

IN THE SUPREME COURT OF FLORIDA

TRAVIS WELSH,

Petitioner,

v.

CASE NO. SC02-1092

L.T. No. 1D01-648

STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RICHARD M. SUMMA
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 890588

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

i

TABLE OF AUTHORITIES

iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 21

ARGUMENT 25

ISSUE I

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW,
IN DENYING PETITIONER'S REQUEST TO INSTRUCT THE JURY
ON LEWD AND LASCIVIOUS CONDUCT AS A LESSER OFFENSE
OF SEXUAL BATTERY? 25

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS LIMITED
DISCRETION IN ADMITTING PETITIONER'S LETTERS
CONTAINING WILLIAMS RULE EVIDENCE INVOLVING
MARGARITA AND OLGA BECAUSE THE PREJUDICIAL NATURE OF
THE LETTERS OUTWEIGHED THEIR PROBATIVE VALUE? 35

ISSUE III

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN
ALLOWING THE WILLIAMS RULE EVIDENCE TO BECOME A
FEATURE OF THE CASE WHERE THE LETTERS INTRODUCED
INTO EVIDENCE WERE EXTREMELY PREJUDICIAL AND THE
PROSECUTOR EMPHASIZED THEM IN CLOSING ARGUMENT? 38

ISSUE IV

WHETHER PETITIONER WAS DENIED HIS FEDERAL AND STATE
DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE
PROSECUTOR COERCED THE COOPERATION AND TESTIMONY OF
THE MOTHER OF THE ALLEGED VICTIM BY CHARGING HER
WITH TAMPERING WITH A WITNESS, AND ALSO COERCED THE
COOPERATION AND TESTIMONY OF THE ALLEGED CHILD

TABLE OF CONTENTS

PAGE(S)

VICTIMS BY THREATENING THE UNITY AND TRANQUILITY OF
THE FAMILY WITH THE IMPENDING PROSECUTION OF THE
MOTHER?

43

TABLE OF CONTENTS

PAGE(S)

<u>ISSUE V</u>	
WHETHER THE SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR A SEXUAL BATTERY NOT INVOLVING PENETRATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL CONSTITUTION OR CRUEL OR UNUSUAL PUNISHMENT UNDER THE FLORIDA CONSTITUTION?	45
CONCLUSION	47
CERTIFICATE OF SERVICE	48
CERTIFICATE OF COMPLIANCE	48

TABLE OF AUTHORITIES

PAGE(S)

CASES

Amado v. State, 585 So. 2d 282 (Fla. 1991) 32

Banks v. State, 342 So. 2d 469 (Fla. 1976) 46

Barnes v. State, 576 So. 2d 758 (Fla. 1st DCA 1991) 28

Bauta v. State, 698 So. 2d 860 (Fla. 3d DCA 1997) 30

Brown v. State, 206 So. 2d 377 (Fla. 1968) 25

Buford v. State, 403 So. 2d 943 (Fla. 1981) 46

Bush v. State, 690 So. 2d 670 (Fla. 1st DCA 1997) 42

Coxwell v. State, 361 So. 2d 148 (Fla. 1978) 35

Davis v. State, 334 So. 2d 823 (Fla. 1st DCA 1976) 24, 44, 45

Fjord v. State, 634 So. 2d 714 (Fla. 4th DCA 1994) 30

Gibson v. State, 721 So. 2d 363 (Fla. 2d DCA 1998) 46, 47

Harrielson v. State, 464 So. 2d 1325 (Fla. 5th DCA 1985) 31

James Lee Manns v. State, Case No. 1D00-4001 45

Jones v. State, 666 So. 2d 960 (Fla. 3d DCA 1996) 32

Jozens v. State, 649 So. 2d 322 (Fla. 1st DCA 1995) 30

King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994) 21, 30

Kolaric v. State, 616 So. 2d 117 (Fla. 2d DCA 1993) 30, 34

Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976) 24, 44

Levesque v. State, 778 So. 2d 1049 (Fla. 4th DCA 2001) 32

Lewis v. State, 591 So. 2d 922 (Fla. 1991) 35

Louisy v. State, 667 So. 2d 972 (Fla. 4th DCA 1996) 30, 34

<u>Mathews v. State</u> , 44 So. 2d 664 (Fla. 1950)	45
<u>McConn v. State</u> , 648 So. 2d 837 (Fla. 2d DCA 1995)	30, 33
<u>O’Bright v. State</u> , 508 So. 2d 385 (Fla. 1st DCA 1987)	27, 28
<u>Ready v. State</u> , 636 So. 2d 67 (Fla. 2d DCA 1994)	30
<u>Reese v. State</u> , 382 So. 2d 141 (Fla. 4th DCA 1980)	23, 44
<u>Roberts v. State</u> , 461 So. 2d 212 (Fla. 1st DCA 1984)	33
<u>S.L.S. v. State</u> , 404 So. 2d 1105 (Fla. 1st DCA 1981)	30
<u>State ex rel. Adams v. Lee</u> , 126 Fla. 396, 171 So. 333 (Fla. 1936)	28
<u>State v. Hightower</u> , 509 So. 2d 1078 (Fla. 1987)	26, 28, 29, 31
<u>State v. Lanier</u> , 464 So. 2d 1192 (Fla. 1985)	26, 27
<u>State v. Pitts</u> , 249 So. 2d 47 (Fla. 1st DCA 1971)	28
<u>Taylor v. State</u> , 601 So. 2d 1304 (Fla. 4th DCA 1992)	35
<u>Travers v. State</u> , 578 So. 2d 793 (Fla. 1st DCA 1991)	38, 42
<u>Turner v. State</u> , 710 So. 2d 688 (Fla. 1st DCA 1998)	30
<u>Turtle v. State</u> , 600 So. 2d 1214 (Fla. 1st DCA 1992)	42
<u>Velazquez v. State</u> , 648 So. 2d 302 (Fla. 5th DCA 1995)	21, 30
<u>Walker v. State</u> , 464 So. 2d 1325 (Fla. 5th DCA 1985)	30

STATUTES

§ 794.011, Fla. Stat.	29
§ 794.011(1)(h), Fla. Stat.	31
§ 794.011(2), Fla. Stat. (1997)	29

§ 794.011(2)(a), Fla. Stat.	2, 24, 28, 46
§ 794.011(3), Fla. Stat. (1997)	29
§ 794.011(4), Fla. Stat. (1997)	29
§ 794.011(5), Fla. Stat. (1997)	29
§ 794.011(h), Fla. Stat. (1997)	25-27
§ 794.041(2)(b), Fla. Stat. (1991)	30
§ 800.04, Fla. Stat. (1997)	21, 25-29, 31, 33-35
§ 800.04(1), Fla. Stat. (1997)	2, 25, 32
§ 800.04(3), Fla. Stat. (1997)	25, 27, 32
§ 90.403, Fla. Stat.	21, 22, 36, 37
§ 90.803(23), Fla. Stat.	2

OTHER

Chap. 84-86, Laws of Florida	26
Ehrhardt, <u>Florida Evidence</u> , § 404.18 (2001 ed.)	21, 36
Ehrhardt, <u>Florida Evidence</u> , § 404.9 (2001 ed.)	21, 36, 39

IN THE SUPREME COURT OF FLORIDA

TRAVIS WELSH,

Petitioner,

v.

CASE NO. SC02-1092

L.T. No. 1D01-648

STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the circuit court for Duval County where he was convicted of one count of capital sexual battery and one count of lewd and lascivious assault. Petitioner was the Appellant in the First District Court of Appeal. He will be referred to in this brief as Petitioner or as Mr. Welsh.

The record on appeal consists of eight volumes, nine exhibits and two supplemental volumes. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (R.I,1). Citations to the supplemental record will appear as "SR," followed by the appropriate volume and page number, e.g., (SR.II,1).

The opinion of the District Court is attached as an appendix and will be referred to as "App".

