Filing # 13555259 Electronically Filed 05/12/2014 03:36:46 PM

RECEIVED, 5/12/2014 15:38:38, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case No. SC13-1828
Lower Court Case No. 3D11-2023

VICTOR VILLANUEVA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Victor Villanueva ("Petitioner") was the defendant in the trial court and the Appellant in the district court of appeal. The State of Florida was the prosecution in the trial court and the Appellee in the district court of appeal. The symbol "R." will refer to the Record on Appeal from Case Number 3D11-2023. References to the trial transcripts will be designated by the symbol "T." The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

The State charged Petitioner by amended information with one count of lewd and lascivious molestation in violation of § 810.04(5)(c)(2), Fla. Stat. (R. 11-14). The amended information charged that Petitioner "being a person of the age of (18) years or older, did unlawfully and intentionally touch the breasts, genitals area, or buttocks, or the clothing covering the breasts, genitals, genital area, or buttocks, of Y.V. (A MINOR), a person 12 years of age or older, but less than 16 years of age." (R. 12). Y.V. is Petitioner's daughter.

Following a jury trial, the jury acquitted Villanueva of the charge of lewd and lascivious molestation of a child, but found him guilty of the lesser-included offense of misdemeanor battery. (R. 83). The trial court adjudicated Petitioner guilty and sentenced him to one year of probation. (R. 112). As special conditions

of his probation Petitioner was ordered to stay away from Y.V., undergo sex offender therapy, and to serve 90 days in the county jail.[1] (R. 112-13).

Petitioner appealed his conviction and sentence for misdemeanor battery, as a lesser-included offense of the charge of lewd and lascivious molestation of a child. *Villanueva v. State*, 118 So. 3d 999, 1001 (Fla. 3d DCA 2013). Following the recitation of the facts, the Third District Court framed the issues as follows:

> (1) whether sex offender therapy as a condition of probation is restricted by statute to only certain enumerated sexual offenses; and (2) whether the imposition of that condition here comports with the standards governing probation announced by the Florida Supreme Court in *Biller v. State*, 618 So.2d 734, 734-35 (Fla. 1993).

Villanueva, 118 So. 3d at 1001. On appeal, Petitioner challenged the trial court's decision in ordering him to undergo mentally disordered sex offender therapy as a special condition of his probation. *Id*. at 1001. Specifically, Petitioner, *inter alia*, argued "that sex offender therapy as a condition of probation is restricted by statute to certain enumerated sexual offenses." *Id.* The Third District found Petitioner's argument unpersuasive, stating:

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[1]The original supervisory order entered reflected that the special condition regarding Petitioner to serve the 90 days did not conform with the court's oral pronouncement. (R. 87). After the State conceded error as to this point, the district court remanded for the trial court to enter a written order to correctly reflect its oral pronouncements. *Villanueva*, 118 So. 3d at 1004.

> Even though a statute includes sex offender treatment as one of a roster of mandatory conditions of probation for certain specified sexual offenses, the statute does not prohibit a judge from selectively requiring sex offender therapy as a special condition of probation for other offenses where appropriate.

Villanueva, 118 So. 3d at 1001. In doing so, the Third District set forth the pertinent language of § 948.30, Fla. Stat., which lists the conditions for "sex offender probation." *Id.* at 1002. The Third District noted that "sex offender therapy," among others, is one of the "mandatory conditions" in § 948.30. *Id.* Recognizing further that the section's legislative intent mandates the imposition of all the conditions listed therein on convicted sexual offenders that "are granted probation," the Third District stated:

> But it contains no language that prohibits these conditions from being selectively imposed on the probation for other crimes.

Id. at 1002. The Third District then noted that not only have courts already imposed some of the individual conditions listed in § 948.30 on other offenses not listed in the statute, but "the Legislature itself" had "authorize[d]" some of them "to be imposed for offenses other than those listed in the statute." *Villanueva*, 118 So. 3d at 1002.

In further rejecting the proposition that the special conditions listed in § 948.30 apply only to the enumerated sexual offenses in the statute, the Third District stated:

> . . . reading such a restrictive inference into the statute runs contrary to the policy of the probation statutes, which encourage trial judges to exercise broad discretion in tailoring the probation conditions to a defendant's rehabilitation. The probation statutes mandate certain conditions of probation for certain crimes, but otherwise recognize that trial judges have broad discretion to fashion conditions of probation that promote rehabilitation.

Villanueva, 118 So. 3d at 1002 (citations omitted).

Lastly, the Third District acknowledged the Fourth and Fifth Districts' decisions in *Sturges v. State*, 980 So. 2d 1108, 1109 (Fla. 4th DCA 2008) and *Arias v. State*, 65 So. 3d 104 (Fla. 5th DCA 2011), which had held that:

> *all* of the conditions listed in the sex offender probation statute could not be imposed on persons who were convicted of a crime other than those crimes enumerated in the statute.

Villanueva, 118 So. 3d at 1002 (italicized in opinion) (citations omitted). The Third District, however, distinguished the decisions in *Sturge* and *Arias*, reasoning that the decisions "did not address situations where the court selectively imposed only one of the listed conditions, such as the sex offender therapy imposed here." *Villanueva*, 118 So. 3d at 1002. Thus, the Third District held that:

> while there are circumstances in which sex offender therapy is a statutorily-required condition of probation, sex offender therapy can still be imposed as a special condition of probation outside of those statutorily-required circumstances when the facts of the crime so warrant.

Villanueva, 118 So. 3d at 1002. Subsequently, the Third District addressed the application of the factors announced by this Court in *Biller* to determine the validity of a special condition of probation. *Villanueva*, 118 So. 3d at 1003-04. Applying *Biller* to this case, the Third District "conclude[d] that the special condition that Villanueva attend sex offender therapy comport[ed] with that decision's standards governing probation because it [was] reasonably related to rehabilitation." *Id.* 118 So. 3d at 1004. Thus, the Third District upheld the lower's decision to impose a special condition on Petitioner. *Id*.

Petitioner then sought this Court's discretionary jurisdiction based on an alleged conflict with the Fifth District's decision in *Arias.* The State filed its Brief on Jurisdiction, arguing a lack of express and direct conflict to vest the Court with jurisdiction. The Court granted jurisdiction.

