IN SUPREME COURT OF FLORIDA

JAMIE LEE TASKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-1281

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Jamie Lee Tasker, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of seven (7) volumes. “Record Volume I” is designated “**R**”, followed by any appropriate page number. “Record Volume II” is designated “**07VOP**”, followed by any appropriate page number. “Record Volume III” is designated “**07S**”, followed by any appropriate page number. “Supplemental Record Volume I”, which contains documents and no transcripts, is designated “**SR**”, followed by any appropriate page number. “Supplemental Record Volume I” which contains the December 13, 2005, probation violation hearing transcript, is designated “**05VOP**”, followed by any appropriate page number. “Supplemental Record Volume II” which contains the January 11, 2005, sentencing transcript, is designated “**05S**”, followed by any appropriate page number. “Supplemental #1" containing the record generated from the motion to correct sentencing error, is designated “**CSE**”, followed by any appropriate page number. "**IB**" will designate Appellant's Initial Brief, followed by any appropriate page number. All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as being generally supported by the record, subject to the following additions and corrections.

1. On October 4, 2004, the State filed an information against Petitioner for Lewd or Lascivious Molestation of a Child and Child Abuse. (SR.1-2).

2. On December 9, 2004, Petitioner entered a plea of guilty to both charges. (CSE.15).

3. At the plea hearing, the Prosecutor stated the plea agreement on the record:

> In exchange for him withdrawing his previously entered plea and guilty of plea those two counts that Mr. Peters announced earlier, the state would be recommending that the Court sentence him to ten years of sex offender probation with the first 12 months of which would be served in the Suwannee County Jail or another jail under the jail-bed program with the Department of Corrections, that he is to have no unwanted, unsupervised contact with either of two victims alleged in the information. The terms and conditions in paragraph A which are 16 statutory required conditions under sex offender probation, he is free to and he is agreeing to those terms and conditions except that he may ask the Court for less jail or no jail and he will be designated as a sex offender and he will also ask the Court to withhold adjudication.
>
> The state will be asking that he be adjudicated guilty and we intend on asking the Court to order a PSI and that's all been reduced to writing and signed by the defendant as well as attachment A.

(CSE.16-17).

4. At the plea hearing, the defense counsel stated:

> Attachment A for the different conditions of sex offender probation is part of the plea agreement as you see, Judge, I have gone over with [Petitioner]. We also stipulate there is a basis or foundation for this plea based, first of all, on the discovery that we received from the state.

> I have shared that with [Petitioner] and he has had a chance to review that and gone over that more than once and I think he would agree if this case were to proceed to trial there would be testimony from the individuals named in the discovery reports as well as identified by initials in the information. There would be testimony from them that these acts and events did occur in Suwannee County on the dates specified by the information.
>
> (CSE.17).

5. Petitioner answered the defense counsel with, “Yeah”. (CSE.17).

6. The trial court found Petitioner’s plea was made freely and voluntarily, “and that there is indeed a factual basis contained within the court file and/or discovery taken in the case that would support the taking of a plea”. (CSE.20).

7. On January 11, 2005, the trial court sentenced Petitioner to 10 years sex offender probation for the molestation and five years of probation for the child abuse to run concurrent. Also the trial court sentenced him to six months residence jail bed. (R.8-9; 05S.8-10).

8. On April 1, 2005, Petitioner’s probation officer filed an Affidavit against Petitioner. (SR.3-4).

9. On June 16, 2005, the trial court entered an Order of Modification of Probation modifying Petitioner’s probation by adding extra 60 days of county jail with credit for time served, successfully completing drug counseling, completed random substance abuse testing, supervised contact with children as approved by probation officer and same terms and conditions previously imposed. (SR.6).

10. On July 29, 2005, Petitioner’s probation officer filed another Affidavit against Petitioner. (SR.7).

11. On December 13, 2005, the trial court entered an Order of Modification of Probation modifying Petitioner's probation by adding 240 days county jail with credit for time served and reinstated the same terms and conditions. (SR.8).

12. On January 24, 2007, an Amended Affidavit was filed, and on May 4, 2007, another Amended Affidavit was filed. (R.20-21, R.51-52).

