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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1828

VICTOR VILLANUEVA,

Petitioner,

-vs.-

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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

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INTRODUCTION

Petitioner, Victor Villanueva, was the appellant in the district court of appeal and the defendant in the circuit court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the circuit court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbols "T," "T2," and "T3" will be used to designate the transcripts dated June 13, July 12, and July 21, 2011 respectively. "RB" will designate the Respondent's brief on the merits.

ARGUMENT

THE TRIAL COURT DID ERR BY IMPOSING A CONDITION OF SEX OFFENDER PROBATION AFTER MR. VILLANUEVA WAS ACQUITTED OF ALL SEXUAL CONDUCT.

The Jury's Verdict

The Respondent primarily argues that the finding of simple battery necessarily implies that Mr. Villanueva touched Y.V.'s breasts and buttocks (R. 24). This is factually inaccurate. Y.V. testified that during the first alleged incident, Mr. Villanueva put his arm around her, touched her chin, then lowered his hand toward her breast (T. 275). It is entirely possible that the jury decided that while Mr. Villanueva placed his arm around Y.V. and touched her chin without her consent, thus supporting a battery, he never touched her breast or buttocks. As such, the Respondent's entire argument is without merit, as it rests entirely on the faulty premise that Mr. Villanueva *must* have touched Y.V.'s breasts and buttocks.

Respondent's Cases

In their brief, Respondent makes a number of errors, which will be addressed in turn. Respondent's primary argument is that despite the fact that the jury acquitted Mr. Villanueva of the charged sex crimes, that there still existed a sufficient nexus with sexual activity upon which the court could base the imposition of sex offender therapy (RB. 24-25). This argument is flawed. It is certainly true that the "reasonable relationship" upon which a condition of

probation may be based can arise from facts beyond the convictions. *See Biller v. State,* 618 So. 2d 734 (Fla. 1993) (information in a pre-sentence investigation could support nexus). However, it is axiomatic that the nexus may not arise from disputed, acquitted conduct. *Carty v. State,* 79 So. 3d 239 (Fla. 1st DCA 2012); *James v. State,* 696 So. 2d 1268 (Fla. 2d DCA 1997); *G.F. v. State,* 927 So. 2d 62 (Fla. 5th DCA 2006).

In support of their argument that the court could impose mentally disordered sexual offender treatment despite the fact that Mr. Villanueva was acquitted of any sex crime, Respondent cites *Morris v. State,* 26 So. 3d 660 (Fla. 4th DCA 2010), *Beals v. State,* 14 So. 3d 286 (Fla. 4th DCA 2009), and *Estrada v. State,* 619 So. 2d 1057 (Fla. 2d DCA 1993). These cases, however, are completely inapplicable to the case at bar. In *Morris,* the Fourth district held that a sufficient nexus existed to impose drug offender probation on a defendant convicted of burglary. *Id.* However, this was only because during sentencing the defendant's mother presented undisputed testimony that the defendant had a severe drug problem, and the defendant's *own attorney* acknowledged that his client needed drug treatment. *Id.*

Similarly, in *Beals,* the court made no ruling *whatsoever* on whether a sufficient nexus with substance abuse existed to impose drug offender probation on a defendant convicted of carrying a concealed firearm. *Beals v. State,* 14 So. 3d

286 (Fla. 4th DCA 2009). Rather, the appellate court remanded to the trial court to make that exact determination. *Id.* Lastly, in *Estrada,* the defendant was sentenced to special conditions of probation regarding alcohol use and testing. *Estrada v. State,* 619 So. 2d 1057 (Fla. 2d DCA 1993). The court held that these provisions were appropriate *because the defendant admitted he was intoxicated*. *Id.*

