Filing # 21519770 Electronically Filed 12/11/2014 03:38:28 PM

RECEIVED, 12/11/2014 15:43:38, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF FLORIDA

RAFAEL ALEXANDER GUTIERREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Case No. SC14-799

5th DCA No. 5D12-3461

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially accurate; however, Respondent would make the following additions and/or corrections:

Petitioner was charged by information with one count of sexual battery. (R1, Vol I). It was alleged the crime was committed on January 27, 2010. Id.

The case was tried by a jury on July 9, 2012, and July 10, 2012. (T1, Vol I). During opening statement, the defense argued: "You're not going to hear from any eyewitnesses. You're not going to hear from anybody to say that her story was corroborated from seeing it." (T11-12, Vol I).

At the jury trial, the victim, who required a Spanish interpreter, recalled that she worked at a bar in January of 2010. (T19, Vol I). She knew Petitioner, who was a patron of the bar, through her friend and boss, Angeles. (T20, Vol I). The victim had seen Petitioner about five or six times before this incident. (T20, Vol I). She never had any kind of a romantic relationship with Petitioner or fraternized with Petitioner outside of the bar. (T20-21, Vol I). On January 27, 2010, the victim went to work at the bar. (T21, Vol I). The victim explained she would get off work at a restaurant at 10:00 p.m. and go to work at the bar until 2:00 a.m. (T22, Vol I). She

would sometimes drink at the bar while she was working and, on January 27, 2010, she had five or six beers. (T22-23, Vol I).

On January 27, 2010, the victim and Petitioner talked as usual. (T23, Vol I). After the bar closed, the victim began to drive away in the parking lot and struck her tire against the sidewalk. (T23,25, Vol I). There was no damage to the car or to the victim. (T26, Vol I). Petitioner offered to drive her car home, and the victim accepted because he was a good person and she knew the friend accompanying Petitioner. (T24, Vol I). At first she had told Petitioner she would sleep it off for a while, but Petitioner insisted he would take her. (T25, Vol I). It was decided Petitioner's friend would follow them in Petitioner's car and Petitioner would drive the victim's car to her home. (T24,28, Vol I). However, Petitioner did not drive the victim to her home, but to an apartment complex. (T29, Vol I). Petitioner told the victim they were going to see a friend. (T29, Vol I). The victim did not get out of her car. Id.

After Petitioner turned the ignition off, Petitioner told the victim they were going to talk for a while. (T30, Vol I). The victim told Petitioner she wanted to go home. Id. She noticed Petitioner's friend from the bar who had driven Petitioner's car was at the apartment complex. (T30-31, Vol I). The victim recalled Petitioner had been drinking that night,

which was unusual. (T31, Vol I). Petitioner, who was seeing Angeles, angrily told the victim he loved Angeles but complained that Angeles would see other men. (T31-32, Vol I). The victim told Petitioner he was a stupid idiot and Petitioner grabbed her hands and told her he would show the victim he was not a stupid idiot. (T32, Vol I). They began to struggle and Petitioner moved on top of the victim while she was seated in the passenger seat of her car. (T32-33, Vol I). The car seat was reclined a bit because the victim had slept some during the drive. (T34, Vol I).

Petitioner held her wrists with one hand and grabbed at her breast and tried to pull down her pants with the other hand. (T33, Vol I). The victim tried to defend herself and scream, but Petitioner covered her mouth to stop her screaming. (T33, Vol I). Eventually, Petitioner was able to pull both her pants and his pants down. (T34, Vol I). Petitioner had sex with the victim, penetrating her vagina, but did not wear a condom. (T35-36, Vol I). Petitioner ejaculated. (T36, Vol I). The victim believed he did this to her because he was angry she had called him a stupid idiot. (T36, Vol I). The victim kept asking Petitioner to let her go but Petitioner never responded. (T36, Vol I). Afterward, Petitioner told the victim not to tell anyone or Angeles. (T36-37, Vol I). The victim promised not to tell

because Petitioner still had her car keys. (T37, Vol I). Photographs of the victim's bruising were introduced into evidence without objection. (T37-38, Vol I). The victim had drawn a picture of the location where she believed the sexual battery occurred and this drawing was introduced into evidence over the defense's objection. (T39-41, Vol I).