13. On May 10, 2007, the trial court found that Petitioner violated probation and sentenced him as follows:

> [Petitioner], first, I do find that you have violated your probation as admitted by you. I also find that this is indeed a multiple violation. It looks like it is arguable that it may be a fourth violation. I am counting it as a third violation at this time.
>
> Last time you were here I did tell you that –- you heard the quote there. I told you if you came back, you were probably going to get sent off. Perhaps I should have sent you off then but I gave you that extra chance. I am not going to do it this time. I will tell you now before I get to where I am going.
>
> What I am going to do is to revoke your probation. I am going to commit you to the custody of the Department of Corrections on Count I, which charges the lewd and lascivious molestation of a child. I am going to sentence you to 120 months in the state prison system.
>
> With regard to Count II, I am going to sentence you to 36 months. Those two terms will run concurrent with one another, meaning the total sentence is going to be 120 months. That's ten years. You will be given credit for any and all time previously served since the inception of this case.

(07S.46-48).

14. Petitioner filed a notice of appeal on June 8, 2007. (R.85).

15. On May 23, 2008, Petitioner filed a Motion to Correct Sentencing Error in order for the trial court to remove the 40 sexual contact points included on his scoresheet. (CSE.1-5).

16. On June 9, 2008, the trial court entered an order setting an evidentiary hearing on Petitioner's Motion to Correct Sentencing Error. (CSE.10-11).

17. An evidentiary hearing was never held. (See Clerk of Court Docket).

18. On September 10, 2008, the trial court entered the following Order Denying Motion to Correct Sentencing Error, in pertinent part:

MOTION TO CORRECT SENTENCING ERROR

> In the instant motion, the Defendant, through counsel, claims that the scoresheet which was used at sentencing improperly included 40 victim injury points for sexual contact. The Defendant was charged with unlawfully and intentionally touching "in a lewd and lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them," of the victim contrary to section 800.04(5), Florida Statues. The Defendant contends that because the information alleges, in the alternative, a touching of clothing covering specific body parts, and because the touching of *clothing covering* those body parts can not constitute sexual contact, the 40 sexual contact points were improperly scored.
>
> If a defendant's scoresheet lists any primary or additional "offense involving sexual contact that does not include sexual penetration," the scoresheet must include 40 points for the sexual contact. See Fla. Stat. Ann.§§ 921.0021(7)(b)(2); 921.0024. However, the statute does not define the term "sexual contact." The Florida Supreme Court has held that "victim injury points for sexual contact are not limited to criminal acts that constitute sexual battery" and thus, union of the sexual organ of one person with the oral, anal, or vaginal opening of another is not required. Seagrave v. State, 802 So.2d 281, 291 (Fla. 2001). Courts have upheld the scoring of sexual contact points for various types of touching. *See e.g.* Knarich v. State, 866 So.2d 165 (Fla. 2d DCA 2005)(sexual contact points upheld based on defendant fondling a child's buttocks in a lewd and lascivious manner); Kitts v. State, 776 So.2d 1067 (Fla. 5th DCA 2000)(sexual contact points upheld for fondling and kissing victim's breasts); Mackey v. State, 516 So.2d 330 (Fla. 1st DCA 1987)(sexual contact points upheld for "touching the victim about the crotch").
>
> "[C]ourts have [also] upheld sexual contact victim injury points in instances where the offender touched clothed sexual parts of the victim." Altman v. State, 852 So.2d 870, 873 (Fla. 4th DCA 2003). In Fredette v. State, 786 So.2d 27, 27-28 (Fla. 5th DCA 2001), the Fifth

District Court of Appeal held that touching a child's vaginal area constitutes sexual contact and further reasoned that such touching would be sexual contact even if the touching occurred over the child's clothing. Likewise, the Fourth District Court of Appeal upheld sexual contact points where the defendant was charged with Lewd and Lascivious Molestation of a Child based on allegations that he touched the clothed buttocks of a child with his hand. Fretwell v. State, 852 So.2d 292 (Fla. 4th DCA 2003). The Fretwell court reasoned that "if touching the clothed buttocks of a child is lewd behavior, it is by definition, sexual behavior, and as such, can constitute sexual contact for the purpose of assessing victim injury points." *Id.* at 293-94.

In the instant motion, the Defendant claims that sexual contact points may not be assessed based on touching the clothing covering sexual body parts, without touching the body parts themselves. As the information charges touching either the body parts, without touching either the body parts listed in section 800.04(5) or, alternatively, the clothing covering those body parts, the Defendant claims the sexual contact points were improper. However, the holding in Fretwell that touching the clothing covering the buttocks, one of the body parts listed in section 800.04(5), warrants sexual contact points, implies that the touching of the clothing covering any of the body parts listed in that section warrants sexual contact points. As such, this court finds that the 40 sexual contact points were properly included on the scoresheet used to sentence the Defendant.