FACTS ADDUCED AT TRIAL

Petitioner was charged with one count of lewd and lascivious molestation on a child older than 12, but less than 16-years-old. (R. 11-13). The following evidence was presented at the trial, sentencing hearing and post-trial motion. (T. 260-512, R. 108-115, R. 123-129).

Petitioner and Martha Mateo ("Mateo") were married for six months. (T. 304). They had a child together, Y.V. (T. 305). However, before Y.V. was born,

Petitioner divorced Mateo. (T. 318). The marriage ended on good terms, and as part of a court order, Petitioner was allowed to visit Y.V. (T. 305, 319). Petitioner's visitation became less frequent as Y.V. got older, and by the time Y.V. was 9 years old, she did not see Petitioner anymore. (T. 265).

When Y.V. was twelve, Y.V. and her family went to McDonalds for breakfast. (T. 269). They saw Petitioner at the restaurant. (T. 270-271, 309). Petitioner and Mateo made arrangements so that he could take Y.V. and spend time with her. (T. 312).

Petitioner picked Y.V. up to take her to her uncle's house to go swimming. (T. 282, 283). Y.V. testified that as they were walking to Petitioner's car he put his arm around her. (T. 275). He touched her chin and told her that she had grown up and was very pretty. (T. 275). Y.V. further testified that Petitioner lowered his hand toward her chest and touched her breast. (T. 275, 276, 277). They got into Petitioner's car, and he tried to put Y.V.'s seatbelt on her. (T. 280). Again, Y.V. testified that Petitioner lowered his hand and touched her breast. (T. 280-281).

When they arrived at her uncle's house, Y.V. went swimming in the pool (T. 283-284). Y.V. began to jump in the pool when Petitioner reached out for her and touched her buttocks. (T. 284). Y.V. told Petitioner "you touched me," and Petitioner apologized and told her that it was because she jumped. (T. 284). They

had dinner at the house, and afterwards, Petitioner dropped Y.V. off at her house. (T. 284-285).

The next morning, Y.V. told Mateo what occurred. (T. 285). Additionally, months later, Y.V. told her teacher about what occurred. (T. 347-348). The teacher was required by law to report the allegation, and the police were notified. (T. 286-287, 347-348). Petitioner testified that he never touched Y.V.'s breasts and never said anything sexual to her. (T. 389).

The jury found Petitioner guilty only of the lesser-included offense of misdemeanor battery. (T. 506). The court adjudicated Petitioner guilty and sentenced him to one year of probation with the special condition that he serve ninety days in jail. (R.112-13).

Over defense counsel's objection, the court required Petitioner to receive "MDSO" therapy at a sex offender treatment program. (R. 112-13). Defense counsel argued that Petitioner was not convicted of a sexual offense, but rather only of misdemeanor battery. (R. 114). The court imposed the condition, stating:

> No, I want him to undergo MDSO Therapy. It's not an MDSO plea, it's not an MDSO probation, just as a condition of his probation. He will undergo MDSO Therapy with whichever mental health professional is able to arrange it with him. My suggestion would be Dr. Marvin. She speaks Spanish and she does that.

(R. 114). Defense counsel later filed a motion to strike the condition that Petitioner receive sex offender treatment because Petitioner is not a sex offender. (R. 94-95, R. 123-29). The trial court denied the motion and stated:

> I ordered MDSO therapy because he was found guilty of battery which is an illegal touching of someone else. That's what he was charged with, was the illegal touching of someone else. They just didn't find it to the same degree that the charging people did. Okay. That being the case, it was still an improper touching of his daughter, and he can acknowledge that in the sense of what it was and what he was found guilty of and go do the therapy, because he needs to learn that he can't do that to children and family.

(R. 127).

SUMMARY OF THE ARGUMENT

The imposed special condition of probation that Petitioner undergo sex offender therapy was proper. The mandatory special conditions as set forth in § 948.30 are not statutorily prohibited from being selectively imposed on probation for other crimes. Because, under principles of statutory construction, the Third District correctly found that there was no clear legislative intent indicating that sexual offender conditions could not be imposed on other non-sex crimes, it did not err in its conclusion that the conditions as set forth in § 948.30, Fla. Stat. are not limited to sex crimes.

Further, the special condition that Petitioner undergo sex offender therapy was not erroneous. The special condition bears a relationship to the conviction of simple battery. Petitioner's non-sexual offense arose out of the same set of circumstance as the sexual offense charged, *i.e.*, lewd and lascivious molestation.

Lastly, Petitioner's substantive due process argument under the United States Constitution and Florida Constitution is procedurally barred as it was not preserved for review. Even if the argument was preserved, Petitioner's argument is meritless.

ARGUMENT

THE IMPOSED SPECIAL CONDITION OF PROBATION THAT PETITIONER UNDERGO SEX OFFENDER THERAPY WAS PROPER.

A. The mandatory special conditions as set forth in § 948.30 are not statutorily prohibited from being selectively imposed on probation for other crimes.

In the instant case, the Third District Court of Appeal did not err in concluding that a requirement of sex offender treatment is authorized, as a discretionary condition of probation, to be imposed under §948.03(2), Fla. Stat. There is nothing in § 948.30 which prohibits that condition, or any other condition, from being imposed as a discretionary condition under §948.03(2), Fla. Stat.

Section 948.30, Fla. Stat., sets forth conditions of probation for defendants convicted of certain sex offenses that the court "must impose... in addition to all other standard and special conditions imposed." These mandatory conditions are: mandatory curfew, residency restrictions, participation in a sex-offender treatment program, prohibitions on contact with the victim or children directly or indirectly, unless authorized by the court, prohibition on contact with the victim, working or volunteering in places where children congregate, viewing, accessing, owning or possessing child pornography, or accessing the Internet or other computer services under some circumstances, a requirement to provide a blood specimen or other approved biological specimen, pay restitution, submit to warrantless searches,

submit to polygraph examinations, maintenance of driving logs, electronic monitoring and under some circumstances, the prohibition on visiting schools, child care facilities, parks, and playgrounds, without prior approval. *See* § 948.30, Fla. Stat.