Petitioner left her car taking the victim's car keys with him and went to sleep in his own car. (T41, Vol I). The victim also slept in her car because Petitioner refused to return her car keys telling her she could not drive. (T42, Vol I). When the victim awakened around 6:00 a.m., Petitioner returned her keys to her and led her out of the area. (T43, Vol I). Petitioner seemed normal. (T43, Vol I). While she was following him in her car, Petitioner drove very fast and left her behind. (T43, Vol I). She was able to get to 17-92 and make it home from there. (T43, Vol I). The victim slept some more and went to work that night. (T44, Vol I). She expected to see Petitioner at the bar and was planning on calling the police, but Petitioner did not show. (T44, Vol I). The victim did not know Petitioner's full name. (T44, Vol I). The victim told her boss she was not feeling well and went home early. (T44, Vol I).

The victim indicated she had not reported the crime to the police until the third day because she was hoping Petitioner

would appear at the bar as usual. (T49, Vol I). When he did not appear, she went to work the next day hoping Petitioner would show, but he did not appear for a second night. Id. After the victim spoke with Angeles, the victim went to the hospital. (T49, Vol I). The victim explained that her vaginal area hurt and was bruised so she went to the hospital. (T50, Vol I). The victim had contact with the police at the hospital. (T50, Vol I). The police took the victim to a clinic in Sanford. (T51, Vol I). After speaking to the police, the victim called Angeles and learned Petitioner's full name. (T47-48, Vol I). The victim identified Petitioner in court. (T48, Vol I).

The victim was still unsure in which county the sexual battery occurred. (T51-52, Vol I). After reporting the crime, the victim never returned to the bar. (T53, Vol I). DEA Agent Samuel Stephenson, who was formerly a Seminole County Sheriff's deputy, responded to the hospital to speak with the victim. (T71, Vol I). However, the victim only spoke Spanish, so he could not speak directly to her. (T72, Vol I). Agent Stephenson recalled the victim was crying. Id. When the victim's map was shown to Agent Stephenson, he explained that the stretch of 17-92 reflected on the map was in Orange County up to Maitland and that the portion of 17-92 between Maitland and SR436 was in Seminole County. (T73, Vol I). Thus, the victim's car was

located in Orange County according to the map she drew for law enforcement. (T73, Vol I).

The sexual assault nurse examiner, Shirley Rice, recalled she had to speak through an interpreter to talk to the victim in this case. (T76,78, Vol I). She first conducted the head-to-toe examination of the victim. (T79, Vol I). Nurse Rice recalled that the victim had some soreness on her neck which corresponded with a red surface area about three by three centimeters in dimension. (T80, Vol I). The victim also had a surface scratch about one half of a centimeter under the victim's left side. (T80, Vol I). Moreover, the victim's left breast was tender. Id.

Between the victim's breasts, the nurse identified a two-centimeter red mark and another scratch above the victim's navel about a centimeter long. Id. The scratch was encrusted which indicated that "it went deep enough to make the body ooze." (T80-81, Vol I). The victim also complained about both hip joints being tender and sported a bruise on her upper right thigh area that was three and one-half by one and one-half centimeters in dimension. (T81, Vol I). The victim's left side thigh was also tender. Id. There were several scratches on the victim's back area, including one right below her scapula which had some crust on it. (T81, Vol I). The victim's left hand had a two and one-half by two centimeter bruise and was swollen and

tender. (T81, Vol I). Nurse Rice also recalled a three-by-three centimeter bruise on the victim's right side calf. Id.

As for the vaginal examination, Nurse Rice recalled that the victim's vaginal area and outside genital area was tender. (T82, Vol I). The victim complained that it hurt when she urinated and the nurse recalled that area was slightly swollen which was consistent with the position the victim had described. (T82, Vol I). The victim had an abrasion just below her vagina, near the entrance to her vagina. (T83, Vol I). The abrasion indicated injury according to Nurse Rice. (T83, Vol I). The vagina was also tender. (T85, Vol I). Nurse Rice explained that when the sex is consensual, the body reacts so that there is no injury under normal circumstances. (T84, Vol I). However, injuries can occur even during consensual sex. Id. Swabs were taken from inside the victim's vagina using a speculum. (T85-86, Vol I). Buccal swabs were also taken from the victim. (T86, Vol I). Pursuant to stipulation, the jury was informed the DNA profile collected on January 29, 2010, from inside the victim's vagina matched Petitioner's DNA profile. (T91-92, Vol I). Petitioner chose not to testify on his own behalf. (T96, Vol I).

