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Updated March 31, 2017

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INTRODUCTION:

This chapter covers those issues, which arise when we file multiple counts against the defendant. Legal conflicts frequently arise which make one or more of the counts invalid. Most of those issues are addressed here. Issues that arise when we file using the language "on one or more occasions" can be found in the chapter entitled "Issues of Time.

DOUBLE JEOPARDY:

Brugal v. State, 2017 WL 1076893 (Fla.App. 3 Dist., 2017)

Defendant was charged with 5 counts of lewd and lascivious battery. Each of the five lewd and lascivious battery counts alleged that the violation occurred between April 1, 2011, and May 31, 2011, but did not identify a specific date or dates unique to that count. The victim testified that each sexual act occurred on a separate day. The appellate court ruled that the victim's testimony was sufficient to sustain the five convictions. The court distinguished case law that found problems with that scenario when all of the acts occurred on a single day.

The court properly allowed the victim to testify there was a gun on the night stand. It was relevant to explain why she was afraid to report the incident.

Tambriz–Ramirez v. State, 2017 WL 815376 (Fla.App. 4 Dist., 2017) *conflict certified*

Attempted sexual battery is not subsumed within the offense of burglary with an assault or battery for purposes of double jeopardy.

Sprouse v. State, 2016 WL 7324176 (Fla. Dist. Ct. App. Dec. 16, 2016)

Convictions for sexual battery on an intellectually disabled person and lewd or lascivious battery on a disabled adult do not violate double jeopardy.

Macias v. State, 2016 WL 2342885 (Fla. Dist. Ct. App. May 4, 2016)

Double jeopardy does not allow a defendant to be convicted of both lewd or lascivious battery and lewd or lascivious molestation arising out of the same conduct.

Roughton v. State, 2016 WL 743245 (Fla.,2016)

Defendant's convictions for lewd or lascivious molestation and sexual battery, arising from the same act, did not violate the prohibition against double jeopardy; lewd or lascivious molestation required a specific lewd or lascivious intent, which sexual battery did not, and although lewd or lascivious intent was often associated with sexual battery, it was not an element of that crime, which could be committed without the intent for sexual satisfaction; receding from *Gibbs v. State*, 698 So.2d 1206; disapproving *Berlin v. State*, 72 So.3d 284, *Smith v. State*, 41 So.3d 1041, *Robinson v. State*, 919 So.2d 623, and *Johnson v. State*, 913 So.2d 1291

George v. State, 2015 WL 9258394,(Fla.App. 1 Dist.,2015):

Defendant and his friend abducted woman and sexually battered her numerous times over a period of a few hours and at two separate locations. Charging multiple counts of sexual battery did not violate double jeopardy.

Holt v. State, No. 5D14-3269, 2015 WL 4768997 (Fla. Dist. Ct. App. Aug. 14, 2015)

Convictions for traveling to meet a minor under section 847.0135(4)(a), Florida Statutes (2013), and unlawful use of a two-way communications device under section 934.215, Florida Statutes (2013), violate double jeopardy because they were a part of the same criminal episode and the elements to prove unlawful use of a two-way communications device are subsumed within the elements for traveling to meet a minor.

Shipman v. State, No. 1D14-3894, 2015 WL 4622782, at *1 (Fla. Dist. Ct. App. Aug. 4, 2015)

Sexual battery and lewd or lascivious battery based upon the same event violated Double Jeopardy.

Holubek v. State, No. 5D14-1339, 2015 WL 5051141, at *2 (Fla. Dist. Ct. App. Aug. 28, 2015)

When the charged conduct arises out of the same criminal episode, a charge for unlawful use of a two-way communications device under section 934.215 is subsumed within a charge of solicitation under section 847.0135(3) and subsumed within a charge of travelling to meet a minor after solicitation under section 847.0135(4).

Graham v. State, 2015 WL 4111657, (Fla. Dist. Ct. App. July 8, 2015)

"Graham was convicted of two counts of lewd or lascivious molestation and the information and the jury verdict demonstrate that the charges were predicated on two distinct acts: touching of the victim's breasts, or the clothing covering them, and touching of the victim's buttocks, or the clothing covering them. For this reason, Graham's multiple convictions for lewd or lascivious molestation do not violate double jeopardy. We recognize that this holding conflicts with the holdings in Cupas v. State, 109 So.3d 1174 (Fla. 4th DCA 2013), and Webb v. State, 104 So.3d 1153 (Fla. 4th DCA 2012); thus, we certify conflict with those decisions."

Cocking v. State, 154 So.3d 1198 (Fla. 2d DCA 2015):

Defendant's trial counsel was ineffective in failing to move to dismiss all but one of the 45 counts of possession of photographs depicting sexual conduct by a child with intent to promote with which defendant was charged, and in advising defendant to enter an open plea to all 45 counts; all 45 images giving rise to the charges were found in a single forensic examination of defendant's computer, such that statute defining the offense, which barred possession with intent to promote of "any" such photograph, allowed for only a single conviction.

Kim v. State, 154 So.3d 1168 (Fla. 2d DCA 2015) *conflict certified*

Defendant's convictions for both traveling to seduce/solicit/entice a child to commit a sex act and use of a computer to seduce/solicit/entice a child to commit a sex act on the same day violated the prohibition against double jeopardy because the soliciting offense was subsumed by the traveling offense; traveling offense proscribed traveling to meet a child to engage in unlawful sexual contact, and the soliciting offense did not contain an element that was not found in the traveling offense.

Silvers v. State, 2014 WL 5462415 (Fla.App. 1 Dist.):

Defendant was charged with sexual battery by engaging in three different types of sex with the victim during the same episode. The jury convicted defendant of three counts of battery. Appellate court ruled that multiple convictions for battery violated double jeopardy even though they were based on different types of sexual acts.

State v. Muhammad, 2014 WL 5099354 (Fla.App. 1 Dist.):

Defendant's conviction of lewd or lascivious battery did not terminate jeopardy as to charge of sexual battery based on defendant's same act of penetrating victim's vagina "with his penis or any other object" and, thus, did not prevent retrial on the sexual battery charge after jury was unable to reach a verdict on that charge; unlike an acquittal, jury's guilty verdict as to lewd or lascivious battery said absolutely nothing about the sexual battery offense.

Dukes v. State, 2014 WL 1491108 (Fla.App. 5 Dist.)

Defendant's convictions for both sex trafficking, a violation of section 796.045, Florida Statutes (2010), and forcing, compelling or coercing another to become a prostitute, a violation of section 796.04(1), Florida Statutes (2010), violated double jeopardy.

State v. Drawdy, 2014 WL 1408556 (Fla.)

Defendant's conviction for sexual battery, for penetrating minor victim's vagina with his penis, and his conviction for lewd or lascivious molestation, for intentionally touching the victim's breasts in a lewd or lascivious manner during the vaginal penetration, were distinct criminal acts of a separate character and type, and thus did not violate double jeopardy; although the acts essentially occurred simultaneously, the touching of victim's breasts occurred with some part of defendant's body other than his penis, and the touching occurred under victim's shirt and was not incidental or integral to the vaginal penetration.

Griffis v. State, 2014 WL 996702 (Fla.App. 1 Dist.): *online solicitation case*

Dual convictions for using a computer online service to solicit a person that defendant believed to be a minor in order to commit an unlawful sexual act and for traveling to meet a person that defendant believed to be a minor in order to commit an unlawful sexual act did not violate double jeopardy; there was a clear legislative intent to punish the offenses separately.

Shelley v. State, 2014 WL 1047074 (Fla.App. 2 Dist.) *online solicitation case*

Dual convictions, for using a computer service to solicit person believed to be a parent to consent to unlawful sexual activity with child and traveling to meet the minor after soliciting the person believed to be a parent, in the course of one criminal transaction or episode violate the prohibition against double jeopardy, but convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer devices to solicit.

Defendant's convictions for both use of computer services or devices to solicit consent of a parent and traveling to meet a minor after using computer services violated the prohibition against double jeopardy because the soliciting offense was subsumed by the traveling offense; traveling offense proscribed traveling to meet a child to engage in unlawful sexual contact after having solicited the child's parent, and the soliciting offense did not contain an element that was not found in the traveling offense, and State only charged one use of computer devices to solicit, and that charge was based on a solicitation occurring on the same date as the traveling offense.

Elsberry v. State, 130 So.3d 798 (Fla. 1st DCA 2014): *online solicitation case*

Conviction and sentence for using a computer service to solicit a person believed to be a child to engage in unlawful sexual conduct, and for thereafter traveling for the purpose of engaging in unlawful sexual conduct with a person believed to be a child did not violate double jeopardy. *Conflict certified*

Cantrell v. State, 2014 WL 660193 (Fla.App. 1 Dist.): *online solicitation case*

No double jeopardy violation arose from convictions for both unlawful use of a computer service to solicit a person believed to be a minor to engage in unlawful sexual activity and traveling to meet a person believed to be minor for the purpose of engaging in unlawful sexual activity, as legislature clearly intended to punish solicitation and traveling after solicitation separately.

Pickel v. State, --- So.3d ----, 2014 WL 52454 (Fla.App. 4 Dist.):

The Court rejected the double jeopardy argument and ruled that Defendant was properly convicted of two counts of sexual battery upon a child and one count of lewd molestation based upon the following facts:

The incidents of sexual battery (count I—penetration of vagina with penis; count II—penetration of vagina with mouth and/or tongue) and lewd or lascivious molestation (count V—touching breasts in lewd or lascivious manner) occurred during the same episode. The young victim alleged that the defendant abducted her from her bedroom, took her to a nearby vacant home, pulled her pants off, placed his mouth on her breasts and vagina, and forced her to have sex with him.

Pinder v. State, 2013 WL 5950995 (Fla.App. 5 Dist.) *online solicitation case*

For purposes of double jeopardy analysis, a single act of solicitation of unlawful sexual activity with a minor through use of a computer device is a lesser-included offense of traveling to meet the minor for unlawful sexual activity, as the statute defining solicitation of unlawful sexual activity with a minor through use of a computer device contains no element not found in the statutory definition of traveling to meet a minor for unlawful sexual activity.

Defendant's convictions of both traveling to meet a minor for unlawful sexual activity and use of computer services to solicit unlawful sexual activity with a minor did not violate double jeopardy, as defendant was alleged to have committed offense of use of computer services to solicit unlawful sexual activity with a minor over eight-day period and evidence established multiple separate uses of online service for purpose of soliciting unlawful sexual activity with person believed by defendant to be 12-year-old girl.

Hartley v. State, --- So.3d ----, 2014 WL 51703 (Fla.App. 4 Dist.) *on motion for rehearing online solicitation case*

Sufficient evidence supported defendant's three convictions for using a computer to solicit a minor, based on communications between defendant and undercover officer posing as a 14-year-old boy online that occurred on three different days, even though the communications on only one of those days, via text messages, involved explicit discussions of mutual sexual acts; considering the content of all of the communications between defendant and undercover officer, it could be inferred that defendant's intent was to begin a sexual relationship with a 14-year-old boy, and, thus, defendant's communications with undercover officer met the plain and ordinary definitions of seduce, solicit, lure, and entice, even if defendant did so only obliquely and implicitly by avoiding explicit references to sexual conduct.