Although this court finds that the decision in this case is controlled by the reasoning of Fretwell, this court elects to address two additional points, namely that the Defendant's reliance on Mann v. State, 974 So.2d 552 (Fla. 5th DCA 2008), and Stubbs v. State, 951 So.2d 910 (Fla. 2d DCA 2007), is misplaced. In Mann, the Defendant was charged with and pleaded guilty to four total charges of lewd and lascivious battery and lewd and lascivious molestation. *See* Mann, 974 So.2d at 553. One of the counts specifically alleged penetration, while the other three alleged union, or in the alternative penetration. *Id.* The scoresheet used at sentencing included victim injury points for penetration for each of the four offenses. *Id.* The Fifth District Court of Appeal held that the victim injury points were improperly assessed for the count which did not specifically allege penetration, but rather alleged union or, in the alternative, penetration. *Id.* at 553-54. Because the information alleged penetration or union, and penetration points may be assessed only for penetration, and not for union, the points were improper. *See id.* The instant case is distinguishable from Mann because sexual contact points may be assessed for *either of the alternative allegations*, touching the specific body parts listed in section 800.04(5) or touching the clothing covering those parts.

> In his motion, the Defendant relies on Stubbs to argue that "unless the state can establish that the Defendant waived [challenging the sexual contact points] by specifically agreeing to the victim injury scoring or acknowledging sexual contact as part of his plea to the original charges in this case, the inclusion of 40 points on his CPC scoresheet was in error." The Defendant then purports to summarize Stubbs in the parenthetical, stating that the court ordered "deletion of victim injury points after finding 'no indication in the record' that defendant agreed to victim injury points." The quote used by the Defendant is taken completely out of context and the summary given by the Defendant is entirely unrepresentative of the actual holding. In Stubbs, the defendant's attorney raised the alleged scoresheet error at his sentencing, but the trial court refused to allow his attorney to challenge the points. *See* Stubbs 951 So.2d at 911. On appeal, the court found that because there was "no indication in the record" that the defendant agreed to the points as a part of his plea, the trial court erred in preventing the defendant from challenging the points and remanded the case to the trial court. *Id.* Contrary to the Defendant's assertions, the Stubbs court did not order deletion of the points; rather, the court found that because he did not agree to the points, he should have been permitted to challenge their inclusion. *Id.* The Defendant's implication that a defendant must either agree to the points or acknowledge sexual contact for those points to be properly assessed on his scoresheet is simply incorrect.

(CSE.27-30).

19. The First District Court of Appeal affirmed the trial court's denial of Petitioner's Motion to Correct Sentencing Error finding that the issue was not preserved for review. Tasker v. State, 12 So.3d 889 (Fla. 1st DCA 2009). Also, the district court certified conflict with three Second District Court of Appeal cases, Stubbs v. State, 951 So.2d 910 (Fla. 2d DCA 2007), Spell v. State, 731 So.2d 9 (Fla. 2d DCA 1999), and Bogan v. State, 725 So.2d 1216 (Fla. 2d DCA 1999).

20. This Court granted discretionary review.

SUMMARY OF ARGUMENT

ISSUE I.

Points originally scored on a scoresheet cannot be challenged after a violation of probation. The fact that Petitioner filed a 3.800(b)(2) challenging the original scoresheet after Petitioner was sentenced after a violation of probation does not alter this conclusion. Petitioner contends that:

> [e]rror in scoring victim injury, which first occurs in the original sentencing hearing but does not then affect the sentence, should be cognizable when challenged initially in a motion to correct sentencing error following probation revocation proceedings.

(IB.5). The State disagrees. The State argues that since Petitioner is barred from raising the issue of the inclusion of the sex contact points at the revocation of probation hearing based on statutory authority, then Petitioner could not raise this issue by Rule 3.800(b)(2), Florida Criminal Rule of Procedure, during an appeal of a revocation of probation.

ISSUE II.

Appellant contends that the trial court erred by including 40 sex contact points on Appellant's scoresheet when he entered a plea of guilty to lewd and lascivious molestation of a child and child abuse and stipulated to the factual basis for the plea. Specifically, Appellant contends that "[b]ecause the information in this case alleges, in the alternative, a touching of clothing covering specific body parts, the offense in this case does not involve sexual contact". The State respectfully disagrees.

First, Appellant attempts to argue that Section 921.0011(7)(b)(2) is

ambiguous as to “a touching of clothing covering body parts rather than a touching of body parts through clothing”. This Court has set out the meaning of sexual contact. Second, Appellant tries to argue that the sex contact points should not be included in the scoresheet because he did not agree to the points. However, Appellant leaves out the fact that he pled guilty as charged and stipulated to factual basis of the plea. Therefore, Appellant’s sentence should be affirmed.