During the charge conference, the parties discussed the State's request for a special instruction that corroboration was not required in a prosecution for sexual battery. (T63-64, Vol

I). The defense objected arguing the proposed instruction was not included in the standard instructions, the standard instruction on the credibility of witnesses was sufficient, and it was misleading in that the special instruction failed to advise the jury to weigh the credibility of the victim's testimony. (T64, Vol I). The judge indicated he was disinclined to give the instruction because the statute simply emphasizes that even where the evidence involved a he said/she said situation, that that would be enough for a conviction. (T64, Vol I). The judge added that was a jury issue and not an issue to be addressed in an instruction. Id. The State noted the instruction followed the statute and the defense had argued about the lack of corroboration in their opening statement. (T64-65, Vol I). The judge agreed the defense had argued about the lack of corroboration and the statute did apply to this case. (T65, Vol I).

Petitioner anticipated that one of the issues during closing argument would be whether the victim's testimony was consistent with the testimony of the nurse examiner. (T65, Vol I). The judge found that to be a different issue. Id. Petitioner contended the allegation of a rape was based on the victim's testimony alone and the jury would also have to consider whether

the victim's testimony was consistent with other witnesses' testimony. (T65, Vol I). The court advised:

> And I think you'll argue that, but - you did argue that - in your opening that there wouldn't be any corroboration and that there would be issues of credibility between defendant's version of consent, perhaps if he testifies, and her version of lack of consent. So if there's a statute that specifically says the testimony of the victim need not be corroborated in a prosecution for a sexual battery, why shouldn't they be entitled to that instruction?

(T66, Vol I). The defense contended the State was seeking the special instruction which, standing alone, highlighted the issue too much. (T66, Vol I). The court explained it was not considering giving a separate instruction, but with all of the other items of weighing the evidence, because as a stand-alone instruction it would be unnecessarily highlighted. Id. The defense still objected, but agreed that would be preferable. Id. The court then granted the State's request for a special instruction, but indicated it would not label it as such, instead adding it to the standard instruction 3.9, which addresses the standards for weighing the evidence as to the credibility of a witness. (T66-67, Vol I).

After giving both parties the chance to review the instructions, the judge advised that the requested special instruction was listed as number eight on instruction 3.9,

weighing the evidence. (T69, Vol I). The defense renewed its objection to the special instruction which was overruled by the court. Id.

The State argued during closing that the only issue was whether the sex was consensual. (T99, Vol I). The prosecutor also pointed out the special instruction to the jury during closing. (T104, Vol I). This was followed by argument that the sex was not consensual based upon the victim's testimony and the physical evidence. Id.

During closing argument, the defense challenged the victim's memory based upon her admission she had been drinking that night. (T106, Vol I). Petitioner also argued he was the victim in this case having been charged with rape. Id. The defense contended Petitioner could not have had sex with the victim had her pants been pulled down and while she was seated as she had described. (T107, Vol I). Furthermore, Petitioner suggested it was curious that the victim did not remember any conversation at the bar, but she could remember what happened in the car after the five or six beers. (T108, Vol I). Petitioner also reminded the jury that the victim fell asleep on the drive and had hit the curb when she tried to drive home. (T108, Vol I). The defense contended it was illogical that, after being raped, the victim fell asleep in her car. (T109, Vol I). Defense

counsel noted that the State had argued it was not necessary to have corroborating evidence, but contended it was not that simple. (T109, Vol I). Counsel then went through the factors listed in the weighing the evidence instruction while applying them to this case. (T110, Vol I). Petitioner contended the victim's testimony did not correspond with her injuries, in that the victim did not mention any scratching and the victim's wrists were not bruised. (T111, Vol I). The defense suggested that the bruising came from two 40-year old adults having sex in the front seat of a vehicle. (T112-113, Vol I).

