooper once. (v3:T263) Other times R.L.C. asked Mr. Cooper to put his hand on R.L.C.'s penis and do it to him. (v3:T264)

Mr. Cooper said R.L.C. asked if he could put his mouth on Mr. Cooper's penis. R.L.C. would move his mouth up and down for a few seconds and then quit after a few seconds. Mr. Cooper thought he told R.L.C. that he did not think it was right to do what they did. Mr. Cooper also said he told R.L.C. at other times that he didn't think they should "this stuff." (v3:T265) Mr. Cooper thought he put his own penis into R.L.C.'s mouth once or twice. The acts took place at the house on Farmette Road. (v3:T266)

R.L.C. asked a few times if he could put his penis into Mr.

Cooper's anus. Mr. Cooper said he would tell him to stop because it hurt. (v3:T266) Mr. Cooper said no when asked if R.L.C. ever asked him to put his penis into R.L.C.'s anus. (v3:T267-268) Mr. Cooper said he attempted to do it once. Mr. Cooper said he bumped him "a little bit." Mr. Cooper said he did not touch the butt hole. He touched the skin. (v3:T268)

Mr. Cooper said he "monkeyed around" something like three or four times with R.L.C. (v3:T268) Mr. Cooper was sure of how long the incidents had taken place but said it was a short time. (v3:T268-269) Mr. Cooper was asked if any force, promises, or coercion were used to get him to talk. He replied, "not that I know of." (v3:T272-273) The tape concluded. (v3:T273)

Germaine Turner testified that he had worked for two years as child protective investigator for the Department of Children and Families. (v2:T305-306) His job required him to assess the risk to a child when a report of abuse was called into the hotline. Turner was trained in sexual abuse, physical abuse, neglect, and meeting basic needs of children. (v3:T306) Mr. Turner because involved in this case on July 26, 2006, after R.L.C. made a report of abuse against his father. (v3:T308-309) Mr. Turner was also investigating whether there were hazardous conditions in the house due to lack of running water. (v3:T310)

Mr. Turner made contact with Mr. Cooper outside the gate of the house on public property. (v3:T310) Turner stayed in his truck while speaking to Mr. Cooper. Turner got outside of his truck when

talked with R.L.C. (v3:T311) Mr. Cooper went back up to the house which was about fifty yards away when Turned talked with R.L.C. (v3:T312)

Mr. Turner read a narrative of the allegations to R.L.C which included alleged sexual abuse. R.L.C. denied the allegations. R.L.C. said he had gotten into an argument with his father about something he wanted. He said he made the statement about abuse while at a funeral because he was mad. Mr. Turner told R.L.C. that he could help him. Turner asked R.L.C. is anything was going on. R.L.C. said no, and told Turner that he was fine. (v3:T313) Turner said he could have helped R.L.C. by removing him from the house, or calling law enforcement. (v3:T313-314) Turner told R.L.C. that if he was being harmed it would be easier to help him immediately. (v3:T314-315)

SUMMARY OF THE ARGUMENT

I. Petitioner was convicted as charged after admission of uncharged collateral crimes without any notice by the prosecutor. The Second District Court of Appeal found this to be error but stated: "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. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)."

This conflicts with the standard for harmless error analysis required by DiGuilio, Knowles v. State, 848 So. 2d 1055 (Fla. 2003), and State v. Lee, 531 So. 2d 133 (Fla. 1988), which rejects weighing of the evidence and focuses the analysis to examine the effect of the error on the trier of fact to hold that an error is harmful unless it is shown beyond a reasonable doubt that the verdict was not affected. A new trial should be ordered because it will be impossible to show the error was harmless beyond a reasonable doubt.

II. The trial court erred in denying the motion for judgment of acquittal on Count six because the evidence was insufficient to show union or penetration of the anus. Touching the "butt" or other area close to the anus is not a substitute for the strict proof of contact or penetration of the anus.

ARGUMENT

ISSUE I

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED BY USING THE WRONG STANDARD TO FIND ADMISSION OF NUMEROUS ACTS OF UNCHARGED SEXUAL MISCONDUCT TO BE HARMLESS?

The Second District Court of Appeal correctly found the admission of numerous other uncharged acts of sexual misconduct without any notice to be error. The information filed in this case alleges that one of each of six different sexual acts occurred during a specific time frame. Yet, the prosecutor was allowed to introduce testimony of numerous other uncharged incidents of each type of act despite her failure to file the notice required by Section 90.404(2)(c)1, Florida Statutes (2007) or otherwise give notice that the uncharged acts would be used for some admissible purpose. However, the Second District applied the wrong test in finding the error to be harmless.