Generally, the interpretation of a statute is purely a legal matter subject to *de novo* review. *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006). In interpreting a statute, legislative intent is the "polestar" that guides a reviewing court in its analysis. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006). Courts initially determine legislative intent by construing a statute's plain and ordinary meaning. *State v. Lacayo*, 8 So. 3d 385 (Fla. 3d DCA 2009) (citing *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) ("When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute.")). If a statute is clear and unambiguous, the courts will not expand its analysis and look beyond the statute's plain language or resort to rules of statutory construction. *Daniels v. Fla. Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005) ("In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.") (citing *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004)).

As required by the principles of statutory interpretation, the Third District properly recognized the clear intent of the Legislature that all the special conditions listed in § 948.30 are mandatory conditions to be imposed when a person is convicted of sexual crimes enumerated therein. *Villanueva*, 118 So. 3d at 1002. It further recognized that the plain language of § 948.30 does not statutorily prohibit the probation conditions enumerated therein from being selectively imposed on probation for other crimes. Because there is no clear legislative intent indicating that the sexual offender conditions could not be imposed on other non-sex crimes, the Third District did not err in its conclusion that the conditions are not limited to sex crimes. Indeed, as recognized by the lower court, courts have selectively imposed the sex offender conditions on defendants convicted of non-sexual offenses. *See e.g.*, *Lacayo*, 8 So. 3d at 385 (holding that a defendant who was convicted of fleeing and attempting to elude a police officer was subjected to electronic monitoring because § 948.30(3) requiring such condition was not limited to probation imposed for sexual offenses.); *Peeples v. State*, 698 So. 2d 910, 911 (Fla. 4th DCA 1997) (revoking probation of defendant convicted of stalking and firearm possession who violated condition that prohibited contacting victim); *Jones v. State*, 678 So. 2d 890, 893 (Fla. 4th DCA 1996) (revoking probation of defendant convicted of aggravated battery who violated special condition imposing

a curfew); *T.S. v. State*, 682 So. 2d 1202, 1202-03 (Fla. 4th DCA 1996) (upholding special condition of electronic monitoring of juvenile convicted of burglary and grand theft)).

Additionally, the special conditions set forth in § 948.30, as correctly noted by the Third District, had been authorized by the Legislature to be individually imposed for other crimes. *Villanueva*, 118 So. 3d at 1002 (citing generally "§§ 948.014, 948.03(1)(*o*), Fla. Stat. (2011) (provide blood or other biological specimens); §§ 948.03(1)(f), 948.032, Fla. Stat. (2011) (pay restitution)"). Just because the special conditions specified in § 948.30 are mandatory for sex crimes, it does not follow that the same special conditions cannot be individually applied to crimes other than those enumerated therein. *See e.g., id.; Lacayo*, 8 So. 3d at 385 *Peeples*, 698 So.2d at 911; *Jones*, 678 So. 2d at 893; *T.S. v. State*, 682 So. 2d at 1202-03. Further, "[t]he enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper." § 948.03(2).

Lastly, under the rules of statutory construction, the Third District recognized its duty, absent a clear expressed legislative intention to the contrary, to reconcile and harmonize statutes that are capable of co-existing. *See Floyd v. Bentley*, 496 So. 2d 862, 864 (Fla. 2d DCA 1986) ("courts have a duty to adopt a

scheme of statutory construction which harmonizes and reconciles two statutes and to find a reasonable field of operation that will preserve the force and effect of each.") (citing *Woodgate Development Corp. v. Hamilton Investment Trust*, 351 So. 2d 14 (Fla. 1977); *American Bakeries Co. v. Haines City*, 180 So. 524 (Fla. 1938)) In doing so, the Third District Court correctly concluded that:

> . . . reading such a restrictive inference into the statute runs contrary to the policy of the probation statutes, which encourage trial judges to exercise broad discretion in tailoring the probation conditions to a defendant's rehabilitation. The probation statutes mandate certain conditions of probation for certain crimes, but otherwise recognize that trial judges have broad discretion to fashion conditions of probation that promote rehabilitation.

Villanueva, 118 So. 3d at 1002 (citations omitted).

Accordingly, the Third District did not err in concluding that the mandatory conditions of probation enumerated in § 948.30 are not limited to sex crimes, but can be selectively imposed on other crimes when facts of the crime so warrant.

B. The imposed special condition is reasonably related to Petitioner's conviction for simple battery as a lesser-included offense of lewd and lascivious molestation, as the battery conviction arose out of the same fact pattern as the charged sex offense.

Petitioner argues that the court improperly imposed the special condition of probation that he undergo sex offender therapy because the jury acquitted him of

the lewd and lascivious molestation. (Pet'r. Br. at 10). He asserts that by convicting him of simple battery[2] - which elements are intentionally touching or striking another person against his or her will-, the jury specifically found that he touched the child in a non-sexual way. (*Id*. at 11). He further claims that the imposed special condition bears no relation to his rehabilitation and it only serves to punish for an offense for which he was acquitted. (Pet'r. Br. at 10).

Here, the special condition that Petitioner undergo sex offender therapy was not erroneous. The special condition bears a relationship to the conviction of simple battery. Petitioner's non-sexual offense arose out of the same set of circumstances as the sexual offense charged.

In *Biller v. State*, 618 So. 2d 734 (Fla. 1993), this Court explained that:

> [i]n determining whether a condition of probation is reasonably related to rehabilitation, we believe that a condition is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.

Id. at 734-35 (quoting *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. 2d DCA 1979)). When a special condition is challenged "on grounds of relevancy, [it] will only be upheld if the record supports at least one of the circumstances outlined in

[2] § 784.03, Fla. Stat.

Rodriguez." *Biller*, 618 So. 2d at 735. The *Biller* Court held that with respect to the defendant "there was nothing connecting any use of alcohol with the crimes with which he stands convicted, and the use of alcohol by adults is legal." *Id*. at 735. It further noted that "***there was nothing in the record, such as information in a presentence investigation report, which would suggest that Biller has a propensity towards alcohol or that his judgment becomes impaired as a consequence of using it."*** *Id*. (emphasis added). The Third District correctly noted that the clear inference from the emphasis language of *Biller* is that a "sentencing judge could consider facts in the record beyond the face of the judgment," when imposing a discretionary condition of probation. *Villanueva*, 118 So. 3d at 1003.