Convictions on two counts of using a computer to solicit a minor based on communications between defendant and undercover officer posing online as a 14-year-old boy did not violate double jeopardy; statute authorized separate punishments for violations of the statute where there were separations of time between each of the crimes charged, and there was a temporal break between the occurrences underlying each of defendant's two convictions and the acts that served as basis for a third charge of using a computer to solicit a minor and traveling to meet a minor for an unlawful sexual act.

Convictions for using a computer to solicit a minor and traveling to meet a minor for an unlawful sexual act, based on events that occurred on a single day, violated double jeopardy, as all elements of soliciting a child were included within offense of traveling to meet a minor.

Murphy v. State, 2013 WL 5567495 (Fla.App. 1 Dist.): *online solicitation case*

No double jeopardy violation arose from convictions for both using a computer service to solicit person believed to be a parent to consent to unlawful sexual activity with a child and traveling to meet the minor after soliciting the person believed to be a parent; legislature clearly intended to punish solicitation and traveling after solicitation separately.

Johnson v. State, 38 Fla. L. Weekly D1511 (Fla. 3rd DCA 2013):

Convictions for both sexual battery with a deadly weapon and lewd and lascivious molestation of a child between the ages of 12 and 16 violated double jeopardy, and thus the latter conviction would be vacated; record did not evidence, nor did state identify, any act by defendant that could serve as basis for a separate conviction for lewd and lascivious molestation.

Hill v. State, 2013 WL 2462115 (Fla. 1st DCA 2013):

Double jeopardy violation resulting from defendant's convictions for sexual battery by person in a position of familial or custodial authority and lewd or lascivious battery, arising out of a single sexual act, was not cured by trial court holding sentencing on the second offense in abeyance; proper remedy was to vacate the verdict of guilt as to one of the offenses.

Cupas v. State, 2013 WL 1136314 (Fla.App. 4 Dist.):

Defendant's two convictions for lewd and lascivious molestation arose out of a single criminal episode, and thus violated double jeopardy; first count alleged he touched the victim's breast or clothing covering it, second count alleged he touched her genital area or the clothing covering it, and these touchings occurred in close temporal proximity in the same place.

Defendant's two lewd or lascivious molestation convictions were based on separate and distinct acts proscribed by the lewd or lascivious molestations statute, and thus did not violate double jeopardy, even though they occurred in the same location and in the same criminal episode with no significant temporal break; a person could violate the statute in two separate and distinct ways, by touching the victim in the proscribed manner, or by forcing or enticing the victim to touch the person in the proscribed manner, both of which were alleged in the instant prosecution.

Register v. State, 38 Fla. L. Weekly D376 (Fla. 5th DCA 2013):

Defendant's convictions on two counts of lewd or lascivious molestation against a victim less than 12 years of age did not violate prohibition against double jeopardy, as defendant intentionally touched the genital area or clothing covering the genital area of victim in a lewd or lascivious manner, which formed factual basis for one count, and defendant forced or enticed victim to touch his genitals in a lewd or lascivious manner, which formed factual basis of other count; although acts occurred during a single criminal episode, they were distinct in character and type and required different elements of proof.

Vaval v. State, 2013 WL 616097 (Fla.App. 3 Dist.):

Defendant's petition for postconviction relief alleging that convictions of both lewd and lascivious battery on a child less than 16 years of age and lewd and lascivious molestation on a child 12 to 16 years of age violated double jeopardy warranted an evidentiary hearing, where it was not apparent from the record whether there was a temporal break between the alleged criminal acts or whether defendant formed a separate criminal intent to commit the two acts.

Webb v. State, 2012 WL 5933010 (Fla.App. 4 Dist.)

Defendant was improperly convicted on two counts of lewd molestation based on touching the child on her breast and her crotch area during a ten minute period. Double jeopardy required one count to cover the episode.

Sanders v. State, 37 Fla. L. Weekly D2313 (Fla. 1st DCA 2012):

Two lewd or lascivious molestation convictions were based on separate and distinct acts proscribed by the lewd or lascivious molestations statute, and therefore two convictions for offenses that occurred in the same location and in the same criminal episode with no significant temporal break between the two acts did not violate double jeopardy; a person could violate the statute in two separate and distinct ways, by touching the victim in the proscribed manner, or by forcing or enticing the victim to touch the person in the proscribed manner, both of which were alleged in the instant prosecution.

Smith v. State, 2012 WL 3822115 (Fla.App. 4 Dist.)

It was reversible error to allow the State to charge multiple counts of lewd conduct in one count of the information over the defendant's objection.

Discussion: This is a tricky area that should be read carefully. The courts have historically allowed the State to charge multiple acts "on one or more occasions" when the victim cannot be more specific. This court seems to say that we can only do it that way if the defendant fails to object. Otherwise, the jury verdict is not unanimous.

Drawdy v. State, 37 Fla. L. Weekly D2112 (Fla. 2d DCA 2012)

Separate convictions for more than one type of sexual battery in a single episode do not violate double jeopardy; each battery is of a separate character and type that requires a different element of proof.

Double jeopardy precluded defendant who was convicted of sexual battery of a child from also being convicted for lewd or lascivious molestation; offenses were committed during a single criminal episode, and defendant could not commit sexual battery without also committing lewd and lascivious molestation.

Graves v. State, 37 Fla. L. Weekly D2040 (Fla. 5th DCA 2012)

Convictions for lewd or lascivious battery and lewd or lascivious molestation violated double jeopardy; the battery count alleged either penetration or union of defendant's penis with the vagina of the victim, the molestation count alleged an unspecified touching, in a lewd or lascivious manner, of the victim's genitalia, and such touching could have occurred with defendant's penis.

Roughton v. State, 37 Fla. L. Weekly D1662 (Fla. 5th DCA 2012):

Although lewd or lascivious intent is often associated with sexual battery, it is not an element of that crime, and may be committed without the intent for sexual satisfaction.

Defendant's convictions for lewd or lascivious molestation and sexual battery, arising from the same act, did not violate the prohibition against double jeopardy; lewd or lascivious molestation required a specific lewd or lascivious intent, which sexual battery did not, and although lewd or lascivious intent was often associated with sexual battery, it was not an element of that crime, and could be committed without the intent for sexual satisfaction.

Note: This case was certified to the Florida Supreme Court on this issue because it conflicts with the First DCA and Second DCA. The Fourth DCA has ruled consistently with this opinion.

Allen v. State, 37 Fla. L. Weekly D280 (Fla. 4th DCA 2012):

Instant messages with nude photographs attached that defendant sent to undercover detective who was posing as a 14-year-old girl constituted "electronic mail" within the meaning of statute making it a felony to transmit, by electronic mail, "an image, information, or data that is harmful to minors" to a specific minor in the state.

Defendant who sent undercover detective who was posing as a 14-year-old girl two instant messages, each with ten nude photographs attached, could be charged with 20 counts of transmitting a harmful image to a minor, representing one for each photograph, rather than just two counts, or one for each instant message; statute punished transmission of "an" image that is harmful to minors, implying that the unit of prosecution was a single image, and detective testified that he had to open each photograph individually, making each a separate image.

Charging defendant with 20 counts of transmitting images harmful to minors, after he sent two instant messages to undercover detective who was posing as a 14-year-old girl, each with 10 nude photographs attached, did not violate double jeopardy; each attached and transmitted photograph was a separate, punishable offense.

Manetta v. State, 2012 WL 555418 (Fla.App. 3 Dist.)

Defendant's two convictions for lewd and lascivious molestation of a child twelve to sixteen years of age violated double jeopardy; the two counts in charging document were identical in every respect, and did not so much as allege separate

acts which might form the basis of separate judgments even if it were permitted under the law.

Benjamin v. State, 36 Fla. L. Weekly D2777 (Fla. 4th DCA 2011):

Lewd or lascivious molestation and lewd or lascivious conduct arose out of one criminal episode, for the purpose of determining whether convictions for both offenses violated defendant's Fifth Amendment right to be free from double jeopardy; both acts were performed on one victim in the same location and with practically no temporal separation.

Berlin v. State, 2011 WL 4905760 (Fla.App. 1 Dist.):

Defendant's convictions and sentences for two counts of sexual battery and one count of lewd and lascivious molestation violated double jeopardy, and thus conviction and sentence for lewd and lascivious molestation would be vacated; sexual battery and lewd or lascivious molestation constituted the same offense for double jeopardy purposes, and all three counts arose out of only two criminal acts of touching or penetration committed within a single criminal episode.

Stowe v. State, 2011 WL 2685611 (Fla.App. 1 Dist.)

"The language of the statute does not contemplate a separate conviction for each child depicted in a single photograph, motion picture, exhibition, show, representation, or other presentation."

Double jeopardy was violated when defendant was convicted for multiple counts based upon multiple children depicted in a single digital video.

Note: This appears to be a case where the defendant possessed a child porn video that was a compilation of multiple child porn video clips. The State argued that the separate videos should be charged separately even though they were combined into a single unit. The court disagreed.

Parton v. State, 2011 WL 1597683 (Fla. 5th DCA 2011)

A defendant can be convicted of both sexual battery and battery as long as the convictions are not based upon the same act.

Murphy v. State, 35 Fla. L. Weekly D2334 (5th DCA 2010):

Defendant's convictions for attempted sexual battery and lewd and lascivious molestation did not violate his right of protection against double jeopardy; unlike the offense of attempted sexual battery, lewd or lascivious molestation did not allege that defendant used his penis, but alleged a lewd touching.

Bishop v. State, 35 Fla. L. Weekly D2039 (Fla. 5th DCA 2010):

Double jeopardy did not bar defendant's convictions for lewd or lascivious molestation or lewd or lascivious conduct, even though the acts supporting the convictions were also used to enhance defendant's kidnapping conviction from a first degree felony to a life felony; the legislature made it clear that an individual who kidnapped a child under the age of thirteen and who, in the course of the kidnapping, committed a lewd or lascivious act against the child may be adjudicated guilty of the lewd or lascivious act in addition to receiving a life felony sentence on the kidnapping offense.

Defendant's convictions for lewd or lascivious molestation and lewd or lascivious conduct violated double jeopardy; the lewd or lascivious molestation charge was based on defendant's act of touching the victim's genital area while the lewd or lascivious conduct charge was based on defendant's act of touching the victim's leg, and the rubbing of the victim's genital area and her leg occurred during a single continuous act.

Firth v. State, 43 So.3d 920 (Fla. 5th DCA 2010)

Convictions for sexual battery with a deadly weapon and battery arising from the same episode violate double jeopardy.

