NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA D. MYERS, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the State proved the essential element of "without the consent" beyond a reasonable doubt.

Whether the trial court's refusal to charge the lesser included offense of sexual battery denied Petitioner a complete defense.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner Joshua D. Myers and Respondent State of Georgia. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1 (b) (iii), are as follows:

1. Superior Court of Gwinnett County, Case No. 15B-01359-4, State v. Joshua D. Myers, Jury trial held August 15-16, 2016 and October 17-19, 2016; Sentence entered October 31, 2016; Motion for new trial hearing held March 9, 2018; Order denying motion for new trial entered on August 27, 2018.
2. Court of Appeals of Georgia, Case No. A19A0816, Joshua D. Myers v. The State, Opinion rendered October 22, 2019; Order denying motion for reconsideration entered on November 4, 2019.
3. Georgia Supreme Court, Case No. S20C0544, Joshua D. Myers v. The State, Order denying petition for writ of certiorari entered June 29, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Myers respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINION AND ORDERS BELOW

The Opinion of the Georgia Court of Appeals affirming Petitioner's judgment of conviction is unpublished and reproduced here. Pet. App. 1a-16a. The order of the Superior Court denying Petitioner's motion for new trial is unpublished and reproduced here. Pet. App. 17a-25a. The order of the Georgia Court of Appeals denying Petitioner's motion for reconsideration is unpublished and reproduced here. Pet. App. 26a. The order of the Georgia Supreme Court denying Petitioner's petition for writ of certiorari is unpublished and reproduced here. Pet. App. 27a.

JURISDICTION

The Georgia Court of Appeals affirmed Petitioner's judgment of conviction on October 22, 2019. Pet. App. 1a-16a. The Supreme Court of Georgia denied Petitioner's petition for writ of certiorari on June 29, 2020. Pet. App. 27a. On March 19, 2020, this Court issued an Order automatically extending the time to file a petition for writ of certiorari to 150 days from the date of the order denying discretionary review. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 16-1-6 provides:

> An accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when:
>
> (1) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish commission of the crime charged; or
>
> (2) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

O.C.G.A. § 16-6-22.2 (a) provides in pertinent part:

> A person commits the offense of aggravated sexual battery when he . . . intentionally penetrates with a foreign object the sexual organ . . . of another person without the consent of that person

O.C.G.A. § 16-6-22.1 (a) provides in pertinent part:

> A person commits the offense of sexual battery when he . . . intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.

INTRODUCTION

The indictment charged Petitioner with aggravated sexual battery and two counts of child molestation. Pet. App. 13a. The victim, Petitioner's step-daughter, did not establish the allegations when she was on the witness stand. Pet. App. 3a. Facing a maximum punishment of life imprisonment for aggravated sexual battery

and twenty years imprisonment for child molestation, Petitioner requested a written jury instruction on sexual battery as a lesser included offense of aggravated sexual battery and child molestation in Count 3. Pet. App. 15a-16a. *See*, O.C.G.A. §§ 16-6-22.2 (c); 16-6-4 (a) (1). There was more than slight evidence to support a charge on sexual battery, and the evidence of Petitioner's guilt of aggravated sexual battery and child molestation in Count 3 was not strong. *See*, Korrita v. State, 263 Ga. 703, 704-705 (1994) (only slight evidence is necessary to authorize a jury charge on a certain subject matter).

Petitioner's decision to request a lesser included offense was reasonable and strategic; he was seeking to avoid convictions on the greater offenses and concomitant harsher penalty. *See*, Jessie v. State, 294 Ga. 375, 377 (2) (2014) ("Decisions about which jury charges to request are classic matters of strategy."); United States v. Cobb, 558 F.2d 486, 489 n. 5 (8th Cir. 1977) (describing the decision to request a lesser included instruction as a 'tactical' one). The offense of sexual battery is punishable by imprisonment for not less than one nor more than five years. O.C.G.A. § 16-6-22.1 (d). His defense was not "all or nothing."

Notwithstanding any other defense asserted by Petitioner, he was entitled to a charge on the lesser included offense of sexual battery as a matter of law and as a matter of fact. *See*, Mathews v. United States, 485 U.S. 58, 63 (1988) ("As a general proposition, a defendant is entitled to an instruction as to any recognized defense for

which there exists evidence sufficient for a reasonable jury to find in his favor."); Rice v. Hoke, 846 F.2d 160, 165 (2nd Cir. 1988) ("A trial judge must charge the jury on lesser included offenses when (1) it is theoretically impossible to commit the greater crime without committing the lesser and (2) a reasonable view of the evidence would permit the jury to find that defendant had committed the lesser, but not the greater offense."); Seabolt v. Norris, 298 Ga. 583, 586 (2) (2016) ("An instruction on a theory of defense, including a lesser included offense, must be given if any evidence supports that theory[]"); Gregoroff v. State, 248 Ga. 667, 670 (1982) ("[T]he general rule [is] that an accused is permitted to interpose inconsistent defenses in a criminal case."); Smith v. State, 244 Ga. App. 667 (1) (2000) (trial court committed reversible error by failing to charge on lesser included offense where evidence supported charge and evidence of defendant's guilt was not overwhelming).

