APPENDIX - A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

August 04, 2020

CASE NO.: 4D19-3936
L.T. No.: 502019CA014747XXXMB

WARREN TARVER *W* v. WILLIAM HAMILTON, WARDEN

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant's July 10, 2020 motion for rehearing and clarification is denied.

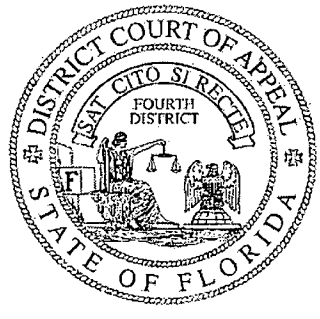
Served:

cc: Attorney General-W.P.B. Mitchell Alan Egber Warren Tarver *W*
William Hamilton, Warden

kr

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



APPENDIX "B"

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION: AB
CASE NO. 50-2019-CA-014747-XXXX-MB

WARREN TARVER,
Petitioner

v.

WILLIAM HAMILTON,
Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court on Petitioner Warren Tarver's Petition for Writ of Habeas Corpus, filed on November 18, 2019. Petitioner was found guilty of five counts of Sexual Battery Upon a Person less than 12 years of age in violation of Section 794.011(2)(a), Florida Statutes. The trial court sentenced Petitioner to a life sentence. Petitioner alleges that his current sentence is illegal as the offense listed in Section 794.011(2)(a) is designated a "capital felony," and that, since the death penalty has been deemed unconstitutional as applied to non-homicide offenses, Section 794.011(2)(a) has no legal authority and cannot be used as a basis for imprisonment.

Both the United States Supreme Court and the Florida Supreme Court have held that the Eighth Amendment forbids the death penalty from being imposed unless the defendant has committed a homicide. *See Kennedy v. Louisiana*, 554 U.S. 407, 420–21 (2008); *Buford v. State*, 403 So. 2d 943, 950–51 (Fla. 1981) (citing *Coker v. Georgia*, 433 U.S. 584, 598–99 (1977)). This is true even in cases where a child is sexually battered. *Kennedy*, 554 U.S. at 421. Section 794.011(2)(a) clearly provides that a person who commits sexual battery on a child less than 12 years of age is a capital felony punishable as provided in Section 775.082, Florida Statutes. § 794.011(2)(a), Fla. Stat. (2019). Section 775.082 unambiguously states that the maximum penalty available is death. § 775.082(1), Fla. Stat. (2019); *see Mills v. Moore*, 786 So. 2d 532, 538 (Fla. 2001) ("there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death."). Petitioner argues that this discrepancy—the death penalty is

forbidden for his crime but the statute still provides for it—essentially voids the statute and cannot serve as the basis for his incarceration. *See Moore v. State*, 924 So. 2d 840, 841 (Fla. 4th DCA 2006) ("[o]ne cannot be convicted of a non-existent offense.").

Petitioner's claim is a familiar one to the Court. Others have presented the conflict between the statutory language and judicial precedent and argued that their non-homicide capital felonies are void, but these challenges have been uniformly rejected by the courts. *See, e.g.*, *State v. Vila Jimenez*, 443 So. 2d 204, 205 (Fla. 3d DCA 1983); *Rusaw v. State*, 451 So. 2d 469, 470 (Fla. 1984). The Court finds the Second District Court of Appeal's decision in *State v. Kwitowski*, 250 So. 3d 210 (Fla. 2d DCA 2018) to be dispositive. The *Kwitowski* Court held that although death is the maximum punishment under statute for a capital felony, this does not mean that a capital felony only exists "when, and only when, the Constitution permits the imposition of the death penalty for an offense so classified." *Id.* at 218. It is not legally or logically inconsistent for an offense to be defined as capital felony even when death is not a constitutionally permissible option. *See id.* Even though the possibility of death is the defining feature of a capital felony, there are other collateral consequences the statute provides regarding a capital felony that separates it from other felonies. *See Batie v. State*, 534 So. 2d 694, 694–95 (Fla. 1988) (defendant convicted of sexual battery upon a person less than twelve years old cannot seek post-conviction bond because it is not available to those found guilty of capital felonies); *Rusaw*, 451 So. 2d at 470 (Fla. 1984) ("[j]ust because death is no longer a possible punishment for the crime described in subsection 794.011(2) does not mean that the alternative penalty suffers from any defect.").

Accordingly, it is hereby

ORDERED that Petitioner's "Petition for Writ of Habeas Corpus" dated November 18, 2019 is **DENIED.**

DONE AND ORDERED, in West Palm Beach, Palm Beach County, Florida this 25th day of November, 2019.

50-2019-CA-014747-XXXX-MB 11/25/2019
Janis Brustares Keyser Judge

50-2019-CA-014747-XXXX-MB 11/25/2019
Janis Brustares Keyser
Judge

COPIES TO:

WARREN TARVER DC# L13572 SOUTH BAY
CORRECTIONAL FACILITY
P.O. BOX 7171
South Bay, FL 33493

APPENDIX "C"

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION: AB
CASE NO. 50-2019-CA-014747-XXXX-MB

WARREN TARVER,
Petitioner,

v.

WILLIAM HAMILTON, Warden at South Bay Correctional and Rehabilitation Facility,
Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR REHEARING

THIS CAUSE came before the Court on Petitioner Warren Tarver's "Motion for Rehearing," filed on December 9, 2019. Petitioner requests that the Court reexamine its previous order, dated November 26, 2019 (DE #4), where it denied his Petition for Writ of Habeas Corpus. Petitioner argues that the Court's reliance on *State v. Kwitowski*, 250 So. 3d 210 (Fla. 2d DCA 2018) was inappropriate and that the definition of capital felony, along with the Florida Legislature's intent, indicates that death is the only available punishment for capital felonies. Petitioner further asserts that, based upon the language and intent of Section 794.011(2)(a), it is unconstitutional to designate the crime of sexual battery of a person less than 12 years of age as a capital felony in light of Supreme Court precedent. For the following reasons, the Court reaffirms its original order and denies Petitioner's motion.