Smith v. State, 35 Fla. L. Weekly D (Fla. 1st DCA 2010)

Defendant's offenses of sexual battery on a person under 12 years of age and lewd or lascivious molestation of a victim less than 12 years of age arose from a single criminal act within a single criminal episode, for purposes of determining whether defendant's convictions of the two offenses violated double jeopardy; victim testified to only a single touching of a body part.

Defendant's offenses of sexual battery on a person under 12 years of age and lewd or lascivious molestation of a victim less than 12 years of age, which arose from a single criminal act within a single criminal episode, were the same offense for double jeopardy purposes, and thus the molestation conviction would be vacated; both offenses required proof of an intentional touching of certain body parts, with sexual battery additionally requiring proof of penetration or union with those body parts.

Comas v. State**,** 35 Fla. L. Weekly D1908 (Fla. 1st DCA 2010):

> Defendant was properly convicted of lewd or lascivious conduct and lewd or lascivious molestation, among other charges, based on distinct criminal acts that occurred within the same criminal episode.

Partch v. State, 35 Fla. L. Weekly D1603 (Fla. 1st DCA 2010):

> Convictions for sexual battery and attempted sexual battery on a person helpless to resist violated double jeopardy; the offenses arose out of the same criminal episode, the charging information did not include language clearly predicating the disputed charges on two distinct sex acts, and the offenses were included in the same charging statute and were degrees of one another.

Roberts v. State, 35 Fla. L. Weekly D1378 (1st DCA 2010)

> "Applying *Meshell* to the case at hand, appellant's convictions for sexual battery and lewd or lascivious molestation do not violate double jeopardy principles because the acts were distinct criminal acts. This distinction is readily apparent here because the information and jury verdict form included particulars for each charge. Examining the specific acts as alleged here, oral and vaginal penetration by appellant's penis require different elements of proof than touching the victim's genitals with appellant's hand and touching the victim's breasts and/or buttocks with appellant's hand and/or mouth."

Davila v. State, 34 Fla. L. Weekly D2174 (Fla. 3d DCA 2009):

> It violates double jeopardy for a defendant to be convicted of aggravated child abuse and kidnapping enhanced by aggravated child abuse.
>
> Generally, a parent cannot be convicted for kidnapping his own child. An exception exists when he "does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself."

State v. Sholl, 34 Fla. L. Weekly D1953 (Fla. 1st DCA 2009):

> Court was in error for dismissing lewd exhibition charge. When defendant exposing himself on a webcam was lewd is a matter for the jury to decide.

Dual convictions for lewd exhibition via webcam and transmission of material harmful to minors by electronic device did not violate double jeopardy.

Court should not rule on double jeopardy motion until sentencing.

Transmission of material harmful to minors is not unconstitutional.

Schuster v. State, 34 Fla. L. Weekly DXX (Fla. 4th DCA 2009):

Defendant who molested 12 year old boy who was spending the night at his house could properly be convicted of four counts of lewd battery and one count of lewd molestation based upon testimony about oral sex both ways, anal sex both ways and fondling of the child's penis.

"We find no double jeopardy violation because the sexual acts were serial, distinct in character, and appellant had sufficient time between each act to reflect and form a new criminal intent."

State v. Meshell, 34 Fla. L. Weekly SXX (Fla. 2009):

Distinct acts of sexual battery do not require a temporal break between them to constitute separate crimes under double jeopardy analysis.

Sexual acts of a separate character and type requiring different elements of proof, such as those proscribed in the sexual battery statute, are distinct criminal acts that the legislature has decided warrant multiple punishments.

The same double jeopardy analysis that applies to acts proscribed under sexual battery statute also applies to acts proscribed under lewd and lascivious battery statute because the definitions of the proscribed acts for each offense are identical.

Acts of oral, anal, and vaginal penetration, as proscribed by statute defining lewd and lascivious battery, are of a separate character and type requiring different elements of proof and are, therefore, distinct criminal acts, such that separate punishments for these distinct criminal acts do not violate double jeopardy.

Darville v. State, 33 Fla. L. Weekly D2532 (Fla. 4th DCA 2008): *On remand from Florida Supreme Court.*

Double jeopardy barred dual convictions for sexual battery arising out of a single encounter in the same space between the same persons, lasting no more than five

minutes, as acts of sexual battery involved exactly the same elements without temporal or spatial separation.

Double jeopardy did not bar separate punishments for defendant's convictions of sexual battery and lewd and lascivious molestation, arising out of conduct occurring during same criminal episode, as each offense contained an element the other did not.

Beahr v. State, 33 Fla. L. Weekly D22307 (Fla. 1st DCA 2008):

Separate convictions of sexual battery on a child and lewd or lascivious molestation which occurred in the same episode violated double jeopardy.

Discussion: The sexual battery on a child charge involved oral sex and the molestation charge involved touching the child's genitals. The court reasoned that you cannot commit sexual battery on a child without also committing lewd molestation, so Blockburger prevents convicting on both. The decision overrules *Seccia v. State,* 720 So.2d 580 (Fla. 1st DCA 1998). The court noted that the sexual battery charge includes the element of penetration that is not included in the molestation charge, but says the molestation charge does not contain any elements in addition to those in the sexual battery charge. The court does not address the fact that lewd molestation requires the touching be done in a lewd manner. Sexual battery does not. Therefore, lewd molestation does have an additional element and should be separate offense. Obviously, the 1st DCA disagrees with my analysis.

Binns v. State, 33 Fla. L. Weekly D1126 (Fla. 4th DCA 2008):

The crimes of lewd and lascivious acts and sexual battery each contain an element that the other does not; therefore a conviction for sexual battery and lewd and lascivious act arising out of the same episode would not violate double jeopardy.

Defendant's conviction on two counts of lewd and lascivious acts against his daughter, arising out of incident in which he touched or rubbed daughter's vaginal area with his hands and touched her breast with his mouth, violated double jeopardy; elements of both counts were identical, and events occurred in a single criminal episode.

Meshell v. State, 33 Fla. L. Weekly D1010 (Fla. 5th DCA 2008):

Double jeopardy prevented defendant from being convicted of two counts of lewd or lascivious battery based upon one count of penis to vagina sex and one count of penis to mouth sex during the same episode.

Conflict certified to Florida Supreme Court.

Discussion: The 5th DCA notes that it is in conflict with every DCA that has addressed this issue and therefore requests the Florida Supreme Court to clarify the issue. Until the Florida Supreme Court addresses the issue, this opinion is only relevant to the cases in that district.

Whittingham v. State, 33 Fla. L. Weekly D612 (Fla. 4th DCA 2008):

Prosecutor's submission to the jury in child sexual abuse case of several counts that included multiple distinct acts of abuse did not constitute fundamental error, and thus, could not be raised for the first time on appeal; the prosecutor charged the defendant with a different type of sexual abuse in each separate count with some counts charging that the act occurred within a specific time frame and others charging the specific type of sexual abuse occurred on one or more occasions within a specified time range.

Because the state may charge a defendant in child **sexual** abuse cases in a manner not permitted in other types of criminal cases, expanding time periods for the commission of offenses and grouping types of offenses together, it is not fundamental error to submit such a charge to the jury.

Bennett v. State, 33 Fla. L. Weekly D98 (Fla. 1st DCA 2007):

Convictions for attempted sexual battery, sexual battery, and lewd and lascivious molestation arose out of multiple offenses and, thus multiple convictions did not violate his double jeopardy rights, although only one victim was involved; record demonstrated several incidents of digital penetration, touching of victim's vagina, and kissing and fondling her breasts throughout a one-year period, victim testified that defendant rubbed her vagina "a lot" of times and touched and kissed her breasts, and defendant admitted touching her vagina four times and digitally penetrating her once or twice.

Claps v. State, (2d DCA 2007):

A defendant may be charged and tried for both an offense and a necessarily lesser-included offense even though the defendant cannot ultimately be adjudicated and sentenced for both offenses due to the protections afforded by the prohibition against double jeopardy.

Discussion: The case basically says we can charge as many crimes as we want, even if they violate double jeopardy. We also have the right to have the jury rule on all counts. Jeopardy only becomes an issue at the end of the trial after the jury has ruled on all of the counts. Therefore, when the defense moves to dismiss some of your counts on double jeopardy grounds, you can use this case to quickly resolve the issue and have the judge defer his ruling until the jury has reached a verdict.

Felton v. State, 32 Fla. L. Weekly D1698 (Fla. 5th DCA 2007):

"We find no double jeopardy violation. The appellant committed multiple sexual acts on the fourteen-year-old victim. The evidence supports a finding that there was a sufficient temporal break between at least two of the acts so as to have allowed appellant "to reflect and form a new criminal intent for each offense." *State v. Paul*, 934 So.2d 1167, 1173 (Fla.2006); see also *Schwenn v. State*, 898 So.2d 1130 (Fla. 4th DCA 2005)."

Capron v. State, 32 Fla. L. Weekly D483 (Fla. 5th DCA 2007):

Conviction for lewd and lascivious molestation did not violate double jeopardy; there was sufficient temporal break between act committed before defendant washed victim and remaining acts that occurred later that evening to allow defendant to reflect and form a new criminal intent.

Multiple convictions for lewd and lascivious battery and lewd and lascivious conduct violated double jeopardy; two lewd and lascivious battery acts were not sufficiently discrete for them to be deemed separate offenses within episode, lewd and lascivious battery included same elements as offense of lewd and lascivious conduct, and two charges could not be considered separate offenses.

When multiple convictions violate double jeopardy, the proper remedy is to vacate the conviction for the lesser offense while affirming the conviction for the greater one.

Discussion: This case includes a good overview of the other myriad of cases that have attempted to confront this issue. One interesting point made by the appellate court is that the charge of lewd conduct does not include any elements that are not already included in lewd battery and lewd molestation charges, therefore, if it is charged in the same episode as one of those charges, it will probably be double jeopardy.

Carlyle v. State, 31 Fla. L. Weekly D2958 (Fla. 2d DCA 2006):

> Four counts of sexual battery did not violate double jeopardy when the "victim described being forced to perform oral sex, followed by vaginal sex, followed by another act of oral sex, and, finally, anal sex. Because there was time between each penetration to reflect and form a new criminal intent, four convictions were appropriate."

Cruz v. State, 31 Fla. L. Weekly D2889 (Fla. 5th DCA 2006):

> Dual convictions for lewd and lascivious molestation by touching breast or clothing covering breast of victim, who was 15 years old, and for lewd or lascivious conduct by sucking or kissing victim's neck violated defendant's constitutional right against double jeopardy; the state's attorney essentially admitted to trial court that defendant's acts occurred during single episode in a single location and without any meaningful temporal breaks between acts, and it was not the case that each offense had an element that the other did not.