Respondent next cites a set of extra-jurisdictional cases in which sex offender conditions are imposed upon defendants not convicted of sex crimes (RB. 19-22). These cases are all equally inapplicable (RB. 19-22). As in the cases cited above, the defendant in *Weiss v. Indiana Parole Bd,* 838 N.E. 2d 1048 (Ind. Ct. App. 2006) did not dispute that he *raped* his victim. In *Coleman v. Dretke,* 395 F. 3d 216 (5th. Cir. 2004), the defendant argued that his due process rights were violated because the actual *methods* of therapy shocked the conscience. Finally, in both *Gunderson v. Hvass,* 339 F. 3d 639, and *Boutin v. LaFleur,* 591 N.W. 2d 711, the defendants were sentenced under a statute clearly and explicitly authorizing the imposition of sex offender probation following the conviction a sex crime *or any other crime arising from the same incident.*

None of these cases are applicable to the case at bar. First, in *none* of these cases did the court consider whether *acquitted* conduct may provide a nexus for a special condition. Moreover, in *Morris, Weiss,* and *Estrada*, the behavior

providing the nexus was *conceded*. Turning to *Coleman,* Petitioner is not arguing any constitutional defect in the methods of treatment themselves, and unlike in *Gunderson* and *Boutin,* the Florida legislature has not explicitly authorized courts to impose sex offender treatment following the conviction of a non-sex offence. Indeed, if *Gunderson* and *Boutin* stand for anything, it would be the principle that the imposition of sex offender conditions upon someone not convicted of a sex offence *needs* to the explicitly statutorily authorized.

Indeed, the *only* case cited by Respondent that is applicable to the case at bar is *State v. Phillips,* 135 P. 3d 461 (Or. Ct. App. 2006). In *Phillips* an Oregon court held that courts may impose sex offender treatment as a condition of probation where the defendant has been acquitted of a sex crime when there is a finding that the "defendant acted with a 'sexual purpose' in committing the crime for which he was convicted." *Id.* This case merely restates the rule developed in *Biller* that a condition of probation must be reasonably related to rehabilitation.

Reasonable Relationship to Sexual Conduct

As stated above, it is axiomatic that *acquitted* conduct cannot provide evidence of a nexus, and Respondent has not provided a single case to the contrary. Thus, taking that basic principle in concert with the holdings of *Phillips* and *Biller,* the single question for this Court is: *absent* the conduct for which Mr. Villanueva

was acquitted by a jury, does there remain sufficient evidence of sexual behavior to allow for the imposition of mentally disordered sexual offender therapy?

In order to answer that question, it is necessary to determine exactly what Mr. Villanueva was acquitted of, and which facts remain available for consideration. First and foremost, the jury in this case was instructed that:

> The words lewd and lascivious mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

(T. 488). Thus, in acquitting Mr. Villanueva of lewd and lascivious molestation *but also* convicting him of simple battery, the jury specifically found that the touching of Y.V. was *not* wicked, lustful, unchaste, licentious, *nor* sensual. This expansive and broad definition of "lewd" and "lascivious" incorporates nearly every synonym in the English language for "sexual." Based on the instructions, the jury was to understand that "lewd" and "lascivious" covered all form of sexual intent. Thus, the jury acquitted Mr. Villanueva of having acted with a "sexual purpose."

Respondent argues that *any* touching of the breasts or buttocks are *inherently* sexual in nature (RB. 26-27). This argument fails for the reasons stated, *supra.* Respondent seems to argue that the jury verdict left open the possibility that there was some form of touching *not* sexual enough to warrant a conviction for lewd and lascivious molestation, but *just* sexual enough to support the special condition. But

the exceptionally expansive definition of "lewd" and "lascivious" precludes such a possibility (T. 488).

The cases relied upon by Respondent for the principle that any touching of the breast or buttocks is necessarily sexual are inapplicable. In *Seagrave v. State,* 802 So. 2d 281 (Fla. 2001), the defendant argued that "sexual contact" points should not have been assessed on his scoresheet because he was not convicted of sexual battery. *Id.* Beyond be procedurally inapplicable, the Respondent failed to address the most significant point: in *Seagrave* the defendant was *convicted* of lewd and lascivious assault, and, *conceded that the conviction was appropriate. Id.* Thus, the entire conversation about what constitutes sexual contact was in the context of someone who conceded that they sexually assaulted someone, and who was convicted of the very crime of which Mr. Villanueva was acquitted. Indeed, the discussion in *Seagrave* revolved entirely around whether victim injury points could be assessed absent penetration. *Id.*