STATEMENT OF THE CASE

By amended information filed October 13, 2000, petitioner Travis Welsh was charged in Count II with the sexual battery of Miriam Vargas, a person less than 12 years of age, between January 1, 1999, and December 31, 1999, by oral-vaginal contact in contravention of section 794.011(2)(a), Florida Statutes. (R.I,61). In Count IV, petitioner was charged with the lewd and lascivious assault of Miriam Vargas by touching her breasts and/or vagina between January 1, 1999, and December 31, 1999, in contravention of section 800.04(1), Florida Statutes. (R.I,62).¹

A jury trial was held with the jury returning verdicts of guilty on both counts. (R.I,121,122). The trial court sentenced petitioner to a term of life imprisonment without the possibility of parole for the offense of capital sexual battery, and a concurrent term of 15 years imprisonment for the offense of lewd and lascivious conduct. (R.I,142).²

STATEMENT OF THE FACTS

¹ The charges in Counts I and III were severed from the present offenses of conviction. (R.I,33).

² After sentencing, the state nolle prossed counts I and III. (R.II,283).

Prior to trial, the state filed five notices of its intent to introduce child hearsay statements pursuant to section 90.803(23), Florida Statutes. (R.I,14,16,18,20,27). At the pretrial hearing on admissibility of child hearsay statements, the state noted that due to the severance of counts, the state was proceeding only on the notice of hearsay statements made by Miriam Vargas to Detective Lewis. (R.II,163-164). Therefore, the only notices at issue were the fourth and fifth. (R.I,20,27,166-168).

The state also filed seven notices of its intention to introduce similar fact or Williams Rule evidence. (R.I,22,23,24,25,26,43,44). The first and third alleged similar acts committed against the alleged victim, Miriam Vargas. (R.22,24). The second, fourth, sixth and seventh notices alleged similar acts committed against another alleged victim, Margarita Vargas. (R.I,23,25,43,44). The fifth notice alleged similar acts against another alleged victim, Aida Hernandez. (R.I,26). The trial court ruled that all of the state's Williams Rule evidence was admissible with the exception of the fifth notice containing allegations involving Aida Hernandez. (R.I,46).

The state subsequently filed its eighth, ninth and tenth notices of its intention to introduce similar act or Williams Rule evidence. (R.I,48,49,50). The eighth, ninth and tenth

notices alleged acts committed against Olga Vargas. (R.I,48,49,50). After hearing, the trial court ruled all of this Williams Rule evidence admissible. (R.I,66-68).

TRIAL TESTIMONY

In opening statement, defense counsel explained the theory of defense. There was trouble at home. The alleged victim, Princess, and her two sisters, Margarita and Olga, were unruly at home. They were going out late, hanging around with the wrong crowd, and possibly engaged in sexual activity. (R.V.352). Petitioner was the disciplinarian in the family. Petitioner argued with the girls about their behavior and imposed a curfew. (R.V.352). The girls resented him for this. (R.V.352). No allegations were made against petitioner until the day Margarita got into a big fight with petitioner about her possible sexual activity, and petitioner kicked her out of the house. (R.V.352). Defense counsel implied that the charges were fabricated as a method of retaliation.

Detective Lewis interviewed Margarita Vargas and then Miriam "Princess" Vargas. (R.V.359). Neither girl was given a medical examination. (R.V.360). Margarita was not emotional or upset or crying during the interview. (R.V.394). Margarita did not inform the detective that she had an argument with petitioner on the day of the interview. (R.V.395). Princess, likewise, was calm and unemotional during her interview. (R.V.398).

Princess Vargas testified that she first lived with petitioner in Connecticut, at the age of four. (R.V.409). The family then moved to Vermont. (R.V.409). Princess then moved to Jacksonville with her mother and two sisters, but petitioner did not move with them. (R.V.409,437-438). Petitioner later moved in with the family in Jacksonville around July, 1999. (R.V.439). While in Jacksonville, petitioner "used his mouth on my private personal part." (R.V.411). Princess referred to her "private personal part" as her "vagina." (R.V.411). She further testified that petitioner also touched her vagina with his fingers. (R.V.413). This, too, occurred while they were living in Jacksonville. (R.V.413). Princess also told of prior incidents in Connecticut and Vermont where petitioner touched her chest, her bottom, and her vagina. (R.V.415-418). She told her sister Margarita and her mom about these incidents. (R.V.419). Her mom told her not to go into petitioner's room. (R.V.419).

Princess acknowledged a letter that she wrote requesting that the charges against petitioner be dropped. (R.V.424). She wrote the letter because her mom told her to do so. (R.V.425). Princess acknowledged another letter that she wrote. Again, she asked that the charges be dropped. She wrote this letter because her mom told her to do so. (R.V.426-427). She conceded, however, that her mom did not threaten to punish her if she did

not write the letters. (R.V.456). Princess was 11 years old at the time. (R.V.456). In describing what was meant by asking that the charges be dropped, Princess indicated in her prior deposition testimony that it meant "like what we told you all wasn't true or something." (R.V.464). Princess expected that petitioner would be released after she wrote the letters. (R.V.465). There is one line in the second letter that was not written by Princess. (R.V.469).

When Princess first discussed the allegations with Detective Lewis, she did not tell him that petitioner had touched her vagina. (R.V.430). She did not tell Lewis that petitioner had put his mouth on her vagina. (R.V.431). She did not tell Lewis that petitioner had placed his finger on her vagina. (R.V.431). The only thing she told Lewis was that petitioner had placed his fingers on her privates. (R.V.431).

Petitioner worked as a maintenance man at the trailer park. Princess would enjoy accompanying him on repair jobs. (R.V.439). Princess is close to her sisters Margarita and Olga. (R.V.437). Margarita would fight with petitioner almost every day. (R.V.440). They would argue about Margarita staying out late and dating older boys. (R.V.441). They argued about Margarita bringing boyfriends into the house. (R.V.442). Her sister Olga had become pregnant and had a baby. (R.V.442). Petitioner also argued with Olga. (R.V.443). Princess never saw petitioner act

inappropriately toward Margarita or Olga. (R.V.444). Neither sister ever told Princess about any improper touching by petitioner. (R.V.444-445).

Princess did not tell anyone about the allegations against petitioner until the day after Margarita got into a big fight with petitioner and kicked her out of the house. (R.V.467). She never told her aunts, uncles, cousins, teachers, guidance counselors or friends at the trailer park until after the big fight between petitioner and Margarita. (R.V.466-467).

Margarita Vargas is an older sister to Princess Vargas. She was 17 years old at the time of trial. (R.V.474). When they were living in Connecticut, Travis Welsh touched her on her clothing in the areas of her breasts and vagina. (R.V.476). This later progressed to touching under her clothing. (R.V.477). This touching occurred on two occasions. (R.V.478). In Jacksonville, petitioner again touched her breasts and vagina. (R.V.480). Petitioner later had sex with Margarita when she was 16 years old. (R.V.481,482). This occurred twice, the second time was the last day of December, 1999. (R.V.486).

Margarita reported the sexual encounters to her neighbor, Ms. Arias, on the same day that she had a big argument with petitioner. (R.V.486-487). The two argued about her curfew, boys, and "stuff like that." (R.V.487,495). Margarita then left the trailer and "walked around the trailer park and was

thinking." (R.V.487). In deposition, however, she said that petitioner kicked her out of the trailer. (R.V.495,498). That is when she made her accusations against petitioner. (R.V.498). She was not upset, however. (R.V.489). Margarita argued with petitioner almost every day about the boys she hung out with. (R.V.499). Petitioner did not want her to have sex with those boys. (R.V.500). Her older sister, Olga, had gotten pregnant and had a baby at the age of sixteen. (R.V.500). Margarita has lots of family in Jacksonville. She did not tell anyone about her accusations against petitioner until after her big fight with petitioner. (R.V.501-503). She was not a virgin at the time of the alleged incidents with petitioner. (R.VI,518).

Margarita acknowledged writing a letter to petitioner. She also acknowledged writing a letter to Judge Wallace asking that the charges against petitioner be dropped. (R.V.491). She wrote this letter because her mom told her to write it. (R.V.492). She also wrote the letter because her accusations against petitioner (as stated at trial) were not true. (R.V.492). Margarita clarified that when the family first moved to Jacksonville, petitioner did not live with them. Petitioner did not rejoin them until about July, 1999. (R.V.494).