Danestan v. State, 31 Fla. L. Weekly D2527 (Fla. 4th DCA 2006):

> Convictions and sentences for both attempted sexual battery on a person 12 years of age or older and lewd or lascivious conduct violated defendant's right against double jeopardy; sole act by which defendant could have been found guilty of either offense occurred when defendant got on top of victim, kissed her, unbuckled and removed his pants, and ejaculated on her.

Hammel v. State, 31 Fla. L. Weekly D2027 (Fla. 2d DCA 2006):

> Defendant was properly convicted of 15 counts of computer child exploitation based upon 15 separate conversations with the undercover detective during the same criminal investigation.
>
> Although all of defendant's acts were targeted at the same victim, separation of time between conversations shows that defendant had time to pause, reflect, and form new criminal intent before initiating each additional conversation.
>
> Single conversation which spanned two days could only be charged as one count.

Ornis v. State, 31 Fla. L. Weekly D1886 (Fla. 4th DCA 2006):

> Convictions for both lewd and lascivious battery on person 12 years of age or older but less than 16 years old, and simple battery as lesser included offense of sexual battery on person 12 years of age or older, based on the same conduct, violated double jeopardy.

Discussion: During the same episode, the defendant fondled and had forcible sex with the victim. He was convicted as charged for both sexual battery and lewd battery for the same act of sexual intercourse. The jury convicted as charge for lewd battery, but convicted the defendant of the lesser included offense of battery on the sexual battery charge. The court ruled that it would have violated double jeopardy to sentence the defendant for both sexual battery and lewd battery, and thus it also violates double jeopardy to sentence him for the lesser included offense of battery.

State v. Paul, 31 Fla. L. Weekly S396 (Fla. 2006):

Neither Double Jeopardy Clause nor statute providing double jeopardy protection prohibited separate convictions and sentences for two counts of lewd and lascivious offenses against 13-year-old victim that occurred in residence, as there was a sufficient temporal break between acts committed by defendant that allowed him to reflect and form new criminal intent for each offense, such that more than one criminal episode occurred; one criminal episode occurred in living room when defendant first entered and the other occurred after defendant invited victim back to a more private room.

Dual convictions of defendant for lewd and lascivious molestation by touching 13-year-old victim's genital area or the clothing covering it and for lewd and lascivious conduct by kissing victim's neck were barred by Double Jeopardy Clause and statute providing double jeopardy protection, as each offense did not require proof of an element that the other did not;

Dual convictions of defendant for committing lewd and lascivious conduct by rubbing his penis on 13-year-old victim's stomach and lewd and lascivious exhibition by intentionally exposing his penis to victim were not barred by Double Jeopardy Clause or statute providing double jeopardy protection, though both crimes occurred based on same act, as each offense required proof of an element that the other did not, and none of the statutory exceptions to "same elements" test applied.

Statutory exception to "same elements" test used to determine whether separate offenses existed, which prohibited multiple convictions and punishments for offenses which were degrees of same offense as provided by statute, did not apply to bar dual convictions of defendant for committing lewd and lascivious conduct by rubbing his penis on 13-year-old victim's stomach and lewd and lascivious exhibition by intentionally exposing his penis to victim, as crimes were not intended to punish the same primary evil, but, rather, different statutory

subsections addressed different evils, i.e., one forbade lewd or lascivious exhibition, while the other forbade lewd or lascivious touching.

Discussion: This case overruled Hunsicker v. State, 881 So.2d 1166 (Fla. 5th DCA 2006). The Supreme Court finally stepped in and partially clarified this rather confusion area of law.

Stanley v. State, 31 Fla. L. Weekly D1679 (Fla. 4th DCA 2006):

Separate convictions for sexual battery with threat to cause serious personal injury and sexual activity with a minor not prohibited by double jeopardy.

Offenses are separate offenses and not merely degree variants of same core offense.

Henry v. State, 31 Fla. L. Weekly D1219 (Fla. 1st DCA 2006):

Separate convictions for lewd and lascivious battery and misdemeanor battery that arose from same continuous criminal episode violated prohibition against double jeopardy, thus requiring misdemeanor battery conviction to be vacated.

Samuel v. State, 31 Fla. L. Weekly D1104 (Fla. 4th DCA 2006):

"In this case, the State charged the defendant with performing oral sex on a male child. In a separate count, the State charged the defendant with having the male child perform oral sex on the defendant. The testimony reflected two sexual acts 'distinct in character' and 'temporally separated' such that the defendant had sufficient time to reflect and form a new criminal intent. There was therefore no double jeopardy violation."

White v. State, 31 Fla. L. Weekly D991 (Fla. 4th DCA 2006):

Double jeopardy was not violated by convictions for both lewd and lascivious battery and lewd and lascivious molestation as there was a break between acts committed by defendant where he could reflect and form criminal intent before next act; after defendant performed oral sex upon victim and penetrated her with his penis, acts which formed the basis of battery charge, defendant stopped, left the bedroom, got a rag for the victim to use, returned and handed the rag to the victim, who left the bedroom and went into the bathroom, and it was only until after victim returned that defendant made victim put her hand on his penis, an act which formed the basis for molestation charge.

Leyva v. State, 31 Fla. L. Weekly D936 (Fla. 4th DCA 2006):

> Offenses of sexual battery and lewd and lascivious conduct were not mutually exclusive since statute defining lewd and lascivious acts was amended to remove language specifically excluding sexual battery as a means of perpetrating a lewd and lascivious act.
>
> Offenses of attempted sexual battery and lewd and lascivious conduct took place at the same time and constituted a single act, and thus convictions of both offenses violated defendant's constitutional rights under the double jeopardy clause, where the acts for which defendant was convicted were pushing down the victim on a bed and rubbing her leg, the incident lasted approximately five minutes, and the defendant did not have time to pause, reflect, and form a new criminal intent between the two acts.

Robinson v. State, 30 Fla. L. Weekly D245 (Fla. 2d DCA 2006)

> Convictions for sexual battery and lewd or lascivious molestation violated double jeopardy clause, where both convictions were based on single act of defendant digitally penetrating victim's vagina.
>
> Issue certified to Supreme Court.

Moore v. State, 30 Fla. L. Weekly D2682 (Fla. 4th DCA 2005):

> Convictions for both child neglect and aggravated child abuse (torture) did not violate prohibition against double jeopardy; offenses were clearly different crimes that required different elements, in that aggravated child abuse required the state to prove that defendant willfully tortured her stepdaughter, while child neglect required that defendant be her stepdaughter's caregiver and act with culpable negligence in failing to provide her with care, supervision, and services.

Johnson v. State, 30 Fla. L. Weekly D2626 (Fla. 2nd DCA 2005):

> Convictions for both sexual battery on a victim under twelve and **lewd** and lascivious molestation violated double jeopardy, where both offenses were perpetrated on the same victim, at the same time and place, and during the same criminal episode.

Douglas v. State, 30 Fla. L. Weekly D2559 (Fla. 3rd DCA 2005):

> Sufficient evidence established that defendant convicted of two counts of lewd and lascivious battery and one count of lewd and lascivious molestation against

his stepdaughter engaged in a series of abuse events, so as to support separate convictions and sentences; stepdaughter provided evidence of events occurring at different times, on different dates and in different locations in the house, and testimony of treating physician substantiated stepdaughter's story.

Darville v. State, 30 Fla. L. Weekly D2304 (Fla. 4th DCA 2005): *remanded 32 Fla. L. Weekly S426 (Fla. 2007)to reconsider in light of State v. Paul*

Three acts giving rise to charges of sexual battery and lewd and lascivious molestation were separate sexual offenses, and thus convictions for each act did not implicate double jeopardy, although all three acts occurred within five minutes of each other and arose during a single episode, where one of defendant's acts involved penetration with a finger, another involved vaginal union with defendant's penis, and the third involved fondling of victim's breasts.

Discussion: The Fourth DCA continues to struggle with how many charges are appropriate during a single criminal episode. The various opinions on the topic are discussed in an effort to reconcile the seemingly contradictory opinions.

Gisi v. State, 30 Fla. L. Weekly D2070 (Fla. 2d DCA 2005):

Multiple convictions for lewd and lascivious conduct involving 13-year-old child arising from single sexual episode violated prohibition against double jeopardy; separate convictions based on handling and fondling activity were immediate prelude to sexual intercourse.

On the sentencing issue, the State concedes that penetration points should not have been added to Gisi's sentencing scoresheet because the jury was not asked to, and did not, make findings of penetration. Therefore, we reverse the sentences and remand for resentencing without penetration points.

Discussion: This case says basically says you cannot charge the defendant for both the foreplay and the eventual sexual act.

Hubbard v. State, 30 Fla. L. Weekly D2095 (Fla. 1st DCA 2005):

Defendant was entitled to new trial for sexual battery upon child 12 or older without child's consent based on child victim's recantation of trial testimony that sexual relations had not been consensual, which recantation ultimate resulted in perjury conviction against victim, where victim's consent was essential element of offense, and there was no other evidence at trial to show that sexual relations were not consensual.

Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial; the trial court should consider all of the circumstances of the case, including the recantation, and it should deny the motion if it is not satisfied that the recantation is true.

Discussion: This case demonstrates the danger of charging lewd battery and sexual battery in the alternative. In this case, the jury convicted of both and the judge dismissed the lewd battery charge based on double jeopardy grounds. After trial, the victim recanted on the consent issue. The State asked the appellate court to reinstate the lewd battery count when the sexual battery count was reversed based on the recantation, but the appellate court said it was without authority to do so. The court did state, however, that the trial court could address the issue on remand.

Schwenn v. State, 30 Fla. L. Weekly D864 (Fla. 4th DCA 2005):

In ruling that the defendant could be convicted of eight counts of sexual battery for repeatedly sexually battering a victim during an attack that lasted 3 hours, the court stated, "Here, the sequence of sexual batteries on the victim was: (1) vaginal penetration; (2) anal penetration; (3) vaginal penetration; (4) cunnilingus; (5) anal penetration; (6) fellatio; (7) vaginal penetration; and (8) anal penetration. Even though there were three events of vaginal penetration and three of anal penetration, each was separated from a similar event by another type of sexual battery. Thus, they were distinct in character and temporally separated, which gave the defendant sufficient time between each penetration to reflect and form a new criminal intent."

Paul v. State, 30 Fla. L. Weekly D856 (Fla. 4th DCA 2005):

Double jeopardy was not violated by two counts against defendant of lewd or lascivious acts against 13-year-old victim as there was break between acts committed by defendant where he could reflect and form criminal intent before next act; defendant deliberately asked victim if they could move from living room into empty bedroom where they were less likely to be discovered, thus separating counts involving kissing victim on neck and touching victim's genitals outside his clothing in living room from counts in empty bedroom where defendant exposed his genitals to victim and rubbed his genitals on victim.

Act of defendant exposing his genitals to victim leading up to more serious offense of defendant rubbing his genitals on victim in empty bedroom was permissive lesser offenses of more serious act, and thus, could not be chargeable as separate offense.