ARGUMENT

ISSUE I: WHETHER PETITIONER IS PROCEDURALLY BARRED FROM CHALLENGING SEXUAL CONTEXT POINTS FROM AN ORIGINAL SCORESHEET AFTER VIOLATING HIS PROBATION? (RESTATED)

An original scoresheet cannot be challenged in a violation of probation proceeding. The fact that Petitioner filed a 3.800(b)(2) challenging the original scoresheet after Petitioner was sentenced following a violation of probation proceeding does not alter this conclusion. Petitioner contends that:

> [e]rror in scoring victim injury, which first occurs in the original sentencing hearing but does not then affect the sentence, should be cognizable when challenged initially in a motion to correct sentencing error following probation revocation proceedings.

(IB.5). The State disagrees. Since Petitioner is barred from raising the issue of the inclusion of the sex contact points at the revocation of probation hearing based on statutory authority, then Petitioner could not raise this issue by Rule 3.800(b)(2), Florida Criminal Rule of Procedure, during an appeal of that revocation of probation.

Standard of Review

The standard of review for purely legal issues is de novo. Williams v. State, 957 So.2d 595, 598 (Fla. 2007).

Merits

First, Petitioner is barred from raising the issue of the inclusion of the forty (40) sex contact points on his original scoresheet at his revocation of probation hearing pursuant to section 924.06(2), Florida Statutes. Section 924.06(2), Florida Statutes, provides, in pertinent part, “[a]n appeal of an order revoking probation may review only proceedings after the order of

probation." The First District Court of Appeal in Bowman v. State, 974 So.2d 1205 (Fla. 1st DCA 2008), and Fitzhugh v. State, 698 So.2d 571 (Fla. 1st DCA 1997), held, "an appeal from resentencing following a violation of probation is not the proper time to assert an error in the original scoresheet." Id. at 573; citing State v. Montague, 682 So.2d 1085 (Fla. 1996)(in order to preserve a *Karchesky* sentencing error for appellate review, a contemporaneous objection to the addition of victim injury points must be made at the time of sentencing). This Court held in Montague:

> The enduring policy rationale in our decisions is that there is an appropriate time and forum for making objections to alleged sentencing errors. *E.g., State v. Rhoden*, 448 So.2d 1013, 1016 (Fla. 1984)("the primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a postconviction relief proceeding.")
>
> *****
>
> By our decision today, we again emphasize that the sentencing hearing is the appropriate time to object to alleged sentencing errors based upon disputed factual matters.

Id. at 1088-1089.[1]

The First District Court of Appeal has appropriately followed this statute since its enactment in 1959. Judicial economy and efficiency requires parties to resolve present issues at the earliest opportunity. It is unreasonable to

[1] This Court receded in part of the holding in State v. Rhoden, 488 So.2d 1013 (Fla. 1984) in Maddox v. State, 760 So.2d 89, 99 (Fla. 2000).

allow parties to litigate an issue that could have been resolved quickly and easily by the actual sentencing court. Maddox v. State, 760 So.2d 89, 95 (Fla. 2000)(citing Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So.2d 1015 (Fla. 1999), *reh'g granted*, 761 So.2d at 1025-1027 (hereinafter Amendments II); Jackson v. State, 983 So.2d 562 (Fla. 2008).

The Second District has employed a different approach that ignores the statute. The Second District cited to and relied on Wright v. State, 707 So.2d 385 (Fla. 2d DCA 1998), as the controlling authority in Spell v. State, 731 So.2d 9 (Fla. 2d DCA 1999), Bogan v. State, 725 So.2d 1216 (Fla. 2d DCA 1999), and Stubbs v. State, 951 So.2d 910 (Fla. 2d DCA 2007). In addition to disregarding the statute, the Second District Court has continuously misapplied flawed case law. The Second District Court of Appeal in Wright, held the following:

> We agree that the trial court erred by allowing the inclusion of the forty points for penetration. *See Daum v. State*, 544 So.2d 1035, 1036 (Fla. 2d DCA 1989). The State argues that, even if the trial court erred by not correcting the scoresheet, Wright waived his right to appeal this sentencing issue because he failed to object at the original sentencing hearing. However, this court in *Daum*, held that "the question of how many points should be scored for victim injury is a question of law which may be raised at any time. *Id.* at 1036. Even if this issue is not cognizable under rule 3.800(a)[FN1], it is correctable on direct appeal for sentencing errors which occurred upon revocation of probation. *See State v. Evans*, 693 So.2d 553 (Fla. 1997).
>
> FN1. *See Davis v. State*, 661 So.2d 1193, 1197 (Fla. 1995)(holding that erroneous sentence correctable only on direct appeal).

