IN THE SUPREME COURT OF FLORIDA

TRAVIS WELSH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-1092

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as the State. Petitioner, Travis Welsh, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner.

The original record on appeal consists of eight volumes, which will be referenced according to the respective roman numeral designated in the Index to the Record on Appeal (I-VIII), followed by any appropriate page number. The supplemental record will be referenced by use of the symbol "SR" followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief on the Merits followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts subject to the following supplementation. The First District Court issued its decision in this cause on May 2, 2002, affirming in all respects the judgment and sentence of the trial court. Of the five claims of error raised by Petitioner, the court addressed only ISSUE I, to wit: whether the trial court erred by failing to instruct the jury on the offense of lewd and lascivious conduct as a lesser offense of capital sexual battery. The court held that Petitioner was not entitled to an instruction on lewd and lascivious conduct as either a necessary or a permissive lesser offense of capital sexual battery. In so holding, the court certified inter-district conflict with the decisions in Velazquez v. State, 648 So. 2d 302 (Fla. 5th DCA 1995)(on motion for rehearing) and King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994). A copy of the First District Court's opinion is attached to this brief as Appendix A and can also be found at Welsh v. State, 816 So. 2d 175 (Fla. 1st DCA 2002).

SUMMARY OF ARGUMENT

ISSUE I Petitioner asserts that the trial court erred in failing to instruct the jury on lewd and lascivious conduct as a lesser included offense of capital sexual battery. The record reflects that this issue was abandoned below and, thus, is not preserved for review. On the merits, no abuse of discretion has been demonstrated in the trial court's failure to instruct the jury on the offense of lewd and lascivious conduct where the information charging capital sexual battery did not allege the statutory elements of this lesser offense and where there was a total lack of evidence to support a finding of guilt thereon.

In holding that Petitioner was not entitled to an instruction on lewd and lascivious conduct as a lesser offense of capital sexual battery, the First District Court herein certified inter-district conflict with the decisions in Velazquez v. State, 648 So. 2d 302 (Fla. 5th DCA 1995) and King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994). The State submits, however, that an examination of the operative facts and principles of law addressed in the decision below reveals no express and direct conflict with the decisions in King and Velazquez and, as such, no constitutional basis exists for this Court to exercise its conflict jurisdiction.

ISSUE II Petitioner asserts that the trial court erred in admitting into evidence letters written by him to the victim's mother because the prejudicial nature of the evidence of other crimes, wrongs or acts contained in the letters outweighed any probative value in violation of §90.403. The State submits that this issue is outside the scope of the certified conflict issue and should not be addressed. Procedurally, the precise claim of error raised on appeal did not constitute the basis of the objection below and, thus, the issue was not preserved for review. On the merits, no abuse of discretion has been demonstrated. The letters written by Petitioner contained evidence of sexual misconduct committed upon the victim's sisters and was introduced to corroborate

the testimony of the victim where Petitioner's theory of defense was that the victim had fabricated the allegations against him. The letters were relevant as corroborative evidence and their probative value far outweighed the potential for undue prejudice.

ISSUE III Petitioner asserts that the trial court erred by allowing letters written by him to the victim's mother, containing evidence of other crimes, wrongs or acts, to become a feature of the trial. The State submits that this issue is outside the scope of the certified conflict and should not be addressed. On the merits, the evidence of other wrongs or acts contained in the letters written by Petitioner did not become an impermissible feature of the trial where the evidence was not excessive in volume or argument, the jury was properly instructed about the use of such evidence, the evidence was essential to corroborate the victim's testimony given Petitioner's theory of defense, and where any emphasis placed upon the evidence was attributable to defense counsel's attempt to impeach the victim and urge to the jury that the victim's testimony was not corroborated.

ISSUE IV Petitioner asserts that he was deprived of a fair trial by virtue of the State's separate prosecution against the victim's mother for the offense of tampering with a witness. The State submits that this issue is outside the scope of the certified conflict issue and should not be addressed. Procedurally, Petitioner's due process claim was not raised below and should not now be considered for the first time on appeal. On the merits, Petitioner has failed to demonstrate how he was deprived of a fair trial by the fact that the State charged the victim's mother for the offense of tampering with a witness.

ISSUE V Petitioner challenges his sentence of life imprisonment without the possibility of parole as cruel and unusual under circumstances where there was no evidence of penile/vaginal union or penetration and where the guidelines scoresheet reflects no prior criminal record. The State submits that this issue is outside the scope

of the certified conflict issue and should not be addressed. On the merits, the sentence imposed is not cruel and unusual where the Florida Legislature has included within the definition of sexual battery the act of oral union with the sexual organ of another, irrespective of penile union or penetration, and has designated a punishment of life imprisonment without parole for the commission of this offense.

ARGUMENT

ISSUE I

DOES THIS COURT HAVE JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION WHERE THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN IT AND THE DECISIONS IN VELAZQUEZ v. STATE, 648 So.2d 302 (Fla. 5TH DCA 1995) AND KING V. STATE, 642 So.2D 649 (Fla. 2d DCA 1994)? IF SO, DID THE DISTRICT COURT PROPERLY HOLD THAT THE TRIAL COURT DID NOT ERR BY FAILING TO INSTRUCT THE JURY ON LEWD AND LASCIVIOUS CONDUCT AS A LESSER INCLUDED OFFENSE OF CAPITAL SEXUAL BATTERY? (Restated)

Statement of the Issues

Effective January 1, 2001, Florida Rule of Appellate Procedure 9.210(b)(5) requires that arguments on each issue include the applicable appellate standard of review for the claimed trial court error. Statements of the issue should be concise, accurate, and scrupulously fair. They should incorporate applicable appellate standards of review, including preservation or non-preservation of the issue and argument in the trial court, and be neutrally cast to present only the appellate question to be resolved.[1] The State declines to accept Petitioner's statements of the issues here because they do not include the relevant standards applicable to this Court's conflict-review jurisdiction.

Standard of Review

The standard of review applied to a trial court's decision to give or withhold a jury instruction is abuse of discretion. James v. State, 695 So. 2d 1229 (Fla. 1997); Bozeman v. State, 714 So.2d 570, 572 (Fla. 1st DCA 1998). The purely legal issue of whether lewd and lascivious conduct is a necessary or permissive lesser included

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[1]Fla. R. App. P. 9.210(b)(5); Kneale v. Kneale, 67 So.2d 233 (Fla. 1953); U.S. Sup. Ct. R. 24(1)(a); Robert Stern, APPELLATE PRACTICE IN THE UNITED STATES (2d ed 1989); and Frank E. Cooper, *Stating Issues in Appellate Practice*,49 A.B.A.J. 180 (1963).

offense of capital sexual battery is reviewed *de novo*. See e.g., Demps v. State, 761 So. 2d 302 (Fla. 2000).

Jurisdiction

In holding that Petitioner was not entitled to an instruction on lewd and lascivious conduct as either a necessary or a permissive lesser offense of capital sexual battery, the First District Court in the instant case certified inter-district conflict with the decisions in Velazquez v. State, 648 So. 2d 302 (Fla. 5th DCA 1995) and King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994). The State maintains, however, that an examination of the operative facts and principles of law addressed in the decision below reveals no express and direct conflict with the decisions in King and Velazquez, and, as such, no constitutional basis exists for this Court to exercise its conflict jurisdiction.