The State responded by arguing it was agreed the two had sex in the front seat and her injuries were consistent with the manner in which the victim had described the sexual battery. (T118-119, Vol I). Moreover, that the injuries on the victim were consistent with her testimony. (T120, Vol I). The State mentioned the special instruction once briefly during rebuttal. (T120, Vol I).

After being given the special instruction as number eight of eight "things" the jury "should consider," the jury was instructed immediately thereafter that it "may rely upon your own conclusions about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness." (T125, Vol I; R80, Vol I).

The jury returned with a guilty verdict as charged to sexual battery. (T132-133,136, Vol I; R86, Vol I). The jury also made a special finding that Petitioner's penis penetrated the victim's vagina. (T133,136, Vol I; R87, Vol I).

Petitioner appealed and the Fifth District Court of Appeal explained that it disfavored the instruction because the standard instructions are sufficient. Gutierrez v. State, 133 So. 3d 1125, 1131 (Fla. 5th DCA 2014). However, the district court concluded that any error was harmless after reviewing the entire record because the victim's testimony was corroborated by "DNA evidence as well as testimony from a sexual assault nurse and photographs of the victim's injuries that were consistent with the described attack." Id.

After briefing on jurisdiction wherein the State argued that there was no express and direct conflict on the face of the opinions, this Court accepted jurisdiction. Briefing on the merits followed.

SUMMARY OF THE ARGUMENT

It remains the State's position that there is no express and direct conflict between Brown v. State, 11 So. 3d 428 (Fla. 2d DCA 2009), and Gutierrez v. State, 133 So. 3d 1125 (Fla. 5th DCA 2014). However, if this Court does retain jurisdiction, the State would assert that this Court should approve the use of the special instruction in this case and others under certain circumstances. Alternatively, this Court should affirm the Gutierrez opinion acknowledging there are circumstances where the instruction would be proper, and also holding that any error in giving the instruction in this case constituted harmless error beyond a reasonable doubt based upon an examination of the entire record. The Fifth District's affirmance of the sexual battery conviction should be upheld.

ARGUMENT

POINT ONE (RESTATED)

NOT ONLY IS THE OPINION IN GUTIERREZ NOT IN EXPRESS AND DIRECT CONFLICT WITH BROWN, BUT THE FIFTH DISTRICT COURT OF APPEAL PROPERLY DETERMINED THIS SPECIAL INSTRUCTION COULD BE PROPER IN CERTAIN INSTANCES AND APPLIED THE CORRECT HARMLESS ERROR ANALYSIS.

While acknowledging this Court's decision to accept jurisdiction in this case, it remains the position of the State that there is no express and direct conflict on the face of the decisions under review. While the Fifth District Court of Appeal held that it refused to adopt an absolute rule that the "no corroboration" instruction always constituted error, this language was pure *dicta* and there is no express and direct conflict on the face of the decision under review. Even assuming this Court agreed with the Brown v. State, 11 So. 3d 428 (Fla. 2d DCA 2009), opinion that seems to find a "no corroboration" instruction is always error, such a ruling by this Court would not change the result in this case. Ciongoli v. State, 337 So. 2d 780 (Fla. 1976) (declining to exercise conflict jurisdiction because conflicting language was *obiter dicta*). In fact, just like the Brown court, the Gutierrez court applied a harmless error analysis differing only in finding that the error was harmless beyond a reasonable doubt, based upon evidence not

found in Brown. Furthermore, both opinions relied upon State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), in making a harmless error determination. Brown, 11 So. 3d at 440; Gutierrez, 133 So. 3d at 1131. Accordingly, Petitioner's argument is wholly without merit, and appears to be an attempt to have this Court conduct a review of the Fifth District Court's harmless error analysis and ruling. As the opinions do not expressly and directly conflict, this Court should find that jurisdiction was improvidently granted.