For example, a substance abuse treatment can be imposed as a special condition where the record reveals a nexus between the substance abuse and the crime convicted. *See Morris v. State*, 26 So. 3d 660, 662 (Fla. 4th DCA 2010) (holding that defendant convicted for grand theft and burglary could not be sentenced to drug offender probation, but substance abuse treatment could be imposed as a special condition where the record reflected a connection between substance abuse and the crimes); *Beals v. State*, 14 So. 3d 286, 287 (Fla. 4th DCA 2009) (reversing an order that sentenced a defendant to drug offender probation for concealed weapon conviction, but permitting the trial court to impose special

probation conditions related to substance abuse, provided *Biller* was satisfied); *Estrada v. State*, 619 So. 2d 1057, 1058 (Fla. 2d DCA 1993) (holding that conditions concerning alcohol use and testing did not violate *Biller* because they were related to the offense, where the record revealed that "appellant told police that he committed the offense because he was intoxicated").

Here, the special condition imposed by the trial court is reasonably related to Petitioner's conviction of simple battery. Petitioner was charged with lewd and lascivious molestation in violation of § 800.04(5)(c)(2). The amended information charged that Petitioner "did unlawfully and intentionally touch the breasts, genitals, genital area, or buttocks, or the clothing covering the breasts, genitals, genital area, or buttocks of Y.V. (A MINOR), a person less than 12 years of age in a in violation of 800.04(5)(c)(2) Florida Statutes ...." Y.V. is Petitioner's daughter. Although, Petitioner was acquitted of the lewd and lascivious molestation charge, he was found guilty of the lesser-included offense of misdemeanor simple battery. (T. 506). There was no evidence adduced that Petitioner touched Y.V. anywhere other than the sexually-related body parts of her breasts and buttocks.

In the instant case, although the jury acquitted Petitioner of the charge of lewd and lascivious molestation, he was convicted of the offense of simple battery based on the same fact pattern charged on lewd and lascivious molestation, namely

the touching of Y.V.'s private parts. Thus, this case compels the conclusion that the jury found that Petitioner impermissibly and intentionally touched the victim on her breasts and buttocks, or clothing covering those areas. As Petitioner was found guilty of having impermissibly and intentionally touched the victim in such an area, notwithstanding the acquittal on the greater charge of lewd and lascivious molestation, a sufficient evidentiary basis remains for finding the special condition of probation reasonably related to the offense for which there was a conviction.

Review of cases in other jurisdictions has not rejected the proposition that a sex offender condition may be imposed on individuals not convicted of a sex offense in the context of the Due Process Clause. *See e.g*. *Ex parte Evans,* 338 S.W.3d 545, 553-54 (Tex. Crim. App. 2011) (holding that a parolee previously released on discretionary mandatory supervision was entitled to due process protections before being required by the parole board to meet certain additional sex offender conditions when he had not been convicted of a sex offense); *Meza v. Livingston,* 607 F.3d 392 (5th Cir. 2010) ("This court has made clear that sex offender conditions may only be imposed on individuals not convicted of a sex offense after the individual has received due process); *Renchenski v. Williams,* 622 F.3d 315, 326-31 (3d Cir. 2010) (holding that only after due process has been afforded may sex-offender conditions be imposed on an inmate who has not been

convicted of a sexual offense); (*Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir. 1999) ("An inmate who has never been convicted of a sex crime is entitled to due process before the state declares him to be a sex offender."); *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) (holding that before an inmate who has never been convicted of a sex offense may be labeled as a "sex offender," he "is entitled to the procedural protections outlined by the Supreme Court in *Wolff* [*v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)]"); *Chamber v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1243 (10th Cir. 2000) (holding that the state's imposition of sex offender status on an inmate never convicted of a sex offense, combined with a reduction in good time credits if the inmate did not participate in treatment, implicated a state-created liberty interest).

Although, there is considerable disagreement among the jurisdictions as to whether fundamental rights are implicated when imposing sex offender conditions on individuals not convicted of a sexual crime, this disagreement, however, has not precluded the imposition of those conditions. Those conditions have been imposed when the non-sexual offense for which the individual had been convicted contained a sexual component based on the fact pattern of the charged offense. *See e.g.*, *Kramer v. Donald*, 286 Fed. Appx. 674 (11th Cir. 2008) (holding that a precondition for parole consideration, that an inmate complete a sex offender

counseling program, was insufficiently stigmatizing to constitute a deprivation of a constitutionally protected liberty interest and to support a due process entitlement; the parole board determined only that the nonsexual offense for which the inmate had been imprisoned also had a sexual component that warranted counseling, and he was not classified or otherwise labeled as a sex offender); *Weiss. v. Indiana Parole Bd*, 838 N.E.2d 1048 (Ind. Ct. App. 2006) (The Parole board had the authority to impose upon parolee special sex offender parole conditions in addition to standard parole conditions, though the parolee had not been convicted of a sex offender crime, as the sex offender parole conditions were reasonably related to the parolee's successful reintegration into the community and they were not unduly restrictive of a fundamental right; the parolee had been convicted of aggravated battery of a minor, the parolee had raped the victim.); *State v. Phillips*, 135 P.3d 461, 466 (Or. Ct. App. 2006) (holing that sex offender evaluation and treatment, as special condition of probation in prosecution for offenses that were not sex offenses and instead involved coercion and supplying controlled substances and alcohol to minors, was reasonably related to the charges and was also reasonably related to needs to protect the public and reform the offender; defendant, who was 25 years old, coerced one 12-year-old girl into watching pornographic movie and touched and rubbed the breasts, buttocks, and crotch of another 12-year-old girl);

Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004) (*Coleman I*) (finding that Texas' imposition of sex offender registration and therapy as conditions to the release on a parole or mandatory supervision of a prisoner absent a sex offense conviction did not constitute an arbitrary state action that "shocked the conscience" and, thus, did not violate the state prisoner's substantive due process rights); *Gunderson v. Hvass*, 339 F.3d 639, 644 (8th Cir. 2003) (finding that the defendant, convicted, upon a guilty plea, of nonsexual third-degree assault, who was originally charged with first-degree sexual assault, was required to register under Minnesota's predatory offender registration statute,[3] where charged offense and offense for

[3] The Minnesota predatory offender registration statute requires a person to register for a period of ten years if he was "charged with" one of several enumerated offenses and "convicted of ... that offense or another offense arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1b(a)(1). As construed by the Minnesota Supreme Court, a defendant is "charged with" an enumerated offense for purposes of the registration statute only if there is probable cause to support the charge filed by prosecuting authorities. *State v. Lopez*, 778, N.W.2d 700, 703 (Minn. 2010) If the defendant is properly charged, however, then the registration requirement applies even when the conviction is not for an offense listed in the statute, as long as it "aris[es] out of the same set of circumstances" as the charged offense. *Id.* at 706; *Boutin*, 591 N.W.2d at 716. According to the Minnesota Supreme Court, the legislature gave the statute this breadth "to ensure that true predatory offenders cannot plead out of the registration requirements."*Lopez*, 778 N.W.2d at 704.

which he was convicted arose out of the same incident, involving an attack on a woman to whom defendant gave a ride home), *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (holding that because the defendant was charged with an enumerated predatory offense and was convicted of another offense which arose out of the same set of circumstances as the charged predatory offense, he was required to register under the statutory provisions.).

This case does not involve the parole board's authority to impose conditions. However, just as the parole board is vested with discretion in setting conditions of parole, the trial courts of this State are given broad discretion in fashioning conditions of probation as noted by the Third District. *Villanueva*, 118 So. 3d at 1002. ("The probation statutes mandate certain conditions of probation for certain crimes, but otherwise recognize that trial judges have broad discretion to fashion conditions of probation that promote rehabilitation.); *Harder v. State*, 14 So. 3d 1291, 1293 (Fla. 1st 2009) ("Section 948.03, Florida Statutes (1995), affords trial courts discretion to impose probation terms and conditions."). Nor does this case involve a statutory provision containing express languages requiring the imposition of the sex offender conditions on individuals convicted of non-sexual crimes arising out of the same set of facts as the sex crime charged. Significantly, as noted by the Third District, this does not preclude the imposition of the condition absent

a clear expressed legislative intention to the contrary. Nevertheless, in this case, the sex offense charged and the non-sex offense for which Petitioner was convicted arose out of the same general group of facts.

In this case, the evidence established that Petitioner only touched Y.V. on her breasts and buttocks, and the touching was intentional and with accompanied endearments. Y.V. testified that

> [Petitioner] put his right arm around me and with his left arm, he touched my chin and told me I was very pretty, I had grown a lot, and as he said that he lowered his hand toward my chest.

(T. 275). Y.V. stated that her "heart was pounding and she did not want to be there." When questioned what she meant by Petitioner touching her chest, Y.V. clarified that Petitioner placed his hand on her breasts. (T. 276). She explained that the touching was not accidental although it lasted a "few seconds, [because] it was long enough for [Petitioner] to realize he was doing something wrong, at least take it away and apologize." (T. 277). Y.V. further stated that she felt "scared" and that Petitioner "just started laughing and looked away" when he was touching her. (T. 277, 280). Thereafter, they got into Petitioner's car, and Y.V. described what transpired next:

> I was scared, but, I mean, as we walked into the truck, I got inside and as I closed the door behind me, I kept my hand on the handle. And when he got inside and started up the car, he tried – he reached out to try to put my seat belt on. I took it from there and with his left hand,

> he put his left hand on my chin the same way he did before, He kept smiling and told me I was growing up, I was very pretty, and he started lowering his hand towards my chest again.

(T. 280-81). Y.V. explained that Petitioner touched her "chest and her breast" again for a few seconds and that she felt "more scared" than during the first touching incident. (T. 281). Y.V. further testified that once at her uncle's house, Petitioner touched her on her buttocks when she was jumping into the pool. She described the third incident as follows:

> There was a clipboard and he had already seen me swim and he knew I could swim. When I jumped off into the pool, he reached out for me and he touched my behind, and there –then I did speak up, because my aunt was in the pool so I told him, hey, you touched me. And he told me oh, I'm sorry, it's that you jumped out, and I reached out, and I find myself with your butt.

(T. 284).

Notwithstanding that the jury did not find Petitioner guilty of the lewd and lascivious charge, there was no error in ordering Petitioner to undergo MDSO therapy as a special condition of his probation. The condition is reasonably related to his conviction of misdemeanor simple battery since it is predicated on the same facts as the greater offense charged. In finding Petitioner guilty of simple battery, the jury inherently found an unlawful and intentional touching of Y.V.'s breasts and buttocks. This is so because the finding of simple battery is based on Y.V.'s testimony that Petitioner touched her breast and buttocks. The fact that the jury

exercised its pardon power here in acquitting Petitioner as to the greater charge and finding him only guilty of the lesser-included offense does not negate that Petitioner impermissibly and intentionally touched V.Y.'s breasts and buttocks.

Petitioner, as he did below, argues that by convicting him of simple battery as the lesser-included offense of the sexual offense charged, the jury found specifically that he touched Y.V. in a "*non sexual way*." (Pet'r. Br. at 11) (emphasis in the original). Thus, he disputes the Third District's conclusion that his touching of Y.V.'s breast and buttock "were sexual in nature." He argues that as a practical matter, the Third District's conclusion equates to a holding "that *any* touching of the breasts or buttock is "sexual in nature." (*Id*. at 14). Petitioner claims that this determination is illogical and contrary to the lewd and lascivious molestation statute, which does not require only a touching, but rather an intentional touching in a lewd and lascivious manner. (*Id.*). In support of this argument, Petitioner relies on *Brown v. State*, 959 So. 2d 218 (Fla. 2007) and *Redondo v. State*, 425 So. 2d 542 (Fla. 1983).