After the trial court refused to charge sexual battery as a lesser included offense, the jury convicted Petitioner on all counts. Pet. App. 1a, 3a. The trial court sentenced Petitioner to life imprisonment on the aggravated sexual battery count. Pet. App. 3a.

"At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged." (Footnote omitted.) Beck v. Alabama, 447 U.S. 625, 633 (I) (1980). The lesser included offense doctrine

"originally developed to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged[.]" Keeble v. United States, 412 U.S. 205, 208 (1973). At common law, the general rule was

> when an indictment charged an offense which included within it another less offense or one of a lower degree, the defendant, though acquitted of the higher offense, might be convicted of the less. This rule, however, was subject to the qualification that upon an indictment for a felony, the defendant could not be convicted of a misdemeanor.

People v. Jones, 497 Mich. 155, 162 (2014), citing Hanna v. People, 19 Mich. 316, 318 (1869).

This rule later evolved from "that of a prosecutor's aid to a defendant's right." Hall, Deanna, "*The Third Option – Extending the Lesser Included Offense Doctrine to the Non-Capital Context*," (2001), Hofstra Law Review, Vol. 29: Iss. 4, Article 12, p. 1335. *See also*, Beck, 447 U.S. at 633 I; 2 CHARLES ALAN WRIGHT; FEDERAL PRACTICE & PROCEDURE 515 n. 54 (1969). "[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble, 412 U.S. at 208. *Accord*, Schmuck v. United States, 489 U.S. 705, 716 (1989) ("[T]he independent prerequisite for a lesser included offense instruction [is] that the evidence at trial must be such that a jury

could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater."); Beck, 447 U.S. at 63 I ("Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.").

"[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense is offered, the jury must, as a theoretical matter, return a verdict of acquittal." Keeble, 412 U.S. at 212. "But a defendant is entitled to a lesser offense instruction . . . because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." Id. at 212-213. "Providing the jury with the "third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt-standard." Beck, 447 U.S. at 634 I. *See also*, Edwards v. D'Lilio, 2018 U.S. Dist. LEXIS 78728 (purpose of the lesser included offense instruction is to provide the jury with a viable alternative other than conviction or acquittal of the more serious crime, so that 'the jury will accord the defendant the full benefit of the reasonable doubt standard[]') (citation omitted); United States v. LoRusso, 695 F.2d 45, 52-53 (2nd Cir. 1982) (holding that trial court's decision to

charge the jury on a lesser offense "was properly designed to ensure the just determination of the charges brought against these defendants").

STATEMENT OF THE CASE

The indictment charged Petitioner with aggravated sexual battery (O.C.G.A. § 16-6-22.2) and two counts of child molestation (O.C.G.A. § 16-6-4 (a)). Pet. App. 1a-2a. The jury convicted Petitioner of all counts, and the trial court imposed the following sentence: life imprisonment on Count 1, aggravated sexual battery, twenty years to serve ten years in confinement on Count 2, child molestation, consecutive to Count 1, and twenty years to serve ten years in confinement on Count 3, child molestation, concurrent to Count 2. Pet. App. 3a. Petitioner appealed the denial of his amended motion for new trial, and the Georgia Court of Appeals affirmed the judgment of his conviction. Pet. App. 1a, 3a. On November 4, 2019, the Georgia Court of Appeals denied Petitioner's motion for reconsideration. Pet. App. 26a. On June 29, 2020, the Supreme Court denied Petitioner's petition for a writ of certiorari. Pet. App. 27a.

A.S. testified at trial, but she did not give any substantive testimony about the charged crimes. Pet. App. 3a. A police detective and a nurse gave the sole testimony bearing upon Counts 1 and 3. Pet. App. 2a-3a.

Detective Montero spoke with five-year-old A.S. at the police department and recorded the interview. A.S. told him that Petitioner touched her vagina, both on the

outside and inside with his finger on more than one occasion. Pet. App. 2a. The detective referred the child to Nurse Carter, who gave A.S. a sexual assault examination. Pet. App. 2a. The nurse related A.S.'s prior out-of-court statements that Petitioner had touched her vagina and "it was sharp and hurt a lot." Pet. App. 2a. Neither witness stated the child said that Petitioner put his finger inside her vagina without her consent or described the circumstances of the contact. Pet. App. 2a.