Id. at 386. The Second District Court reliance in Wright in its cases: Stubbs, Spell and Bogan, is flawed. First, the court misconstrues the holding in State

v. Evans, *supra*. In State v. Evans, 693 So.2d 553 (Fla. 1997), this Court held the following:

> Based on our decision in *Davis*, we conclude that the district court erred in finding that Evans' sentence was illegal. Our decision in that case makes it clear that the failure of a trial court to comply with the mandated direction of providing written reasons does not make a sentence illegal.
>
> *****
>
> Additionally, as in this case, the defendant did not seek review on that issue until after his direct appeal was final when he filed a postconviction motion to vacate and to set aside his sentence under Florida Rule of Criminal Procedure 3.800 and/or 3.850. In his motion, the defendant claimed for the first time that his sentence was illegal because the trial judge failed to timely reduce his reasons for the departure from the sentencing guidelines. We concluded that the defendant was not entitled to relief. Although we acknowledged that an illegal sentence can be addressed at any time, we held that the failure to file written findings for a departure sentence is not illegal so long as the sentence does not exceed the maximum period set forth by law. Our decision in *Davis* is controlling here.

Id. at 554. In fact, the holding in Evans is completely contrary to the language it cites in Wright.

Second, the court in Wright also relies on a case, Daum v. State, 544 So.2d 1035, 1036 (Fla. 2d DCA 1989). Daum filed a direct appeal of his judgment and sentence following a revocation of his community control. He originally pled no contest to two counts of lewd assault on a child and one count of lewd act in the presence of a child. The original scoresheet was prepared including forty victim injury points for each lewd assault, eighty points total. Daum was originally sentence pursuant to the negotiated plea agreement to one year in county jail, followed by two years community control and ten year's probation all counts to run concurrently. Daum violated his community control and objected to the scoresheet, which included the eighty

points, arguing that he was not convicted on sexual battery, only lewd assault. The trial court sentenced him to 12 years Department of Corrections. The court found that the trial court erred by allowing the inclusion of the eighty points because Daum had pled no contest to charges of lewd assault rather than sexual battery. The court also stated, "[h]owever, the question of how many points should be score for victim injury is a question of law which may be raised at any time. Brown v. State, 508 So.2d 522 (Fla. 2d DCA 1987).

Daum relies on Brown v. State, 508 So.2d 522 (Fla. 2d DCA 1987). Brown was convicted of robbery, kidnapping, grand theft and burglary, and he filed a motion for postconviction relief based on the allegation that his scoresheet had an error. The court held in Brown that, "[i]t is our view that Brown's motion generates a question of law which may be raised at anytime free from a requirement that the error preserved by a contemporaneous objection or presented in an appeal." Id. Brown's postconviction motion was not after a revocation of probation.

However, after Brown were issued, the Florida Supreme Court adopted an amendment to Florida Rules of Criminal Procedure 3.701(d)(7), effective July 1, 1987, "which allowed for the scoring of victim injury points regardless of whether the injury was an element of the crime". Fla. R. Crim. P. Re:Sentencing Guidelines, 509 So.2d 1088 (Fla.1987); see also Companioni v. State, 971 So.2d 883, 884 (Fla. 3d DCA 2007). Therefore, the Second District's reliance on Brown in Daum is inapplicable because the rule had changed and transformed the question of how many points should be scored for

victim injury from an error which at one time was apparent on the face of the scoresheet to an error in the sentencing process. Since Wright's reliance on Daum is flawed as well as its reliance on Evans and all three cases that have been certified for conflict relied on Wright, the Second District's decisions in each case is based on faulty logic and flawed case law.

The Second District's rationale is that a defendant, who receives a sentence from a negotiated plea where the original scoresheet was not considered in the original sentencing, should be able to challenge the original scoresheet after a violation of probation, because the defendant had no reason to challenge the scoresheet at the original sentencing. This rationale does not support this rule. There is no such exception established in the section 924.06, Florida Statutes. The Second District's approach ignores the strong policy requiring litigants to raise objections at the earliest opportunity. If the scoring of the original offense is erroneous, it should be addressed at sentencing for the original offense, not at some indeterminate time in the future following a violation of probation. All parties have a right to finality in cases, including the victims.