The conflict between decisions "must be express and direct" and the only relevant facts for the determination of discretionary jurisdiction must appear within the "four corners" of the majority decision. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict; dismissing petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra. It is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). Conflict jurisdiction is present only when decisions which interpret the same principles of law are applied to indistinguishable facts. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

In Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Id. at 810. Accordingly, the determination of conflict jurisdiction herein distills to whether the district court's decision in the instant case reached a result opposite King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994), and Velazquez v. State, 648 So. 2d 302 (Fla. 5th DCA 1995).

The decision below affirmed in all respects the judgment and sentence of the trial court. Of the five claims of error raised by Petitioner, the court addressed only ISSUE I, to wit: whether the lower court erred by failing to instruct the jury on the offense of lewd and lascivious conduct as a lesser offense of capital sexual battery. Under circumstances where Petitioner was charged with committing capital sexual battery upon a victim less than twelve years of age in violation of §794.011(2)(a), Fla. Stat., by placing his mouth on the vagina of the victim, the court held that by operation of law the information charging capital sexual battery could not also allege all of the statutory elements of lewd and lascivious conduct and, therefore, Petitioner was not entitled to an instruction on lewd and lascivious conduct as a lesser included offense of capital sexual battery. Welsh, 816 So. 2d at 175-178.

In Velazquez, the defendant was charged with two counts of capital sexual battery upon a person less than twelve years of age. Prior to trial, the defendant filed a motion to dismiss both counts on the grounds that the victim was not less than 12 years of age when the sexual batteries occurred. The trial court denied the motion to dismiss. Id.

at 303. On appeal, the Fifth District Court concluded that the motion to dismiss should have been granted because the victim had turned 12 years old before the offenses occurred. Id. at 303-305. The court went on deny the State's request that judgments be entered for the lesser offense of sexual battery upon a person 12 years of age or older under §794.011(5), because that section contains the additional element of lack of the victim's consent and is thus not a necessarily lesser-included offense of §794.011(2). Id. at 305. The court also concluded that it could not enter judgments for lewd, lascivious, or indecent assault or act upon or in the presence of a child under the age of sixteen years under §800.04, because that section is not a necessarily lesser-included offense of §794.011(2). Id. at 305. The court, then, vacated the two convictions for capital sexual battery. Id. at 305. In a footnote, however, the court noted the following: "On the other hand, if the evidence adduced at trial can support a jury verdict of lewd and lascivious assault as set forth in section 800.04, then a trial court, if requested, must give an instruction on such offense as a permissive lesser-included offense of sexual battery under section 794.011(2). *See King v. State*, 642 So.2d 649 (Fla. 2d DCA 1994)." Id. at 305, n. 7.

Having vacated the two convictions for capital sexual battery, the issue which the Velazquez court posed for itself in footnote seven was hypothetical and its answer dicta, unnecessary to the holding and lacking the binding force of precedent. The language contained in footnote seven in no way controlled the outcome of the decision and, as such, the decision in Velazquez cannot be said to be in express and direct conflict with the decision of the court in the instant case. Review should be declined on this basis.

In King, the defendant challenged his conviction for capital sexual battery by digitally penetrating his eight-year-old great-niece. Without reciting the evidence adduced at trial, the Second District Court stated that a prima facie case of capital

sexual battery had been presented. Id. at 649. The court held, however, that the evidence adduced could also have supported a verdict of lewd, lascivious, or indecent assault or act upon or in the presence of a child, a violation of §800.04, and that the trial court erred in denying a request for a jury instruction on this offense. Id. at 649-650.

There is no way to determine from the "four corners" of the decision in King whether the charging document and evidence adduced at trial supported a permissive lesser instruction on lewd and lascivious conduct. In the instant case, it can be gleaned from the First District Court's decision that neither the information nor the evidence supported such an instruction. Under these circumstances, no express or direct conflict exists between the decision in King and the instant decision. As previously stated, conflict jurisdiction exists only when decisions which interpret the same principles of law are applied to indistinguishable facts. Department of Revenue v. Johnston, supra. Where there are no facts in conflict within the "four corners" of the decisions in King and Welsh, it cannot be said that there exists express and direct conflict. On this basis, review should be declined.

Preservation

The State submits, as previously urged upon the First District Court of Appeal below, that the jury instruction claim of error raised by Petitioner was not properly presented to the trial court and is thus not reviewable on appeal pursuant to well-settled authority. §924.051(1)(b), Fla. Stat.; State v. Barber, 301 So. 2d 7 (Fla. 1974). The record reflects that a charging conference was held off the record and that it was understood that the result of the conference would be placed on the record at a later time. (VII. 731). At a later point in the trial, the trial judge raised the issue of whether the jury should be instructed on the offense of lewd and lascivious conduct as a lesser

offense of sexual battery. The judge cited the case of State v. Hightower, 509 So. 2d 1078 (Fla. 1987), as suggesting that lewd and lascivious conduct is not a lesser included offense of sexual battery as the two offenses are mutually exclusive. (VII. 785-786). Defense counsel acknowledged the existence of case law holding that one act cannot constitute both capital sexual battery and lewd and lascivious conduct, but argued that there was also case law suggesting that a jury is permitted to decide whether an act constitutes sexual battery or lewd and lascivious conduct. (VII. 786). After the defense had rested, the issue was raised again. Following a conference with a trial court staff attorney, the judge ruled as follows:

[COURT]: On the question of the lesser included charges as to Count I, I think we're satisfied that we have the sexual battery charge down, it is a question of the lesser included charge of Count I. I'm concluding that we should not give the charge, that the conclusion based upon the State vs. Hightower, 509 So. 2d 1078, where it says – this is not worded, and I think this is the same wording we have now in Section 800.04(5), "where sexual activity takes place with a person under 16 years of age which does not does [sic] the crime of sexual battery, this conduct seems to be lewd or lascivious, thus the unique language contained in the recent amendment, the then recent amendment to Section 800.04 make [sic] clear these particular crimes as [sic] mutually exclusive." And then I have Bauta, B-a-u-t-a, vs. State, which comes to the same conclusion following Hightower. And then counsel for the defense just brought me State vs. Robinson, which was entered just a month ago, apparently is not even final here, but it's a Third DCA decision holding the crime of lewd and lascivious conduct is not a necessarily lesser included offense of the crime of sexual battery. I noticed lewd or lascivious is not listed under the category schedule of offenses, so I don't think we should include that as a lesser included of Count I.

(VII. 843-844). No objection or argument was interposed from defense counsel. Thereafter, at the completion of the charging conference, the following transpired:

[COURT]: Okay. Do you have any comments on the jury instructions, Mr. Welsh?

[DEFENDANT]: No, they are just above my head.

[COURT]: Okay. I understand that. Is there anything you wish to say?

[DEFENSE COUNSEL]: He has not placed any concerns. He has asked me some questions as to what we were doing as we went along, and I have explained to him, for instance, that we were requesting certain lessers, and the Court had ruled on that, and explained to him that we were changing some of the language of the instructions. And I've just explained to him what we were doing and so that he would understand, and he's indicated that he did understand, but he's raised no concerns or objection to anything that we have discussed or talked about today during this charge conference.

(VII. 858-859).

Following completion of closing arguments, the trial court asked the attorneys whether they had an opportunity to review the transcription of the instructions. (VIII. 920). Defense counsel requested a bench conference, indicating there was no need for a court reporter. (VIII. 920). Following the bench conference, the trial judge inquired, "Then, counsel, as to the transcription of the instructions is as we had contemplated?" (VIII. 921). Defense counsel responded, "Yes, Your Honor, it is." (VIII. 921).