Petitioner elected not to testify. Pet. App. 3a. He requested a written jury instruction on sexual battery as a lesser included offense of aggravated sexual battery and child molestation in Count 3 based on evidence that he touched the child's vagina on the inside and outside. Pet. App. 3a, 15a. The trial court refused to charge sexual battery. Pet. App. 15a.

Petitioner argued below, among other things, that the evidence was insufficient to sustain his aggravated sexual battery conviction because no rational trier of fact could have found the essential element of "without the consent" beyond a reasonable doubt, and the trial court erred in refusing to charge sexual battery as a lesser included offense of aggravated sexual battery and child molestation. Pet. App. 4a-6a, 14a-16a.

REASONS FOR GRANTING THE PETITION

Petitioner's convictions for aggravated sexual battery and child molestation in Count 3 must be reversed because the Georgia Court of Appeals failed to apply Georgia statutes as written. *See*, Anderson v. Wilson, 289 U.S. 20, 27 (1933) ("We take the statute as we find it."); State v. Fielden, 280 Ga. 444, 448 (2006) (Courts "do not have the authority to rewrite statutes.").

A person commits the offense of aggravated sexual battery when he "intentionally penetrates with a foreign object the sexual organ of another person without the consent of that person." O.C.G.A. § 16-6-22.2 (b).

The Georgia Court of Appeals has read 'without the consent of that person" in the aggravated sexual battery statute "to imply something broader than the common-law definition[]" and its plain meaning, effectively lowering the State's constitutional burden of proof on an essential element of the crime. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 II (1992). *See also*, MultiCare Medical Ctr. v. Department of Soc. & Health Servs., 114 Wn. 2d 572, 583 I (1990) (The general rule of statutory interpretation is that "an undefined term is afforded its common law meaning.") (citations omitted).

At common law, "the basic premise of consent is that it is 'given voluntarily.'" Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1253 (11th Cir. 2014), citing Gager v. Dell Financial Services, LLC, 727 F.3d 265, 270-271 (3rd Cir. 2013);

Black's Law Dictionary, 346 (9th ed. 2009). *See also*, Restatement (Second) of Torts, § 892 ("Consent is a willingness in fact for conduct to occur."). Therefore, "without the consent" of another person means that the person is not willing for the conduct to occur or does not voluntarily agree with the conduct.

Here, the Georgia Court held that evidence the victim did not want to go to the basement, the penetration hurt, and she was told to, and believed that she had to listen to Petitioner, was evidence of lack of consent. Pet. App. 5a. This extrajudicial interpretation "is not a construction of a statute, but in effect, an enlargement of it by the court[]" and unsupported by Georgia law or any State. Nichols v. United States, 136 S.Ct. 1113, 1118 III (2016). *See also*, State v. Sepahi, 78 P.3d 732, 735 (Ariz. 2003) (Courts may not "amend[] [a] statute to require proof of elements not set forth by the legislature[.]"). The Court of Appeals failed to cite any controlling authority for its supposition. Its decision is unpublished and cannot be cited as precedent.

Due process mandates "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." In re Winship, 397 U.S. 358, 364 (1970). Petitioner's aggravated sexual battery conviction violates due process and was insufficient under Jackson v. Virginia. *See*, Harris v. United States, 404 U.S. 1232, 1233 (1971) ("[A] conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged

would violate due process."); Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) (holding that it is "a violation of due process to convict and punish a man without evidence of his guilt.").

This Court has summarily reversed convictions unsupported by any relevant evidence as to a crucial element of the offense on due process grounds. It has reached this result even where the due process ground was not raised in the State court or this Court. *See*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (Court summarily reversed a state criminal conviction on ground not raised in state court or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment); Terminiello v. Chicago, 337 U.S. 1 (1949) (Court reversed state criminal conviction on a ground not urged in State court, nor even in this Court). This case warrants summary reversal.

Additionally, trial courts are not at liberty to curtail a defendant's defense when a defendant requests a jury instruction on a lesser included offense supported by the evidence. Refusing to charge on a defendant's defense theory "invades the defendant's constitutional right to a jury determination of factual matters in a criminal trial." Christie v. State, 580 P.2d 310, 318 III (1978), citing Strader v. State, 362 S.W.2d 224, 230 (Tenn. 1962). *See also*, Henwood v. People, 129 P.1010, 1014 (Colo. 1913) ("[S]o long as there is evidence relevant to the issue of [a lesser included offense], "its credibility and force are for the jury and cannot be matter of

law for the decision of the court."); United States v. Tyson, 653 F.3d 192, 212 (3rd Cir. 2011) ("A defendant's strategy is his own.").