The Second District improperly used a "strong evidence" test in place of the "beyond a reasonable doubt" standard required by State v. DiGuilio, 491 So.2d 1129 (Fla.1986), to find the error harmless. The Second District 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 of its case 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. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Cooper v. State, 13 So. 3d 147, 149 (Fla. 2d DCA 2009).

The "strong evidence" test used by the Second District is wrong because it improperly considers the strength of other available evidence while ignoring the effect the improperly admitted evidence had on consideration of all other admissible evidence by the jury. Although the Second District noted that presentation of the State's case would have been different, there was no consideration of how the jury would have been affected during the decision process.

This Court's decision in DiGuilio requires a careful analysis of all the evidence and consideration of how error might have affected the jury in reaching a verdict. The error is to be considered harmless only if the court can say beyond a reasonable doubt that the verdict was not affected. The demanding standard of DiGuilio requires that:

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility

> that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

DiGuilio, 491 So. 2d at 1139 (Fla. 1986).

The presence of "strong evidence" separate and distinct from erroneously admitted evidence is not a substitute for the required proof beyond a reasonable doubt that the error did not affect the jury's deliberations. Use of a strong or substantial evidence test improperly invites the appellate court to sit as a substitute juror. Instead of considering the strength of the evidence the appellate court must consider the effect of the error on the deliberation process and whether it could have possibly affected the verdict. As explained by this Court:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.(citations omitted)

State V. Lee, 531 So. 2d 133, 137 (Fla. 1988).

The Second District applied the wrong standard in this case to find the error harmless. A reversal should be ordered in this case. The improper admission of other crimes evidence is presumed

to be harmful. Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994); Keen v. State, 504 So. 2d 396 (Fla. 1987).

The danger is that the jury will use the improperly admitted evidence of bad character or propensity to conclude that the defendant must have committed the charged crime. Mims v. State, 872 So. 2d 453, 456 (Fla. 2d DCA 2004). This Court has the recognized the heightened danger of unfair prejudice resulting from uncharged misconduct similar to that in this case:

> This is especially true in cases like the present Because of the commonly held belief that individuals who commit sexual assaults are more likely to recidivate as well as societal outrage directed at child molesters, the admission of prior acts of child molestation has an even greater potential for unfair prejudice than the admission of other collateral crimes.

McLean v. State, 934 So. 2d 1248, 1256 (Fla. 2006).

A new trial should be ordered because the jury was required to resolve complex issues to determine Petitioner's guilt. Instead of dealing with six separate and distinct allegations of sexual contact alleged in the information, the defense was confronted at trial with numerous allegations of uncharged acts which were indistinguishable from the incidents charged in the information. The jury had to decide what effect to give Mr. Cooper's taped statement to police where he said he "monkeyed around" three or four times with R.L.C in committing certain acts. The statement is important evidence but it does not match or track each incident contained in R.L.C.'s testimony. The

Second District noted that the State's proof would have been presented differently absent the error of the improperly admitted evidence but did not consider the effect of this error on the jury deliberations because taped statement was "strong evidence."

The jury had to decide whether R.L.C. told the truth at trial or when he told the D.C.F. investigator a few days before police got involved that nothing had taken place with his father. R.L.C. was in a position of safety when told the D.C.F. worker that he made the initial allegation of abuse (while at a funeral) because he was mad after arguing with his father over something he wanted. R.L.C. testified that he initially decided to live with his father because he thought he would get more of what he wanted. The jury had to decide whether R.L.C. was telling the truth or because he would trade life without electricity or running water in a flea infested trailer with his father for the air conditioned apartment his mother shared with her new boyfriend.

The prosecutor did not argue that these uncharged acts served to corroborate her proof on the charged acts. The effect of the prosecutor's argument was to suggest to the jury that Mr. Cooper must have committed the charged acts because of the uncharged acts:

> But the bottom line is, you heard what R.L.C. told you that his father did to him over the course of four years, the sexual contact that they had over the course of four years. Once a week maybe, once every other week, once every couple of days.

> These kinds of things would happen. He said it was pretty much every time it was the same thing. They would masturbate each other, perform oral sex on one another. They would—defendant would try and attempt to perform anal sex on R.L.C., R.L.C. would perform anal sex on him.

(v3:T338)

By commingling the charged and uncharged acts the prosecutor made it impossible for Mr. Cooper to have a jury fairly determine his guilt on the charged offenses. The nature of the charges in this case made it especially critical that a proper test for harmless error be applied. In Knowles v. State, 848 So. 2d 1055 (Fla. 2003), the trial court improperly allowed the State to introduce testimony of a former defense psychologist in violation of the defendant's attorney-client privilege. The Second District found the error to be harmless because it "did not substantially influence the jury's verdict." Id., at 1057. This Court reversed because the standard applied by the Second District was "an unwarranted departure from the DiGuilio standard." Id., at 1058.