Where the alleged error on appeal is the giving or failure to give a particular jury instruction, a timely objection is required. Castor v. State, 365 So. 2d 701 (Fla. 1978). "The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." Id. at 703. In the instant case, while there was some discussion on the record as to whether lewd and lascivious conduct should be instructed as a lesser included offense of sexual battery, and while at one point defense counsel asserted that the jury is entitled to decide whether an act constitutes lewd and lascivious conduct or sexual

battery, it appears that any request for the lesser included instruction was abandoned. As set out above, at the time the trial judge issued his ruling, he announced on the record that *defense counsel herself* had provided him with case law holding that lewd and lascivious conduct is *not* a lesser included offense of sexual battery. The trial court's decision not to give the instruction on lewd and lascivious conduct was not challenged and no objection was raised or argument renewed at the time the trial judge asked the parties whether "the transcription of the instructions is as we contemplated." (VIII. 921). It appears that defense counsel was satisfied with the instructions at that point in the proceedings. Furthermore, the issue was not raised or argued in Petitioner's motion for new trial. (I. 125-126; II. 256-257).

Under the foregoing circumstances, the argument now raised in this appeal was not adequately preserved and should not be considered absent a showing of fundamental error. See Jones v. State, 718 So. 2d 1286 (Fla. 5th DCA 1998)(finding that defense counsel abandoned request to give a lesser included offense instruction of committing an unnatural and lascivious act in conjunction with the charge on lewd and lascivious assault on a child and agreed to the proposed instructions which included as lesser offenses, attempt, battery and assault); Howell v. State, 687 So. 2d 1339 (Fla. 1st DCA 1997)(concluding that although defense counsel initially requested a jury instruction on third-degree felony murder, premised on the underlying felony of an aggravated assault with a firearm, the record "leads us to conclude that the request for such an instruction was subsequently abandoned"). The State respectfully requests that this Court deny review.[2]

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[2]The State recognizes that the First District Court disposed of this issue on the merits and did not address the preservation bar raised by the State.

Merits

When a defendant requests an instruction on a non-category 1 necessarily lesser included offense, the trial court is required to grant the request only if (a) the accusatory pleading specifically alleges all the statutory elements of the lesser offense, and (b) a finding of guilt on the offense would be supported by the evidence submitted at trial. Overway v. State, 718 So.2d 308, 310 (Fla. 5th DCA 1998). "A permissive lesser included offense is a crime which may or may not be lesser included depending upon the pleading and the evidence presented at trial." Id. "[A]n instruction cannot be given on a permissive lesser included offense unless both the accusatory pleading and the evidence support the commission of that offense." Farley v. State, 740 So.2d 5, 6 (Fla. 1st DCA 1999). "[T]he elements of the lesser must be alleged in the information, and there must be proof of those elements at trial." Id. In order to qualify as a proper permissive lesser included offense, the information must allege all the statutory elements of the subject lesser offense and the evidence at trial must establish each of these elements. Jones v. State, 666 So. 2d 960 (Fla. 3d DCA 1996).

Thus, no jury instruction is required on a permissive lesser offense unless the specific conduct announced as criminal in the charging document could also support a finding of the lesser included offense based on that specific conduct alleged. Harrielson v. State, 441 So. 2d 691 (Fla. 5th DCA 1983). Stated otherwise, there is no need to give a requested jury instruction on a lesser offense not necessarily included in the charged offense (i.e., a category 2 permissive included offense) when there is a total lack of evidence of the lesser offense -- which is to say, when there is no evidence in the record that the permissive lesser offense was independently committed, rather than the charged offense. Jones v. State, 666 So. 2d at 968.

The amended information herein charged Petitioner with sexual battery against Margarita Vargas, a person under 12 years of age (Count I), sexual battery against

Miriam P. Vargas, a person under 12 years of age (Count II), lewd and lascivious conduct committed upon Aida Hernandez (Count III), and lewd and lascivious conduct committed upon Miriam P. Vargas (Count IV). (I. 61-62). Counts I and III were severed and Counts II and IV went to trial. Count II, which is the subject of this appeal, alleged as follows:

SECOND COUNT

> . . . TRAVIS A. WELSH on or between the 1st day of January, 1999 and the 31st day of December, 1999, in the County of Duval and the State of Florida, being a person 18 years of age or older, did commit a sexual battery upon or injure the sexual organs of Miriam P. Vargas, a person less than 12 years of age, in an attempt to commit sexual battery upon said person, by placing his mouth upon the vagina of Miriam Vargas, contrary to the provisions of Section 794.011(2)(a), Florida Statutes.

Section 794.011(2)(a) provides that a person 18 years of age or older who commits sexual battery upon a person less than 12 years of age commits a capital felony. Section 794.011(1)(h) defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object ...."

The victim, Miriam Princess Vargas (hereinafter Princess), testified with regard to Count II that on two occasions Petitioner used his mouth on her vagina. (V. 411-414). In closing arguments, the prosecutor urged the jury to convict Petitioner on Count II on the basis of the victim's testimony that Petitioner placed his mouth/tongue on her vagina. (VII. 869-871; VIII. 919).

The trial judge instructed the jury as follows as to Count II:

> Before you can find the defendant guilty of sexual battery upon a person less than 12 years of age, the State must prove the following two elements beyond a reasonable doubt:
>
> No. 1. Miriam P. Vargas was less than 12 years of age.
> 2. Travis A. Welsh committed an act upon Miriam P. Vargas in which the sexual organ of the victim, Miriam P. Vargas, had union with the mouth of the defendant, Travis A. Welsh.

(VIII. 921-922). The jury was also instructed on the lesser offenses of battery, attempted sexual battery, and assault. (VIII. 923-925).

Under the foregoing circumstances, Petitioner was not entitled to an instruction on lewd and lascivious conduct because the information did not include the elements of this offense, nor was there any evidence presented at trial on this count to support a finding of guilt thereon.

The evidence adduced on Count II, namely the testimony of the victim, proved up only the charged offense and in no way could have supported a finding of guilt on the offense of lewd and lascivious conduct. The victim testified that Petitioner used his mouth on her vagina. (V. 411-414). There was no room left by the victim's testimony for any finding that Petitioner committed a lewd and lascivious act. Either Petitioner committed the act of sexual battery by placing his mouth on the vagina of the victim or he did not. Petitioner asserts he was entitled to an instruction on lewd and lascivious conduct because the jury could have rejected the testimony of Princess, Margarita and Olga, to conclude that no sexual battery of Princess ever occurred, or could have found from the evidence presented that Petitioner was guilty of multiple instances of lewd and lascivious conduct rather than one. (IB. 34). Notably, however, Petitioner does not cite specifically what evidence presented on Count II could have supported a conviction for lewd and lascivious conduct. While it is true that the victim testified that Petitioner on more than one occasion touched and rubbed her chest and bottom and vagina area (V. 412-414, 415-417, 418), this testimony clearly went towards Count IV and not towards Count II. In closing arguments, the prosecutor urged the jury to convict Petitioner of Count II based on the victim's testimony that he placed his mouth/tongue on her vagina (VII. 869-871; VIII. 919), and urged the jury to convict on Count IV on the evidence that Petitioner fondled the victim with his hands. (VII. 877-878; VIII. 919). The prosecutor at no time commingled the facts

supporting the two separate counts. The jury was not asked to consider the incidents involving Petitioner's fondling or touching the victim's vagina with his hand as a basis for finding him guilty of the sexual battery charge.