> If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

United States v. Hicks, 748 F.2d 854, 857 (4th Cir. 1984), citing Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967). Here, the trial court's refusal to charge sexual battery "seriously impaired [Petitioner's] ability to conduct his defense." United States v. Camejo, 929 F.2d 610, 614 (11th Cir.), *cert. denied*, 502 U.S. 880 (1991). *See also*, United States v. Taylor, 997 F.2d 1551, 1558 (D.C. Cir. 1993); United States v. Wood, 982 F.2d 1, 3 (1st Cir. 1992); United States v. Neal, 951 F.2d 630, 633 (5th Cir. 1992); United States v. Sassak, 881 F.2d 276, 279 (6th Cir. 1989).

> [W]hen facts are put in evidence which support instructions as to lesser degrees and they are not given, the jury may be faced with the choice of either acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged.

Christie, 580 P.2d at 318 III.

As this case demonstrates, "the use or refusal of [lesser included offenses] has the possibility of completely altering the outcome of a trial, and consequently, the defendant's life, whether that is literally, or in terms of the duration of his confinement." Hall at 1362.

The Georgia Court of Appeals found that Petitioner's "defense at trial was not based on a lesser included offense, but rather was intended to show inconsistencies in the victim's outcries to the other witnesses in an effort to establish that he was not the perpetrator." Pet. App. 16a. By its conclusion, the Court improperly limited and mischaracterized Petitioner's defenses, denying him a complete defense. The written jury charge on sexual battery reflects one defense theory in the case. Pet. App. 15a.

The Court's conclusion is flawed because it failed to address whether the evidence, viewed in the light most favorable to Petitioner, supported sexual battery. It acknowledged that penetration is an essential element of aggravated sexual battery, but not an essential element of sexual battery. Pet. App. 16a. But its analysis went no further and did not address O.C.G.A. § 16-1-6 (1) or (2). Petitioner was entitled to assert inconsistent defenses based on the evidence adduced at trial. Shah v. State, 300 Ga. 14, 22 (2) (b) (2016); Gregoroff, 248 Ga. at 670; State v. Knowles, 495 A.2d 335, 339 (1985) (if the defendant's defense "was generated by the evidence, from whatever source, the defendant was entitled to an instruction on it, regardless of the fact that he denied committing the underlying criminal acts[]").

It was fair game for Petitioner to deny the allegations in the indictment, argue the inconsistencies in the victim's hearsay statements to third parties, *and* request a charge on sexual battery as a lesser included offense of aggravated sexual battery and child molestation as a matter of law and fact, respectively, based on the indictment and the evidence adduced at trial.

The decision below flies in the face of this Court's precedent and a majority of federal circuits holding that a defendant is entitled to present inconsistent defenses to the jury. *See*, Mathews, 485 U.S. at 63; United States v. Goldson, 954 F.2d 51, 55 II (2nd Cir. 1992); United States v. Broadus, 291 Fed. Appx. 486, 489 II (B) (3rd Cir. 2008); United States v. Browner, 889 F.2d 549, 555 (5th Cir. 1989); United States v. Cruse, 805 F.3d 795, 815 II (E) (7th Cir. 2015) (inconsistent defenses are permissible); Arcoren v. United States, 929 F.2d 1235, 1245 (8th Cir. 1991) (holding that a defendant was entitled to a jury instruction that he reasonably believed the victim was at least 16 years old, and, in the alternative, that he had no sexual contact with her); United States v. Spentz, 653 F.3d 815, 818 II (9th Cir. 2011); United States v. Trujillo, 390 F.3d 1267, 1274 II (10th Cir. 2004) ("a criminal defendant is entitled to instructions on any defense, including inconsistent ones, that find support in the evidence and the law and failure to so instruct is reversible error"); United States v. Smith, 757 F.2d 1161, 1167 IV (11th Cir. 1985) (same); Womack v. United States, 336 F.2d 959 (D.C. Cir. 1964) ("a defendant is entitled to an instruction on any issue

fairly raised by the evidence, whether or not consistent with the defendant's testimony or the defense trial theory.").

Several state courts agree. *See*, Shah, 300 Ga. at 22 (2) (b); State v. McCoy, 219 W.Va. 130, 133 III A (2006) ("[A] defendant may present alternative defenses even if they are inconsistent[]"); Muhammad v. State, 892 A2d 137, 139 (Del. 2003); State v. Poole, 837 A.2d 307, 310 (N.H. 2003) ("Defendants are generally allowed to present alternative theories of defense."); Clayton v. State, 63 S.W.3d 201, 206 (Mo. 2002) (same); People v. Wheeler, 200 Ill. App. 3d 301, 307 (4th DCA 1990) (a defendant is entitled to a jury instruction to present his defense theory of the case if supported by the evidence even if the facts supporting the defense is inconsistent with defendant's own testimony); Knowles, 495 A.2d at 338 ("The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal should be accorded every reasonable protection in defending himself against governmental prosecution.") (citation omitted); People v. White, 191 Colo. 353, 356 (1976) ("A defendant is entitled to an instruction on his theory of the case whenever the theory is supported by some evidence.").

