

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAFAEL JACOB STOFFEL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari
to the Florida First District Court of Appeal**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

Document	Page
1. May 16, 2018, opinion of the Florida First District Court of Appeal	A-1
2. February 5, 2019, order of the Supreme Court of Florida.	A-8
3. December 19, 2018, order of the Supreme Court of Florida.	A-9
4. December 14, 2015, judgment of the First Judicial Circuit of Florida.	A-11
5. December 14, 2015, sentence of the First Judicial Circuit of Florida.	A-14

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-0079

RAFAEL JACOB STOFFEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

May 16, 2018

B.L. THOMAS, C.J.

Appellant, Rafael Jacob Stoffel, appeals his conviction and sentence for lewd or lascivious molestation of a child under the age of twelve. § 800.04(5), Fla. Stat. (2014). Appellant raises two issues on appeal: 1) whether the trial court erred by denying his request for a jury instruction on the lesser-included offense of battery; and 2) whether the trial court's imposition of the minimum-mandatory term of twenty-five years' imprisonment constitutes cruel and unusual punishment under both the Florida and federal constitutions.* We find no merit as to the second

* Per statute, a conviction for lewd or lascivious molestation of a child under the age of twelve requires that a trial court impose one of two sentencing options: 1) life imprisonment; or

issue, but write to address Appellant's claim that he was entitled to a jury instruction on battery.

I.

Appellant took his nine-year-old stepdaughter, S.P., to a movie on a "daddy-daughter" date to celebrate her upcoming birthday. A few minutes into the movie, Appellant asked if he could touch S.P.'s breasts. S.P. consented and Appellant proceeded to put his hand underneath S.P.'s shirt and grabbed her breasts. After the movie, Appellant apologized to S.P. for his actions.

Approximately a year after the incident, S.P.'s mother asked S.P. if Appellant had ever touched her inappropriately. S.P. then told her mother what occurred. S.P.'s mother then confronted Appellant about the incident, and Appellant admitted to touching S.P.'s breasts. Appellant expressed remorse for his actions and self-reported the incident by calling the Department of Children and Families (DCF). As a result, DCF sent its investigator and an Okaloosa County Deputy Sheriff to S.P.'s home. Recorded interviews were conducted with S.P., her mother, and Appellant. S.P. reiterated what had occurred during the movie. During his interview, Appellant stated that when he apologized to S.P. for his actions, she stated, "Well, I did say yes." At the conclusion of the interviews, Appellant was arrested and charged with lewd or lascivious molestation of a child under the age of twelve.

During trial, S.P. testified that Appellant touched her breasts for approximately two to three minutes and told her that she was "growing up" and "becoming quite the woman." Additionally, S.P. testified that she "felt like something was wrong, but I wasn't, like, exactly sure, and I didn't really know what was going on." Appellant testified and admitted to touching S.P.'s breasts for a few seconds. Both the State and defense

2) "a split sentence . . . of at least twenty-five years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life." § 775.082(4)(a), Fla. Stat. (2014).

counsel stipulated that, while Appellant was touching S.P., Appellant told S.P. "your chest is getting big."

At the charge conference, defense counsel asked for a jury instruction on the lesser-included offense of battery. The trial court denied the request. The trial court, however, granted defense counsel's request for a jury instruction on the lesser-included offense of attempted lewd or lascivious molestation and a jury instruction for an unnatural and lascivious act.

In its closing statement, the defense argued that Appellant did not have the lascivious intent required to be found guilty of lewd or lascivious molestation. The trial court then instructed the jury:

THE COURT: Lewd or lascivious molestation. To prove the crime of lewd or lascivious molestation, the State must prove the following three elements beyond and to the exclusion of a reasonable doubt: One, [S.P.] was under the age of 12 at the time of the offense. Two, Rafael Stoffel intentionally touched in a lewd or lascivious manner the breasts of [S.P.]. Three, Rafael Stoffel was 18 years of age or older at the time of the offense.