As previously set forth, no jury instruction is required on a permissive lesser included offense when there is a total lack of evidence on the lesser offense -- which is to say, when there is no evidence of record that the permissive lesser offense was independently committed, rather than the charged offense. Jones v. State, 666 So. 2d 960 (Fla. 3d DCA 1996). Herein, there was no evidence adduced at trial on Count II that the lesser offense of lewd and lascivious conduct was committed. As such, Petitioner was not entitled to an instruction on this lesser offense.

Next, the information did not allege the elements of lewd and lascivious assault or conduct. In the decision on review, the First District Court concluded as such in holding that "by operation of law, the information in the present case charging capital sexual battery could not also allege all of the statutory elements of lewd and lascivious conduct." Id. at 176. It was not necessary to reach this statutory determination where disposition turned on the facts alone, to wit: whether the evidence adduced at trial supported a finding of guilty on the lesser offense. Nonetheless, the State concurs with the First District Court's conclusion that an instruction on lewd and lascivious conduct was not warranted because Count II of the information did not include the statutory elements of that offense under §800.04, Fla. Stat. (1997). Section 800.04 provides in pertinent part:

> **800.04 Lewd, lascivious, or indecent assault or act upon or in the presence of child.** - A person who
>
> (1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;
>
> (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is

> being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
>
> (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
>
> (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,
>
> *without committing the crime of sexual battery*, commits a felony of the second degree....

(Emphasis added).

In the instant case, Petitioner was charged in Count II with committing sexual battery in violation of §794.011(2)(a), by placing his mouth on the vagina of the victim, a person less than 12 years of age. As found by the First District Court, these allegations clearly comply with the definition of sexual battery, which is defined in §794.011(1)(h) as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." Id. at 176. In State v. Hightower, 509 So. 2d 1078 (1987), this Court stated that the offenses of sexual battery under §794.011(2) and lewd and lascivious conduct under §800.04 are mutually exclusive and that the crime of lewd and lascivious conduct is not a necessarily included offense of the crime of sexual battery. Id. at 1079. Following Hightower, the First District Court has held that one cannot be convicted of a lewd and lascivious act committed upon a child under 12 years of age for conduct that also constitutes the crime of sexual battery under §794.011. Jozens v. State, 649 So. 2d 322 (Fla. 1st DCA 1995). Any activity proscribed in §794.011(1)(h) perpetrated upon a victim less than 12 years of age necessarily constitutes the crime of sexual battery, pursuant §794.011(2), where consent is irrelevant, and by definition cannot be considered a lewd and lascivious conduct under section §800.04. Jozens.

As correctly concluded by the First District Court in the opinion below, the trial court herein did not err in failing to instruct the jury on the offense of lewd and

lascivious conduct as a lesser included offense of capital sexual battery where Count II of the information did not include the statutory elements of an offense under §800.04. If Petitioner committed an act defined as sexual battery precisely as alleged in Count II, he could not be convicted of lewd and lascivious conduct under §800.04.

In sum, where neither the information nor the evidence at trial supported an instruction on lewd and lascivious conduct as a lesser offense of capital sexual battery, no abuse of discretion has been demonstrated in the trial court's failure to so instruct the jury. The following case law supports affirmance under the instant facts: State v. Robinson, 771 So. 2d 1256 (Fla. 3d DCA 2000)(citing Hightower and holding that defendant charged with sexual battery on a victim less than 12 years of age was not entitled to a jury instruction on the lesser offense lewd and lascivious conduct); Bauta v. State, 698 So. 2d 860 (Fla. 3d DCA 1997)(finding trial court did not err in failing to instruct on offense of lewd and lascivious assault as a lesser offense of capital sexual battery, citing Hightower and referencing the schedule of lesser included offenses); McGriff v. State, 526 So. 2d 995 (Fla. 4th DCA 1988)(holding that where the information charging sexual battery and the evidence presented at trial did not support an instruction on lewd and lascivious conduct as a lesser included offense, trial court did not err in failing to give such instruction, citing Hightower); Walker v. State, 464 So. 2d 1325 (Fla. 5th DCA 1985)(holding that trial court did not err by failing to give instruction on lewd and lascivious assault as a lesser included offense of sexual battery because (a) the two crimes contain different elements and therefore lewd and lascivious assault cannot be a necessary lesser and (b) the information simply alleged the commission of sexual battery and there was no basis to argue that the elements of lewd and lascivious assault were sufficiently alleged so as to make it a permissive included lesser offense); Harrielson v. State, 441 So. 2d 691 (Fla. 5th DCA

1983)(holding that defendant charged with sexual battery was not entitled to instruction on lesser offense of lewd assault under §800.04 where the indictment charged defendant only with acts constituting sexual battery which if proven did not encompass the elements of lewd assault).

As noted by Judge Ervin in the opinion below, the Schedule of Lesser Included Offenses in the Florida Standard Jury Instructions in Criminal Cases does *not* list §800.04 as a lesser included offense of the §794.011(2)(a) crime of sexual battery upon a person less than 12 years of age. The Schedule lists under §794.011(2)(a) only one category 1 necessarily lesser included offense -- battery, and five category 2 permissive lesser included offenses -- sexual battery (794.011(5)), attempt, assault, aggravated assault, and aggravated battery. The record herein reflects that with regard to Count II, the trial court instructed the jury on the category 1 necessarily lesser included offense of battery and the category 2 permissive lesser included offenses of attempted sexual battery and assault. (VIII. 923-925). The jury, thus, was not deprived of an opportunity to exercise its inherent pardon power. Even if the trial court herein should have given an instruction on lewd and lascivious conduct, the failure to do so can be deemed harmless where the jury was instructed on the one-step removed lesser offense of attempted sexual battery and yet returned a conviction on the charged offense. See Pryor v. State, 755 So. 2d 155 (Fla. 4th DCA 2000)(*citing* State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978)(holding only the failure to instruct on the next immediate lesser included offense one step removed constitutes error that is per se reversible)).

ISSUE II

SHOULD THIS COURT ADDRESS THIS ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT DISCUSSION AND WHICH IS OUTSIDE THE SCOPE OF THE CONFLICT ISSUE CERTIFIED BELOW? IF SO, WAS THE ISSUE PRESERVED FOR REVIEW AND DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING INTO EVIDENCE LETTERS WRITTEN BY PETITIONER TO THE VICTIM'S MOTHER CONTAINING ADMISSIONS OF OTHER SIMILAR CRIMES, WRONGS OR ACTS? (Restated)

Jurisdiction

The State submits that this claim of error is outside the scope of the conflict issue certified below. The First District Court affirmed in all respects the judgment and sentence of the trial court, discussing solely the claim of error raised under ISSUE I. The State recognizes that this Court has discretion to entertain this issue, see Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982)(stating that "once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case."), but respectfully requests that it exercise its discretion *not* to entertain this issue. See Fox v. State, 759 So. 2d 680, 681 n. 1 (Fla. 2000)(declining to address the additional issue raised by appellant "which is clearly outside the scope of the certified conflict issue"); Williams v. State, 759 So. 2d 680 n. 1 (Fla. 2000)(declining to address claim "which is clearly outside the scope of the certified conflict issue.").