For example, suppose a defendant had been sentenced to five years in prison with ten years sex offender probation after entering a guilty plea pursuant to a negotiated plea, but instead of violating probation couple of months later, he violates his probation eight years later, after he is released from prison. Now after being sentenced upon violation of probation to ten years imprisonment, he appeals the inclusion of sexual contact or penetration points that were placed on his original scoresheet eight years

earlier. By following the rationale of the Second District, the State is compelled to relitigate a matter occurring eight years earlier, and the victim, eight years later, is compelled to appear at an evidentiary hearing and testify (basically relive) the whole horrible and horrifying experience again. Moreover, due to the passage of time, witnesses or evidence may not be available. This argument supports the rational of the statute and the case law from the First District.

Also, under the facts of this case, Petitioner did not object at his original sentencing nor did he object at the two other violations of probation hearings. Petitioner simply sat silently for two years until the trial court decided after his third violation of probation to sentence him to ten years in the DOC. Once the trial court sentenced him to ten years in DOC, Petitioner wanted to appeal the sexual contact points included on his scoresheet in an attempt to see if the trial court would reduce his sentence. This notion is preposterous. The State prepares the scoresheet for sentencing. The defense counsel is required to review the scoresheet and, the trial court also reviews it. In State v. Montague, 682 So.2d 1085 (Fla. 1996), this Court held:

> Counsel cannot just "assume" the correctness of the underlying factual predicate for points assessed in a sentencing guidelines scoresheet prepared by someone else. Sentencing proceedings should be conducted with the same level of preparation and care that is required for the guilt phase of criminal proceedings. Sentencing is obviously a critically important stage of the proceedings, and counsel must be responsible for ensuring the factual integrity of the findings made by the trial court. . . . . We caution that our holding, while emphasizing the responsibility of defense counsel, in no way lessens the ethical and legal duty of the State and the trial court to ensure that factual determinations made at sentencing are correct.

Id. at 1089. Section 924.06(2), Florida Statutes, was established for the goal of addressing errors at the earliest opportunity by the trial court. A rule allowing defendants to appeal the inclusion of points on an original scoresheet after defendant has substantially and willfully violated his probation completely undermines the goal of the statute.

In addition, Petitioner, by not objecting contemporaneously at the original sentencing hearing nor filing a 3.800(b) motion,[2] in an appeal of the original sentence, waived the opportunity to challenge the points after Petitioner received the benefit of his bargain. See State v. Szempruch, 935 So.2d 66 (Fla. 2d DCA 2006)(*citing* State v. Swett, 772 So.2d 48, 52 (Fla. 5th DCA 2000)("The sentence was part of a quid pro quo and the defendant cannot accept the benefit of the bargain without accepting its burden." To allow a defendant to use a rule [3.800] motion to evade a negotiated plea "would

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[2] The issue presented in this case is whether a defendant can challenge sexual contact points imposed on the original scoresheet at the original sentencing proceeding **after a violation of probation proceeding**. This case does not present the question of whether a defendant can challenge sexual contact points by 3.800(b) motion after the **original** sentencing proceeding. While that issue is not before this Court, it is not clear whether this alleged error could have even been raised by 3.800(b) motion following the original sentencing, pursuant to Jackson v. State, 983 So.2d 562 (Fla. 2008). Nevertheless, while the State contends that this alleged error was an "error in the sentencing process" that cannot be raised by 3.800(b) motion, this Court need not necessarily reach this issue in this case, because the alleged error clearly cannot be raised after violation of probation.

discourage the state from entering into plea bargains in the future".) In the present case, Petitioner received only 60 days in county jail, and a total of 10 years sexual offender probation when he was facing a minimum of 72.15 months to 20 years maximum. Petitioner received a significantly lesser sentence from the potential sentence that could be imposed. Also allowing the defendants to go back and challenge issues prior to the revocation probation will deter prosecutors from entering into negotiated pleas.

In his initial brief, Petitioner attempts to use rule 3.800(b) as an improper vehicle to reach through a violation of probation (actually three violations of probation) and belatedly take a second bite at the apple to challenge his original scoresheet:

> Both Fitzhugh and the excerpt from section 924.06(2) predate motions to correct sentencing errors under rule 3.800(b). Neither supports the First District's conclusion that Tasker's rule 3.800(b)(2) motion fails to preserved the issue for appeal. Because 3.800(b)(2) proceedings are sentencing proceedings, a rule 3.800(b)(2) motion preserves error in scoring victim injury.

(IB.11). Petitioner argues that since the trial court set for a hearing and ruled on the 3.800(b)(2) motion, that the motion preserved the issue for review.