Olga Vargas is the eldest sister in the family. She stated that petitioner touched her, also, when they lived in Connecticut. (R.VI,530). Petitioner fondled her body, including

her breasts and vagina. (R.VI,530). At first she had her clothes on; later this fondling occurred with her clothes off. (R.VI,532-533). On two or three occasions, petitioner placed his mouth on her "vaginal area." (R.VI,534). Olga moved from Connecticut to Jacksonville to live with her father because she was not getting along with petitioner. (R.VI,536). While living with her mom and petitioner, Olga conceived a child at age sixteen. (R.VI,537). Petitioner would lecture her about her sexual activities. He did not want her to have sex with her boyfriend, and he did not want her to get pregnant. (R.VI,537). Olga resisted petitioner's counseling. She said she would do what she wanted to do. (R.VI,538). Olga confirmed that petitioner argued with Margarita just about every day. (R.VI,538-539). Petitioner would set the rules and enforce the rules. (R.VI,539). There was a lot of yelling and screaming in the house. (R.VI,540). That is why Olga, after having a big fight with petitioner, moved from Connecticut to Jacksonville. (R.VI,540). Olga was again living with her mom in Jacksonville when petitioner came down from up north and moved in with them. (R.VI,541-542). At some point, Olga had another big fight with petitioner and he kicked her out of the house. (R.VI,542).

Olga testified that her younger sister, Princess, also had conflict with petitioner. Princess, then 11 years old, did not like petitioner's rules as to where she could go and who she

could hang out with. (R.VI,542). Despite the fact that there were long periods of time that she did not live with petitioner, Olga made no complaints of sexual abuse against petitioner. (R.VI,543). Even after learning that petitioner had been arrested, Olga did not raise any allegations against him. (R.VI,545). In fact, Olga did not make any allegations against petitioner until about seven months after he was arrested, after investigators inquired about the letters her sisters had written. (R.VI,546). Olga never witnessed any sexual conversations or acts between petitioner and her sisters. (R.VI,547). Nor did her sisters appear afraid or unwilling to be around petitioner. (R.VI,547).

Miriam Vargas is the mother of the alleged victim, Princess Vargas. (R.VI,550). Petitioner, Travis Welsh, was her boyfriend. (R.VI,550). When they lived in Connecticut, none of her daughters ever complained of petitioner touching them in an unwanted way. (R.VI,553). Princess, however, asked her not to leave her alone with petitioner. (R.VI,552). Again in Jacksonville, none of the girls complained of unwanted touching on the part of petitioner. (R.VI,554). After petitioner was arrested, Ms. Vargas received letters from him. (R.VI,555,556). In his letters, petitioner requested that Miriam have the girls write letters stating that petitioner did not commit the crimes alleged. (R.VI,556). Referring to the state's exhibit "B"

(exhibit #3 in evidence), Miriam stated that Princess wrote the part asking that the charges against petitioner be dropped. (R.VI,557). Miriam asked Princess to write that much. (R.VI,557). Miriam, herself, wrote the last line of the letter. (R.VI,557). The last line states: "He never sexually abused me." (R.VI,563). Princess was unaware that Miriam added this line to the letter. (R.VI,563). At the time this letter was written, Miriam believed petitioner was innocent. (R.VI,558). Miriam, herself, wrote a letter to which she signed Margarita's name. (R.VI,558). She wanted the judge to think that the letter actually came from Margarita. (R.VI,558). In this letter (state's exhibit #4), Miriam wrote: "I, Margarita Vargas, want the charges against Travis to be dropped, he never sexually abused me." (R.VI,563). Miriam never even showed this letter to Margarita before mailing it to Judge Wallace. (R.VI,564).

Miriam Vargas was subsequently arrested for tampering with a witness. (R.VI,564). Miriam thereafter retrieved a bunch of letters sent to her by petitioner and turned them over to Detective McCallum. (R.VI,565). Miriam stated that she has not been promised anything by the state in exchange for her cooperation. (R.VI,566).

On cross-examination, Miriam stated that when she first moved to Jacksonville, petitioner did not live with her. (R.VI,592). Petitioner moved down to Jacksonville around the

middle of 1999. (R.VI,592). Her children never told her anything about allegations of sexual abuse by petitioner. (R.VI,592). Miriam never saw anything unusual in the relationship between her daughters and petitioner. (R.VI,593). She never heard any sexual conversation between them. (R.VI,593). Her children were never afraid to be around petitioner. (R.VI,593,594). In fact, Princess used to enjoy accompanying petitioner as he went around to his repair jobs at the trailer park, Sunny Acres. (R.VI,593). Princess would even ask petitioner to take her with him. (R.VI,594). When they lived in Connecticut, Princess asked to accompany petitioner on a trip to his parents' home in Vermont. (R.VI,595). In Connecticut, the girls would actually fight over which one of them would accompany petitioner on his paper route. (R.VI,595).

At the time of trial, Margarita was living with her friends. (R.VI,596). There was a great deal of animosity between Margarita and petitioner. (R.VI,596). The two fought every day, and sometimes two or three times a day. (R.VI,596). They fought over the boys that Margarita hung out with, the curfew, drinking and smoking marijuana. (R.VI,597). The fights were screaming matches. (R.VI,554). Olga, too, would fight with petitioner. (R.VI,596). Olga, too, thought she should be able to do whatever she wanted. (R.VI,597).

At her first deposition in June, Miriam indicated her support for petitioner. (R.VI,598). Miriam corresponded with petitioner up until her arrest on July 27, 2001. (R.VI,606). After her arrest, her attitude toward petitioner changed quite a bit. (R.VI,607). In her prior deposition, Miriam said it was Princess's idea to write the letter dated June 26th. (R.VI,609,610). In her prior deposition, Miriam also stated that it was Margarita's idea to write her letter dated June 26th. (R.VI,610). Miriam admitted that she changed her testimony in this regard at trial. (R.VI,611).

Q: You have given a different story to the jury in your testimony in this trial; isn't that correct?

A: Yes.

(R.VI,611). In addition, Miriam's prior deposition contradicts her trial testimony with respect to the July 20th letter. At deposition, Miriam stated that Margarita wrote the July 20th letter. (R.VI,616-617). Margarita wanted to write the letter after seeing Miriam write her own letter. (R.VI,617). In contrast, Miriam had just testified that she, herself, had written the July 20th letter and signed Margarita's name to it. (R.VI,617).

In her trial testimony, Miriam stated that Princess did not know she added the line - he never sexually abused me - to the July 19th letter. (R.VI,618). In her deposition, however, Miriam

stated that Princess was present and witnessed her adding something to the letter. (R.VI,619). In addition, contrary to her trial testimony, Miriam stated in deposition that she did not tell Princess what to write in the July 19th letter. (R.VI,619). Miriam knew of the allegations against petitioner since January, 2000, but still supported petitioner in June and July, 2000. (R.VI,620).

After these letters were mailed, Miriam received a call from the state attorney's office. (R.VI,621).

Q: And during that call you were told - you were threatened by the state attorney's office that if you didn't testify against Mr. Welsh that you would go to jail?

A: That's correct.

(R.VI,621). At that point, Miriam wrote to petitioner and advised him that she thought her rights were being violated. (R.VI,623). She sent him her kisses. (R.VI,624).

About a week later, investigators came to the trailer park and questioned the children when Miriam was not present. (R.VI,624). The children were taken downtown for questioning. (R.VI,625). The next day, July 27, Miriam was arrested. (R.VI,626). After her arrest, for the first time, Miriam said she had written the letters at petitioner's request. (R.VI,626). Once she admitted to writing the letters, Miriam was released without having to post bond. (R.VI,629). Her girls were then

able to come back to live with her. (R.VI,629). Miriam is currently charged with tampering with witnesses, a third degree felony. (R.VI,629). Any offer for a reduced sentence would have to come from the prosecutor -- the same prosecutor in this case. (R.VI,630). Miriam would not want to make the prosecutor angry and does not want to go to prison; she is facing the possibility of losing her daughters. (R.VI,631). Her case has been continued until after the conclusion of this trial. (R.VI,632). Miriam corroborated the fact that these allegations arose one day after Margarita had a big fight with petitioner and petitioner kicked her out of the house. (R.VI,633).