ISSUE II was fully addressed in the briefs filed with the First District Court. By reasserting this claim of error, Petitioner is attempting to seek a second, *de novo*, review on the merits. The State submits the following abbreviated argument in support of its position that no reversible error has been demonstrated with regard to this claim of error.

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court, and an evidentiary ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000). More specifically, a trial court's ruling on an objection to the admissibility of evidence under §90.403, Fla. Stat., is reviewed under an abuse of discretion standard. See Williamson v. State, 681 So. 2d 688 (Fla. 1996). Where the trial court has weighed the probative value against the prejudicial nature of the evidence, the decision to admit or exclude evidence will not be disturbed on appeal absent a showing of abuse of discretion. Jent v. State, 408 So. 2d 1024 (Fla. 1981). If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

Argument

Petitioner asserts that the trial court erred in admitting into evidence letters written by him to the victim's mother because the prejudicial nature of the evidence of other crimes, wrongs or acts contained therein outweighed any probative value in violation of §90.403, Florida Statutes. A review of the trial transcript reflects that this precise argument did not constitute the basis of the objection below and, thus, the issue is not preserved for review under §924.051(b), Fla. Stat. (VI. 641-656; 720-723; 718-719; 727-729; 782). See, Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)(stating that in order for argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below). See also, Reynolds v. State, 660 So. 2d 778 (Fla. 4th DCA 1995)(finding that objection at trial that hearsay testimony was cumulative did not preserve for review issue of whether probative value of evidence was outweighed by danger of unfair prejudice under

§90.403); Ghent v. State, 685 So. 2d 72 (Fla. 1st DCA 1996)(finding that claim on appeal that trial court erred in failing to rule that hearsay statements of child victim of alleged sexual battery were inadmissible on basis that their cumulative and misleading nature outweighed their probative value was not preserved for review where asserted ground was not basis of objection below); Anderson v. State, 598 So. 2d 276 (Fla. 1st DCA 1992)(finding that trial court's failure to conduct a §90.403 analysis of hearsay testimony was not preserved for review). In Reynolds v. State, supra, the court noted that a claim of violation of §90.403 did not demonstrate fundamental error such that it could be reviewed on appeal without objection at trial. Id., 660 So. 2d at 780.

Even if the issue had been preserved for review, Petitioner may not prevail on the merits. Evidence of other crimes, wrongs, or acts is admissible if it is found to be relevant for any purpose, save that of showing bad character or propensity. Williams v. State, 110 So. 2d 654 (Fla. 1959). Section 90.404(2), Florida Statutes, which codified the holding in Williams, provides that evidence of other crimes, wrongs or acts may be admitted when relevant to prove a material fact in issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when relevant solely to prove propensity. The test of admissibility of Williams rule evidence, thus, is relevance. Williams v. State; §90.404(2), Fla. Stat.

In Heuring v. State, 513 So.2d 122 (Fla. 1987), the Florida Supreme Court expanded the Williams rule in cases involving sexual battery committed within the familial context. It determined that similar fact evidence arising out of the familial context is relevant to *corroborate* the victim's testimony and that the probative value of such evidence outweighs its prejudicial effect. Id. at 125. In Heuring, the defendant was charged with committing sexual battery upon his stepdaughter. The trial court permitted the defendant's adult daughter to testify that she had been sexually abused

by the defendant years earlier when she was roughly the same age as the victim. In upholding the admissibility of the testimony, the Florida Supreme Court stated:

> Cases involving sexual battery committed within the familial context present special problems. The victim knows the perpetrator, e.g., a parent, and identity is not an issue. The victim is typically the sole eye witness and corroborative evidence is scant. Credibility becomes the focal issue. In such cases, some courts have in effect relaxed the strict standard normally applicable to similar fact evidence. These courts have allowed evidence of a parent's sexual battery on another family member as relevant to modus operandi, scheme, plan, or design, even though the distinction between sexual design and sexual disposition is often tenuous. We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect.

Id. at 124-125. Section 3.08 of the standard jury instructions has since been amended to add corroboration to the uses a jury may make of evidence of other crimes, wrongs or acts. Standard Jury Instructions - Criminal Cases (99-1), 765 So. 2d 692, 695 (Fla. 2000).

In the instant case, the State sought to introduce letters written by Petitioner to the victim's mother from jail following his arrest. These letters detailed sexual misconduct committed upon the victim's sisters, Margarita and Olga. The State argued that the letters were admissible as corroboration evidence. (VII. 725-727). Immediately before the letters were admitted into evidence, the trial judge read the following instruction to the jury:

> [COURT]: [T]he evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving the absence of mistake or accident on the part of the defendant or to corroborate the testimony of Miriam P. Vargas, and you shall [c]onsider it only as it relates to those issues, however, the defendant is not on trial for a crime that is not included in the information.

(VII. 741-742).

Additionally, at the close of evidence the judge instructed the jury as follows:

[COURT]: The testimony of Miriam P. Vargas which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of the absence of mistake or accident on the part of the defendant. Any other evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of the absence of mistake or accident on the part of the defendant or to corroborate the testimony of Miriam P. Vargas.

(VIII. 932-933).

Petitioner argues in this appeal that the letters written by him detailing sexual misconduct with Margarita and Olga were cumulative to the trial testimony of Margarita and Olga and prejudicial due to the explicit and graphic nature thereof.[3] Contrary to Petitioner's assertion, §90.403 does not preclude admission of the letters under the facts of this case. As stated by this Court in Escobar v. State, 699 So. 2d 988 (Fla. 1997), almost all evidence introduced during a criminal prosecution is prejudicial to a defendant. Id. at 998. In reviewing evidence regarding other crimes, wrongs or acts that is admitted over an objection based upon §90.403, a trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Id. at 998. Evidence should be excluded only when unfair prejudice substantially outweighs the probative value of the evidence. Id. at 998. The pertinent question is whether prejudice to the defendant is so unfair that it should be deemed unlawful. LaMarca v. State, 785 So. 2d 1209 (Fla. March 8, 2001).

The Williams rule is not intended to keep out relevant evidence but, rather, to admit it. See Lazarowicz v. State, 561 So. 2d 392 (Fla. 3d DCA 1990)(stating that Williams rule is not a rule of exclusion but a rule of admissibility). The fact that it is prejudicial

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[3]Petitioner does not raise as an issue in this appeal a claim that the evidence of other wrongs or acts contained in the letters was not sufficiently similar to the charged offenses described by the victim to be admissible under §90.404(2).

is, of course, what makes it relevant. In the instant case, the letters were not offered into evidence by the prosecution for the purpose of proving that because Petitioner committed similar wrongful acts against the victim's two sisters he committed the charged offenses. Rather, the letters were offered to corroborate the testimony of the victim. Witness credibility was a material fact at issue in this trial. Petitioner's theory of defense was that he was the household's sole disciplinarian and that the charges were fabricated to remove him from the home. The similar fact evidence contained in the letters was relevant under Heuring to corroborate the testimony of the child victim, whose credibility was placed in issue by Petitioner's defense that the charges against him were fabricated. See e.g., Adkins v. State, 605 So. 2d 915 (Fla. 1st DCA 1992). As recognized in Heuring, the import of such corroborative evidence far outweighs the danger of unfair prejudice. There were significant similarities between the charged offenses and the similar fact evidence that enhanced the probative value of the similar fact evidence. See State v. Rawls, 649 So. 2d 1350 (Fla. 1994). The similar fact evidence herein was not made the focal point of the trial and proper cautionary instructions were given. Because the letters were relevant as corroborative evidence, their probative value outweighed the potential for undue prejudice, and there was no bar to their admission. The fact that portions of the letters contained graphic details of sexual misconduct does not necessarily give rise to a finding of prejudice. The trial judge acted within his discretion in admitting the letters into evidence. See Shipman v. State, 668 So. 2d 313 (Fla. 4th DCA 1996).[4]

Harmless Error

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[4]Petitioner cites no case law in support of reversal on the grounds that the prejudicial nature of the evidence outweighed its probative value.