The State disagrees. If a defendant is prohibited by statute from challenging an alleged error in the original scoresheet at the violation of

probation proceeding, then he cannot challenge the alleged error by rule 3.800(b) motion **following** the violation of probation proceeding. Petitioner has the opportunity to challenge the scoresheet at the original sentencing or by rule 3.800(b) motion following the original sentencing. [3] Petitioner is not, however, permitted to raise this challenge after violation of probation, whether by objection at the violation of probation sentencing or by rule 3.800(b) motion. The State contends Petitioner's argument regarding the 3.800(b) motion, is a red herring.

Petitioner fails to recognize that both section 924.06(2), Florida Statutes and rule 3.800(b) have similar if not identical goals. This Court held in Jackson v. State, 983 So.2d 562 (Fla. 2008):

> As we explained in *Amendments II*, rule 3.800(b) was designed to accomplish two purposes: "First, we intended to correct sentencing errors in the trial court at the earliest opportunity, especially when the error resulted from a written judgment and sentence that was entered after the oral pronouncement. Second, we intended to give defendants a means to preserve these errors for appellate review. 761 So.2d at 1016.

Id. at 571 as well as Rule. 3.800(b)(2). This goal is not served by permitting defendants to wait until a violation of probation to challenge an alleged error from a previous proceeding.

For the foregoing reasons, the State asserts that the First District's

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[3] See Note 2.

finding that Petitioner had not properly preserved this issue on appeal based on Section 924.06(2), Florida Statutes (2007), and supporting case law. The Court should affirm the decision below.

ISSUE II: WHETHER PETITIONER WAS ERRONEOUSLY SENTENCED PURSUANT TO A SCORESHEET WHICH INCLUDED 40 POINTS FOR SEX CONTACT WHEN HE PLED GUILTY AS CHARGED TO LEWD OR LASCIVIOUS MOLESTATION AND CHILD ABUSE? (RESTATED)

Standard of Review.

The standard of review for purely legal issues is de novo. Williams v. State, 957 So.2d 595, 598 (Fla. 2007).

Merits

Even if this were an issue that could be raised following a violation of probation, Petitioner has failed to show error in the scoring of the 40 sexual contact points. Petitioner contends that the trial court erred by including 40 sex contact points on Appellant's scoresheet when he entered a plea of guilty to lewd and lascivious molestation of a child and child abuse and stipulated to the factual basis for the plea. Specifically, Petitioner contends that "[b]ecause the information in this case alleges, in the alternative, a touching of clothing covering specific body parts, the offense in this case does not involve sexual contact". (IB.8). The State respectfully disagrees.

First, Petitioner attempts to argue that this Section 921.0011(7)(b)(2) is ambiguous as to "a touching of clothing covering body parts rather than a touching of body parts through clothing". (IB.16).

Section 921.0011(7)(b)(2), Florida Statutes, provides:

> If the conviction is for an offense involving sexual contact that does not include sexual penetration, the sexual contact must be scored in accordance with the sentence points provided in s. 921.0014 for sexual contact, regardless of whether there is evidence of any physical injury.

> If the victim of an offense involving sexual contact suffers any physical injury as a direct result of the primary offense or any additional offense committed by the offender resulting in conviction, such physical injury must be scored separately and in addition to the points scored for the sexual contact or the sexual penetration.

The statute does not define "sexual contact". However, this Court and the district courts have defined this term in the case law. In Seagrave v. State, 802 So.2d 281 (Fla. 2001), this Court ruled that victim injury points for sexual contact were properly assessed against defendant who fondled child victim's buttocks and placed victim's hand on his clothed penis. Id. **The Seagrave's Court, cited with approval Altman v. State, 852 So.2d 870, 873 (Fla. 4th DCA 2003). The Fourth District held in Altman that imposition of victim injury points for sexual contact may be appropriate where defendant was convicted of three lewd acts in violation of section 800.04(1) for tongue-kissing the minor victim and one lewd act in violation of section 800.04(2) for rubbing his crotch against the victim's crotch and buttocks while both were clothed.** Id. at 873; (bold added). Thus, "sexual contact" includes contact with sexual body parts through clothing, even contact between two separately clothed sexual body parts. Louis v. State, 764 So.2d 930, 932 (Fla. 4th DCA 2000)(ruling that touching victim's chest through her shirt, along with touching her stomach and genital area, involved sex contact); Blackburn v. State, 762 So.2d 989, 990 (Fla. 5th DCA 2000)(ruling that defendant's act of rubbing his erect penis on the victim's clothed back constituted sexual contact for victim injury scoring); Mackey v. State, 516 So.2d 330, 330-331 (Fla. 1st DCA 1987)(affirming victim injury points for sexual contact where defendant fondled a thirteen-year old boy by touching him about the crotch).