Detective McCallum testified that Miriam Vargas turned a number of letters over to him after her arrest. (R.VI,660,662). McCallum identified a number of handwriting exemplars taken from petitioner on October 9, 2000. (R.VI,664,666). These exemplars were sent to the FDLE laboratory. (R.VI,667). Miriam Vargas was not present in the room when McCallum spoke with her daughters. (R.VI,671). He questioned the girls one at a time. (R.VI,671). He then brought them to the state attorney's office for further questioning about the letters. (R.VI,671). When he brought the girls home he advised Miriam Vargas that the girls said she had forced them to write the letters. (R.VI,672). Margarita told McCallum that she had never seen the letter dated July 26. McCallum advised Miriam that she may have committed a criminal

act. (R.VI,673). Miriam Vargas did not admit to fabricating the letters. (R.VI,673). In other words, Miriam denied fabricating the letters. (R.VI,675). The next day, McCallum arrested Miriam Vargas for tampering with a witness, a third degree felony with a possible penalty of five years imprisonment. (R.VI,676). She was released on her own recognizance. (R.VI,676). McCallum has some experience in sex crimes investigations where mothers of victims have lost custody of their children for pressuring the children to change their story or otherwise tampering with the childrens' testimony. (R.VI,677-678). Detective McCallum did, in fact, call the Department of Children and Families to report Ms. Vargas. (R.VI,682).

In anticipation of the next witness, defense counsel objected to the introduction of letters written by petitioner. Petitioner argued that the letters discuss incidents involving Margarita and Olga and constitute Williams Rule evidence. (R.VII,718-719). Petitioner argued that the letters were cumulative and threaten to make the Williams Rule evidence a "feature of the case." (R.VII,719). Petitioner also argued that the letters dealing with Margarita and Olga were extremely prejudicial to his right to a fair trial. (R.VII,719,727-728). The trial court overruled the objection. (R.VII,728).

Don Pribbenow is a FDLE handwriting expert. (R.VII,734). After comparing the known handwriting exemplars to the letters

comprising state's exhibits #6 through 12, Pribbenow concluded that the handwriting samples were written by the same person, Travis Welsh. (R.VII,749). Portions of the letters were published to the jury, that is, read by the witness. (R.VII,757-768). The most incriminating statements include:

Exh #6:

Tell Princess and Margarita I will admit to everything and get help.... But we do need counseling, especially me.... Margarita started it...and I did not say no....I have not touched them in a while and never will.... no spankings.... I did touch Princess's private nine times, but I could have been a better father.

(R.VII,757-759).

Exh.#7

Princess only tried to compete with Margarita. That's my fault. But I had stopped.... I asked God to remove all lust from my heart....I do not want this to go to court.... Tell them you won't testify.... but I went too far and did this with Margarita.

(R.VII,759-761).

Exh. #8

Yes, I've touched and done things I should have said no. I just could not turn it down. You know how much I love Margarita. Olga may be beautiful, but I never had sex with her. Instead I brought her the dildos and showed her I was too small for her. I tried that with Margarita, and she refused the dildo and said she did not need sex, but then one day we kissed and it got wild. I did not pull my stuff off at first but I

lost control. She was good for three days, and then she came in and sat on my bed. I gave her a kiss, and it happened again. I felt so guilty. We never had sex before, we just rubbed and I ate her out to orgasm. I truly thought if I said no to her, she would feel ugly and go run to Will or Pablo.

(R.VII,761).

Exh. #9

Just tell the girls to say nothing bad about me, and for them to disagree with anything about what they said about me.... But we must be careful not to say anything the state can use against me.... Let me know if you understand this and can explain it to the girls.... I ask God to wipe M and P's memory clean as part of forgiveness.

(R.VII,762-763).

Exh. #10

Princess and Margarita need to prepare a few statements taking back their depositions. Just as long as the girls admit they lied because they were mad and all will be fine.

(R.VII,764).

After moving for judgment of acquittal, defense counsel renewed petitioner's objection to the letters on the ground that the letters were cumulative and that such evidence "makes the Williams Rule evidence a feature of the case." (R.VII,782). The court then moved on to discuss a previously considered jury instruction issue. The court opined that the offense of lewd and lascivious conduct would not be a lesser included offense to the charge of capital sexual battery, citing State v. Hightower,

509 So. 2d 1078. (R.VII,785). Defense counsel objected to that ruling. (R.VII,786).

Defense counsel: [T]here is quite a bit of case law out there that says that something cannot be both capital sexual battery and a lewd, and that is true, but that is not the same - there is also case law that says the jury can decide if it's not a sexual battery that it is a lewd.... And that's what makes it a lesser that can be included.

(R.VII,786).

The defense presented Donald Quinn, a forensic document examiner. (R.VII,791). Quinn testified that state's exhibit #6 (letter) had been altered by erasure. (R.VII,798). Quinn described Defendant's Exhibits "B" and "C", which are photographic enlargements state's exhibit #6. (R.VII,799-801). Quinn opined that the sentence which appeared as "I did ... touch Princess" had been altered. The original text was actually "I did not touch Princess", but the word "not" had been erased. (R.VII,800,801). Thus, the original text actually stated: "I did not touch Princess' privates nine times, but I could have been a better father." (R.VII,800;759). The state did not rebut Mr. Quinn's testimony. (R.VII,831).

Charles Share is a neighbor of Travis Welsh and Miriam Vargas. (R.VII,821). Share is also acquainted with Princess and Margarita. (R.VII,822). Princess and Margarita never acted as though they did not want to be around petitioner -- "no way."

(R.VII,823). The children were not afraid of petitioner. (R.VII,823). In fact, Princess requested on more than one occasion to accompany petitioner as he performed his maintenance jobs at the trailer park. (R.VII,823). She wanted to go with him to carry his tool box. (R.VII,823). Elizabeth Share corroborated this testimony. (R.VII,827,828).

At a subsequent jury instruction conference, the court again opined that lewd and lascivious conduct was not a lesser included offense to the charge of capital sexual battery. (R.VII,840-842). The court then reached its ultimate determination that the jury would not be instructed on lewd and lascivious conduct as a lesser offense of capital sexual battery. (R.VII,843-844). After further discussion, defense counsel noted that the defense had requested that the jury be instructed on certain lesser offenses and that the court had ruled on that. (R.VII,858-859).

In closing argument, the prosecutor urged the jury to convict petitioner, in part, based upon his admissions contained in the letters introduced into evidence. (R.VIII,911). The prosecutor quoted extensively from the letter exhibits. (R.VIII,911-914). In particular, the prosecutor read from Exhibit #8:

I tried that with Margarita, but she refused the dildo and said that she did not need sex. Then one day we kissed and it got

involved. I did not pull my stuff out at first, but I lost control. She was good for three days and then she came in and sat on my bed. I gave her a kiss, and it happened again. I felt so guilty. We had never had sex before, we just rubbed and I ate her out to orgasm. I truly thought if I said no she would feel ugly and run to someone else.

(R.VIII,914-915). After further argument, the prosecutor emphasized that "Margarita and Olga's testimony corroborates Princess' testimony." (R.VIII,917).

The jury returned a verdict of guilty as charged of one count of capital sexual battery and one count of lewd and lascivious conduct against Princess Vargas. (R.VIII,950).

At the sentencing hearing, petitioner argued that imposition of a life sentence without the possibility of parole for this offense constitutes cruel and unusual punishment under the federal constitution or cruel or unusual punishment under the Florida Constitution. (R.II,272-274,276). The trial court considered the argument and rejected it. (R.II,278-279). The trial court sentenced petitioner to life imprisonment without possibility of parole for the offense of capital sexual battery. (R.II,280; I,139,142). On the additional count of lewd and lascivious activity, the court sentenced petitioner to a concurrent term of 15 years. (R.II,280; I,139,143). At the conclusion of sentencing, the state nolle prossed the remaining two counts of the information. (R.II,283).

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court erred in denying petitioner's request to instruct the jury on lewd and lascivious conduct as a lesser offense of capital sexual battery. Lewd and lascivious conduct is a *permissive* lesser offense of sexual battery because section 800.04, Florida Statutes (1997), proscribes, among other things, acts defined as sexual battery. The permissive

instruction is required where, as here, the charging document and the evidence adduced at trial could support a conviction for the lesser offense. See King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994); Velazquez v. State, 648 So. 2d 302, 305 n.7 (Fla. 5th DCA 1995).