Act of kissing victim on neck leading up to more serious offense of touching victim's genitals outside his clothing in living room was permissive lesser offenses of more serious act, and thus, could not be chargeable as separate offense.

"We conclude that the separate acts committed in the bedroom, one in touching the victim's nude body in the manner described, and the other in Paul exposing his genitals, are not chargeable as separate offenses. Paul also should not be punished separately for the cumulative acts occurring in the living room."

Romage v. State, 30 Fla. L. Weekly D203 (Fla. 5th DCA 2005):

Double jeopardy permitted defendant's conviction of only count of lewd and lascivious molestation for defendant's acts touching victim's breast, digitally penetrating her vagina and touching her vagina with his penis, where although defendant did not engage in the three acts at exactly the same time, the same victim was involved, attack occurred solely in one location, and there was no meaningful temporal break in the episode.

Discussion: It should be noted that he was also convicted of one count of sexual battery and that charge was not a double jeopardy problem.

Rios v. State, 29 Fla. L. Weekly D2850 (Fla. 5th DCA 2004):

Trial court's attachment of amended information to its order summarily denying defendant's motion for postconviction relief did not conclusively refute defendant's double jeopardy claim by demonstrating a temporal break between each of the alleged child molestation offenses, and thus, remand was necessary to enable trial court to attach portions of record to support its ruling, or to conduct evidentiary hearing on the merits.

Discussion: The information charged two separate counts based on the defendant fondling the victim's breast and vaginal area multiple times during a seven month time span. The appellate court was not satisfied that each event was sufficiently separated by time to constitute a unique offense. Consequently, when you charge a defendant with committing an offense on one or more occasions, double jeopardy might be a problem unless you separate the different types of touching by different dates or other means.

State v. Roberson, 29 Fla. L. Weekly D2774 (Fla. 5th DCA 2004):

Pretrial order dismissing and consolidating two counts of lewd molestation based upon possibility that counts might violate double jeopardy was premature where jeopardy had not yet attached.

Cabrera v. State, 29 Fla. L. Weekly D2243 (Fla. 5th DCA 2004):

Double jeopardy was violated when defendant was charged with two counts of lewd and lascivious behavior pursuant to F.S. 798.02 for touching a victim's breast and buttocks during a single episode.

Hunsicker v. State, 29 Fla. L. Weekly D1924 (Fla. 5th DCA 2004): *overruled by State v. Paul*

Separate convictions for separate crimes of lewd or lascivious molestation, lewd or lascivious conduct, and lewd or lascivious exhibition did not violate double jeopardy principles.

Discussion: This case provides a good discussion of the history of double jeopardy as it applies to committing lewd acts on children. The court points out that prior precedent limiting the number of charges allowed in one episode is based on an interpretation on the lewd and lascivious statute that was repealed effective October 1, 1999. The court reasoned that the legislative intent in rewriting F.S. 800.04 indicates that multiple counts can be filed for one episode if different subsections of the statue are charged. It appears that this case will conflict with some of the other districts and will probably end up in the Florida Supreme Court.

Muarez v. State, 29 Fla. L. Weekly D1912 (4th DCA 2004):

Defendant was erroneously convicted of one count of lewd and lascivious battery of child under age sixteen and two separate counts of lewd and lascivious molestation where all three counts arose from same criminal episode.

Discussion: The defendant was charged with lewd molestation for fondling the victim's breast and lewd battery for having intercourse with her. The court ruled that the defendant could only be convicted of one charge.

Messer v. State, 29 Fla. L. Weekly D1626 (Fla. 5th DCA 2004):

Convictions on two counts of lewd and lascivious molestation not precluded by double jeopardy where there was substantial competent evidence demonstrating that there was sufficient spatial and temporal differentiations between the multiple

occurrences so that jury could properly find that defendant had time to pause, reflect and form new criminal intent between the occurrences.

Discussion: Unfortunately, the court did not discuss the facts of this case, so the value of this decision is limited.

Coffield v. State, 29 Fla. L. Weekly D1148 (Fla. 4th DCA 2004):

Record does not support conviction on two counts of lewd and lascivious battery because acts on which charges were based occurred almost simultaneously during single sexual assault, with no temporal breaks, and without requisite time for defendant to pause and reflect in order to form second criminal intent.

Discussion: Here comes another bad case for us. In this case, a 22-year-old grabbed a 13-year-old girl and forced her to have sex. He claimed it was consensual. Unfortunately, the appellate court was not very clear on the exact nature of the touching. The facts say, "he both touched and inserted his penis into her vagina." This could mean that he caused his penis to unite with her vagina on one occasion and penetrated it on another, or it could mean that he touched (penetrated) her vagina with his hand and his penis." The episode lasted ten minutes.

Taylor v. State, 29 Fla. L. Weekly D1040 (Fla. 2d DCA 2004):

Separate convictions for aggravated child abuse and child abuse were improper where offenses involved same act committed against the same child.

Cabenela v. State, 29 Fla. L. Weekly D777 (Fla. 3rd DCA 2004):

Error to deny claim that multiple convictions and sentences for lewd assault upon a child under the age of sixteen were violative of double jeopardy where all of the charges arose out of a single criminal episode, and there was no significant spatial or temporal break in the episode.

Discussion: This case interprets chapter 800.04 prior to its October 1, 1999 revision. The concerning part of this opinion is its scope. Count I charged the defendant with performing oral sex on the victim, Count II charged the defendant with fondling the victim's vagina. Count III charged the defendant with fondling the victim's breasts and Count IV charged the defendant with licking the victim's breast. All of these offenses occurred in a single episode. It is understandable that counts II-IV are duplicitous, but count I appears to be of a different type and character that should be distinguishable from the other three counts. Under the current statute, the oral sex would be a lewd battery and the other three counts

would be a lewd molestation. Whether that distinction is still valid under this case is not completely clear.

Pires v. State, 29 Fla. L. Weekly D614 (Fla. 4th DCA 2004):

Convictions of two counts of lewd and lascivious conduct on a person under sixteen for touching the victim's breast and inserting his tongue into her mouth violated double jeopardy where both acts occurred in one location without a temporal break.

Binder v. State, 28 Fla. L. Weekly D2046 (Fla. 5th DCA 2003):

Two charged offenses of failing to report were separate and no double jeopardy violation occurred when defendant was convicted of both where one charge was based on defendant's failure to register with FDLE and the other charge was based on failure to register with DHSMV.

Gisi v. State, 28 Fla. L. Weekly D1589 (Fla. 4th DCA 2003):

Defendant entitled to relief on claim that appellate counsel was ineffective for failure to argue that conviction of handling and fondling child under age of sixteen in addition to convictions for committing actual intercourse upon child under age of sixteen for acts occurring during a single continuous course of conduct violated double jeopardy.

Defendant entitled to relief on claim that appellate counsel was ineffective in failing to argue that trial court erred in sentencing him above the statutory maximum on basis of victim injury without submitting issue of victim injury to jury in violation of *Apprendi v. New Jersey.*

Defendant entitled to relief on claim that appellate counsel was ineffective for failure to argue that trial court erred in denying motion for judgment of acquittal as to counts for which there was no evidence that the offenses occurred on the dates specified by state in statement of particulars.

Marshall v. State, 28 Fla. L. Weekly D1616 (Fla. 5th DCA 2003):

Error to deny post conviction relief claim that multiple convictions for lewd and lascivious acts on child resulted in double jeopardy violation where denial was based on wording of information but information did not conclusively show that alleged acts were committed at different times.

Tannihill v. State, 28 Fla. L. Weekly D1526 (Fla. 4th DCA 2003):

Separate convictions for both sexual battery with slight force and lewd and lascivious battery based on same act of oral penetration or union violate defendant's right against double jeopardy.

Discussion: When you charge a defendant with lewd battery and sexual battery based upon the same act, you are actually charging the two offenses in the alternative. If the jury convicts on both, the judge should sentence on one of the two convictions and dismiss the other. The law allows us to charge both, but not convict on both.

King v. State, 28 Fla. L. Weekly D163 (Fla. 5th DCA 2003):

Defendant was erroneously convicted of two counts of lewd or lascivious molestation based on acts of having union with victim's buttocks and handling or fondling victim's breasts where the two counts arose from the same episode.

Jenkins v. State, 813 So.2d 182 (Fla. 4th DCA 2002):

Separate convictions for sexual battery and attempted sexual battery violated double jeopardy where convictions arose out of single episode in which defendant sexually battered victim in living room, picked her up to carry her to a bedroom to continue the attack, but dropped victim and discontinued attack before entering the bedroom.

Morman v. State, 811 So.2d 714 (Fla. 2d DCA 2002):

Multiple convictions for lewd and lascivious act on child based on separate acts of improperly touching two proscribed areas on victim's body during single episode violated double jeopardy.

No error in separate convictions for two distinct episodes in which defendant improperly touched victim on two separate days.

Discussion: The defendant simultaneously touched the victim's breast and buttocks on one day and her breast and genital area the next day. He cold only be convicted of two count; one for each day.

Cardali v. State, 794 So.2d 719 (Fla. 3d DCA 2001):

Sexual battery is not an essential element of kidnapping, and to convict for one and not the other does not result in an inconsistent verdict.

Rios v. State, 791 So.2d 1226 (Fla. 5th DCA 2001):

> Separate convictions for capital sexual battery and lewd and lascivious assault based on same act violated double jeopardy.

D.R. v. State, 790 So.2d 1242 (Fla. 5th DCA 2001):

> Where juvenile was charged in one count with sexual battery by placing his penis in or in union with child's vagina, and trail court, in non-jury trial, found reasonable doubt regarding contact and penetration with respect to that count, juvenile could not be convicted on second count charging lewd and lascivious act in presence of another child by placing his penis in or in union with first child's vagina.
>
> Language in lewd and lascivious count relating to sexual contact and penetration was not mere surplusage because the manner or nature of an act is essential to the charge.
>
> Discussion: The court noted that if the State had simply tracked the language of the statute, the conviction would have stood. When the State chose to insert the words "by placing his penis in or in union with K.T.'s vagina in the presence of I.T," that act became a necessary element of proof. Be careful not to add unnecessary information into your informations or they may come back to haunt you.

Eaddy v. State, 789 So.2d 1093 (Fla. 4th DCA 2001):

> Where evidence failed to reflect that during single episode of lewd assault defendant had time to pause, reflect, and form a new criminal intent between inappropriate touchings of victim's breast and vagina, deeming acts separate and distinct would violate defendant's right to be free of double jeopardy.
>
> Discussion: This important case has broad-ranging implications for our case filing decisions. It appears we cannot file a separate charge for each body part fondled during a sexual encounter unless we can show the touchings are separate distinct acts with separate criminal intent. The victim must be able to articulate sufficient details to make this distinction.

Overway v. State, 783 So.2d 373 (Fla. 5th DCA 2001):

> Separate convictions for aggravated child abuse did not constitute double jeopardy violation where there were two separate allegations of child abuse-striking the child in the abdomen and holding his hands under hot water.