Error, if any, was harmless under the facts of this case under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). While the improper admission of Williams rule evidence is presumed harmful, Straight v. State, 397 So. 2d 903, 908 (Fla. 1981), not only was its introduction in the case at bar proper, but substantial competent evidence was introduced, independent of the Williams rule evidence, proving each element of the crime as determined by the jury beyond a reasonable doubt.

The victim testified with regard to Count II that on two occasions Petitioner used his mouth on her vagina. (V. 411-414). With regard to Count IV, she testified that one on occasion Petitioner touched her vagina with his fingers (V. 412-414), that on more than one occasion he took off his clothes and her clothes and rubbed her chest and bottom (V. 415-417), that on another occasion he took off his clothes and her clothes and rubbed her bottom and vagina area (V. 417), and that on another occasion he touched her chest, bottom and vagina. (V. 418). The victim's testimony was believable and consistent, and provided all the necessary elements to convict Petitioner of the two charges. Section 794.022(1) specifically provides that the testimony of the victim need not be corroborated in a prosecution under §794.011. See also Robinson v. State, 462 So. 2d 471 (Fla. 1984)(noting that no corroborative evidence is required in a sexual battery case when the victim can testify directly to the crime and can identify her assailant). Hence, the testimony of the victim alone in this case was sufficient to convict. In addition to the victim's testimony, however, the victim's sisters testified with regard to sexual misconduct perpetrated upon them by Petitioner during the same time period and while under the same roof. Thus, the victim's testimony was corroborated by the testimony of her sisters. The jury had plenty of evidence upon which to support a conviction. Finally, any prejudice to Petitioner was cured by the trial court's issuance of a limiting Williams rule instruction prior to admission of the letters into evidence as well as at the close of all the evidence. The

trial court specifically instructed the jury for what purpose the testimony was introduced and that it should be considered only as it relates to those issues. Furthermore, defense counsel in closing argument expressly admonished the jury not to convict Petitioner of a crime not charged in the information. (VII. 905).

In light of the substantial competent evidence, independent of the similar fact evidence contained in Petitioner's letters, to support the jury's finding of guilt, there is no evidence or indication that the jury failed to follow the instructions of the trial court and the admonition of defense counsel. It can thus be concluded beyond a reasonable doubt that the admission of the letters into evidence did not contribute to the jury's verdict. Under the standard set forth in DiGuilio, any error was harmless.

ISSUE III

SHOULD THIS COURT ADDRESS THIS ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT DISCUSSION AND WHICH IS OUTSIDE THE SCOPE OF THE CONFLICT ISSUE CERTIFIED BELOW? IF SO, DID THE LETTERS WRITTEN BY PETITIONER CONTAINING EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS BECOME A FEATURE OF THE TRIAL SUCH AS TO RENDER THEIR ADMISSION INTO EVIDENCE AN ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT? (Restated)

Jurisdiction

As with ISSUE II, the State submits that this claim of error is outside the scope of the conflict issue certified below and urges the Court to exercise its discretion *not* to entertain this issue. The State submits the following abbreviated argument in support of its position that no reversible error has been demonstrated with regard to this claim of error.

Standard of Review and Preservation

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000). Specifically, the decision on the relevance and admissibility of evidence of other crimes, wrongs, or acts is addressed to the discretion of the trial court. LaMarca v. State, 785 So. 2d 1209 (Fla. 2001); Duffey v. State, 741 So. 2d 1192 (Fla. 4th DCA 1999). If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). Petitioner preserved this issue for review.

Argument

The test for determining when evidence of other crimes, wrongs or acts becomes an impermissible feature of the trial is set out by this Court in Bush v. State, 690 So.2d 670 (Fla. 1st DCA 1997):

> Unfair prejudice results where the state makes a collateral offense a feature, instead of an incident, of a trial. State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993). The state's presentation of evidence of collateral offenses must not transcend the bounds of relevancy to the offense being tried. Id. A similar offense becomes a feature instead of an incident of the trial on the charged offense where it can be said that the similar fact evidence has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes. Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA), rev. denied, 547 So.2d 1210 (Fla.1989)

Id. at 673.

The issue of whether the Williams rule evidence of similar wrongs perpetrated against Margarita and Olga became a feature of the trial was argued extensively below with regard to the in-trial testimony of Margarita and Olga. A "feature of the trial" argument was also raised with regard to the similar fact evidence contained in the letters written by Petitioner to the victim's mother from jail. (VII. 718-719). The issue was raised again in the motion for new trial. (I. 125-126). On appeal, Petitioner appears to limit his "feature of the trial" argument solely to that similar fact evidence contained in the letters written by Petitioner. He argues that the evidence of other wrongs or crimes contained in the letters, particularly in reference to Margarita and Olga, became a feature of the trial both with respect to the quantum of evidence presented and the arguments of counsel.

The letters in question were introduced into evidence during the testimony of the State's handwriting examiner witness Don Pribbenow. (VII. 742). Portions of the letters were read aloud by Mr. Pribbenow during his testimony. (VII. 757-768). The full-length letters are included in the record on appeal.

In Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989), the defendant was convicted of five counts of sexual battery involving two children aged four and six months. The defendant's wife was the baby-sitter for the child victims who, along with other Williams rule witnesses, were left at the defendant's residence in the care of the defendant while she ran errands. The four-year old victim had given inconsistent testimony, giving rise to the issue of fabrication by the child. Evidence of two other children who had been sexually abused by the defendant while the children were left in the care of the defendant's wife was introduced as similar fact evidence in the trial. In affirming the lower court's ruling to admit the evidence at trial, the Third District Court analyzed in detail the defendant's complaint that the similar fact evidence had improperly become a feature of the trial. Id. at 1389, 1390. The court cited five reasons why the evidence was not subject to exclusion on that ground: (1) the jury was properly instructed about the proper use of such evidence; (2) the evidence was not excessive in volume in comparison to the evidence of the charged offenses; (3) part of the reason the similar fact evidence was a "feature" of the case was attributable to the defendant; (4) the evidence was essential to the State's proof; and (5) in the context of such cases involving the sexual abuse of children by adults having custodial access to the children, such evidence has a recognized corroborative function. Id. at 1389.

Another example of use of similar fact evidence held not have become a feature of the trial can be found in this Court's opinion in Perry v. State, 718 So.2d 1258 (Fla 1st DCA 1998). The defendant therein was convicted of one count of capital sexual battery, two counts of lewd and lascivious assault on a child under the age of 16, and one count of the lesser included offense of misdemeanor battery. At trial, the State presented three witnesses who testified to uncharged acts. Each testified to types of activities that were similar to the acts complained of by the victim. At the conclusion

of their testimony the trial judge instructed the jury on the limited purposes of similar crime testimony. The judge again gave that charge when instructing the jury following the presentation of evidence. On appeal, this Court affirmed the convictions, noting that ". . . the trial court twice gave a cautionary instruction, and the testimony by the state's witnesses as to the collateral acts was limited in duration" and "[a] review of the entire record shows that the testimony presented by the state's witnesses pertaining to the collateral acts was not excessive." Id. at 1259.