The standard applied in this case is an equally unwarranted departure from what DiGuilio requires just like wrong standard used in Knowles. The remedy in Knowles was a remand to the Second District Court of Appeal because this Court was uncertain whether application of the DiGuilio standard would mean a different result. This Court should order a new trial in contrast

to the remedy in Knowles because of the complicated issues of fact make it impossible to show beyond a reasonable doubt the verdict was not affected.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITAL ON COUNT SIX BECAUSE THE STATE FAILED TO PROVE UNION OR PENETRATION OF THE ANUS?

The State's evidence failed to prove that Mr. Cooper's penis touched or penetrated the anus of R.L.C. In plain english, touching the "butt" is not the equivalent of touching the anus. A discharge should be ordered on this count. This issue was not the basis for finding conflict jurisdiction. However, this Court should exercise its discretion to consider the matter since jurisdiction exists over the whole case. See Savoie v. State, 422 So. 2d 308, 312 9Fla. 1982).

R.L.C. was asked if Mr. Cooper tried to penetrate his "butt." However, he never testified that his anus was touched or penetrated by Mr. Cooper. (v3:T224) Mr. Cooper's taped statement to police indicated that his penis touched the skin of R.L.C. but did not indicate that R.L.C.'s anus was touched. Defense counsel moved for a judgment of acquittal at the close of the State's case:

> That count alleges sexual activity with a child and charges that—Count 6, that particular count alleging sexual activity with a child and indicating or charging that the sexual organ of the defendant united with or penetrated the anus of R.L.C.
>
> I do not believe that the testimony here today establishes that the – R.L.C. indicated that his father attempted to penetrate but never indicated there was an actual touching between the penis and the anus.

> And in the taped statement, the defendant's taped statement also did not indicate a direct touching between the penis and the anus. So I do not believe the state has established a prima facie case as it related to Count 6.

(v3:T299)

In Swift v. State, 973 So. 2d 1196, 1197 (Fla. 2d DCA 2008), this Court explained the standard of review:

> However, in reviewing the sufficiency of the State's evidence to survive a defense motion for judgment of acquittal, we apply a de novo standard of review and view the evidence in the light most favorable to the State. *See* Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). Upon such review, if "a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Id.*

The evidence even when viewed in a light most favorable to the State did not establish that Mr. Cooper's penis touched or penetrated the anus of R.L.C. Touching the buttocks or other skin around the anus is insufficient to prove the offense charged in Count 6. See Richards v. State, 738 So. 2d 415 (Fla. 2d DCA 1998). The anus is a medical term defined as "the opening at the terminal end of the anal canal." See Mosby's Medical, Nursing, and Allied Health Dictionary, 110(5th Ed. 1998).

R.L.C. was asked if Mr. Cooper tried to penetrate his butt. R.L.C. said Mr. Cooper tried. Mr. Cooper was unable to do so because R.L.C. "would tighten up." (v2:T224) Mr. Cooper's taped statement was that he bumped him "a little bit." The taped

statement indicated that Mr. Cooper touched skin and not the anus. (v3:T268)

Touching the skin of the buttocks or other area surrounding the anus does not establish union with the anus. The term "butt" is not the equivalent of the term anus. The prosecutor used the term "butt" during a leading question to R.L.C. but did not ask questions to clarify what R.L.C. meant. R.L.C.'s testimony that he "tightened up" does not establish union or penetration of the anus. R.L.C. may have tightened up when touched on the buttocks by the penis, or he could have also tightened up if touched elsewhere on his body. The State did not satisfy its burden of prove union or penetration of the anus beyond a reasonable doubt. The prosecutor could have asked questions to clarify the meaning of the answer but did not.

Courts in other states have found that similarly imprecise testimony was not sufficient to prove that an anus was touched or penetrated. In State v. Wells, 740 N.E. 2d 1097 (Ohio 2001), testimony that the defendant's penis penetrated the area between the buttocks was not sufficient to establish penetration of the anus. In State v. O'Neill, 589 A. 2d 999 (N.H. 1991), the victim testified that the defendant "stuck his fingers in my bum" and pointed to his buttocks was not sufficient to prove anal penetration.

The State failed to prove that Mr. Cooper's penis touched R.L.C.'s anus. The testimony that Mr. Cooper put his penis into

R.L.C.’s butt is insufficient to prove the charged offense because the statute must be strictly construed. Richards, 738 So. 2d at 419-420. Like the courts in Wells and O’Neill, this Court should find that the use of imprecise language is not sufficient to prove contact or penetration of the anus. A discharge should be ordered on this count.

CONCLUSION

Based upon the foregoing argument, authorities, and reasoning, Petitioner asks this Court to order that he be given a new trial. Additionally, he asks that a discharge be ordered on Count six.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Marilyn Beccue, Assistant Attorney General, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2010.

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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