ISSUE II - Even if "similar fact evidence" is relevant and admissible under the Williams Rule, it is subject to the constraint of section 90.403, Florida Statutes, whereby relevant evidence must be excluded if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." See Ehrhardt, Florida Evidence, § 404.9 (2001 ed.)(text accompanying notes 10,11); § 404.18 (2001 ed.)(text accompanying notes 17,18,19). In the present case, the letters written by petitioner and admitting his collateral sexual conduct with Margarita and Olga were cumulative to the trial testimony of Margarita and Olga and extraordinarily prejudicial to petitioner due to the explicit and graphic nature of the admissions. In particular, the court should note state's exhibit #8, the substance of which was read to the jury, wherein petitioner admitted his predilection for dildos and cunnilingus and employment of deviant sexual behavior with Margarita and Olga. (R.VII,761).

No jury could give petitioner a fair trial after introduction of the collateral evidence encompassed within state's exhibit #8. The admission of this similar fact evidence, therefore, was legally erroneous under section 90.403, Florida Statutes. The error cannot be considered harmless in this case because: (1) Williams Rule error is presumptively prejudicial; (2) this was a swearing match type of case as regards the charges involving Princess; (3) the state coerced the testimony of Princess' mother, Margarita and Olga by prosecuting the mother for tampering with a witness (as argued in ISSUE IV).

ISSUE III - Even if it was not legal error for the trial court to admit petitioner's letters into evidence (as argued in ISSUE II), the Williams Rule evidence became a feature of the trial when the letters (particularly state's exhibit #8) were admitted into evidence. If the similar fact evidence did not become a feature of the trial at this point, it certainly became a feature of the trial in closing argument, when the prosecutor quoted the vitriolic state's exhibit #8 to the jury. The error cannot be considered harmless in this case because: (1) Williams Rule error is presumptively prejudicial; (2) this was a swearing match type of case as regards the charges involving Princess; (3) the state coerced the testimony of Princess' mother,

Margarita and Olga by prosecuting the mother for tampering with a witness (as argued in ISSUE IV).

ISSUE IV - Petitioner 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 the result of "emotional blackmail" or coercion in the form of the prosecution of the mother for tampering with a witness. Because the children had written letters asking that the charges be dropped and stating that petitioner never sexually abused them, the state prosecuted the mother for tampering with a witness. The mother, Miriam Vargas, flatly stated at trial that the authorities threatened to put her in jail if she did not testify against petitioner. The state thus threatened the mother with five years imprisonment and threatened the children with separation from their mother and the intervention of the Department of Children and Families. In this manner the state 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. The testimony of the mother and children cannot be trusted, however, because it was obtained by coercion. See 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). Such shameful and outrageous conduct on the part of the state warrants the reversal of the convictions, the condemnation of the court, and referral to the Florida Bar for possible disciplinary investigation.

ISSUE V - Petitioner was sentenced to a term of life imprisonment without the possibility of parole for the offense of capital sexual battery in contravention of section 794.011(2)(a), Florida Statutes. Petitioner's sentence for this offense constitutes cruel and unusual punishment under the United States and Florida Constitutions, particularly where the proof offered at trial proved, at most, oral/vaginal "union" as opposed to penile/vaginal penetration and where petitioner has no prior criminal record according to his guidelines scoresheet.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING PETITIONER'S REQUEST TO INSTRUCT THE JURY ON LEWD AND LASCIVIOUS CONDUCT AS A LESSER OFFENSE OF SEXUAL BATTERY?

STANDARD OF REVIEW

The question whether lewd and lascivious conduct is a permissible lesser included offense of capital sexual battery is purely a question of law which should be reviewed *de novo*.

MERITS

An offense is a permissive lesser included offense of a greater offense if (1) the information alleges all the statutory elements of the lesser offense and, (2) the evidence presented at trial would support the lesser offense. Brown v. State, 206 So. 2d 377, 383 (Fla. 1968). As to the first prong of the test, the information in the present case alleged oral-vaginal union on a person under 12 years of age and thereby also alleged the statutory elements of lewd and lascivious conduct, s. 800.04, Florida Statutes (1997), in two separate and distinct ways. First, oral-vaginal union on a person under 12 also constitutes a lewd and lascivious handling or fondling of a person under 16 years of age. § 800.04(1), Fla. Stat. (1997). Second, the allegation of oral-vaginal union on a person under 12 years of age also constitutes an act defined as sexual battery against a

person under 16 years of age. § 800.04(3), Fla. Stat. (1997); § 794.011(h), Fla. Stat. (1997).

In the proceedings below, the district court erroneously stated that section 800.04, Florida Statutes (1997), "by specifically excluding sexual battery as a means of" violating the statute, "removed sexual battery as an element involved in the commission of a lewd and lascivious act." (App.4). This assertion was based upon the statutory language "without committing the crime of sexual battery," and upon the district court's erroneous interpretation of State v. Hightower, 509 So. 2d 1078, 1079 (Fla. 1987).

The district court's opinion is misguided because section 800.04 does not exclude the act of sexual battery (as defined in section 794.011(h)) as a means of violating the statute. Rather, section 800.04 excludes the crime of sexual battery as a means of violating the statute. As explained in Hightower, the intent of the legislature in enacting chapter 84-86, Laws of Florida, to amend section 800.04, Florida Statutes, (including the phrase "without committing the crime of sexual battery"):

was and remains to prohibit lewd and lascivious acts upon children, including sexual intercourse and other acts defined as sexual battery, without regard either to the victim's consent or the victim's prior chastity.

Hightower, 509 So. 2d at 1079 (e.s.), citing chapter 84-86, Laws of Florida; see also, State v. Lanier, 464 So. 2d 1192 (Fla. 1985). Hightower instructs, therefore, that *acts* defined as sexual battery in section 794.011(h), Florida Statutes, fit squarely within the prohibition of section 800.04, Florida Statutes. This conclusion is also compelled by State v. Lanier, 464 So. 2d 1192 (Fla. 1985), which specifically held that section 800.04, Florida Statutes was violated when a male engaged in sexual intercourse with a twelve year old girl regardless of the victim's lack of chastity or consent.

By its express terms, section 800.04(3), Florida Statutes (1997), prohibits the commission of acts "defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years." In the present case, the alleged victim was under the age of 16. The commission of an act defined as sexual battery (oral-vaginal union) against the present victim is therefore proscribed by section 800.04(3), Florida Statutes (1997).

An exhaustive analysis of the law appears in O'Bright v. State, 508 So. 2d 385, 388 (Fla. 1st DCA 1987)(Zehmer, J., dissenting). In O'Bright, Judge Zehmer opined that the Florida Supreme Court implicitly recognized in Lanier that since the element of consent was immaterial, the fondling charged in Lanier was a violation of section 800.04 *even though the conduct*

charged also involved penetration and amounted to sexual battery. Id. at 388 (e.s.).³

An act defined as sexual battery is also prohibited by section 794.011(2)(a). The purpose of section 794.011(2)(a), Florida Statutes, is to provide an enhanced penalty for the same conduct proscribed by section 800.04, Florida Statutes, if the victim is less than 12 years of age, and the perpetrator 18 years of age or older. The fact that sexual battery is prohibited by section 794.011(2)(a), does not negate the fact that such conduct is also proscribed by section 800.04(3), Florida Statutes.

In concluding that the information in the present case could not also allege all of the elements of lewd and lascivious conduct, the district court misconstrued the following passage from Hightower.

[It] is evident that the phrase "without committing the crime of sexual battery" was included to differentiate between crimes of sexual battery and lewd and lascivious conduct. Had the phrase been excluded, a person having forcible sexual intercourse

³ O'Bright is also noteworthy because the state, in O'Bright, contended that penetration is merely a degree of handling or fondling, directly contrary to its position in the present case. O'Bright, 508 So. 2d at 387. The state should not be permitted to take inconsistent positions in different cases for the sake of convenience. See State ex rel. Adams v. Lee, 126 Fla. 396, 171 So. 333 (Fla. 1936); State v. Pitts, 249 So. 2d 47 (Fla. 1st DCA 1971); Barnes v. State, 576 So. 2d 758, 762 (Fla. 1st DCA 1991)(Zehmer, J., specially concurring).

with a child under sixteen would be guilty of both crimes. As now worded, section 800.04 contemplates that if sexual activity takes place with a person under sixteen years of age which does not constitute the crime of sexual battery, the conduct is deemed to be lewd and lascivious. Thus, the unique language contained in the amendment to section 800.04 makes clear that these particular crimes are mutually exclusive.