Petitioner's argument is flawed as it rests on a misreading of the Third District Court's decision. The Third District's determination cannot be interpreted as Petitioner proposes because "regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case." *Castillo v. Florida, Sec'y*

Dept. of Corr., 713 F.3d 1281, 1290 (11th Cir. 2013). Here, the Third District reached its conclusion after recognizing that "the only inappropriate touching ***in the record,*** **-** the only non-consensual physical contacts" was the touching of the child's breasts and buttocks. *Villanueva*, 118 So. 3d at 1004 (emphasis added). Thus, the Third District's determination rests on the specific facts of this particular case. *Villanueva*, 118 So. 3d at 1004 ("The special condition of probation that Villanueva undergo sex offender therapy, therefore, bears a rational relationship to his rehabilitation, **when the facts in the record are considered"**) (emphasis added). Additionally, the Third District was correct that the touching of the child's breasts or buttock was "sexual in nature." *See e.g., Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001) ("conclud[ing] that the most common usage of the phrase "sexual contact" encompasses the physical touching of a person's sexual body parts."); *Kitts v. State*, 766 So. 2d 1067, 1068 (Fla. 5th DCA 2000) ("the female breast is, as a matter of common sense, a sexual object (as evidenced by the fact that women in most societies clothe their upper bodies in public")).

Thus, the Third District Court did not err in its finding that the special condition imposed was related to Petitioner's conviction because there was a nexus between the jury's finding of battery as a lesser-included offense of lewd and lascivious molestation. The jury's finding of lesser-included offense was based on

the same facts - the unlawful touching of Y.V.'s breasts and buttocks - supporting the greater offense charged.

Petitioner's reliance on *Brown* and *Redondo* is misplaced. Such cases involve an offense that as a matter of law cannot be committed unless another underlying offense has also been committed. The commission of the underlying offense is a necessary element of the other offense. Where a defendant is charged with such legally interlocking offenses and is effectively acquitted of the underlying offense, a guilty verdict on the other offense is an impermissible inconsistent verdict. Because "the underlying felony [is] a part of the crime charged [,] without the underlying felony the charge [can] not stand." *State v. Cappalo*, 932 So. 2d 331 (Fla. 2d DCA 2006) ("citing *Eaton v. State,* 438 So. 2d 822, 823 (Fla. 1983)).

Unlike *Brown* and *Redondo*, this case does not involve legally interlocking offenses. *Brown* and *Redondo* involve a principle of law unrelated to Petitioner's case, and thus, their logic is inapplicable to the instant case.

Petitioner also argues that the Third District's decision conflicts with the decisions in *Carty v. State*, 79 So. 3d 239 (Fla. 1st DCA 2012); *G.F v. State*, 927 So. 2d 62 (Fla. 5th DCA 2006); *Arias v. State*, 65 So. 3d 104 (Fla. 5th DCA 2011);

Sturges v. State, 980 So. 2d 1108 (Fla. 4th DCA 2008); and *James v. State*, 696 So. 2d 1268 (Fla. 2d DCA 1997). Those cases are legally and factually distinguishable.

In *Carty*, the defendant was originally charged with battery, burglary of a conveyance with assault, and resisting an officer without violence. *Carty*, 696 So. 2d at 240. The jury acquitted him of the battery and burglary charges, but returned a guilty verdict on the resisting charge. *Id.* In sentencing the defendant, the trial court included the batterer's intervention program as a special condition of defendant's probation. *Id*. The First District held that condition was not reasonably related to defendant's rehabilitation. *Id*. The First District reasoned that the batterer's intervention program has no relationship to the defendant's conviction for resisting an officer without violence, and there was nothing in the record to suggest that Petitioner has a propensity towards domestic violence. *Id*. The First District further reasoned that the fact that defendant was also charged with battery and burglary of a conveyance with assault did not justify the condition because the jury acquitted Carty of those charges and thus the condition was invalid.

In *James*, the defendant was engaged in a continuing two-year sexual relationship with a 14-year-old girl. *James*, 696 So. 2d at 1269. They had a child and eventually married after his arrest. *Id*. at 1269. A jury found the defendant guilty of a lewd act, and the trial court sentenced him to three years in prison

followed by two years' probation. *Id*. He was acquitted of a separate charge of aggravated child abuse, which related to alleged physical abuse of the couple's child. *Id*. On appeal, the defendant challenged the conditions of probation prohibiting him from having physical contact with his wife and their child. The Second District struck the condition, reasoning that the jury acquitted the defendant of committing aggravated child abuse. *Id*. 1270. It reasoned that from the transcript of the sentencing hearing, it appeared that the trial court imposed the condition based on the allegations of child abuse in this case and its knowledge from a separate dependency case. *Id*.

In *G.F.*, the defendant was charged with committing the crime of battery. Following testimony of three employees of the juvenile facility where the defendant resided that the defendant had struck them, the trial court found that the defendant had committed two counts of battery. *G.F.*, 927 So. 2d at 62. The defendant's predisposition report indicated that his psychological evaluation recommended, among other things, participation in an intensive outpatient sex offender treatment program. *Id*. 63. Thus, the trial court ordered the defendant to participate in mental health counseling and recommended that such counseling include sex offender treatment. *Id*. Subsequently, the defendant's post-commitment conditional release was changed to probation by agreement of the parties. *Id*. The

post-conviction order specifically stated that the defendant was required "to enroll in and complete an out-patient sex offender treatment program as a condition of his probation." *Id*. at 63. In reversing the special condition, the Fifth District Court noted that "ordering [the defendant] to attend sex offender counseling bears no relationship to the offense of which [the defendant] was adjudicated delinquent."*Id*. The Fifth District also noted that although the defendant's prior record indicates that he was charged with one count of lewd and lascivious molestation on a child under 12 years and one count of lewd and lascivious exhibition by a person less than 18, those charges were dismissed. *Id.*

In *Arias,* the defendant entered a no contest plea to the charge of burglary of a dwelling with an assault or battery therein. The defendant entered his girlfriend's home without permission to retrieve his wallet. *Arias,* 65 So. 3d at 104. After retrieving his wallet, the defendant entered his girlfriend's daughter's bedroom and petted her hair without her permission. *Id*. The girl was frightened by the defendant's conduct so that she locked herself in the bathroom. *Id*. The trial court felt there was a sexual motive to the defendant's conduct and imposed as special conditions of probation the sexual offender conditions set forth in § 948.30. Relying on *Sturges,* the Fifth District Court reversed, holding that defendant's offense was not enumerated in the statute governing imposition of the sex offender

conditions, and the conditions were not related to the offense. *Arias*, 65 So. 3d at 105.