In the case *sub judice*, the letters written by Petitioner detailed sexual conduct with all three daughters and were introduced to corroborate the testimony of the victim in light of Petitioner's theory of defense that the charges were fabricated. The credibility of the victim and her two sisters became the focal issue at trial. As in Snowden, the facts of the instant case present the type of custodial involvement with child victims that warrants the corroborative use of such similar act evidence. Also similar to Snowden, it was defense counsel's attempt to impeach the credibility of the victim, and her attempt to argue that the State had presented no evidence to corroborate the testimony of the victim, which resulted in the placement of any emphasis on the similar fact evidence. See also, Travers v. State, 578 So. 2d 793 (Fla. 1st DCA 1991)(finding that in sexual battery trial any emphasis placed on similar fact evidence was attributable to defensive efforts and did not warrant reversal). As to the claimed excessive nature of the evidence, the reading aloud of portions of the letters by Don Pribbenow accounted for twelve pages of the lengthy trial transcript. (VII. 757-768). Finally, with regard to references made to the letters during closing argument, in her initial closing argument the prosecutor referred only briefly to the letters as containing evidence of other wrongs, crimes or acts. (VII. 875-877). Defense counsel in closing argument asserted repeatedly that the State had presented no corroborating evidence to support the victim's testimony. (VII. 881-907). In rebuttal, the prosecutor read

aloud portions of the letters written by Petitioner and urged the jury to consider them as corroborative evidence. This argument accounted for five pages of the trial transcript. (VIII. 911-915).

In ruling on defense's claim that the admission of the letters allowed the similar fact evidence to become an impermissible feature of the trial, the lower court herein referenced the relevant case law and correctly applied it to the facts. (VII. 728-729). No error has been demonstrated in the trial court's ruling. See, Coleman v. State, 484 So. 2d 624 (Fla. 1st DCA 1986); Shipman v. State, 668 So. 2d 313 (Fla. 4th DCA 1996).

ISSUE IV

SHOULD THIS COURT ADDRESS THIS ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT DISCUSSION AND WHICH IS OUTSIDE THE SCOPE OF THE CONFLICT ISSUE CERTIFIED BELOW? IF SO, IS THIS UNPRESERVED ISSUE REVIEWABLE UNDER THE DOCTRINE OF FUNDAMENTAL ERROR? IF SO, WAS PETITIONER DEPRIVED OF A FAIR TRIAL BY VIRTUE OF THE STATE'S SEPARATE PROSECUTION AGAINST THE VICTIM'S MOTHER FOR THE OFFENSE OF TAMPERING WITH A WITNESS? (Restated)

Jurisdiction

As with ISSUES II and III, the State submits that this claim of error is outside the scope of the conflict issue certified below and urges the Court to exercise its discretion *not* to entertain this issue. The State submits the following abbreviated argument in support of its position that no fundamental error has been demonstrated with regard to this unpreserved claim of error.

Standard of Review

If the Court finds this issue to be reviewable on appeal, then the State concurs with Petitioner that the standard of review would appear to be *de novo*.

Argument

Petitioner claims, in essence, that he was denied his due process right to a fair trial by virtue of the State's pending prosecution against the victim's mother for tampering with a witness. More specifically, he argues that the testimony of the victim's mother, as well as the testimony of her children, was obtained as a result of coercion in the form of the prosecution of the mother for tampering with a witness. At no time was

this due process claim raised at trial below. Absent a showing of fundamental error, it should not be considered for the first time in this appeal.

On the merits, Petitioner has failed to demonstrate fundamental error. Petitioner was arrested on the instant charges in January 2000. At trial, Miriam Vargas (the victim's mother) testified that Petitioner wrote her numerous letters from jail. In some of these letters, he requested that she have her daughters write letters to the trial judge recanting the allegations against him. (VI. 556-557). He even suggested language to include in the letters. (VI. 557, 559). In June and July of 2000, Ms. Vargas had Princess and Margarita write letters to the trial judge stating that Petitioner never sexually abused them and asking that the charges be dropped. (VI. 557, 563). At trial, Ms. Vargas acknowledged that she had forged Margarita's signature on one of the letters, and that she had added a sentence to one of the letters from Princess, unbeknownst to Princess. (VI. 557-564, 628). Shortly after the letters had been sent to the trial judge, investigators from the State Attorney's Office came to Ms. Vargas' house to question her daughters. On July 26, the daughters were taken to the courthouse and questioned about the letters. (VI. 624-625; VI. 671). On the following day, July 27, Ms. Vargas was arrested and charged with the crime of tampering with a witness. (VI. 564, 626; VI. 672-676). Following her arrest, she informed authorities that she had sent the letters from her daughters to the judge at Petitioner's request. (VI. 629).

On direct examination at trial, Ms. Vargas testified that at the time she had her daughters write the letters she believed Petitioner to be innocent and she wanted the charges against him dropped. (VI. 558-559). She stated that she was now cooperating with the State and had not been threatened in any way or promised anything in return for her cooperation. (VI. 566). On cross-examination, defense counsel asked Ms. Vargas whether after she had sent the letters from Princess and

Margarita to the judge she received a telephone call from the State Attorney's office threatening her that if she did not testify against Petitioner that she would go to jail. Ms. Vargas responded, "That's correct." (VI. 621). On re-direct, Ms. Vargas reiterated that she had wanted to help Petitioner early on in the case because she was in love with him and wanted the charges dropped. (VI. 635-636). She explained that she had acted untruthfully in the past with regard to this case because she had been "humiliated, intimidated for all these years." (VI. 637).

On appeal, Petitioner argues that he was denied his federal and state due process rights to a fair trial "because the in-court testimony of the mother of the alleged victim, as well as the testimony of her children Princess, Margarita and Olga, was obtained as a result of 'emotional blackmail' or coercion in the form of the prosecution of the mother for tampering with a witness." (IB. 43). He asserts that the State threatened Ms. Vargas with five years in prison and the children with separation from their mother and, in this manner, "coerced the crucial testimony that the children wrote the letters only because their mother told them to do so, and coerced the mother's testimony that she wrote some of the exculpatory statements herself, unbeknownst to her children." (IB. 44).

There is no record evidence that Princess and Margarita were coerced into testifying with regard to the letters written to the judge. The State had already learned of the letters prior to the arrest of Ms. Vargas and Petitioner cannot show that Princess and Margarita would have provided different testimony at trial but for the subsequent charge filed against their mother. In the same vein, there is no evidence that the State coerced Ms. Vargas into acknowledging at trial that she forged one of the letters and added a statement to another. Despite her affirmative response to the question from defense counsel on cross-examination regarding whether she received a telephone call from the State Attorney's office threatening her that if she did not testify against

Petitioner she would go to jail, she testified on direct examination that she had *not* been threatened in any way or promised anything in return for her cooperation.

In any event, it is the State's prerogative to file a charge against an individual who has committed a crime. The State herein became aware in July, through an interview with Princess and Margarita, that Ms. Vargas had possibly committed the offense of tampering with a witness. The State thereafter arrested Ms. Vargas. Petitioner has failed to demonstrate on the instant record how the fact that the charge against Ms. Vargas was still pending at the time of trial violated his personal due process right to a fair trial.