State v. Nardi, 779 So.2d 596 (Fla. 4th DCA 2001): Lebow

Separate convictions for attempted sexual battery and burglary of a dwelling with battery did not violate double jeopardy principles.

Discussion: The appellate court distinguished this opinion from its previous opinion in Guinto v. State, 693 So.2d 46 (Fla. 4th DCA 1997) which ruled that convictions for attempted sexual battery with a firearm and aggravated assault with a firearm violated double jeopardy when the two offenses were in reality one and the same.

Geske v. State, 770 So.2d 252 (Fla. 5th DCA 2000):

If a victim's confinement in an attempted sexual battery is incidental to the attempt, a conviction for false imprisonment must be vacated when a conviction for attempted sexual battery is also obtained.

Discussion: After exposing his penis to the victim, the defendant chased her down and tackled her twice. Before abandoning the attack as two men approached, the defendant told the victim that he had a gun, covered her moth, grabbed at her underwear, told her that he was not going to rape her, but continued to touch her inappropriately.

Garcia v. State, 769 So.2d 449 (Fla. 4th DCA 2000):

Separate convictions for sexual battery and simple battery were improper where there was one continuous offense, and battery was not separate form sexual battery.

Discussion: The battery conviction was a lesser included offense of the charged burglary with a battery. The State argued that the defendant's act of pushing the victim onto a bed was a separate act of battery preceding the sexual battery. The appellate court ruled that "the act was an integral part of the sexual battery, since it prevented the victim from escaping and facilitated the subsequent act. Please note that this rationale does not apply to aggravated battery convictions. See Bradham v. State, 657 So.2d 40 (Fla. 1st DCA 1995) and Hipp v. State, 509 So.2d 1208 (Fla. 4th DCA 1987).

Young v. State, 762 So.2d 595 (Fla. 5th DCA 2000):

Separate conviction of both sexual battery and burglary with battery, based on same sexual battery, not improper.

Koenig v. State, 757 So.2d 595 (Fla. 5th DCA 2000):

> Separate convictions of aggravated manslaughter of child and child abuse did not violate double jeopardy rights. Child abuse is not subsumed in charge of aggravated manslaughter of child.

Pryor v. State, 755 So.2d 155 (Fla. 4th DCA 2000):

> Error to convict defendant for separate counts of indecent assault where neither Information nor evidence showed if incidents occurred at different times or arose from separate acts.

Folk v. State, 753 So.2d 675 (Fla. 2d DCA 2000):

> Separate convictions for handling and fondling child under age 16 and lewd and lascivious conduct in presence of child under age 16, violates double jeopardy rights when the same conduct forms the basis for both convictions.
>
> Discussion: The court does not discuss the specific facts of this case, therefore, it is difficult to know how to distinguish a particular fact pattern under this holding. For instance, if A fondles B and A is subsequently charged for lewd acts in the presence of B, as well as lewd acts upon B, that scenario would appear to violate the double jeopardy clause. On the other hand, if A fondled B in the presence of victim C, it appears that you could charge A for fondling B and A for fondling B in C's presence. The holding in this case is not specific enough to address that issue.

Harris v. State, 743 So.2d 133 (Fla. 1st DCA 1999):

> Court improperly adjudicated defendant guilty of both child abuse and battery of the same victim, based upon the same conduct.

Rivera v. State, 745 So.2d 343 (Fla. 4th DCA 1999):

> Court did not err in denying motion for mistrial and giving curative instruction when witness testified that defendant had been discharged from army for sexual harassment where testimony was not intentionally elicited.
>
> State's filing of amended information deleting some charges and changing dates on other charges after jury had been sworn, did not violate prohibition against double jeopardy when no prejudice was demonstrated.

Skeens v. State, 733 So.2d 1094 (Fla. 2d DCA 1999):

> Defendant's convictions for sexual battery and for lewd and lascivious act upon child under 16 violated double jeopardy, where evidence was undisputed that defendant committed only one penile penetration that constituted crime of sexual battery.

State v. Keith, 732 So.2d 9 (Fla. 3rd DCA 1999):

> Trial court's pretrial order which required the prosecution to elect only one of the two charges against the defendant on which to proceed to trial and to dismiss the remaining charge departed from the essential requirements of law by unnecessarily and prematurely interfering with prosecutorial discretion in the charging area, and thus, pretrial order could not stand.
>
> The basis of the order was a finding that defendant could not be convicted of both charges without violation of the double jeopardy rule. Making no judgment on the legal validity of this finding, the appellate court agreed with the State that the order was premature because jeopardy has not yet attached in this case.
>
> Discussion: The opinion does not mention what the underlying charges were, but the decision can be relevant in many of our cases. For instance, if we choose sexual battery and indecent assault in the alternative, the court cannot make us choose one or the other before trial.

Aiken v. State, 742 So.2d 811 (Fla. 2d DCA 1999):

> Defendant properly convicted of both sexual battery with a firearm and aggravated assault with a firearm where both convictions resulted from same incident.
>
> Double jeopardy does not prohibit conviction for permissive lesser included offense when defendant has also been convicted of a greater offense arising out of the same conduct.

Hausen v. State, 730 So.2d 327 (Fla. 5th DCA 1999):

> Separate conviction for battery and commission of lewd act on child were improper where charges were based on same conduct.
>
> Acquittal of defendant of sexual battery count was not inconsistent with verdict of guilty on charge of lewd act. Sexual battery and lewd act charges were not interlocking but were, in fact, mutually exclusive.

Simmons v. State, 722 So.2d 862 (Fla. 5th DCA 1998):

> Defendant who committed sexual act on one child in the presence of another child was properly convicted of both lewd act by having sexual intercourse with child under sixteen and lewd act in presence of child.

Seccia v. State, 720 So.2d 580 (Fla. 1st DCA 1998):

> Where evidence supported finding that separate acts of fondling victim and oral sex occurred, double jeopardy did not preclude separate convictions for both sexual battery and lewd act.

Donaldson v. State, 722 So.2d 177 (Fla. 1998):

> No merit to contention that separate convictions of first-degree murder and aggravated child abuse violated rights against double jeopardy. Jury could have found aggravated child abuse from evidence of willful abuse and torture without resort to aggravated battery.

Burk v. State, 705 So.2d 1003 (Fla. 4th DCA 1998):

> No error in charging defendant with multiple counts of promoting sexual performance by child predicated on twenty five nude photographs defendant took of fourteen-year-old stepdaughter. Direction of poses and taking of separate photographs by defendant sufficient to support separate violations of statute for each photograph produced.
>
> Discussion: Note that this case was decided under F.S. 827.071(3) regarding promoting a sexual performance by a child. The text of the statute does not specifically say that each photograph can be a separate charge. On the other hand, F.S. 827.071(5), which covers the unlawful possession of such a photograph specifically includes language that the possession of each photograph constitutes a separate offense. Therefor if you had assumed the absence of such language would preclude charging separate counts under the promoting section, you assumed incorrectly.

Khan v. State, 704 So.2d 1129 (Fla. 4th DCA 1998):

> Dual convictions for *interfering with custody of child* and *removing a minor from the state contrary to court order* violate double jeopardy clause, because both offenses seek to punish the same underlying act of unlawfully taking a child, and differ only in degree of violation.

Dingle v. State: 699 So.2d 834 (Fla. 3rd DCA 1997):

> A defendant's conviction for both felony murder and the underlying felony of aggravated child abuse was not barred by the double jeopardy clause.

Beltran v. State, 700 So.2d 132 (Fla. 4th DCA 1997) Speiser

> Separate convictions for aggravated child abuse, attempted second degree murder, and sexual battery of a child do not violate double jeopardy principles because the offenses are not variants of the same core offense.
>
> Where defendant never claimed that his confession was false, but only that his confession was involuntary due to intoxication, trial court did not err in refusing to admit into evidence at suppression hearing defendant's expert evidence regarding false confessions. Court's decision not to be construed as any approval of the admission of such "false confession" evidence in any case.

State v. Cohen, 696 So.2d 435 (Fla. 4th DCA 1997):

> Under double jeopardy clause, defendant may be punished for same conduct under both Pornography and Child Exploitation Act (F.S. 847.0135) and statute prohibiting possession of presentations that include sexual conduct by child.

Guinto v. State, 693 So.2d 46 (Fla. 4th DCA 1997):

> Double jeopardy clause prohibits separate convictions and sentences for attempted sexual battery a with firearm and lesser included offense of aggravated assault with firearm.

State v. Jones, 668 So.2d 1073 (Fla. 2d DCA 1996):

> Under dual sovereignty exception to double jeopardy, successive prosecutions in Florida and another state for charges arising out of same conduct are not barred. Defendant who was convicted in foreign state based on incident in which he took his son from Florida to foreign state and concealed son from mother could be prosecuted in Florida for interference with child custody based on same incident.

D.D.M. v. State, 662 So.2d 384 (Fla. 5th DCA 1995):

> Adjudication of lewd act upon child could not be sustained on same evidence used to establish sexual battery or attempted sexual battery.

Hartman v. State, 659 So.2d 1360 (Fla. 5th DCA 1995):

In prosecution for sexual battery on a nine year old and for lewd and lascivious assault, error to deny motion for judgment of acquittal on the latter charge where the only act proven as basis for the charge was the same act necessary to sustain the sexual battery charge.

Bradham v. State, 657 So.2d 40 (Fla. 1st DCA 1995):

Double jeopardy principle is not violated by separate convictions for aggravated battery and sexual battery.

Roe v. State, 654 So.2d 1287 (Fla. 1st DCA 1995):

Separate convictions for attempted sexual battery and lewd and lascivious assault arising from single act improper where conduct alleged in count charging lewd and lascivious assault formed the basis for the attempted sexual battery conviction.

Bernard v. State, 651 So.2d 817 (Fla. 1st DCA 1995):

Conviction for lewd and lascivious assault reversed where conduct which resulted in conviction arose out of same act for which defendant was convicted of sexual battery. Ongoing sexual assault in this case could not be broken into two sequential crimes.

Burrows v. State, 649 So.2d 902 (Fla. 1st DCA 1995):

In sexual battery prosecution where defendant raped his victim in the bedroom, went into the living room where he sat on the couch for a period of time, whereafter he again raped her in the bedroom, it was proper for court to sentence defendant to two separate counts of sexual battery. The defendant had time for reflection between the two acts.

McConn v. State, 648 So.2d 847 (Fla. 2d DCA 1995):

Defendant could not be convicted of lewd, lascivious or indecent conduct based upon his placing his exposed penis between the legs of victim and of sexual activity by one with custodial authority based upon penetrating victim's vagina with his penis where charges arose out of same encounter. In view of allegations of information and evidence presented at trial, lewd and lascivious conduct was lesser included offense of sexual activity.
Discussion: This opinion does not say you cannot charge both indecent assault and sexual activity with a child in the same information. It says that you cannot

charge both crimes for different stages of the same act. In this case, the state charged indecent assault for the penis touching the outside of the vagina and sexual activity for the act of penetration.