Notwithstanding the foregoing, this Court should affirm the use of this instruction in this case and others where, e.g., the defense specifically asserts that there will be no corroboration of the victim's testimony since this could mislead the jury into believing that corroboration is required. Alternatively, this Court should affirm the harmless error holding in this case since the instruction is a correct statement of Florida law, the defense attacked the lack of corroboration, the judge incorporated the statutory language into the standard instruction on weighing the evidence, including it as number eight of the "things" the jury "should consider" in weighing the evidence, immediately after which the jury was told they could reach their own conclusion about the credibility of a witness,

and the State did not mislead the jury about the purpose of this evidentiary rule.

It is well established that a trial court has wide discretion in instructing the jury and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. Carpenter v. State, 785 So. 2d 1182, 1199-2000 (Fla. 2001); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). In that regard, a trial judge in a criminal case is not constrained to give only those instructions that are contained in the Florida Standard Jury Instructions. Carpenter, supra. Moreover, the appellate courts will not reverse a decision regarding an instruction in the absence of a prejudicial error that would result in a miscarriage of justice. Coday v. State, 946 So. 2d 988, 994 (Fla. 2006) (quoting from Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990)). Charging a jury with this special instruction is proper under certain circumstances, did not constitute a miscarriage of justice in this case and, even if it was error, was harmless beyond a reasonable doubt.

Section 794.022(1), Florida Statutes, Rules of Evidence, provides: "The testimony of the [sexual battery] victim need not be corroborated in a prosecution under s. 794.011." As noted above, one of the bases for an alleged conflict herein seems to

rely upon the assumption that the district court in Brown found that the giving of the "no corroboration" instruction in sexual battery cases was always error; whereas, the Fifth District generally disapproved of the instruction but held (in dicta) that there might be circumstances where it would be proper. The State would submit that, as the Gutierrez court acknowledged, the instruction is proper under certain circumstances.

In Brown, the district court, noting that there was no Florida authority on this issue, turned to this Court's opinion in Marr v. State, 494 So. 2d 1139 (Fla. 1986). Brown, 11 So. 3d at 432, 435-36. In Marr, this Court held that a jury instruction which required a jury to scrutinize a rape victim's testimony more closely than any other witness "should no longer play a role in Florida jurisprudence." Id. at 1142. But, as the Gutierrez court explained, "the instruction in Marr ... was quite different than the instruction requested in this case and in Brown." Gutierrez, 133 So. 3d at 1129. The obvious differences are that the jury instruction in Marr was patently offensive and required the jury to treat a rape victim very differently from any other victim or witness,[1] a principle which

[1] Lord Matthew Hale, Chief Justice of the Court of King's Bench from 1671 to 1676, once observed: "It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and

is antiquated and contrary to Florida law. On the other hand, the instruction used in Brown and Gutierrez is a correct statement of Florida law, does not affect the State's burden of proof, does not remove an element from the jury's consideration, and the jury retains the duty to determine all witnesses' credibility. See State v. Rayfield, 631 S.E. 2d 244, 250 (S.C. 2006) ("A trial judge is not required to charge 16-3-657, [South Carolina's statutory corollary to Section 794.022(1)] but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses."); Gaxiola v. State, 119 P.3d 1225, 1233 (Nev. 2005) ("This court has repeatedly stated that the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction. Furthermore, other courts have approved jury instructions to that effect. Moreover, we conclude that the instruction is significantly different from a 'Lord Hale' instruction. 'Lord Hale' instructions amount to a

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harder to be defended by the party accused, tho never so innocent." (1 Hale, The History of the Pleas of the Crown (1st Am. ed. 1847) p. 634.). In Marr, this Court noted that the State urged this Court to "bury Lord Hale once and for all. We oblige." Marr, 494 So. 2d at 1142.

commentary on the evidence, by telling a jury that a category of witness testimony should be given greater scrutiny. A 'no corroboration' instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law.") (footnotes omitted); People v. Gummage, 828 P.2d 682 (Cal. 1992) (The jury is instructed that the prosecution must prove its case beyond a reasonable doubt. This places a heavy burden of persuasion on a complaining witness whose testimony is uncorroborated. [California's no-corroboration instruction] does not affect this instruction but, 'a balance is struck which protects the rights of both the defendant and the complaining witness.'") (quoting from People v. Hollis, 1 Cal. Rptr. 2d 524 (Cal. Ct. App. 1991)); People v. Smith, 385 N.W. 2d 654, 657 (Mich. 1986) (stating that the trial court properly instructed jury it could convict defendant of criminal sexual conduct on basis of complainant's uncorroborated testimony, where defense counsel argued that, due to strength of defendant's alibi defense, jury should insist upon some corroborating evidence); Stallworth v. State, 258 S.E. 2d 611, 612 (Ga. Ct. App. 1979) (stating that the trial court properly instructed the jury on the issue of corroboration in light of the fact that Georgia law does not require corroboration of victim's testimony in rape cases);