(App.5), quoting State v. Hightower, 509 So. 2d 1078, 1079 (Fla. 1987). Properly construed, this passage acknowledges that an act defined as sexual battery, when committed against a person under 16 years of age, falls within the prohibitions of both section 800.04, Florida Statutes, and section 794.011, Florida Statutes. Note that chapter 800, Florida Statutes, is entitled: *Lewdness; Indecent Exposure*, whereas chapter 794, Florida Statutes, is entitled: *Sexual Battery*. Thus, where section 800.04, Florida Statutes, refers to the *crime of sexual battery*, this constitutes a reference to the crime of sexual battery as proscribed by chapter 794, which provides for enhanced penalties for acts defined as sexual battery based upon aggravating factors such as the ages of the perpetrator and victim, lack of consent, use of a deadly weapon, use of physical force, etc. See § 794.011(2),(3),(4),(5), Fla. Stat. (1997). The legislature's use of the phrase "without committing the crime of sexual battery" refers to offenses proscribed by section 794.011(2)-

(5), Florida Statutes (1997), and was intended to embrace those crimes involving the aggravating factors described above.

Given that the act of sexual battery is prohibited by both section 800.04 and section 794.011, Hightower further explains that the legislature did not intend that a defendant could be convicted of both violations based upon the same conduct. Thus, when this Court stated that violations of 800.04 and 794.011 are "mutually exclusive", it did not mean that a single information alleging an act defined as sexual battery could not allege a violation of both statutes. Rather, the Court meant that the legislature did not intend that an information alleging a single act defined as sexual battery could support convictions under both statutes. This interpretation of Hightower has been embraced by the district courts. See Fjord v. State, 634 So. 2d 714 (Fla. 4th DCA 1994)⁴; see also, Turner v. State, 710 So. 2d 688 (Fla. 1st DCA 1998)(affirming conviction for lewd and lascivious conduct where information charged digital penetration of vagina (sexual battery) "without committing the crime of sexual battery"); Velazquez v. State, 648 So. 2d 302, 305 n.7 (Fla. 5th DCA 1995); King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994); Ready v. State, 636 So. 2d 67 (Fla. 2d DCA 1994); Kolaric v. State, 616 So. 2d 117 (Fla. 2d DCA 1993); McConn v. State,

⁴ Opinion written by then-Judge Pariente.

648 So. 2d 837 (Fla. 2d DCA 1995)(finding lewd and lascivious conduct a category two (permissive) lesser offense of the crime of sexual activity, section 794.041(2)(b), Florida Statutes (1991); Louisy v. State, 667 So. 2d 972 (Fla. 4th DCA 1996); S.L.S. v. State, 404 So. 2d 1105 (Fla. 1st DCA 1981)(affirming conviction for lewd and lascivious conduct as permissive lesser offense of initial charge of sexual battery); but see, Bauta v. State, 698 So. 2d 860, 861 (Fla. 3d DCA 1997); Jozens v. State, 649 So. 2d 322 (Fla. 1st DCA 1995), Walker v. State, 464 So. 2d 1325 (Fla. 5th DCA 1985); Harrielson v. State, 464 So. 2d 1325 (Fla. 5th DCA 1985).

Although this Court in Hightower opined that lewd and lascivious conduct is not a *necessarily* included offense of the crime of sexual battery, it left open the question whether lewd and lascivious conduct could be a permissive lesser included offense of the crime of sexual battery. Hightower v. State, 509 So. 2d at 1078, n.2.⁵

⁵ Under the above analysis, the relationship between lewd and lascivious conduct and sexual battery is analogous to the relationship between battery and battery of a law enforcement officer because the latter offense is a battery enhanced by the status of the victim. Battery is a necessarily included offense of battery of a law enforcement officer. For this reason, petitioner respectfully suggests that the court may wish to revisit its opinion in Hightower, to hold that the commission of a lewd and lascivious act, at least by commission of an act defined as sexual battery, is a necessarily lesser included offense to the crime of sexual battery.

In its opinion, the district court remarked that the information charged a violation of section 794.011(1)(h), and, because the victim was less than 12 years of age, the act is sexual battery regardless of consent. Under the above analysis, that observation is irrelevant because an act defined as sexual battery falls within the proscriptions of both 800.04 and section 794.011(1)(h) regardless of consent.

The offense of lewd and lascivious conduct, section 800.04, Florida Statutes (1997), may be charged by any one of four alternative means. The information in the present case alleged all of the elements of at least two of the four available theories of prosecution, lewd and lascivious handling or fondling, section 800.04(1), Florida Statutes (1997), and commission of an act defined as sexual battery, section 800.04(3), Florida Statutes (1997).

The second prong of the test is whether the evidence at trial would support the lesser offense. The answer is yes. First, the jury could find petitioner guilty of violating section 800.04, Florida Statutes, because, as explained above, an act defined as sexual battery is proscribed by section 800.04. Under such a circumstance, "the jury is privileged to exercise its *de facto* pardon power and acquit the defendant on the charged offense, but convict the defendant on the lesser offense." Jones v. State, 666 So. 2d 960, 965 (Fla. 3d DCA

1996)(citing Amado v. State, 585 So. 2d 282 (Fla. 1991)). The jury, therefore, could return a verdict of guilty under section 800.04 even if it found all of the allegations to be true.⁶

There is a second reason why the evidence presented at trial could support a conviction under section 800.04. Section 800.04

⁶ There are analogous situations under Florida law that support petitioner's position. For example, if the information charges trafficking by sale or possession, the defendant is entitled to a jury instruction on simple possession as a permissive lesser included offense of trafficking even where there is no dispute that the amount of drugs involved satisfies the trafficking threshold. Amado v. State, 585 So. 2d 282 (Fla. 1991). If the information charges second degree murder, the defendant may be entitled to a jury instruction on aggravated battery as a permissive lesser offense to second degree murder, even if there is no dispute that the victim died. See Levesque v. State, 778 So. 2d 1049 (Fla. 4th DCA 2001). If the information charges arson, the defendant may be entitled to a jury instruction on criminal mischief as a permissive lesser offense to arson, even if there is no dispute that the damage was caused by fire. See Roberts v. State, 461 So. 2d 212 (Fla. 1st DCA 1984). In the present case, therefore, the jury should have been presented with the option of convicting for lewd and lascivious conduct as a permissive lesser offense of sexual battery, even if the jury found that petitioner committed the specifically charged sexual battery. In the words of Judge Altenbernd:

From a practical standpoint, however, it is impossible to commit the sexual activity alleged in the information [penile penetration] without committing the alleged lewd act [placing his exposed penis between the legs of the victim] in the process. Thus, under the evidence and the allegations of the information, lewd and lascivious conduct was a lesser included offense of the charged sexual activity.

McConn v. State, 648 So. 2d 837, 838 (Fla. 2d DCA 1995).

proscribes a variety of conduct. Included within its proscriptions are lewd, lascivious or indecent handling, fondling or assaulting of a child under 16 years of age. Although there was testimony of oral-vaginal union, the prosecution depended entirely upon the credibility of the victim witnesses. It must be remembered that victims of crimes always have a motive to testify falsely. The motive is retribution. Thus, a victim of crime may fabricate factual details which tend to prove an offense greater than that actually committed. In this case, the victims may have testified to acts defined as sexual battery in order to exact retribution in the form of a greater penalty against a perpetrator who committed lesser acts of fondling or assault. The jury is the sole fact finder as to the credibility of the witnesses. The jury may believe all or part of the testimony. Had the jury been given the option of finding the commission of a lesser offense, it may have done so. Faced, however, with an all or nothing choice, the jury may have been pressured into rendering a verdict of guilty on the greater offense. The facts at trial, therefore, could have supported a verdict of guilty on the lesser offense of lewd and lascivious conduct, section 800.04, Florida Statutes. This factual question was wrongly taken from the jury.