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

Neither the victim's loss of chastity nor consent is a defense to the crime charged. The Defendant's ignorance of the victim's age, the victim's misrepresentation of her age, or the Defendant's bona fide belief of the victim's age is not a defense to the crime charged.

During its deliberations, the jury asked the trial court the following question: "Ask [Appellant] why he decided to reach under her shirt. What was he thinking? What was his reasoning?" The trial court responded by informing the jury that "you have all of the evidence that's been received for your

consideration of the verdict in this matter.” The jury then resumed its deliberations and found Appellant guilty as charged.

II.

There are two categories of lesser-included offenses: necessary and permissive. *Sanders v. State*, 944 So. 2d 203, 206 (Fla. 2006). “Necessarily lesser-included offenses are those offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense.” *Id.* In contrast, a permissive lesser-included offense is one where both offenses appear to be separate on the face of the statutes, “but the *facts alleged* in the accusatory pleadings are such that the lesser [included] offense *cannot help but be perpetrated* once the greater offense has been.” *Id.* (quoting *State v. Weller*, 590 So. 2d 923, 925 n.2 (Fla. 1991)) (emphasis added).

A trial court must instruct the jury on a necessary lesser-included offense. *McKiver v. State*, 55 So. 3d 646, 649 (Fla. 1st DCA 2011). However, the instruction on a permissive lesser-included offense must be given only if: 1) the charging document alleges all the statutory elements of the requested permissive lesser-included offense; and 2) some evidence is adduced at trial that establishes those statutory elements. *Khianthalat v. State*, 974 So. 2d 359, 361 (Fla. 2008). Battery is listed as a lesser-included offense of lewd or lascivious molestation. Fla. Std. Jury Instr. (Crim.) 11.10(c). Accordingly, Florida courts have found that battery is a permissive lesser-included offense of lewd or lascivious molestation. *Barnett v. State*, 45 So. 3d 963, 964 (Fla. 3d DCA 2010). The question for this Court is thus two-fold: 1) did the State’s information allege the statutory elements of battery, and if so, 2) did the evidence adduced at Appellant’s trial establish those elements?

III.

The elements of battery are an actual and intentional touching or striking of another, without their consent. § 784.03(1)(a)1., Fla. Stat. The fact that Appellant intentionally touched S.P. is uncontested. As a result, this Court’s analysis centers on the remaining statutory element of consent.

The State's second amended information alleged that Appellant "on or about June 22, 2014, at and in Okaloosa County, Florida, while being eighteen (18) years of age or older, 31 years of age, did unlawfully and intentionally touch in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than twelve (12) years of age, S.P., . . ., 9 years of age, or force or entice S.P. to touch the perpetrator, in violation of Section 800.04(5)(b), Florida Statutes."

The language of the information makes no mention of Appellant's touching being against the will of S.P., and there is no evidence in the record to support the finding that S.P. did not consent to Appellant's touching. Certainly, S.P.'s testimony indicates that at the time she felt uncertain or taken aback by Appellant's conduct. It is clear, however, that S.P.'s verbal statements to Appellant before and after the incident demonstrate that the touching was consensual.

We find the holding in *Barnett* to be persuasive here. The defendant in *Barnett* was charged with lewd or lascivious molestation of a child under the age of twelve. 45 So. 3d at 964. He requested a jury instruction on battery, which the trial court denied. *Id.* Relying on *Khianthalat*, the Third District affirmed the trial court, holding that the defendant was not entitled to a jury instruction on battery, because "[t]he information did not include any language stating that the touching was against the will of the victim." *Id.*

The court in *Barnett* addressed *Belser v. State*, 854 So. 2d 223 (Fla. 1st DCA 2003), which predated *Khianthalat*. *Barnett*, 45 So. 3d at 964. In *Belser*, the defendant was charged with lewd or lascivious molestation of a child under the age of sixteen. 854 So. 2d at 224. On appeal, the defendant argued that the trial court erred by denying his request for a jury instruction on battery. *Id.* This Court held that the defendant was entitled to the instruction and reversed. *Id.* at 225. In our rationale, we noted that "[t]he state concedes that simple battery is a permissive lesser included offense, that unlawful touching was alleged in the information, and that evidence of battery was

presented at trial to support such a finding.” *Id.* at 224. But our decision in *Belser* made no attempt to analyze the remaining statutory element that the touch be against the will of the victim. Consequently, the Third District in *Barnett* found that “*Belser* does not survive the more recent decision of the Supreme Court in *Khianthalat*.” 45 So. 3d at 964. We agree, and hold that *Belser* has been abrogated by the rule of law articulated by the Florida Supreme Court in *Khianthalat*.