Similarly, in *Kitts v. State,* 766 So. 2d 1067 (Fla. 5th DCA 2000), the defendant was *convicted* of committing a lewd and lascivious act on a child. *Id.* The defendant argued that his act of kissing and fondling a female child's breast did not constitute lewd and lascivious behavior. *Id.* The court did nothing more than hold that kissing and fondling a female breast supported a conviction of committing a lewd and lascivious act. *Id.*

Because the defendants in both *Kitts* and *Seagrave* were *convicted* of lewd and lascivious behavior, those cases do not stand for the principle that there is some "lesser" category of sexual behavior not encompassed by those terms. Given that the jury decided that the touching of Y.V. was *not* lewd, lascivious, wicked, lustful, unchaste, licentious, *nor* sensual, the jury found that Mr. Villanueva did not engage in sexual activity.

Sex Offender Treatment is Subject to an Apprendi Analysis

Moreover, *even if* there is some form of sexual conduct that would not be included in the expansive definition of lewd and lascivious behavior, any such conduct was not specifically found by the jury to have occurred beyond a reasonable doubt, and thus it cannot be used to increase Mr. Villanueva's sentence pursuant to *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Respondent cites *In re Bedell,* 2007 WL 5313337 (Vt. May 2007) for the principle that imposition of sex offender treatment absent a jury finding of sexual conduct does not violate *Apprendi*.[1] In *Bedell,* the defendant plead guilty to sexually assaulting his daughter. *Id.* The court performed a cursory *Apprendi* analysis, and determined

[1] Respondent cites two additional cases supporting this principle: *State v. McAhre,* 118 P. 3d 859 (Or. Ct. App. 2005), and *People v. Young,* 779 N.E. 2d 293 (Ill. Ct. App. 2002). These cases are inapplicable. Briefly, *McAhre* explicitly states that the imposition of the conditions in question *might actually be error* but that the court declined to consider that, while *Young* deals only with the imposition of a recidivist enhancement - an enhancement *specifically authorized by Apprendi*.

that because sex offender treatment does not increase the term of years that the defendant was incarcerated, *Apprendi* was not implicated. *Id.*

By way of contrast, the California Fourth District Court of Appeal held that imposition of a sex offender residency requirement following an acquittal for a sex offense *did* violate *Apprendi*. *People v. Mosley*, 116 Cal. Rptr. 3d 321, 323 (Cal. Ct. App. 2010) *review granted and opinion superseded,* 247 P.3d 515 (Cal. 2011) (currently pending review). The *Mosley* court performed a deep analysis of *Apprendi* jurisprudence, and decided that the proper course of action was to evaluate the residency requirement for its punitive intent and effect in order to determine whether *Apprendi* applied. *Id.*

Petitioner urges this Court to adopt the well reasoned analysis of the California court, rather than that of the Vermont court proposed by Respondent. Indeed, the Vermont court did not engage in any *analysis* at all, but rather made an unsupported declaration that *Apprendi* was inapplicable. Instead, this Court should adopt the thorough analysis performed by the California court and evaluate the condition of probation under the factors outlined in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963) in order to determine whether *Apprendi* is applicable, or to remand to the lower court to perform such an analysis. [2]

[2] According to *Kennedy*, the factors courts should consider when decided whether a condition is "punitive" are: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it is applied following a finding of scienter, whether it promotes

Constitutional Implications

As stated, *supra,* the jury's verdict forecloses any possibility that Mr. Villanueva engaged in sexual conduct for which he was *not* acquitted. Thus, the only remaining way for Respondent to support the imposed condition of probation is to make the untenable argument that *acquitted* conduct may form the nexus upon which a probation condition may be based. As stated previously, such an argument offends our most basic constitutional principles, and would violate Mr. Villanueva's substantive due process rights. Respondent argues that a substantive due process argument has not been properly preserved (RB. 33). This is both factually and legally incorrect. Firstly, "magic words" are not necessary to preserve an issue for appeal. *State v. Johnson,* 990 So. 2d 1115 (Fla. 3d DCA 2008). Rather, an argument is preserved as long as the court is informed of the alleged error. *Id.* Here, the trial attorney specifically argued that the imposition of mentally disordered sex offender treatment would be inappropriate following Mr. Villanueva's acquittal for lewd and lascivious molestation (T2. 6-9).