That the requested instruction should have been given stems from the unassailable legal proposition that neither the trial

court nor the appellate court is a trier of fact. The jury *could* have rejected the testimony of Princess, Margarita and Olga, to conclude that no "sexual battery" of Princess ever occurred. On the other hand, the jury *could* have found from the evidence presented that petitioner was guilty of multiple instances of lewd and lascivious conduct against Princess. The jury, therefore, could have returned a verdict of guilty on two counts of lewd and lascivious conduct rather than one. No matter how strong the evidence is against the defendant, "the defendant is entitled to an instruction on a lesser offense as to which there is any evidence." Louisy v. State, 667 So. 2d 972, 974 (Fla. 4th DCA 1996)(citing Kolaric v. State, 616 So. 2d 117, 119 (Fla. 2d DCA 1993)). Under the authority cited above, the trial court was required to instruct on the lesser offense of lewd and lascivious conduct. The failure to so instruct deprived the jury of the proper legal options.

The trial court, therefore, erred in denying petitioner's request to instruct the jury on the permissible lesser included offense of lewd and lascivious conduct, section 800.04, Florida Statutes (1997).

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS LIMITED DISCRETION IN ADMITTING PETITIONER'S LETTERS CONTAINING WILLIAMS RULE EVIDENCE INVOLVING MARGARITA AND OLGA BECAUSE THE

**PREJUDICIAL NATURE OF THE LETTERS OUTWEIGHED
THEIR PROBATIVE VALUE?**

STANDARD OF REVIEW

The trial court's determination whether to admit or exclude evidence is a discretionary one, although the trial court's discretion is "narrowly limited" by the rules of evidence. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992). The trial court's discretion in ruling on evidentiary matters is also greatly circumscribed by the defendant's federal and state constitutional rights. See e.g., Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Lewis v. State, 591 So. 2d 922, 925-26 (Fla. 1991). The interpretation of statutory and constitutional law are purely legal matters. To the extent that a trial court's evidentiary ruling is dependent upon the application of statutory or constitutional law, the reviewing court owes no deference to the trial court's ruling.

MERITS

Even if "similar fact evidence" is relevant and admissible under the Williams Rule, it is subject to the constraint of section 90.403, Florida Statutes, whereby relevant evidence must be excluded if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." See Ehrhardt, Florida Evidence, § 404.9 (2001

ed.)(text accompanying notes 10,11); § 404.18 (2001 ed.)(text accompanying notes 17,18,19). In the present case, the letters written by petitioner and admitting his collateral sexual conduct with Margarita and Olga were cumulative to the trial testimony of Margarita and Olga and extraordinarily prejudicial to petitioner due to the explicit and graphic nature of the admissions. This court should note, in particular, state's exhibit #8, the substance of which was read to the jury:

Yes, I've touched and done things I should have said no. I just could not turn it down. You know how much I love Margarita. Olga may be beautiful, but I never had sex with her. Instead I brought her the dildos and showed her I was too small for her. I tried that with Margarita, and she refused the dildo and said she did not need sex, but then one day we kissed and it got wild. I did not pull my stuff off at first but I lost control. She was good for three days, and then she came in and sat on my bed. I gave her a kiss, and it happened again. I felt so guilty. We never had sex before, we just rubbed and I ate her out to orgasm. I truly thought if I said no to her, she would feel ugly and go run to Will or Pablo.

(R.VII,761).

The prejudicial and graphic nature of this evidence should be weighed against: (1) the fact that petitioner never admitted sexual battery against the alleged victim, Princess; (2) petitioner's claim that the charges against Princess were fabricated as retaliation for arguments and conflict in the home; (3) petitioner's unrefuted claim that the allegations of

sexual abuse of Princess arose only after a major domestic dispute between petitioner and Margarita.

No jury could give petitioner a fair trial after introduction of the collateral evidence encompassed within state's exhibit #8. The admission of this similar fact evidence, therefore, was legally erroneous under section 90.403, Florida Statutes. The error cannot be considered harmless in this case because: (1) Williams Rule error is presumptively prejudicial; (2) this was a swearing match type of case as regards the charges involving Princess; (3) the state coerced the testimony of Princess' mother, Margarita and Olga by prosecuting the mother for tampering with a witness (as argued in ISSUE IV).

ISSUE III

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING THE WILLIAMS RULE EVIDENCE TO BECOME A FEATURE OF THE CASE WHERE THE LETTERS INTRODUCED INTO EVIDENCE WERE EXTREMELY PREJUDICIAL AND THE PROSECUTOR EMPHASIZED THEM IN CLOSING ARGUMENT?

STANDARD OF REVIEW

The question whether properly admitted⁷ Williams Rule evidence has become the feature of the trial is one the appellate court can determine from the record on appeal without deference to the trial court's ruling. Since the appellate court must review the entire record to determine whether the similar fact evidence has become a feature of the trial, this is a type of plenary review for which the appellate court owes no deference to the trial court's ruling. The issue should be reviewed *de novo*. Petitioner knows of no case directly on point, although Travers v. State, 578 So. 2d 793 (Fla. 1st DCA 1991), implicitly supports petitioner's position. In Travers, the district court reviewed the entire record of the case, sua sponte, to determine whether the admission without objection of Williams Rule evidence had become the feature of the case. Since the issue was not raised either at the trial level or the appellate level, the court reviewed the issue under the doctrine

⁷ Petitioner does not concede that the evidence was properly admitted, but merely assumes that fact *arguendo*.

of fundamental error. In so doing, the court necessarily conducted a *do novo* review of the entire record.

MERITS

Even if it was not legal error for the trial court to admit petitioner's letters into evidence (as argued in ISSUE II), the Williams Rule evidence became a feature of the trial when the letters (particularly state's exhibit #8) were admitted into evidence. If the similar fact evidence did not become a feature of the trial at this point, it certainly became a feature of the trial in closing argument, when the prosecutor quoted the vitriolic state's exhibit #8 to the jury.

In determining whether the Williams Rule evidence has become a feature of the trial, the court should consider a number of factors: (1) the strength of the other evidence available to the prosecution; (2) whether the defense is vigorously disputing the fact; (3) the emotional impact of the Williams evidence; (4) how closely the Williams evidence resembles the crime charged; (5) the amount of Williams evidence as compared the amount of evidence of the charged offense; (6) whether the evidence was adduced by the prosecution or the defense; (7) the type of prosecution in which the evidence is offered; and (8) whether the jury will be instructed on the proper use of the evidence. See Ehrhardt, Florida Evidence, § 404.9 (2001 ed.)(text accompanying note 14). In the present case, the strength of the

case is debatable, but the court should be extremely sensitive to the "feature of the case" argument because this is a swearing match type of case. Petitioner may have made a number of incriminating admissions but none of them amount to an admission of the greater offense of capital sexual battery of Princess. Petitioner vigorously denied committing capital sexual battery and his claim as to the girls' motives to testify falsely was unrefuted. The charges against petitioner arose only after petitioner had a big fight with Margarita. It is also undisputed that petitioner was involved in harsh disciplinary confrontations with both Olga and Princess. The girls' motive to falsify was unrebutted.

Another significant factor in evaluating the strength of the state's case is the fact that the mother's testimony was coerced by her prosecution for the offense of tampering with the witness. In addition, the trial testimony of the children was tainted by the emotional blackmail implicit in their mother's prosecution and the potential for the disintegration of the family at the hands of the Department of Children and Families. In fact, absent the introduction of petitioner's letters, the jury may have disbelieved the testimony of the mother and the children insofar as they stated that their exculpatory letters to the judge and prosecutor were written at the insistence of the mother. This testimony could have been the result of the

state's coercion. It is noteworthy that the state introduced the testimony of a handwriting expert to prove that petitioner's letters to Miriam Vargas were written by him. The state could have produced the same type of expert testimony to prove that Miriam Vargas forged an exculpatory sentence in the children's letters - but it did not. This anomaly in the presentation of the state's case leads to the reasonable suspicion that Miriam Vargas may not have forged letters for the children, may not have intended to deceive the trial judge, and may not have insisted that the children write letters on petitioner's behalf. This anomaly leads to the reasonable inference that the state's evidence of the mother's tampering with witnesses and forgery may be the product of the state's blackmail. As stated by the mother, the state threatened to put her in jail if she did not testify against petitioner. (R.VI,621). In further support, petitioner notes the unrebutted expert testimony that someone tampered with one of petitioner's letters, erasing the word "not", and thus altering petitioner's assertion that "I did not touch Princess...." (R.VI,800,801,831). It may be reasonably inferred that Miriam Vargas tampered with this evidence as a direct result of the state's coercion and blackmail. On balance, the state's case was subject to strong attack absent the unduly prejudicial letters.