Notably, Ms. Vargas' testimony did not directly incriminate Petitioner in any way. She incriminated only herself by acknowledging that she had forged one of the letters and added a statement to the another. Furthermore, defense counsel took the opportunity at trial, through cross-examination of Ms. Vargas and at closing argument, to urge the jury to believe that Ms. Vargas was testifying against Petitioner solely at the State's coercion. (VI. 588-635). Petitioner, thus, was not deprived of the opportunity of advancing this theory to the jury below.

No fundamental error has been demonstrated on these facts. The cases cited in Petitioner's brief, all concerning threats to charge witnesses with perjury, are factually and legally inapposite.[5]

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[5]Reese v. State, 382 So. 2d 141 (Fla. 4th DCA 1980); Davis v. State, 334 So. 2d 823 (Fla. 1st DCA 1976); Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976). (IB. 44-45).

ISSUE V

SHOULD THIS COURT ADDRESS THIS ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT DISCUSSION AND WHICH IS OUTSIDE THE SCOPE OF THE CONFLICT ISSUE CERTIFIED BELOW? IF SO, DOES PETITIONER'S SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR CAPITAL SEXUAL BATTERY INVOLVING NO PENILE PENETRATION CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT? (Restated)

Jurisdiction

As with ISSUES II-IV, the State submits that this claim is outside the scope of the conflict issue certified below and urges the Court to exercise its discretion *not* to entertain this issue. The State submits the following abbreviated argument in support of its position that the sentence of life imprisonment imposed herein does not constitute cruel and unusual punishment.

Standard of Review

The question of whether a sentence constitutes cruel and unusual punishment is a question of law subject to *de novo* review.

Argument

Petitioner was convicted as charged under Count II with committing sexual battery upon a child under 12 years of age, a capital felony under §794.011(2)(a), Florida Statutes. Subsection (2)(a) provides that a person 18 years of age or older who commits sexual battery upon a person less than 12 years of age commits a capital felony, punishable as provided in §775.082. Section 794.011(1)(h) defines sexual

battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object ...." Pursuant to §775.082(1), capital sexual battery offenders are punished by life imprisonment and shall be ineligible for parole. The information charged Petitioner with committing sexual battery by placing his mouth upon the vagina of the victim Miriam Princess Vargas. (I. 61). The victim testified at trial that on two occasions Petitioner used his mouth on her vagina. (V. 411-414). Petitioner asserts that his sentence for capital sexual battery constitutes cruel and unusual punishment under the United States and Florida Constitutions, particularly where the State's evidence proved, at most, oral/vaginal union as opposed to penile/vaginal penetration and where his guidelines scoresheet reflects no prior criminal record. Petitioner acknowledges the holding in Gibson v. State, 721 So. 2d 363 (Fla. 2nd DCA 1998) that a sentence of life imprisonment without the possibility of parole for the offense of penile union with the vagina of a girl less than 12 years of age, where the defendant was 23 years old with no prior criminal record, does *not* constitute cruel and unusual punishment. He urges, however, that Gibson should be distinguished on the grounds that no penile union or penetration occurred in the instant case.

The Legislature has the exclusive power to define crimes and set punishments, Rusaw v. State, 451 So. 2d 469 (Fla. 1984), and legislative acts are strongly presumed constitutional. See State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts should resolve every reasonable doubt in favor of the constitutionality of a statute. Florida League of Cities, Inc. v. Administration Com'n, 586 So. 2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994).

In §794.011, the Legislature chose to include the act of oral union with the sexual organ of another within the definition of sexual battery and to impose punishment for such an act by life imprisonment without the possibility of parole, irrespective of penile union or penetration. Sexual battery can occur when the defendant's mouth has union with the victim's vagina -- proof of penetration is not required. See Richards v. State, 738 So. 2d 415 (Fla. 2d DCA 1999); Dorch v. State, 458 So. 2d 357 (Fla. 1st DCA 1984).

Petitioner's claim herein appears to be that the sentence is too harsh for the crime committed. He presents no analysis or argument that his sentence is different from other criminals in the same jurisdiction, or that his sentence is different from those imposed for the same crime in other jurisdictions. When comparing the crime to the punishment, this Court must compare the underlying crime that Petitioner committed (sexual battery on a child under 12 years of age by a defendant over 18 years of age) to the penalty he received (life imprisonment without parole). The gravity of the crime of sexual battery on a child under 12 years of age speaks for itself. The courts are unified in agreement that a sexual battery charge is one of the most serious offenses. In Gibson, supra, the Second District Court stated:

> Considering first the gravity of the offense of capital sexual battery and the harshness of the penalty of life imprisonment without the possibility of parole, we do not question the legislature's wisdom in deciding that this crime is a very grave offense warranting severe punishment. Child sexual predation is a serious concern. Even when it leaves no physical scars, it can create emotional damage that lasts a lifetime. There is evidence that victims of abuse become abusers and that this crime can transmit its injuries across generations. Because victims hesitate to report this crime and proof of the offense is often difficult to obtain, there is a risk that perpetrators will believe they can escape detection and punishment. As a result, there is a need for a harsh penalty to act as a sufficient deterrent.

Id. 721 So.2d at 368-69 (citations omitted). In Bunney v. State, 603 So. 2d 1270 (Fla. 1992), Justice Shaw commented in a dissenting opinion that:

> The legislature has determined that two crimes, first-degree murder and sexual battery of a child, are more serious than others and has prescribed specific penalties for these capital felonies independent of the sentencing guidelines.

Id. at 1273 (citations omitted). Sexual battery is a grave crime deserving stringent punishment. Jesus v. State, 565 So. 2d 1361, 1365 (Fla. 4th DCA 1990). Sexual battery upon a child less than 12 years of age is "one of the most heinous and despicable offenses imaginable, short of actual mayhem, or murder . . . ." Kendry v. State, 517 So. 2d 78 (Fla. 1st DCA 1987)(finding a high correlation between the gravity of the offense and the harshness of the penalty of life imprisonment without the possibility of parole for 25 years). See also, Caulder v. State, 500 So. 2d 1362 (Fla. 5th DCA 1986)(holding that mandatory life sentence with no possibility of parole for 25 years for sexual battery under §794.011(2) is not cruel and unusual).

Petitioner's sentence of life imprisonment without the possibility of parole does not constitute cruel and unusual punishment under the facts of this case. Where the Florida Legislature has chosen to include the act of oral union with the sexual organ of another within the definition of sexual battery, there is no basis for distinguishing the decision in Gibson. Whether or not penile union or penetration occurred in the context of a capital sexual battery is a distinction without a difference for purposes of sentencing under §794.011(2)(a), §775.082(1). Petitioner's sentence is constitutional and proper and should be affirmed by this Court.

CONCLUSION

The State respectfully requests that this Court deny review on the grounds that no express and direct conflict exists between the decision of the First District Court on review and the decisions in Velazquez v. State, 648 So. 2d 302 (Fla. 5th DCA 1995) and King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994). If, however, the Court elects to exercise its jurisdiction, the State respectfully submits that the decision of the First District Court reported at 816 So. 2d 175 (Fla. 1st DCA 2002), be approved and the judgment and sentence entered by the trial court be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Richard Summa, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on July __, 2002.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

TRAVIS WELSH, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. SC02-1092

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