

IN THE SUPREME COURT OF FLORIDA

JAMES HUSTON ROUGHTON,

Petitioner,

vs.

CASE NO. SC12-1719

STATE OF FLORIDA,

Respondent.

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**ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL**

**REPLY BRIEF OF PETITIONER**

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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## ARGUMENT

### IN REPLY TO APPELLEE'S CONTENTION THAT DOUBLE JEOPARDY DOES NOT PREVENT DUAL CONVICTIONS FOR SEXUAL BATTERY AND LEWD OR LASCIVIOUS MOLESTATION BASED ON A SINGLE ACT.

Respondent argues the convictions for sexual battery and lewd or lascivious molestation do not violate double jeopardy utilizing the entirety of the statutes to support its position (RB 6). Respondent argues the exception contained within Section 794.021(4)(b)(1), Florida Statutes (2008) does not apply because the two do not share the same elements (RB 11). Respondent's argument is misplaced since it does not analyze the conduct charged.

Sexual battery and lewd or lascivious battery can be proven by various differing conduct. Sexual battery can be proven by penetration or union with certain various sexual organs. Section 794.011, Florida Statute (2008). Union is defined as contact. Florida Standard Jury Instruction (Criminal) 11.10(a). Similarly, lewd or lascivious molestation can be proven by having touched, in a lewd or lascivious manner, various sexual organs. Section 800.04(5)(a), Florida Statutes (2008). This Court has held it is the conduct alleged that gets compared in analyzing double jeopardy claims involving alternative conduct statutes. *Gibbs v. State*, 698 So. 2d 1206, 1209-1210 (Fla. 1997); *See also, Graves v. State*, 95 So.

3d 1033, 1035-1036 (Fla. 5th DCA 2012). Thus, the language of the information is imperative when conducting a proper double jeopardy claim in the instant case.

The State charged Roughton, in Count I, with committing sexual battery by “a person eighteen (18) years of age or older...commit a sexual battery upon [C.H.], a person less than twelve (12) years of age, and in furtherance thereof JAMES HUSTON ROUGHTON *did with his mouth have union with the penis of [C.H.]*.” (Vol. I, R 16) (emphasis added). The elements charged are Roughton’s age, C.H.’s age, and C.H.’s penis having union with Roughton’s mouth.

In Count II, the State charged Roughton with committing lewd or lascivious molestation by “a person eighteen (18) years of age or older...intentionally touch [C.H.], a person less than twelve (12) years of age, in a lewd or lascivious manner, and in furtherance thereof JAMES HUSTON ROUGHTON *did with his mouth have union with the penis of [C.H.]*.” (Vol. I, R 17) (emphasis added). The elements for this count are Roughton’s age, C.H.’s age, and Roughton intentionally touching, in a lewd or lascivious manner, the penis of C.H.

It is clear two of the three elements involved in each crime are identical: the ages of the participants. It is to the third element where the question lies. In the instant case, the conduct charged for both sexual battery and lewd or lascivious molestation was also identical: Roughton, with his mouth, had union with C.H.’s

penis. The only difference between the two was that the touching was required to be done in a lewd or lascivious manner for the molestation charge. Thus, every element of the sexual battery was contained within the charge of lewd or lascivious molestation.

The instant case is no different than what this Court considered in *Gibbs*. *Gibbs* involved trafficking in cocaine, based upon possession, and possession of cocaine. *Gibbs*, 698 So. 2d at 1207. This Court held double jeopardy existed due to both offenses being based on possession of the same drug. *Id.* at 1209.

Notably, the Fifth District Court of Appeal addressed a similar double jeopardy claim after its decision in *Roughton v. State*, 92 So. 3d 284 (Fla. 5th DCA 2012). The court, applying the principle set forth in *Gibbs*, found double jeopardy existed between a charge of lewd or lascivious battery and lewd or lascivious molestation. *Graves*, 95 So. 3d at 1036. The court observed the information alleged penetration or union of the victim's sexual organ for the lewd or lascivious battery offense and touching of the genitalia for the lewd or lascivious molestation offense. *Id.* at 1033-1034. Finding a violation of double jeopardy, the court stated "[t]o avoid a violation of double jeopardy, *each* offense must contain an element not within the other." *Id.* at 1036.

This Court has stated “the same sexual acts proscribed in the sexual battery statute are also proscribed in the lewd and lascivious battery statute.” *State v. Meshell*, 2 So. 3d 132, 136 (Fla. 2009); *See also, Hill v. State*, 114 So. 3d 1071 (Fla. 1st DCA 2013). It then must follow, that sexual battery and lewd or lascivious molestation can be in violation of double jeopardy if lewd or lascivious battery and lewd or lascivious molestation can be as held by *Graves*. Therefore, this Court should reverse the ruling of the Fifth District in *Roughton* and apply the analysis it utilized in *Gibbs* to find a double jeopardy violation in the instant case.

## CONCLUSION

Based on the arguments and authorities presented herein, and in the Initial Brief, this Court should reverse the decision of the Fifth District Court of Appeal and find the two offenses do violate double jeopardy in the instant case.

Respectfully submitted,

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## **CERTIFICATE OF FONT**


I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

## **DESIGNATION OF E-MAIL ADDRESS**

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and weiss.ed@pd7.org (secondary).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at [www.myflcourtagency.com](http://www.myflcourtagency.com); delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at [crimappdab@myfloridalegal.com](mailto:crimappdab@myfloridalegal.com); and a true and correct copy thereof delivered by USPS to Mr. James Huston Roughton, Inmate #114753, Columbia Correctional Institution - Annex, 216 Southeast Corrections Way, Lake City, Florida 32025-2013, on this 13th day of October, 2014.

  
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EDWARD J. WEISS  
ASSISTANT PUBLIC DEFENDER