Considering the other factors, the emotional impact of the Williams evidence was undoubtedly great. In particular, state's exhibit #8 highlights petitioner's deviant sexual behavior toward additional teenage females. The "amount" of the Williams evidence was relatively large. Two other alleged victims, Margarita and Olga, testified to corroborate the testimony of one alleged victim, Princess. The testimony of Princess occupies only 63 pages of the trial transcript. (R.V,407-470). Margarita's testimony covers 54 pages. (R.V,473-R.VI,527). Olga's testimony spans 20 pages. (R.VI, 538-548). Thus, the Williams witnesses testimony covers 74 pages of transcript in contrast to the testimony of the alleged victim, Princess, at 63 pages. This is without even considering the time and attention devoted to the introduction of petitioner's letters which concern primarily the Williams victims. The entire testimony of FDLE expert Don Pribbenow was devoted to the introduction of petitioner's letters into evidence, and the primary focus of those letters is the incriminating and prejudicial admission pertaining to Margarita and Olga. Certainly, by the time the letters had been introduced into evidence, the similar fact evidence had become a feature of the trial. If that were not enough, the prosecutor emphasized the letters in closing argument. The prosecutor summarized the most incriminating aspects of the letters, including the portions relating to

Margarita and Olga. In particular, the prosecutor read, almost verbatim, the substance of state's exhibit #8, detailing petitioner's predilection for dildos and cunnilingus, and admitting such conduct with Margarita and Olga. No amount of cautionary jury instructions could cure this taint. The Williams rule evidence became a feature of the trial. See Bush v. State, 690 So. 2d 670 (Fla. 1st DCA 1997); Turtle v. State, 600 So. 2d 1214 (Fla. 1st DCA 1992); cf. Travers v. State, 578 So. 2d 793 (Fla. 1st DCA 1991).

The error cannot be considered harmless in this case because: (1) Williams Rule error is presumptively prejudicial; (2) this was a swearing match type of case as regards the charges involving Princess; (3) the state coerced the testimony of Princess' mother, Margarita and Olga by prosecuting the mother for tampering with a witness (as argued in ISSUE IV).

ISSUE IV

WHETHER PETITIONER WAS DENIED HIS FEDERAL AND STATE DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR COERCED THE COOPERATION AND TESTIMONY OF THE MOTHER OF THE ALLEGED VICTIM BY CHARGING HER WITH TAMPERING WITH A WITNESS, AND ALSO COERCED THE COOPERATION AND TESTIMONY OF THE ALLEGED CHILD VICTIMS BY THREATENING THE UNITY AND TRANQUILITY OF THE FAMILY WITH THE IMPENDING PROSECUTION OF THE MOTHER?

STANDARD OF REVIEW

The question whether petitioner's trial satisfied his federal and state due process rights to a fair trial is purely a question of law to be reviewed *de novo*. The claim that petitioner was deprived of his due process right to a fair trial may be considered for the first time on appeal under the doctrine of fundamental error.

MERITS

Petitioner 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 the result of "emotional blackmail" or coercion in the form of the prosecution of the mother for tampering with a witness. Because the children had written letters asking that the charges be dropped and stating that petitioner never sexually abused them, the state prosecuted the mother for tampering with a witness. The mother, Miriam Vargas, flatly stated at trial that the authorities threatened to put her in jail if she did not testify against petitioner. The state thus threatened the mother with five years imprisonment and threatened the children with separation from their mother and the intervention of the Department of Children and Family Services. In this manner the state 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. The testimony of the mother and children cannot be trusted, however, because it was obtained by coercion. See Reese v. State, 382 So. 2d 141 (Fla. 4th DCA 1980)(judge's admonition to witness regarding crime of perjury deprived defendant of due process right to fair trial); Davis v. State, 334 So. 2d 823 (Fla. 1st DCA 1976)(prosecutor's threat to charge recanting witness with perjury deprived defendant of due process right to fair trial); Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976)(prosecutor's threat to charge adverse witness with perjury required new trial). In dealing with witnesses prior to trial, a prosecutor

... must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.

Lee v. State, 324 So. 2d 694, 698 (Fla. 1st DCA 1976)(quoting Mathews v. State, 44 So. 2d 664, 669 (Fla. 1950)).

Rules of evidence and procedure exist which are designed to assist prosecution and defense alike in eliciting the truth from balky witnesses. Coercion and threats are not among these rules.

Davis v. State, 334 So. 2d 823, 826 (Fla. 1st DCA 1976).

Such shameful and outrageous conduct on the part of the state in this case warrants the reversal of the convictions, the

condemnation of the court, and referral to the Florida Bar for possible disciplinary investigation.⁸

ISSUE V

WHETHER THE SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR A SEXUAL BATTERY NOT INVOLVING PENETRATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL CONSTITUTION OR CRUEL OR UNUSUAL PUNISHMENT UNDER THE FLORIDA CONSTITUTION?

STANDARD OF REVIEW

The question whether petitioner's sentence of life imprisonment without possibility of parole constitutes cruel and/or unusual punishment is purely a question of constitutional law to be reviewed *de novo*.

MERITS

Petitioner was sentenced to a term of life imprisonment without the possibility of parole for the offense of capital sexual battery in contravention of section 794.011(2)(a), Florida Statutes. Petitioner's sentence for this offense constitutes cruel and unusual punishment under the United States

⁸ The undersigned notes with a great deal of alarm that the authorities in Duval County seem to be establishing a pattern or practice of charging mothers of alleged victims with the felony of tampering with witnesses with little provocation. Detective McCallum's testimony indicates that the present case is not unusual in this respect. (R.VI,677-678,682). See also, James Lee Manns v. State, Case No. 1D00-4001.

and Florida Constitutions, particularly where the proof offered at trial proved, at most, oral/vaginal "union" as opposed to penile/vaginal penetration and where petitioner has no prior criminal record according to his guidelines scoresheet. A sentence of death for the offense of capital sexual battery is grossly disproportionate. See Gibson v. State, 721 So. 2d 363, 366 (Fla. 2d DCA 1998)(citing Buford v. State, 403 So. 2d 943 (Fla. 1981)). A sentence of life imprisonment with the possibility of parole after 25 years for the offense of capital sexual battery does not constitute cruel and unusual punishment. See Gibson v. State, 721 So. 2d 363, 366 (Fla. 2d DCA 1998)(citing Banks v. State, 342 So. 2d 469 (Fla. 1976)). The present case involves a sentence of life imprisonment without the possibility of parole for the offense of capital sexual battery and falls within the "gray area" between Buford v. State, 403 So. 2d 943 (Fla. 1981), and Banks v. State, 342 So. 2d 469 (Fla. 1976). Petitioner acknowledges that Gibson v. State, 721 So. 2d 363 (Fla. 2d DCA 1998), holds that a sentence of life imprisonment without the possibility of parole for the offense of capital sexual battery does not constitute cruel or unusual punishment. The district court in Gibson did acknowledge, at least, that "the issue is close." Gibson v. State, 721 So. 2d at 365. Petitioner notes, however, that Gibson v. State is distinguishable from the present case in that

Gibson involved the narrow issue whether life imprisonment without the possibility of parole for "penile union", not involved in this case, is cruel or unusual. Petitioner urges the court to hold that the sentence of life imprisonment without parole, on the facts presented herein, constitutes cruel and/or unusual punishment.

CONCLUSION

Based upon the argument and authority raised in ISSUE IV, petitioner requests that the court reverse his convictions and remand with directions to discharge petitioner. Based upon the argument and authority raised in either ISSUE I, II, III, or IV, or the cumulative effect thereof, petitioner requests that the court reverse his convictions and remand for a new trial. Based upon the argument and authority raised in ISSUE V, petitioner requests that the court vacate his sentence and remand for imposition of a constitutional sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Anne C. Toolan, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to petitioner, on this ____ day of June, 2002.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RICHARD M. SUMMA
Assistant Public Defender
Florida Bar No. 890588
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR Petitioner