Independent of what was argued at trial, an error that amounts to a denial of substantive due process may be raised at any time. *Haliburton v. State,* 7. So. 3d 601 (Fla. 4th DCA 2009). The consideration of acquitted conduct at sentencing

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retribution or deterrence, whether it applies to a crime, whether it is connected to an alternative purpose, and whether it is excessive in relation to the alternative purpose. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963).

amounts to a denial of substantive due process, and is thus cognizable in this appeal. *Epprecht v. State,* 488 So. 2d 129 (Fla. 3d DCA 1986) ("[i]t is fundamental that the due process clause prohibits a court from considering charges of which an accused has been acquitted in passing sentence"); *Doty v. State,* 884 So. 2d 547 (Fla. 4th DCA 547 2004) (same).

Respondent then spends considerable time arguing that Mr. Villanueva's substantive due process rights were not implicated because the imposition of sex offender treatment does not pass the "stigma plus" test (RB. 36-40). This argument fails for two reasons. First and foremost, as stated, *supra,* courts have explicitly stated that consideration of acquitted conduct at sentencing violates due process, thus no further analysis is necessary. Moreover, the "stigma-plus" analysis is *only* used in the context of *procedural* due process claims, and does not apply to substantive due process claims. *Doe v. Michigan Dept. of State Police,* 490 F. 3d 491 (6th Cir. 2007). Thus Respondent's entire argument is wholly inapplicable.

However, regarding *procedural* due process, Respondent seems to rightly concede that when courts impose conditions of sex offender probation on defendants not convicted of sex crimes that enhanced *procedural* protections are required (RB. 18-19). Petitioner agrees with Respondent's analysis and cited cases. Should this Court hold that conditions of sex offender probation may be

imposed upon defendants not convicted of sex crimes, Petitioner urges this Court to follow the well reasoned opinions of the cases cited by Respondent, and impose *procedural* due process protections, such as notice to the defense that the sentencing court intends to impose such special conditions. Significantly, while Respondent argues that sex offender treatment does not pass the "stigma-plus" test relevant to a procedural due process claim, *Doe v. U.S. Parole Com'n,* 958 F. Supp. 2d 254 (D.D.C. 2013) holds that imposition of sex offender treatment may be cognizable as a procedural claim under the theory that one has a liberty interest in refusing medical treatment.

Legislative Interpretation

Lastly, Respondent argues that there is no clear legislative intent to prohibit the imposition of particular conditions of sex offender probation upon defendants not convicted of sex crimes (RB. 12). But the language of the sex offender probation statute suggests otherwise. The statute states that "the court must impose the following conditions in addition to *all other* standard and special conditions imposed:" § 948.30(1), Fla. Stat. (2010) (emphasis added). The language "in addition to *all other* standard and special conditions" suggests that the legislature intended the sex offender conditions enumerated in the statute to remain separate and apart from "special conditions," thereby strictly limiting their imposition to defendants convicted of the enumerated sexual crimes.

In conclusion, because the jury in this case acquitted Mr. Villanueva of sexual conduct, and consideration at sentencing of conduct for which Mr. Villanueva was acquitted would violate substantive due process, this Court should reverse the decision of the Third District Court of Appeal, and strike the condition of probation that Mr. Villanueva attend mentally disordered sexual offender therapy.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and strike the special of Mentally Disordered Sexual Offender treatment.

Respectfully submitted,

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed to the Office of the Attorney General at CrimAppMIA@MyFloridaLegal.com on June 2, 2014. Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: AppellateDefender@pdmiami.com (primary E-Mail Address); jmoody@pdmiami.com (Secondary E-Mail Address).

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