Count 1, aggravated sexual battery, is based on a non-consensual penetration of A.S.'s vagina with Myers' finger; Count 3, child molestation, alleges that Myers rubbed A.S.'s vagina with his finger with the intent to arouse his sexual desires. Pet. App. 13a. The charged crimes are specific intent crimes, and the nature of

Petitioner's intent was in dispute at trial. There was a rational basis for the jury to acquit Petitioner of the greater offenses but convict him of the lesser offense of sexual battery. Keeble, 412 U.S. at 208; Shah, 300 Ga. at 22 (2) (b). *See also*, O.C.G.A. § 16-1-6.

The concerns of Beck are equally applicable here: "the failure to give the jury the third option of convicting on a lesser included offense would seem inevitably to enhance the rise of an unwarranted conviction." Beck, 447 U.S. at 637.

Petitioner respectfully requests that this Court grant the writ of certiorari, reverse his convictions and remand the case to the trial court for findings consistent with this Opinion.

I. The Decision Below Is Contrary to this Court's Precedent.

In capital cases, a trial court's refusal to charge a lesser included offense supported by the evidence (pursuant to Alabama statute) is a due process violation because death is different. *See*, Beck, 447 U.S. at 637-638 I. This Court has not applied the Beck rule to non-capital cases, but it has recognized the "nearly universal acceptance of the rule [regarding a defendant's entitlement to a lesser included offense] in both state and federal courts[,]" a valuable "procedural safeguard" to a defendant. Id. at 637. Only the Third Circuit has held that lesser included offense instruction is constitutionally required in non-capital cases. *See*, Vujosevic v. Rafferty, 844 F.2d 1023 (3rd Cir. 1988). Indeed, "there is a large body of caselaw

on the issue of jury instructions which does not distinguish between capital and non-capital punishment. The most famous of these is the Supreme Court's decision in In re Winship." Hall at 1361-1362.

In Beck, Alabama law provided that the defendant was entitled to a lesser included offense instruction in non-capital cases if "there is any reasonable theory from the evidence which would support the position." Beck, 447 U.S. at 630 n. 5, citing Fulghum v. State, 277 So. 2d 886, 890 (Al. 1973). This Court agrees and requires only some evidence to support the lesser included offense. Schmuck, 489 U.S. at 716; Keeble, 412 U.S. at 208.

This is the prevailing law in numerous federal circuits and state courts. *See*, United States v. Foster, 374 Fed. Appx. 448, 450 (4th Cir. 2010); Cantu v. Collins, 967 F.2d 1006, 1013 (5th Cir. 1992); Browner, 889 F.2d at 551; United States v. Walden, 206 F.3d 597, 604 (B) (6th Cir. 2000) ("[I]f a defendant asks for a lesser included offense instruction, it is generally reversible error not to give it.[]"); United States v. Medina, 755 F.2d 1269, 1273 II (7th Cir. 1985) (requirement to give lesser included offense can be satisfied by the "presentation of sharply conflicting testimony on the element distinguishing the greater offense from the lesser offense[]" or "where there is no conflict in the testimony but the conclusion as to the lesser offense fairly may be inferred from the evidence presented, 'including a reconstruction of events gained by accepting the testimony of one or more witnesses

only in part[]"); United States v. Fay, 668 F.2d 375, 377 (8th Cir. 1981) ("A criminal defendant is entitled to an instruction on a theory of defense if he makes a timely request for such an instruction if the request is supported by evidence and if it sets out a correct declaration of law."); Crace v. Herzog, 798 F.3d 840, 848 (9th Cir. 2015); United States v. Gibbs, 904 F.2d 52, 59 (D.C. Cir. 1990); People v. Roman, 398 P.3d 134, 138 (Colo. 2017); Henry v. State, 805 A.2d 860, 864 (De. 2002); State v. Headley, 210 W. Va. 524, 529 (2001) (*per curiam*) ("Even where the evidence is scant, the trial court has a duty to allow a defendant to get [his/] her theory before the jury."); Messick v. State, 209 Ga. App. 459, 460 (1) (1993) (if the facts alleged in the indictment and evidence presented at trial "are sufficient to establish the lesser offense," it must be given); State v. Valencia, 121 Ariz. 191, 198 (1979) ("The trial court should instruct the jury on every degree or grade of offense that is supported by the evidence."); Westbrook v. State, 265 Ark. 736, 747 VI (1979) ("[W]hen the evidence presented shows the accused might be convicted of a lesser offense than that charged or of an offense which is necessarily included in the offense charged, it is the duty of the court to present instructions to embrace all degrees of a particular offense, and included offenses, to which the evidence is applicable."); White, 191 Colo. at 356 ("A defendant is also entitled to have the jury instructed on any lesser included offense if there is a rational basis for the jury to acquit the defendant of the greater offense but convict him of the lesser offense.").