In *Sturges*, the trial court sentenced the defendant for aggravated assault with a deadly weapon and imposed a sentence of 364 days in prison, anger management, and five years of sex offender probation *pursuant to* §§ 948.30 and 948.31. *Sturges*, 980 So. 2d at 1109. The Fourth District reversed the sexual offender probation condition finding that "aggravated assault is not one of the enumerated felonies for which those statutory provisions are imposed." *Id*.

Unlike the defendants in *Carty, James, G.F., Arias, and Sturges*, Petitioner was charged with a sexual offense. Although Petitioner was convicted of simple battery, this conviction was based on the same testimony supporting the lewd and lascivious molestation charge, *i.e*., the unlawful touching of the victim's breasts and buttocks. Thus, unlike *Carty*, *James, G.F*., *Arias*, and *Sturges* where the imposition of the sex offender conditions of probation had no nexus with the offense pled to or convicted of, here there was a nexus. Further, unlike *Arias*, where the defendant just "petted" the girl's hair, here Petitioner touched his daughter's breasts and buttocks with accompanying endearments. Further, this case is unlike *G.F*. in which the imposition of the sex condition was based on the defendant's prior record indicating sexual charges that had been dismissed. Here,

the sexual nature of the offense was not dismissed, but the jury opted to find him guilty of the simple battery as a lesser-included of the greater offense charged. Lastly, unlike *James*, where the charge of aggravated child abuse was based on the alleged *physical abuse* of the couple's child, Petitioner's original charge was based on sexual conduct.

Petitioner, however, takes issue with the Third District's distinction of *G.F.* (Pet'r. Br. at 18). In distinguishing the instant case from *G.F.*, the Third District stated:

> We distinguish *G.F. v. State,* 927 So. 2d 62, 65 (Fla. 5th DCA 2006), in which the appellate court struck a special condition of sex offender therapy, even where a disposition report indicated the need for such therapy. The battery in *G.F.* consisted of a juvenile's physical assault on three state employees. Unlike the instant case, the battery had no sexual component.

Villanueva, 118 So. 3d at 1004. Petitioner claims that the distinction is irrelevant for two reasons. First, he claims that there is no distinction between *G.F.*, *James*, or *Carty* because he was acquitted of any and all sexual conduct. Unlike *G.F.*, *James*, and *Carty*, there was no nexus between the acquitted charge and the conviction as extensively discussed therein. Second, contrary to Petitioner's assertion, the Third District did not misread *G.F.*'s decision as correctly noted that "[t]he battery in *G.F.* consisted of a juvenile's ***physical assault*** on three state

employees [which] [u]nlike the instant case, the battery had no sexual component." *Villanueva*, 118 So. 3d at 1004.

Based on the facts of this case, the lower court did not err in its conclusion that the special condition that Petitioner undergo sexual therapy was reasonably related to his rehabilitation.

C. Petitioner's substantive due process argument under the United States constitution and Florida constitution is procedurally barred as it was not preserved for review.

Specifically, Petitioner argues that the court "disregarded the verdict and supplanted" the jury's will by basing the imposition of the special condition on "accusations that the jury rejected." By doing so, Petitioner argues that the court violated his "constitutional rights to due process[4] and a trial by jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution , and sections nine and twenty two of the Florida Constitution." (Pet'r Br. at 10).

Petitioner's argument is procedurally barred because it was not raised in Petitioner's direct appeal brief to the Third District Court of Appeal. Petitioner never argued that the trial court supplanted the jury's will by imposing the special

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[4] Respondent only addresses under this section a substantive due process claim, as Petitioner does not assert a procedural due process in his brief.

condition. Nor did he argue that the condition violated his rights under the United States or Florida constitutions. Instead, he only argued that the trial court erred in imposing the special condition as it was not reasonably related to his battery conviction as required by the test announced in *Biller v. State*, 618 So. 2d 734 (Fla. 1993).

Accordingly, this Court should decline to address this argument as it was not raised to the trial court or the Third District Court of Appeal during the direct appeal from Petitioner's conviction. *See Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982) (stating that challenges to the constitutionality of statute on due process claim requiring resolution of extensive factual matters cannot be raised for the first time on appeal.); *White v. State*, 753 So. 2d 548, 548 (Fla. 1999) (declining to address the defendant's dues process rights argument under Florida Constitution because it was not presented to the lower courts and thus it was not preserved for review.).

Nevertheless, Petitioner's claims are without merits. First, the trial court did not "disregard the verdict and supplant" the jury's will, so as to deny Petitioner's right to a fair trial. Here, the trial court did not reject the jury's verdict by adjudicating Petitioner guilty of the lewd and lascivious molestation charge as opposed to simple battery. Nor did the court effectively veto the jury's decision to

exercise its pardon power by acquitting Petitioner of the lewd and lascivious molestation charge by imposing the special condition. The court only exercised its broad discretion under the probation statutes to fashion a condition of probation which was related to Petitioner's rehabilitation based on the facts of this case. Thus, the trial court's imposition of the special condition did not diminish the role of the jury so as to deny Petitioner his rights to a fair trial.