Thompson v. State, 650 So.2d 969 (Fla. 2d DCA 1995):

Concurrent sentences for separate convictions of sexual battery on a physically incapacitated victim and sexual activity while in custodial authority of a child based on a single sexual act violated prohibition against multiple punishments. Multiple punishments based on single act are impermissible when offenses are distinguished only by degree elements.

Audano v. State, 641 So.2d 1356 (Fla. 2d DCA 1994):

Defendant's conviction and sentence on charges that he touched vaginal area of victim with his hands and that he penetrated victim's vagina with his fingers was double jeopardy, where touching was based on same evidence as penetration.

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

Defendant's convictions for both battery and lewd and lascivious assault arising from single act involving either touching victim's vagina or vaginal area violated constitutional prohibition against double jeopardy.

Proper remedy was to vacate conviction and sentence for battery.

Lewis v. State, 626 So.2d 1073 (Fla. 1st DCA 1993):

Defendant could not be convicted of both sexual battery on person under 12 and committing lewd and lascivious act on same person, where defendant was specifically charged with committing lascivious act by committing sexual battery upon victim, and trial court instructed jury that conviction for lewd and lascivious act required showing that defendant touched victim's vaginal area.

Hallberg v. State, 621 So.2d 693 (Fla. 2d DCA 1993):

School teacher's convictions for committing lewd act on child were not lesser included offenses of convictions for engaging child in sexual activity by person standing in position of custodial authority in that each offense required proof of element that other did not; digital penetration of victim's vagina giving rise to various charges occurred on numerous different occasions.. Decision approved in part, quashed in part 649 So.2d 1355.

Roberts v. State, 620 So.2d 1082 (Fla. 2d DCA 1993):

Defendant charged with lewd and lascivious act in the presence of a child under 16 years of age, could be charged for only the number of acts, not the number of victims.

Discussion: The defendant masturbated in front of four girls at the same time. This constitutes only one act. This case involves one of the more bizarre factual scenarios.

Wallen v. State, 606 So.2d 399 (Fla. 5th DCA 1992).

Defendant was properly convicted of five counts of sexual activity with child 12 years of age or older with whom defendant stood in position of familial or custodial relation, despite his claim that statute did not provide that each incident of sexual activity constitutes separate crime; each count charged discrete offense constituting separate criminal episode on specific dates or within time frames.

State v. Hernandez, 596 So.2d 671 (Fla. 1992):

Single act of masturbating in front of two children could be basis of only one lewd act charge; number of distinct lewd acts, rather than number of witnesses or size of audience, should determine number of convictions.

Saavedra v. State, 576 So.2d 953 (Fla. 1st DCA 1991):

Double jeopardy principles did not preclude convictions and sentences for multiple acts of sexual battery of the same type and character committed against the same victim, where victim was moved to different locations and defendant had time to pause and reflect and form a new criminal intent between acts of penetration.

Sexual batteries of a separate character and type requiring different elements of proof warrant multiple punishments, but fact that same victim is sexually battered in the same manner more than once in a criminal episode by the same defendant does not conclusively prohibit multiple punishments; spatial and temporal aspects are equally as important as distinctions in character and type in determining whether multiple punishments are appropriate.

Discussion: This is an excellent case for the issue of filing multiple charges. The opinion discusses various other decisions on the same issue. Other relevant issues discussed in the opinion are scoring injuries under the sentencing guidelines and severing co-defendants. It should be noted that this case went up

to the Florida Supreme Court on the issue of whether a minor may consent to a warrantless search of a home. The Supreme Court did not address the issues discussed above.

Hipp v. State, 509 So.2d 1208, (Fla. 4th DCA 1987)

Defendant could be convicted and sentenced for both sexual and aggravated battery without violating double jeopardy rights, even though both convictions arose out of same transaction.

George v. State, 488 So.2d 589 (Fla. 2d DCA 1986):

An act of single penetration could not support conviction for both sexual battery by force or violence not likely to cause serious personal injury and sexual battery by force or violence likely to cause serious injury.

Duke v. State, 444 So.2d 492 (Fla. 2d DCA 1984):

Attempted penetration of vagina and attempted penetration of anus were distinct acts of attempted sexual battery, requiring different elements of proof, and despite short interval of time between each act, constituted two separate offenses of attempted criminal sexual battery.

Discussion: This case also stands for the proposition that capital sexual battery is not a life felony for all purposes. It is a capital in all respects save the death penalty. This case will be helpful when you get a judge or clerk of court who tries to treat it as a life felony.

Bartee v. State, 401 So.2d 890, 893, (Fla. 5th 1981)

Footnote: E. g., whether multiple factual events, such as repeated blows or knife stabbings, constitute separate offenses or but one offense in the aggregate, may depend on whether they are different in quality or are sufficiently separated by time or place to be different factual events and therefore "separate and distinct" offenses in fact. See, e. g., Johnson v. State, 366 So.2d 418 (Fla. 1978); Walker v. State, 386 So.2d 630 (Fla. 5th DCA 1980); Bass v. State, 380 So.2d 1181 (Fla. 5th DCA 1980); Hearns v. State, 378 So.2d 70 (Fla. 3d DCA 1979). As to whether the taking at one time of multiple objects owned by various persons constitutes a single larceny offense or multiple offenses, see Hearn v. State, 55 So.2d 559 (Fla. 1951).

Bass v. State, 380 So.2d 1181 (Fla. 5th DCA 1980):

Evidence that defendant forced victim to commit one act upon him while driving his car and then forced her to commit another act after reaching his destination which, although sexual battery and falling within same statute, was of separate character and type, time interval between one act and the other, although minimal, was nevertheless sufficient to separate one episode from the other, and therefore defendant was properly convicted of two counts of sexual battery.

In prosecution for sexual battery and kidnapping, wherein it appeared that defendant forced the victim into his car and drove to a more isolated spot, removal of victim was not incidental and no part of removal constituted element of either act of sexual battery, and trial court did not err in adjudging defendant guilty of both sexual battery and kidnapping.

JOINDER AND SEVERANCE OF OFFENSES:

Charles v. State, 37 Fla. L. Weekly D416 (Fla. 4th DCA 2012):

Charges of sexual battery and fraudulent use of a credit card were based on two or more connected acts or transactions and, thus, could be brought in the same information; defendant had access to victim's credit card, victim of both crimes was the same, and the credit card was used hours after the sexual battery.

Hart v. State, 2011 WL 1815144 (Fla.App. 1 Dist.)

Since no meaningful relationship existed between the two criminal episodes, trial court abused its discretion when joined for a single trial a case, in which defendant was charged with sexual battery, kidnapping, aggravated battery and armed robbery, and a second case, in which defendant was charged with carjacking involving different victim; while the two criminal episodes were separated by only a few hours and a couple of blocks, these factors were not sufficient to prove a proper and significant link between the crimes, even taking into consideration fact that BB gun was used during both criminal episodes, and in fact, the two criminal episodes were freestanding and distinct.

Trial court's error in joining criminal charges for a single trial, when no meaningful relationship existed between the two criminal episodes, was not harmless; although State alleged that some of the testimony concerning each of the criminal episodes could have been introduced in the trial of the other as similar fact evidence, the two criminal episodes were distinctly different.

McGee v. State, 34 Fla. L. Weekly D2056 (Fla. 4th DCA 2009):

> Defendant was not entitled to severance of two charges of unlawful sexual activity with a minor; the two crimes were committed against the same victim, in the same area, and in the same manner, and the victim reported all of the crimes at the same time.
>
> In determining whether severance of charges is warranted, a court considers the temporal and geographic association of the crimes, the nature of the crimes, and the manner in which the crimes were committed.

Price v. State, 33 Fla. L. Weekly S821 (Fla. 2008):

> Information charging defendant with sexual battery on a physically incapacitated person by "oral and/or vaginal penetration by, or union with the sexual organ of victim," provided sufficient notice to defendant of the allegations against him, so as to comply with requirements of due process; information tracked the language of sexual battery statute, referenced specific section of the criminal code which sufficiently detailed all the elements of the offense, and could include alternative bases for conviction, since offense of sexual battery could be proven by alternative methods.

Burnett v. State, 33 Fla. L. Weekly D219 (2d DCA 2008):

> Defendant was charged with soliciting young boys to engage in lewd acts while being videotaped. The police locate the videotape in the same location as numerous computer disks containing hundreds of child pornography images. All counts were filed in one information. After conviction, the defendant alleged ineffective assistance of counsel based upon the fact that his attorney did not move to sever the lewd conduct counts from the child pornography counts.
>
> In remanding the case for an evidentiary hearing, the court noted that the facts presented should have resulted in a severance of the counts.
>
> The court also noted that the possession of child pornography images and the videotape depicting the boys were not similar enough to be admissible as Williams Rule evidence.

Shermer v. State, 31 Fla. L. Weekly D2305 (Fla. 4th DCA 2006):

Defendant, who was charged with capital sexual battery and lewd and lascivious molestation committed upon four victims, was entitled to sever charges relating to two of the victims; no temporal or episodic connection existed between the charges.

The "connected acts or transactions" requirement in joinder rule requires that the charges joined for trial must be considered in an episodic sense.

There must be a "meaningful relationship" between or among the charges before they may be tried together, and thus in or to be joined, the crimes in question must be linked in some significant way.

Discussion: This is a very important case to read if the defendant ever moves to sever counts when you have two or more victims charged in the same information. The opinion reviews other similar opinions. Importantly, the court notes that judicial economy does not outweigh the defendant's rights to sever and the fact the other victims are admissible Williams Rule evidence is irrelevant.

Boley v. State, 739 So.2d 730 (Fla. 2d DCA 1999):

It was error to consolidate cases of two separate defendants who sexually battered the same victim when each sexual battery took place at different times and places. The error was not fundamental, however, and defense counsel stipulated to the consolidation so the conviction was affirmed.

Wright v. State, 739 So.2d 1230 (Fla. 1st DCA 1999):

No error in refusal to sever count charging sexual activity by person 24 years of age or older with person 16 years or 17 years of age from count charging sexual battery on person twelve years of age or older where charges arose from same act of transaction which occurred in one location within a short period of time.

Severance not required because of the fact that defendant, by presenting consent defense as to sexual battery charge, was forced to admit guilt to charge of engaging in a lawful sexual activity with person age 16 or 17.

Domis v. State, 755 So.2d 683 (Fla. 4th DCA 1999):

No abuse of discretion in denial of motion for severance of counts where lewd assaults were linked in that the victim was the same, all assaults started in the same manner and the victim reported all assaults at once.

Error to deny motion for mistrial were witnesses repeatedly referred to lewd acts allegedly committed by defendant on another child.