II. The Decision Below is Wrong.

(a) The State failed to prove the essential element of "without the consent" beyond a reasonable doubt.

"When [the legislature] has used a term that has a settled common law meaning, a court must infer, unless the statute otherwise dictates, that [the legislature] means to incorporate the established meaning of that term." Neder v. United States, 527 U.S. 1, 21 (1999). "[W]ithout the consent" is not defined in Georgia statutes construing aggravated sexual battery or sexual battery. Thus, the Georgia Court of Appeals was required to look to common law for the meaning of these words.

At common law, consent means that it is 'given voluntarily.'" Osorio, 746 F.3d at 1253. "Consent is generally defined as '[a]greement, approval, or permission as to some act or purpose.' Lack of consent or "'[w]ithout consent' then refers to the lack of agreement, approval or permission." Dickie v. State, 282 P.3d 382, 385 (2012). Dictionary definitions agree. *See*, Black's Law Dictionary at 368 (Consent is defined as "[a] voluntary yielding to what another proposes or desires.").

The Georgia Court of Appeals relied upon the following evidence to support a finding that the contact alleged in aggravated sexual battery was "without the consent" of the victim: the victim was reluctant to go down to the basement, the alleged sexual abuse occurred in the basement, the victim was told to, and believed

that she had to, listen to Myers, the victim was enticed with toys and other inducements, and that the penetration hurt her. Pet. App. 5a. This hodgepodge of facts, whether considered individually or collectively, fails to establish the essential element of "without the consent of that person." The State failed to "prove the absence of freely given agreement[]" beyond a reasonable doubt. Quovadis Conyice Evans v. Pollard, 2013 U.S. Dist. LEXIS 18711 *22.

Evidence that the penetration hurt the victim does not establish the essential element of lack of consent. *See*, United States v. House, 2009 CCA LEXIS 192 [*24] (child's testimony that she said "ow, that hurt" "in and of itself, is not an affirmative declaration expressing a lack of consent"; rather, it is "a verbalization of a physical sensation that is ambiguous and inconclusive with respect to the child's consent."). Whether the victim was hurt or had a physical injury is not an essential element of aggravated sexual battery. O.C.G.A. § 16-6-22.1. *Compare*, O.C.G.A. § 16-6-4 (c) ("A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child[.]"); Grooms v. State, 261 Ga. App. 549, 550 (1) (2003) ("The victim's testimony indicating the molestation 'hurt' sufficed to prove the element of physical injury[]" for child molestation.) (footnote omitted).

In Georgia, aggravated sexual battery can encompass "apparently innocent conduct[,]" such as "a physician's [vaginal] exam on a 15-year-old patient[]" or

Nurse Carter's examination of the child here. Watson v. State, 297 Ga. 718, 720 (2) (2015). These actors are not guilty of aggravated sexual battery since their contact with the child is not "without the consent" of the child.

Here, the evidence showed that the child's mother worked at night, and Petitioner assumed childcare duties in her absence. Pet. App. 2a, 5a. A rational trier of fact could reasonably infer that if Petitioner touched the inside of the child's vagina with his finger, he did so as part of his parental responsibilities, i.e. making sure that she took a shower or bath before she went to bed and/or washing her himself. Since A.S. had to respect her step-father, the alleged touching was not without her consent or permission. Pet. App. 5a.

Further, A.S.'s reluctance to go to the basement does not prove that the penetration of her vagina was without her consent. This evidence was not connected with the act for which Myers is prosecuted. *Cf.* Commonwealth v. Feijoo, 419 Mass. 486 (1995) (while there was evidence that defendant was physically imposing and trained and experienced in violence, there is no evidence that the child submitted to the conduct with which defendant was charged because of fear or physical harm if he refused; thus, the evidence was insufficient to prove lack of consent required for indecent assault and battery of a child under 14). A person is not presumed to act with criminal intent. *See*, Burden v. State, 187 Ga. App. 778 (1988).