Therefore, the law clearly provides that sexual contact includes touching the clothing covering specific body parts.

Second, Petitioner attempts to argue that the sex contact points should not be included in the scoresheet because he did not agree to the points as a part of his negotiated sentence. However, this argument ignores the fact that he stipulated to factual basis of the plea, and that criminal offense he pled to cannot be committed without sexual contact. (CSE.20). Section 800.04(5)(a), Florida Statutes, provides:

> A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of 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.

Lewd or lascivious molestation cannot be committed without a touching of the breasts, genitals, genital area, or buttocks, or the clothing covering them. Therefore, sexual contact points were appropriate included on the scoresheet based on the facts of this case.

Also, Petitioner failed to recognize this Court's decision Seagrave in its argument regarding the ambiguity in s. 921.0011(7)(b)(2), as in Seagrave clearly found to the contrary. Defendant seeks application of the rule of lenity. (IB. 16-17.) This Court in Seagrave instructed the courts to resort to the canons of statutory construction to determine its proper meaning. Seagrave at 281. The intent of the Legislature is the polestar of statutory construction. See, e.g., Borden v. East-European Ins. Co., 921 So.2d 587, 595 (Fla.2006). To discern this intent, the Court looks "primarily" to the plain text of the relevant statute, and when the text is unambiguous, the inquiry is

at an end. Id. However,

> if a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the Court will examine the entire act and those in pari materia in order to ascertain the overall legislative intent.

ContractPoint, 986 So.2d at 1265-66 (brackets omitted) (quoting Fla. State Racing Comm'n v. McLaughlin, 102 So.2d 574, 575-76 (Fla.1958)). "The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." Fla. Dep't of State v. Martin, 916 So.2d 763, 768 (Fla.2005). As part of this inquiry, we must address the legislation "as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence." Bautista v. State, 863 So.2d 1180, 1185 (Fla.2003) (quoting State v. Anderson, 764 So.2d 848, 849 (Fla. 3d DCA 2000)). The rule of lenity is only applied when after every other method of statutory construction has been applied, and the statute is still ambiguous. *See* § 775.021(1), FLA. STAT. (2007) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; **when the language is susceptible of differing constructions**, it shall be construed most favorable to the accused.") (bold added).

This Court in Seagrave addressed the definition of sexual contact since it had not previously been expressly defined in the statutes or case law. Id. at 286. The Court held:

> Because the statute does not define the term "sexual contact", the Court must resort to the canons of statutory construction in order to derive the proper meaning. *See Green v. State*, 604 So.2d 471, 473 (Fla. 1992). "One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature. *Id*. When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary. *See id.*

Seagrave at 286. "[T]he Fourth District stated that the supreme court's opinion in *Seagrave* indicates a "more expansive interpretation of 'sexual contact,' which takes into account the wide range of activity proscribed by the lewd and lascivious statute." Knarich v. State, 866 So.2d 165, 171 (Fla. 2d DCA 2004)(*citing* Altman v. State, 852 So.2d 870, 874 (Fla. 4th DCA 2003).

Here, for the reasons set out above, Section 921.0011(7)(b)(2) has been properly interpreted by this Court, and therefore, the application of the rule of lenity is unnecessary.

In addition, Petitioner attempts to apply Mann v. State, 974 So.2d 552 (Fla. 5th DCA 2008)(*citing* Chatman v. State, 943 So.2d 327 (Fla. 4th DCA 2006)), but cannot overcome the distinguishable fact in this case. In the present case, the charge of touching the sexual body parts or in the alternative, touching the sexual body parts covered by or through clothing, both involve some form of touching and both score the same amount of points. In Mann, the acts charged in the alternative were penetration and/or union, therefore, the trial court could only include the points for union and not penetration without a specific agreement to penetration by the appellant. Id. at 554. In the present case, since Petitioner would have gotten the same amount of points for either one, it is not necessary for Appellant to specify

which alternative he was entering his guilty plea. As such, Mann does not apply.

Therefore the sexual contact points were properly included on Petitioner's original scoresheet, and Petitioner's sentence should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal in Tasker v. State, 12 So.3d 889 (Fla. 1st DCA 2009, should be approved, and the sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on February 1, 2010: Glenn Gifford, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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