Discussion: The defendant was charged with seven separate lewd acts that took place at four different times over an eighteen month period. The Appellate Court ruled that since the separate assaults were connected in a significant way, they could all be charged in one information. The appellate court looked at the various similarities in this case such as where the assaults took place, how the victim was touched and how the suspect made certain incriminating statements regarding all of the events at a family meeting. It is not clear from this opinion how many similarities are required before we can charge numerous sexual assaults on the same victim in a single information.

Gudinas v. State, 693 So.2d 953 (Fla. 1997):

Defendant's attempt to rape first victim occurred within three hours previous to, and in same proximate area of, later rape and murder, and defendant's failure to complete attack against first victim may have provided a causal link to his completed attack on second, therefore, it was proper to join the offenses.

Discussion: This case is useful for two issues. The first helps us with cases of attempted sexual battery. The second deals with joinder of offenses. If you review a case where the defendant assaults more than one woman on the same night, you may be able to use this case to justify filing both incidents in the same information. If you can show that the acts were part of a crime spree or that there is another meaningful relationship between the two offenses, you may be able to charge them together.

Ghent v. State, 685 So.2d 72 (Fla. 1st DCA 1996):

Error to deny motion to sever counts charging offenses that occurred at different times, involved different victims, and were not connected in episodic sense.

Discussion: An eight year old boy was anally penetrated by his mother's boyfriend twice during the summer of 1993. During the same summer, the boy's cousin was anally penetrated by the same suspect at the same home. The sexual acts were not part of the same criminal episode. It was reversible error not to sever the sexual battery counts involving different victims. This opinion cites the case of *Roark v. State*, 620 So.2d 237 (Fla. 1st DCA 1993) as factually indistinguishable. The *Roark* court held that "in child sexual molestation cases, motions to sever should be granted where offenses occurred at different times and places, involving different victims." The *Roark* case was also quoted as saying it was error not to sever offenses that "were related only in that they were sex

offenses occurring within the same seven-month period, the victims were related to each other, and the defendant allegedly was guilty."

This decision does not explain whether a *Williams Rule* notice was filed by the state. If a *Williams Rule* motion was granted, it could have been argued that judicial economy would dictate not severing offenses. This issue was not addressed by the appellate court.

Hammond v. State, 660 So.2d 1152 (Fla. 2d DCA 1995):

Abuse of discretion to fail to sever charges involving different victims over two and a half year period where state was unable to prove temporal relationship between the crimes and only similarities between the crimes were that they were sexual in nature and allegedly occurred in teacher's home.

Wonyetye v. State, 648 So.2d 797 (Fla. 4th DCA 1994):

Where defendant was charged in 19 counts for conduct (exposure of sexual organs) occurring over several days at two separate residences, trial court did not abuse its discretion in denying motion to try each count separately, and in ordering separate trials for counts relating to the separate residences.

Discussion: The court notes that two or more related offenses may be joined if they are based on the same act or transaction or on two or more connected acts or transactions. In the instant case each of the offenses tried together shared a temporal and geographical proximity, and the nature of the crimes and the activities of the defendant in each were very similar.

Snyder v. State, 564 So.2d 193 (Fla. 5th DCA 1990):

In prosecution for aggravated child abuse, district court did not abuse its discretion by consolidating for trial offenses of December 1988 with those of March 1989; defendant showed no prejudice, as offenses were similar and based on connected acts.

Warren v. State, 475 So.2d 1027 (Fla. 1st DCA 1985):

Separate child abuse incidents involving different children were reasonable considered connected together as part of one ongoing pattern for purposes of joinder of criminal charges arising out of each incident, and thus joinder of such charges was proper; incidents involved single household, same family members, a short time frame, and same adult primary custodial supervisor of children at time of their injuries.

MUTUALLY EXCLUSIVE CRIMES:

Note: The cases in this section are based upon the rule of law announced in Hightower v. State, which states that sexual battery and indecent assault are mutually exclusive. If you commit one of them then by definition you cannot have committed the other. It should be noted that the Hightower opinion interpreted the Indecent Assault law prior to it's October 1, 1999 change, which eliminates the phrase "without committing the crime of sexual battery."

Palmer v. State, 28 Fla. L. Weekly D96 (Fla. 1st DCA 2003):

> New trial required where information alleged two alternative theories regarding defendant's actions, one of which constituted crime of sexual battery; jury returned general verdict of guilt which did not differentiate between the two theories; and appellate court previously held that "one cannot be convicted of a lewd and lascivious act upon a child under 12 years of age for conduct that . . . constitutes the crime of sexual battery."
>
> Discussion: The language of the information read, *BILLY JOE PALMER, between and including the dates of March 1, 1998, and November 1, 1998, in the County and State aforesaid, did unlawfully handle, fondle or make an assault upon a child under the age of sixteen (16) years, to-wit: [ ], age 9, in a lewd and lascivious manner, by oral and/or digital manipulation of the penis of [ ] and by penile penetration of the anus of [ ], in violation of Section 800.04, Florida Statutes.* The court noted that the lewd and lascivious statute has changed since the case law that dictates the reversal of this case.

Rice v. State, 774 So.2d 40 (Fla. 2d DCA 2000):

> Separate conviction for attempted sexual battery and attempted lewd and lascivious act improper where charges arose out of one single incident. The two counts were mutually exclusive.

Hausen v. State, 730 So.2d 327 (Fla. 5th DCA 1999):

> Separate conviction for battery and commission of lewd act on child were improper where charges were based on same conduct.

Acquittal of defendant of sexual battery count was not inconsistent with verdict of guilty on charge of lewd act. Sexual battery and lewd act charges were not interlocking but were, in fact, mutually exclusive.

Banks v. State, 728 So.2d 768 (Fla. 1st DCA 1999):

Defendant cannot be convicted of both sexual battery and lewd and lascivious conduct arising from same sexual act. The two offenses are mutually exclusive.

Beck v. State, 732 So.2d 427 (Fla. 1st DCA 1999):

Defendant cannot be convicted of a lewd and lascivious act upon a child under twelve (12) based upon conduct that constitutes a crime of sexual battery.

D.B. v. State, 23 Fla. L. Weekly D2658 (Fla. 4th DCA December 9, 1998):

Error to adjudicate juvenile delinquent for both sexual battery and lewd, lascivious or indecent act where both charges arose out of same incident. It is well settled that the crimes of sexual battery and lewd and lascivious assault are mutually exclusive and a defendant cannot be convicted of both crimes arising from the same incident.

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

No error in refusing to instruct jury on offense of lewd and lascivious assault as a lesser included offense of sexual battery. The two offenses are mutually exclusive.

Roberts v. State, 687 So.2d 959 (Fla. 5th DCA 1997):

Defendant may not be convicted of both sexual battery under section 794.011 and lewd and lascivious conduct under section 800.04(3) since the latter offense applies only to crimes committed "without committing the crime of sexual battery" and the two offenses are thus mutually exclusive.

Discussion: The court relies on the Florida Supreme Court case of State v. Hightower. As noted in 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…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 it clear that these particular

crimes are mutually exclusive." The Hightower opinion is cited again for the proposition that "If uncertain of the proof, the cautious prosecutor will probably charge sexual battery and lewd and lascivious conduct in separate counts, recognizing, however, that only one conviction can be obtained for the same conduct."

This decision leaves us in a difficult predicament. If we file our cases as suggested by the Florida Supreme Court, then consent will be an issue at trial on the sexual battery count, even though it is not relevant to the indecent assault count. If we file a single count of indecent assault and the evidence clearly shows that the conduct constitutes sexual battery, the defense could request a directed verdict or a judgment of acquittal based upon the fact that the two charges are mutually exclusive. Be prepared for this argument when it arises.

State v. Stone, 677 So.2d 982 (Fla. 5th DCA 1996):

The crimes of sexual battery and lewd and lascivious assault are mutually exclusive and a defendant cannot be convicted of both crimes if the charges arise out of the same act.

Evidence was sufficient to support separate acts supporting separate offenses.

No error in scoring convictions of attempted sexual battery as first degree felonies even though instructions and verdict form did not expressly reference attempted capital sexual battery.

Vitagliano v. State, 680 So.2d 500 (Fla. 1st DCA 1996):

Retrial of defendant on charge of sexual battery of child less than twelve years of age was barred where jury in first trial deadlocked on sexual battery charge, but acquitted defendant of charge of lewd and lascivious conduct which rested on same facts as sexual battery charge.

"There is no dispute that the crimes of sexual battery and lewd and lascivious conduct are by statutory definition mutually exclusive and that 'the crime of lewd and lascivious conduct was not and is not a necessarily included offense of the crime of sexual battery.'"

Discussion: This court points out the Florida Supreme Court's footnote in the *Hightower* opinion which states that the wise prosecutor will charge indecent assault and sexual battery in the alternative when uncertain of proof. If the jury convicts on both charges, the defendant will only be sentenced on one. The problem in this case is that the jury was hung on one of the two charges and the

prosecutor requested the wrong jury instruction. This is an important case to read if you want to avoid a similar fate.

Pierce v. State, 662 So.2d 398 (Fla. 5th DCA 1995):

Defendant could not be convicted of both sexual battery upon child under twelve and lewd act upon child where charges arose out of same act.

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

Defendant could not be convicted of both sexual battery and lewd and lascivious assault based on single incident in which defendant penetrated victim's vagina with his finger; offenses were mutually exclusive.

Walker v. State, 622 So.2d 630 (Fla. 3d DCA 1993):

Charge of lewd and lascivious assault on two year old child and charge of attempted sexual battery of that child which involved same incident and acts were mutually exclusive, and thus judgment and sentence for lewd and lascivious assault had to be vacated.

Discussion: Based upon the facts of the case, it was wise for the State to charge both charges. The judge should have realized that they could only be charged in the alternative.

State v. Hightower, 509 So.2d 1078 (Fla. 1987):

Crime of lewd and lascivious conduct is not necessarily included offense of crime of sexual battery, so that where defendant was charged only with the "sexual battery" of six year old complainant, trial court should not have instructed on other uncharged offense.

Discussion: This case has been listed under this subsection not for the direct ruling of the court, but for the implications of the ruling. The Supreme Court notes that "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 it clear that these particular crimes are mutually exclusive." Therefore intercourse with a child under 12 is a sexual battery irrespective of consent and by definition cannot be lewd and lascivious conduct pursuant to 800.04. The Supreme Court notes in footnote number 4 that "If uncertain of the proof, the cautious prosecutor will probably charge sexual battery and lewd and lascivious conduct in separate

counts, recognizing that only one conviction can be obtained for the same conduct." As an example, it you have a case of digital penetration of a child under twelve years of age, it may be advisable to charge both indecent assault and sexual battery of a child. If you have a proof problem with the penetration, it will give the jury an alternative verdict choice. If the jury returns a verdict on both counts, you will be able to sentence the defendant to the more serious charge and dismiss the other.