State v. Malone, 20 Wash. App. 712, 714-15, 582 P. 2d 883 (1978) (The court found the instruction is a correct statement of the law and is pertinent when corroboration of an alleged sexual offense victim's testimony is at issue), rev. denied, 91 Wash. 2d. 1018 (1979)).

"What is important is that sufficient instructions ... be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before them." State v. Bryan, 287 So. 2d 73, 75 (Fla. 1973). This legislation addressing sexual battery victims contained in section 794.022 was dealing with serious concerns as to the victimization of victims in sex offense cases and, if 794.022(1) is not accompanied by an instruction in factually appropriate cases, 794.022(1) will be a meaningless statute, accomplishing nothing, and merely stating the general principles that could have and would have been said prior to its enactment. Nothing other than an instruction can give that statute any meaning.

For example, that statute also provides that the use of a prophylactic during a sexual battery "is not, by itself, relevant to either the issue of whether or not the offense was committed or the issue of whether or not the victim consented." § 794.022(5), Fla. Stat. Noting that "[i]nstructions quoting an applicable statute have been previously upheld[,] the Third

District Court affirmed the trial court's special instruction following this subsection. Strong v. State, 853 So. 2d 1095 (Fla. 3d DCA), rev. denied, 862 So. 2d 728 (Fla. 2003). As the district court explained, "Sexual battery, however, is something about which most jurors will have little or no firsthand knowledge. The statute appears to have been adopted to counteract some laypersons' intuitive belief that condom use automatically signifies consent." Id. at 1098. Similarly herein, there is a legitimate and serious concern that where the defense argues about the lack of corroboration, the jury may be confused into believing that corroboration is required in sexual battery cases. The instruction given herein is a correct statement of the law in Florida and would ensure the jury understood that the victim's testimony was not required to be corroborated, especially in those cases where there was no corroboration. In affirming the Gutierrez court's proper refusal to impose a complete prohibition on this special instruction, this Court would ensure the jury was not confused about such an important evidentiary matter.

Petitioner also focuses on the Fifth District Court's harmless error analysis. Rockmore v. State, 140 So. 3d 979, 984 (Fla. 2014) (Where a special instruction is found to be erroneous, an appellate court's review whether the jury

instruction constitutes harmless error is *de novo*). However, as the circumstances of the two cases are easily distinguishable and the Gutierrez court clearly applied the correct harmless error analysis, Gutierrez should be affirmed.

In Brown, the State presented only the testimony of the two victims at the trial of Brown for two counts of capital sexual battery. Id. at 430. Unlike the instant case, there was no physical evidence presented at Brown's trial. Id. During opening statement and the cross-examination of the two victims, the defense in Brown pointed out the lack of any evidence corroborating the victims' testimony. Id. The State requested and was granted a special jury instruction following section 794.022(1), Florida Statutes, that the testimony of the victim need not be corroborated. Id. at 431. The defense objected to the special jury instruction, arguing that this statute applied to the State's burden of proof rather than as an instruction to the jury. Id. The trial court overruled the objection. Id. The district court in Brown pointed out that:

> Having decided to give the special instruction, the trial court might have incorporated the instruction into the text of Standard Jury Instruction 3.9 on "Weighing the Evidence." Instead, the trial court added the special instruction to the end of Standard Jury Instruction 11.1 on "Sexual Battery - Victim Less than 12 Years of Age." Because there were two victims, the instruction was read to the jury twice, once

> in connection with each separate instruction for each sister.

Id. at 431. The district court concluded the special instruction was "likely to confuse and to mislead the jury." Id. at 439. As such, the Brown court found the trial court erred by giving this special jury instruction. Id. at 439.