But Appellant argues that the fact that S.P. was under the age of twelve satisfies the requirements of *Khianthalat*, because a minor cannot give consent to an unlawful sexual touching; thus, as a matter of law, Appellant’s acts were without S.P.’s consent. This assertion is untenable, however, given our Court’s recent affirmation that parents and those *in loco parentis* are privileged to touch their children, non-abusively, against their will. *Morris v. State*, 228 So. 3d 670 (Fla. 1st DCA 2017). As a matter of law, Appellant could not commit a battery against his stepchild, *unless* Appellant touched her in a lewd manner, which is unlawful, and therefore the fondling would be a lewd and lascivious molestation. Thus, either the act of fondling the nine-year old’s breasts was a lewd molestation or it was no crime at all, because a *non-lewd* touching of a child by a parent *cannot constitute a battery*, absent evidence of physical injury or other factors not alleged or proven here. See § 784.085, Fla. Stat.; § 827.03(1)(a)&(b), Fla. Stat.

If it had received the battery instruction, the jury could have only found Appellant guilty of battery if they found that the State failed to prove the charged offense (as well as the lesser-included offenses of attempted lewd or lascivious molestation or unnatural and lascivious act) beyond a reasonable doubt. Such a finding necessarily means that the jury would have determined that Appellant did not act with a lascivious intent. Therefore, the resulting touch between Appellant and S.P. could not constitute battery, as a matter of law. *Morris*, 228 So. 3d at 673. Thus, the only proper choices for the jury to consider were in fact provided: Either Appellant committed a lewd or lascivious act, or he committed no crime at all

The record is undisputed that Appellant touched S.P.'s breasts. Appellant admitted touching the victim's breasts. Therefore, the only issue remaining for the jury to resolve was whether Appellant had a lascivious intent. Appellant asked S.P. if she liked being touched, and Appellant commented that S.P. was becoming "quite the woman." Both parties stipulated that Appellant told S.P. that "your chest is getting big." Based on these facts, the jury had sufficient evidence to conclude that Appellant acted with lascivious intent.

AFFIRMED.

OSTERHAUS and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Michael Ufferman, Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Trisha Meggs Pate, Assistant Attorney General, Thomas H. Duffy, Assistant Attorney General, Tayo Popoola, Assistant Attorney General, and Steven Woods, Assistant Attorney General, Tallahassee.

Supreme Court of Florida

TUESDAY, FEBRUARY 5, 2019

CASE NO.: SC18-956

Lower Tribunal No(s).:

1D16-79;

462014CF001876XXXAFX

RAFAEL JACOB STOFFEL

vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

On December 19, 2018, this Court entered its order accepting jurisdiction and setting oral argument. We have now determined that the Court is without jurisdiction and, therefore, the Petition for Review is dismissed as improvidently granted.

No motion for rehearing or reinstatement will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.
POLSTON and LABARGA, JJ., dissent.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court

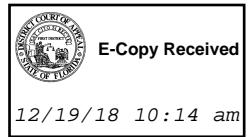


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Served:

HON. J. D. PEACOCK, CLERK
HON. KRISTINA SAMUELS, CLERK
HON. WILLIAM FRANCIS STONE, JUDGE

MICHAEL R. UFFERMAN
STEVEN E. WOODS



E-Copy Received

12/19/18 10:14 am

Supreme Court of Florida

WEDNESDAY, DECEMBER 19, 2018

CASE NO.: SC18-956
 Lower Tribunal No(s).:
 1D16-79; 462014CF001876XXXAFX

RAFAEL JACOB STOFFEL

vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

The Court accepts jurisdiction of this case.