Since the State did not produce any evidence surrounding the nature of the touching or its context evidencing Myers' alleged criminal intent, such as his "words, conduct, demeanor, motive and all other circumstances connected with the act for which [he] is prosecuted[,]" the jury cannot infer that he intentionally penetrated A.S.'s vagina without her consent. Tucker v. State, 182 Ga. App. 625 (1987). *See also,* Burden, 187 Ga. App. at 779 (1) ("[T]he factfinder may consider the circumstances surrounding the act for which the accused is being prosecuted in determining whether the requisite intent is manifested by the circumstances[.]") (citations omitted).

Notably, A.S. did not testify or tell anyone that Myers put his finger in her vagina without her consent. *Compare*, Duran v. State, 274 Ga. App. 876, 878 (1) (2005) (victim's testimony that defendant entered her bedroom and inserted his finger into her genitals without her consent was sufficient to support aggravated sexual battery conviction). Nor was there any evidence that A.S. told another person that she did not want Myers to touch her and asked him to stop when he allegedly penetrated her vagina. *Compare*, Williams v. State, 347 Ga. App. 6, 8-9 (1) (2018) (child's testimony that she told counselor she did not want defendant to touch her and wanted him to stop proved element of 'without consent').

While the Court relied upon Moon v. State, 335 Ga. App. 642, 645 (1) (a) (2016), this case is inapposite. In Georgia, the victim's testimony suffices to support

an aggravated sexual battery conviction. *See*, Pate v. State, 269 Ga. App. 684, 687 (2) (2004). Unlike this case, the victim in Moon testified about the acts forming the basis of the charges. 335 Ga. App. at 645 (1) (a). The Court held that N.M.'s testimony that defendant touched her vagina countless times for a period of years, that she was forced to touch Moon's penis and Moon threatened her by saying her mother would be poor and homeless if N.M. disclosed the abuse proved lack of consent for aggravated sexual battery. Id. Those circumstances are not present here.

The plain language of the aggravated sexual battery statute and common law meaning of "without the consent" trump Moon and the tortured reasoning of the Georgia Court of Appeals. *See*, Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364 (2012) ("[A]s long as legislation does not violate the Constitution, when the legislature says something clearly – or even just implies it – statutes trump cases.").

(b) The trial court's refusal to charge the lesser included offense of sexual battery denied Petitioner a complete defense.

Section 1.07 (4) of the Model Penal Code (1985) provided that

> A defendant may be convicted of an offense included in an offense charged in the indictment. An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged, or
>
> . . .
>
> (b) it differs from the offense charged only in the respect that a less serious injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

Georgia, like many states, adopted statutes patterned after the lesser included provision of the Model Penal Code. O.C.G.A. § 16-1-6 (1) and (2) define included crimes as a matter of fact and as a matter of law, respectively. *See*, State v. Estevez, 232 Ga. 316 (1974). O.C.G.A. § 16-1-6 (1) provides that

> [a]n accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when[] . . . it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish commission of the crime charged.

"[W]hether a lesser offense is included in a greater offense as a matter of fact must be determined on a case-by-case basis, depending upon the facts alleged in the indictment and the evidence presented at trial." (Citation omitted). Strickland v. State, 223 Ga. App. 772, 775 (1996).

O.C.G.A. § 16-1-6 (2) provides that "[a] crime is so included when: . . . [i]t differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission." This provision pertains to lesser included offenses as a matter of law.

A person commits sexual battery when he "intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person." O.C.G.A. § 16-6-22.1 (b). "Intimate parts" is defined as the primary genital area of a male or female. O.C.G.A. § 16-6-22.1 (a).

A person commits the offense of aggravated sexual battery when "he . . . intentionally penetrates with a foreign object the sexual organ . . . of another person without the consent of that person." O.C.G.A. § 16-6-22.2 (b).

Both offenses require an intentional touching of some sort involving another person's vagina without the consent of said person. O.C.G.A. §§ 16-6-22.1, 16-6-22.2. The only difference between the two offenses is penetration. *See*, Henderson v. State, 333 Ga. App. 759, 761 (1) (2015).

Nurse Carter's testimony that A.S. stated that Myers touched her tu-tu was slight evidence of sexual battery, i.e. "intentional[] . . . physical contact with the intimate parts of the body of another person[.]" O.C.G.A. § 16-6-22.1 (b); Korrita, 263 Ga. at 704-705 (only slight evidence is necessary to authorize a jury charge on a subject matter).

Similarly, Detective Montero's testimony that A.S. said Myers touched her vagina on the outside, coupled with the lack of any detail regarding that contact, was slight evidence to support a charge on sexual battery. The evidence "need only be enough to enable the trier of fact to carry on a legitimate process of reasoning." Id.