Even if error, the trial court primary factor in imposing of the special condition here is that this is being done as a part of a sentence after a guilty verdict. A trial court imposing a sentence can make any necessary factual determinations based on the evidence where the sentence imposed is within the statutory maximum and the Criminal Punishment Code. *See e.g*. *Jones v. State*, 71 So. 3d 173, (Fla. 1st DCA 2011) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (citing *Apprendi v. NewJersey*, 530 U.S. 466 (2000); *Blakely, v. Washington*, 542 U.S. 296 (2004)). Thus, since the court is not exceeding any statutory or guidelines maximums, it can make any necessary factual determinations based on the evidence. *See. e.g. In re Bedell*, 2007 WL 5313337 (Vt. May 2007) (rejecting the defendant's contention that the requirement that he participate in sex offender treatment programs violates

Apprendi ... because defendant does not allege or demonstrate, however, that the programming increases the term of his sentence beyond the statutory maximum.) (emphasis in the original); *State v. McAhren*, 118 P.3d 859, 356 (Or. Ct. App. 2005) ("[e]ven assuming, without deciding, that the imposition of special conditions of probation without submission of the predicate facts to a jury is plain error, we would decline to exercise our discretion to correct it in this case. [,] as ... defendant does not face potentially unlawful incarceration."); *People v. Young*, 779 N.E.2d. 293, 794 (Ill. Ct App. 2002) (rejecting defendant's contention that under *Apprendi* the Class X sentencing provision of section 5-5-3(c)(8) violates the right of a defendant to due process and trial by jury because it subjects a defendant to increased punishment without notice or a jury finding upon proof beyond a reasonable doubt of the facts qualifying defendant for sentencing as a Class X offender.).

Further, although not easily ascertainable from Petitioner's brief, Petitioner appears to claim some type of liberty interest under the Due Process Clause in freedom from sex offender classification and conditions. Due process challenges in the context of sex offender registration acts have been rejected by the United States Supreme Court and this Court. *See Smith v. Doe*, 538 U.S. 84 (2003) (upholding registry against *ex post facto* challenge); *Connecticut Department of*

Public Safety v. Doe, 538 U.S. 1. (2003) (upholding registry against procedural due process challenge); *Milks v. State*, 894 So. 2d 925 (Fla. 2005) (same).

To the extent that Petitioner attempts to equate the consequences of being required to attend sex offender therapy with the consequences of being required to register as sex offender, this claim fails. Although some courts[5] have found the "the stigmatizing effect of being classified as a sex offender" a deprivation of liberty under the Due Process Clause by finding critical ***the combination of classification and treatment,*** [6] this is not Petitioner's case. (emphasis added).

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[5] *Mesa*, 607 F. 3d 392 (5th Cir. 2010) (noting that relying on *Vitek v. Jones*, 445 U.S. 480 (1980) it had held that "prisoners who have not been convicted of a sex offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions." (citing *Coleman I*, 395 F.3d at 222); *Renchenski*, 622 F.3d at 328 (stating that "the stigmatizing effects of being labeled a sex offender, when coupled with mandatory behavioral modification therapy, triggers an independent liberty interest"); *Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1238, 1242-43 (10th Cir.2000) (finding liberty interest in avoiding sex offender label and treatment conditioned on prisoners admission that he committed a sex offense); *Kirby*, 195 F. 3d at 1292 (11th Cir. 1999); *Neal*, 131 F.3d at 830 ("[T]he stigmatizing consequences of the attachment of the 'sex offender' label coupled with the subjection of the targeted inmate to a mandatory treatment program whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural protections.").

[6] *Doe v. United States, Parole Commission*., 958 F. Supp. 2d 254, 267 (D.C. 2013) (noting that cases cited in footnote 3 have found that the liberty interest of avoiding stigmatization is implicated by the combination of being labeled or classified as a sex offender and having to undergo treatment, or behavior

Petitioner has not been subjected to that classification. The trial court only determined that the nonsexual offense for which Petitioner had been convicted has a sexual component that warrants therapy. *See e.g. Kramer*, 286 Fed. Appx at 677.

Additionally, even if the consequence of attending sex offender therapy can be equated with the consequence of registering as a sex offender, interest in reputation alone does not amount to a cognizant constitutional right. *See Boutin v. Lafleru*, 591 N.W.2d 711, 718 (Minn. 1999) ("The Supreme Court has stated that a liberty interest is implicated when a loss of ***reputation is coupled with the loss of some other tangible interest***.") (citing *Paul v. Davis*, 424 U.S. 693, 701-02, 96 S.Ct. (1976) ("adopting the so-called "stigma-plus" test)") (emphasis added). Petitioner has not asserted that complying with the requirements of undergoing the sex therapy amounts to the loss of a recognizable interest as to satisfy the "stigma-plus test." *See Boutin*, 591 N.W. 2d at 718 ("***to bring a successful procedural due process challenge a person must suffer more than mere stigma, the injury to reputation must also be coupled with the loss of some other recognizable interest***.") (citing *Davis*, 424 U.S. at 710) (stating that liberty or property interests receive constitutional protection only if they have been "initially recognized and

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modification of some sort.).

protected by state law)). (emphasis added). Accordingly, to the extent that Petitioner claims that he has a liberty interest under the Due Process Clause because the condition to undergo sex offender therapy stigmatized him, the claims fails.

Lastly, to the extent that Petitioner claims that requiring him to participate in a sex offender therapy implicates his right to self incrimination because he would have to admits guilt, this claim fail as well. Petitioner only has to admit guilt to the extent to which he was found guilty, *i.e*. battery, and not for the acquitted charge as explained by the court:

> I ordered MDSO therapy because he was found guilty of battery which is an illegal touching of someone else. That's what he was charged with, was the illegal touching of someone else. They just didn't find it to the same degree that the charging people did. Okay. That being the case, it was still an improper touching of his daughter, and he can acknowledge that in the sense of what it was and what he was found guilty of and go do the therapy, because he needs to learn that he can't do that to children and family.

(R. 127). Accordingly, participation in the sex therapy program is not contingent on Petitioner admitting guilt for an offense that he was acquitted, and thus, it does not affect his probation. Courts that have addressed similar self-incrimination claims under the Fifth Amendment have found such claims to be meritless. *See e.g*., *Morris v. Berghuis*, 2013 WL 1874872 * 1 (E.D. Mich. Mar. 28, 2013) (and

cases cited therein). Accordingly, the Court should conclude that Petitioner is not entitled to relief on this claim.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court to affirm the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was e-mailed to Assistant Public Defender James Moody, Esquire, at appellatedefender@pdmiami.com, and e-mailed to JMoody@pdmiami.com, this 12th day of May, 2014.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a) (2).

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