Petitioner's initial brief on the merits must be served on or before January 8, 2019; respondent's answer brief on the merits must be served twenty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits must be served twenty days after service of respondent's answer brief on the merits.

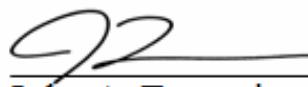
The Clerk of the First District Court of Appeal must file the record which must be properly indexed and paginated on or before February 18, 2019. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

PARIENTE, QUINCE, POLSTON, and LABARGA, JJ., concur.
 CANADY, C.J., dissents.

Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

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 John A. Tomasino
 Clerk, Supreme Court



CASE NO.: SC18-956

Page Two

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Served:

MICHAEL R. UFFERMAN
STEVEN E. WOODS
HON. KRISTINA SAMUELS, CLERK

- Probation Violator
- Community Control Violator
- Retrial
- Re-Sentencing

State of Florida

v.

Defendant: RAFAEL JACOB STOFFEL

Address: 1502 ROYAL PALM DR
NICEVILLE, FL 32578

D.O.B.: 9/24/1982

RECEIVED
JD PEACOCK III
In the Circuit Court, First Judicial Circuit, in
and for Okaloosa County, Florida

Division 002

2015 DECEMBER 14 Case Number(s) 2014 CF 001876 F

CLEARED: 2015 DECEMBER 14
OKALOOSA COUNTY
FT. WALTERS JAIL, FL

JUDGMENT

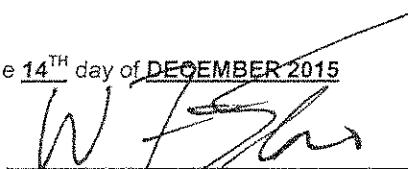
The defendant Rafael Jacob Stoffel, being personally before this court represented by Tony Henderson, Esq., the attorney of record, and the state represented by Christine Bosau, Esq., and having

- been tried and found guilty by jury of the following crime(s)
- entered a plea of guilty to the following crime(s)
- entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
1	Lewd Or Lascivious Molestation (Offender 18 Or Older, Victim Less Than 12)	800.04(5)(b)	F'L	14-CF-1876	4601098930

- and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).
- and being a qualified offender pursuant to s.943.325, the defendant shall be required to submit DNA samples as required by law.
- and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in open court in Okaloosa County, Florida, on the 14TH day of DECEMBER 2015


WILLIAM F. STONE

Circuit Judge

Defender Rafael Jacob Stoffel

Case Number(s) 2014 CF 001876 F 002

CHARGES/COSTS/FEES

The defendant is hereby ordered to pay the following sums if checked:

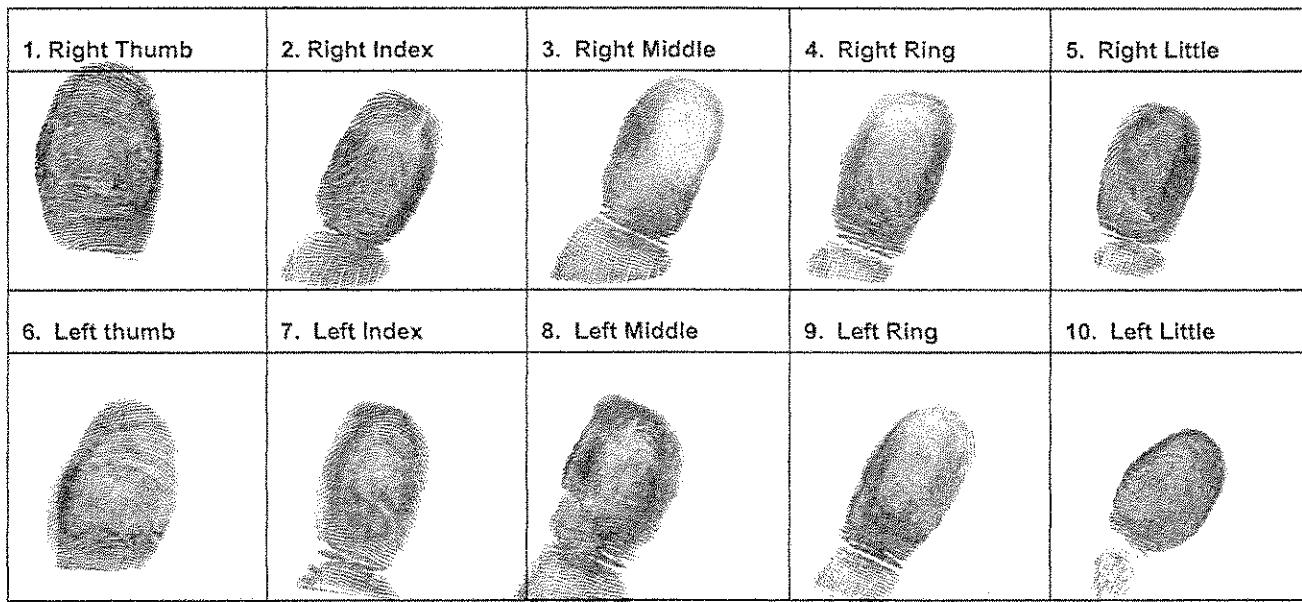
- \$50.00 pursuant to section 938.03, Florida Statutes (Crimes Compensation Trust Fund)
- \$3.00 as a court cost pursuant to section 938.01, Florida Statutes (Criminal Justice Trust Fund)
- \$2.00 as a court cost pursuant to section 938.15, Florida Statutes (Local Law Enforcement Education)
- \$50.00 as a court cost pursuant to section 775.083(2), Florida Statutes (Crime Prevention (BOCC))
- \$20.00 as a court cost pursuant to section 938.06, Florida Statutes (Crime Stopper Trust Fund and Fee)
- \$225.00 as a court cost pursuant to section 938.05, Florida Statutes (Additional court cost (CJF))
- \$65.00 as a court cost pursuant to section 939.185(1)(a), Florida Statutes (Additional costs (BOCC) – Programs)
- \$100.00 as a court cost pursuant to section 938.27(8), Florida Statutes (Cost of Prosecution)
- \$100.00 as a court cost pursuant to section 938.25, Florida Statutes (FDLE Operating Trust Fund Fee)
- \$151.00 as a court cost pursuant to section 938.10, Florida Statutes (Crimes Against Minors)
- \$151.00 as a court cost pursuant to section 938.085, Florida Statutes (Rape Crisis Trust Fund)
- \$201.00 as a court cost pursuant to section 938.08, Florida Statutes (Domestic Violence Trust Fund)
- A sum of \$100.00 pursuant to section 938.29, Florida Statutes (Court Appointed Counsel Fees)
- \$50.00 pursuant to sections 27.525 and 938.29, Florida Statutes (Affidavit of Indigent Status Application Fee)
- Restitution in accordance with Court's pronouncement: _____
- Other: _____

DONE AND ORDERED in open court in Okaloosa County, Florida, on the 14TH day of DECEMBER 2018


WILLIAM F. STONE
Circuit Judge

Defendant Rafael Jacob Stopfel case Number(s) 2014 CF 1876

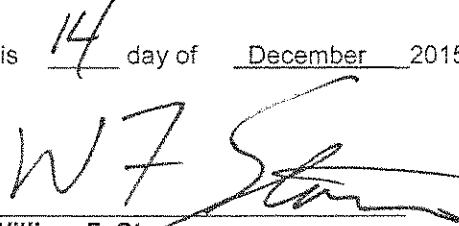
FINGERPRINTS OF DEFENDANT



Fingerprints taken by: Name Dave Cooper #142 Title: DEPUTY SHERIFF

I HEREBY CERTIFY that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, Rafael Stopfel, and that they were placed thereon by the defendant in my presence in open court this date.

DONE and ORDERED in open court in Okaloosa County, Florida this 14 day of December 2015.