Because sexual battery is "established by proof of the same or less than all the facts or a less culpable mental state than is required to establish commission of [aggravated sexual battery][,]" it is a lesser included offense as a matter of fact. O.C.G.A. § 16-1-6 (1). *See also*, McCrary v. State, 252 Ga. 521, 523 (1984) (A

defendant may be convicted of a lesser offense other than that expressly named in the indictment "where the former is necessarily included in the latter, and also in some cases in which the lesser is not so included in the greater offense but where the language used in the indictment is sufficient to embrace the smaller offense.").

It is also a lesser included offense of child molestation as a matter of fact because "the indictment put[] the defendant on notice that he could be convicted of the lesser included offense and the evidence presented at trial is sufficient to establish the lesser included offense consistent with these averments." Strickland, 223 Ga. App. at 776 (1). Because "the evidence at trial was sufficient to show an intentional touching of the child's intimate parts, but without the intent necessary to prove child molestation, a charge on sexual battery as a lesser included offense would be required." Id. at 776 (1) (b).

Based on the plain language of the statute defining included offenses, intentional physical contact with another person's vaginal area involves "a less serious injury or risk of injury to the same person[]" than intentional penetration of another person's vagina, required for aggravated sexual battery. O.C.G.A. § 16-1-6 (2). Since "a lesser kind of culpability suffices to establish . . . commission[] of" [sexual battery[]" than aggravated sexual battery, sexual battery is a lesser included offense of aggravated sexual battery as a matter of law. O.C.G.A. § 16-1-6 (2).

Trial courts routinely instruct juries that sexual battery is a lesser included offense of aggravated sexual battery and child molestation, and juries have found defendants guilty of sexual battery as a lesser included offense of these crimes. *See*, Massey v. State, 346 Ga. App. 233, 234 (2018); Strickland, 223 Ga. App. at 776 (1); Flowers v. State, 220 Ga. App. 814, 817 (6) (1996).

The Federal Rules of Criminal Procedure have a similar rule. Under Federal Rule Criminal Procedure Rule 31 (c), "[a] defendant may be found guilty of . . . (1) an offense necessarily included in the offense charged." This Court has construed this rule to mean that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." Schmuck, 489 U.S. at 716.

The elements of sexual battery are a subset of aggravated sexual battery and necessarily included in the greater offense. Id. One cannot commit aggravated sexual battery as alleged without committing sexual battery. *See* Giles v. United States, 144 F.3d 860, 861 (9th Cir. 1944) ("To be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without first having committed the lesser."); Christie, 580 P.2d at 317 (same); House v. State, 186 Ind. 593 (1917); People v. Kerrick, 144 Cal. 46, 47 (1904) ("To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof.").

By way of further example, simple assault involves "a less serious injury or risk of injury to the same person[]" than aggravated assault, and a "lesser kind of culpability suffices to establish its commission." O.C.G.A. § 16-1-6 (2). A trial court errs in failing to charge simple assault as a lesser included offense of aggravated assault where evidence supports the charge and the nature of petitioner's intent is in dispute. *See*, Beck, 447 U.S. at 63 I; Cordis v. State, 236 Ga. App. 629, 630 (1) (1999) (when evidence is in dispute regarding whether the defendant had the specific intent to commit an aggravated assault with a deadly weapon, trial court's refusal to charge simple assault as a lesser included offense is reversible error).

Where, as here, the State's evidence reasonably raised sexual battery, "neither the State nor the trial court is authorized to preclude the jury from considering [the alternative defense theory of sexual battery as a lesser included offense of aggravated sexual battery and child molestation]." Shah, 300 Ga. at 22 (2) (b). "Since the nature of petitioner's intent was very much at dispute at trial, the jury could rationally have convicted him of [sexual battery] if that option had been presented." Keeble, 412 U.S. at 212-213. But "the jury was presented with only two options: convicting the defendant of [aggravated sexual battery and child molestation in Count 3], or acquitting him outright." Id. Given weak evidence of Petitioner's guilt, the Georgia Court of Appeals "cannot say that the availability of a third option – convicting the defendant of [sexual battery] – could not have resulted in a different verdict." Id.

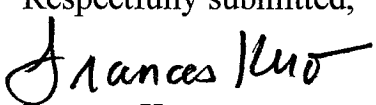
The trial court's refusal to charge sexual battery as a lesser included offense of aggravated sexual battery and child molestation in Count 3 was harmful reversible error. Keeble, 412 U.S. at 208; Shah, 300 Ga. at 21 (2) (b); Seabolt, 298 Ga. at 586 (2); Hill v. State, 300 Ga. App. 210, 212-213 (2009) (reversing convictions where trial court refused to give jury instructions on inconsistent defenses and the evidence of defendant's guilt was not overwhelming).

CONCLUSION

The petition for a writ of certiorari should be granted.

This 27th day of November, 2020.

Respectfully submitted,



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