The Brown court also concluded the error was not harmless for several reasons including the lack of corroborating evidence presented at trial and the prosecutor's reliance on the instruction to counter argument by the defense. Id. Specifically, the State had argued:

> The reason we have this instruction, that the testimony of the victim need not be corroborated in a prosecution for sexual battery[,] is for situations where these crimes were committed in secret and the disclosure is not made for a great period of time.

Id. at 439. The district court found the State's statement in Brown about the purpose of the statute was inaccurate and erroneously implied "the law discounted the need for corroboration of the victim's testimony 'where ... the disclosure is not made for a great period of time.'" Id. at 439. Accordingly, the Brown court found the error was not harmless and reversed for a new trial. Id. at 440.

Here, the Gutierrez court properly found, after setting forth and applying the harmless error test established in

DiGuilio, that any error was harmless beyond a reasonable doubt. Gutierrez, 133 So. 3d at 1131.[2] First, there was corroborating physical evidence involving the victim's injuries which were testified to in great detail by Nurse Rice as well as the DNA evidence which made it impossible for Petitioner to deny sexual intercourse had occurred. Thus, Petitioner was arguing the physical evidence was inconsistent with the victim's testimony rather than simply that there was no evidence corroborating the victim's testimony. Second, the judge incorporated the special instruction into the standard instruction on weighing the evidence, which the Brown court indicated would have been more advisable. Unlike in Brown, immediately after the jury was instructed that the victim's testimony did not have to be corroborated, the judge instructed the jury it may rely upon its

[2]The district court explained:

> The harmless error test places the burden on the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record including a close examination of the permissible evidence on which the jury could have legitimately relied and, in addition, an even closer examination of the impermissible evidence, here the improper jury instruction, which might have possibly influenced the jury verdict.

Gutierrez, 133 So. 3d at 1131 (citations to DiGuilio omitted).

own conclusion about a witness and may believe or disbelieve all or any part of the evidence or the testimony of the witnesses. Third, the victim did not wait to disclose the sexual battery for a "great period of time," e.g., 20 years in Brown. Fourth, while the State made two brief references to the instruction during its closing and rebuttal, the State did not mislead the jury regarding the purpose of the instruction or use it to undermine the defense's argument about this evidentiary rule, as the State had in Brown. Finally, contrary to Brown where the jury was given the instruction twice as the court read the elements of capital sexual battery for each count, here the instruction was given only once. Brown, 11 So. 3d at 431.

In light of the foregoing, instructing the jury with this special instruction can be proper, where, for example, the defense attacks the lack of corroboration thus potentially misleading the jury into believing the sexual battery victim's testimony required corroboration. Thus, this Court should find the instruction was properly given in the instant case and others like it, e.g., where the defense argues about the lack of corroboration. Alternatively, this Court should affirm the Fifth District Court's finding that the giving of the "no-corroboration" instruction constituted, at worst, harmless error. The defense in this case challenged the lack of

corroborating evidence during opening statement, there was corroborating physical evidence of a sexual battery, the judge simply incorporated the statutory language into the standard instruction on weighing the evidence, including it as number eight of the "things" the jury "should consider" in weighing the evidence, immediately after which the jury was told they could reach their own conclusion about the credibility of a witness, and the State did not mislead the jury about the purpose of this evidentiary rule. DiGuilio, supra; § 924.051(3), Fla. Stat. (2009).

Based upon the foregoing, this Court should find that jurisdiction was improvidently granted in that there is no express and direct conflict. Assuming this Court concludes it has jurisdiction, this Court should find the instruction was properly given, and is proper in certain circumstances. Alternatively, this Court should affirm the Fifth District Court of Appeal's opinion in Gutierrez. Petitioner is entitled to no relief.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests this Honorable Court find that jurisdiction was improvidently granted or affirm the Fifth District Court of Appeal's opinion affirming Petitioner's judgment and sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Respondent has been furnished via Email to counsel for Petitioner, Terrence E. Kehoe, Esquire, (Tinker Building, 18 West Pine Street, Orlando, Florida 32801) at tekehoelaw@aol.com this 11th day of December 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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