William F. Stone
CIRCUIT JUDGE

RECEIVED
JD PEACOCK II
10:48 AM 22 DEC 2015
CLERK'S OFFICE
OKALOOSA COUNTY
FT. WALTERS, FLA.

Page 3 of 6

Defender Rafael Jacob Stoffel

Case Number(s) 2014 CF 001876 F 002

SENTENCE
(As to Count(s): 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, Tony Henderson, Esq., and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matter in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable)

- and the Court having on _____ deferred imposition of sentence until this date
(date)
- and the Court having previously entered a judgment in this case on _____ now re-sentences the defendant
- and the Court having placed the defendant on probation and having subsequently revoked the defendant's probation.

It is the Sentence of the Court that:

- The defendant pay a fine in the amount of \$_____, pursuant to section 775.083, Florida Statutes, plus \$____ as the 5% surcharge required by section 938.04, Florida Statutes.
- The defendant is hereby committed to the custody of the Department of Corrections.
- The defendant is hereby committed to the custody of the Sheriff of Okaloosa County, Florida.
- The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check One; unmarked sections are inapplicable):

- For a term of natural life.
- For a term of 25 years (min/man).
- Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If a split sentence, complete the appropriate paragraph.

- Followed by a period of LIFE on probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
- However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defender Rafael Jacob Stoffel

Case Number(s) 2014 CF 001876 F 002

SPECIAL PROVISIONS
(As to Count(s): 1)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm It is further ordered that the 3 year minimum imprisonment provisions of section 775.087(2)(a), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking It is further ordered that the _____ mandatory minimum imprisonment provisions of Section 893.135(1) Florida Statutes, is hereby imposed for the sentence specified in this count.

**Controlled Substance
Within 1,000 Feet of School** It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**Habitual Violent
Felony Offender** The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order or stated on the record in open court.

**Law Enforcement
Protection Act** It is further ordered that the defendant shall serve a minimum of _____ year(s) before release in accordance with section 775.0823, Florida Statutes.

Capital Offense It is further ordered that the defendant shall serve a life sentence without the possibility of parole in accordance with Florida Statute 775.082.

**Short-Barreled Rifle
Shotgun, Machine Gun** It is further ordered that the minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.

**Continuing Criminal
Enterprise** It is further ordered that the 25 year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

**Taking a Law Enforcement
Officer's Firearm** It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Sexual Predator The defendant is adjudicated a sexual predator as set forth in section 775.21, F.S.

Sexual Offender The defendant meets the criteria for a sexual offender as set forth in section 943.0435(1)(a)1a., b., c., or d.

Defender Rafael Jacob Stoffel

Case Number(s) 2014 CF 001876 F 002

Other Provisions:

Retention of Jurisdiction

The Court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes.

Jail Credit

It is further ordered that the defendant shall be allowed a total of 141 days as credit for time incarcerated before imposition of this sentence.

Prison Credit

It is further ordered that the defendant will be allowed credit for all time previously served on this count in the Department of Corrections prior to re-sentencing.

Consecutive/Concurrent

It is further ordered that sentence imposed for count _____ shall run (check one): consecutive to concurrent with the sentence set forth in count _____ of this case.

**Consecutive/Concurrent
As to Other Convictions**

It is further ordered that the composite term of all sentences for the counts specified in this order shall run (check one): consecutive to concurrent with the following (check one):

Any active sentence being served.

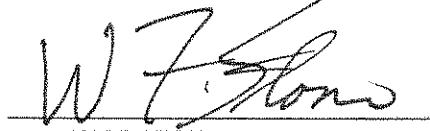
Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Okaloosa County is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statutes.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within thirty (30) days from this date with the clerk of this Court and the defendant's right to the assistance of counsel in taking the appeal as the expense of the state on showing indigency.

In imposing the above sentence, the court further orders: no contact with S.P. and no unsupervised contact with minors.

DONE AND ORDERED in open court at Okaloosa County, Florida this 14TH day of DECEMBER 2015.


WILLIAM F STONE
Circuit Judge