A motion for rehearing can only be directed at a final judgment and must be served within fifteen (15) days of the entry of the final order. Fla. R. Civ. P. 1.530(b). A motion for rehearing is only proper when a final judgment occurs or when an order "complete[s] the judicial labor" on a portion of the case by acting as a *de facto* final judgment. *See Seigler v. Bell*, 148 So. 3d 473, 478 (Fla. 5th DCA 2014). The decision to grant or deny rehearing is purely within the discretion of the trial judge. *Petrucci v. Brinson*, 179 So. 3d 398, 400 (Fla. 1st DCA 2015). Because the motion is timely, and since the Court's denial of the petition essentially disposed of the cause of action, Petitioner's motion is properly before the Court.

Petitioner argues that the meaning of "capital felony" inherently requires the possibility of

a death sentence. *See Donaldson v. Sack*, 265 So. 2d 499, 501–02 (Fla. 1972) ("the death penalty must be a possible punishment in all 'capital' cases") (citations omitted). He also rejects the *Kwitowski* Court's analysis regarding the term "capital felony" as providing a second definition that is not supported by the language and intent of the statute itself. Petitioner is correct that, in Florida, the term "capital felony" only has one meaning, but that meaning does not impose a mandatory death penalty or even a mandatory consideration of the death penalty. The statute defining a capital felony only requires a death sentence if a separate penalty proceeding pursuant to Section 921.141, Florida Statutes is held and that an independent determination that a death sentence is appropriate is made, "otherwise such person shall be punished by life imprisonment and shall be ineligible for parole." § 775.082(1)(a), Fla. Stat. (2019). *Kwitowski* confirms that the "constitutional availability" of the death penalty does not determine whether or not a crime is classified as a "capital felony. *See Kwitowski*, 250 So. 3d at 217.

The Petitioner's citation to *Donaldson* is actually quite instructive to the instant case. In Donaldson, the Florida Supreme Court had to rectify the Supreme Court's recent decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which placed a moratorium on all capital punishment nationwide due to constitutional concerns, with the State's capital felony statute. The Court explicitly held that the "elimination of the death penalty from the statute does not of course destroy the entire statute," and that life sentences should be given in lieu of death sentences. *Donaldson*, 265 So. 2d at 502 (emphasis added). The capital felony statute at the time of *Donaldson* also contained a provision explicitly imposing life sentences for capital felonies in the event the death penalty was considered unconstitutional—that provision continues to exist today. *See* § 775.082(2), Fla. Stat. (2019). The Legislature's intent in categorizing certain crimes as "capital felonies" is to punish and penalize those adjudicated guilty of the most heinous crimes, regardless of whether or not the death penalty is deemed unconstitutional. While it is undoubtedly true that a "capital felony" is linked to the death penalty in a way that all other categories of felonies are not, the capital felony statute and case law are abundantly clear that death is not mandatory and that a "capital felony" includes other collateral consequences not available to someone convicted of a life felony. *See* § 921.0024, Fla. Stat. (2019); *Batie v. State*,

534 So. 2d 694, 694–95 (Fla. 1988).

Petitioner's other conceit is that even the mere linkage of his crime to the death penalty is impermissible in light of precedent that forbids capital punishment for sexual battery. *See Buford v. State*, 403 So. 2d 943, 950-51 (Fla. 1981). This is simply incorrect, Petitioner has not been sentenced to death and thus no constitutional right has been violated. The designation of "capital felony" for non-death penalty offenses is permissible and common, as it applies to other sexual battery cases, drug trafficking, and even first-degree murders where the death penalty is not sought by the State. *See* §§ 782.04(1)(a)–(b), 794.011(2)(a), 893.195(1)(b)(2)(b), Fla. Stat. (2019). The Florida Supreme Court has unanimously held that "the legislature intended that the penalties set out in subsection 775.082(1) be fully applied to the extent that they are constitutionally permissible." *Rusaw v. State*, 451 So. 2d 469, 470 (Fla. 1984). To the extent that Petitioner argues that Section 794.011(2)(a) is unconstitutional for classifying his crime as a "capital felony," that argument has been foreclosed by *Rusaw*.

Accordingly, it is hereby

ORDERED and ADJUDGED that Petitioner's "Motion for Rehearing" dated December 9, 2019 is **DENIED**. The Clerk is hereby ordered to **CLOSE** the case.

DONE AND ORDERED, in West Palm Beach, Palm Beach County, Florida this 13th day of December, 2019.

50-2019-CA-014747-XXXX-MB 12/13/2019
Janis Brustares Keyser, Judge

50-2019-CA-014747-XXXX-MB 12/13/2019
Janis Brustares Keyser
Judge

COPIES TO:

WARREN TARVER DC# L13572 SOUTH BAY
CORRECTIONAL FACILITY
P.O. BOX 7171
South Bay, FL 33493

STATE OF FLORIDA - PALM BEACH COUNTY
I hereby certify that the foregoing is a true copy of the record in my office with redactions, if any as required by law.
THIS 6 DAY OF January, 2021
JOSEPH ABRUZZO
CLERK OF THE CIRCUIT COURT & COMPTROLLER
By: Deputy Clerk
Shalea Ravenell

APPENDIX "D"

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

WARREN TARVER
Petitioner

v.

WILLIAM HAMILTON, Warden
FLORIDA DEPARTMENT OF CORRECTIONS, etc.
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

Comes now, Petitioner, Warren Tarver and files this pro se Petition for Writ of Habeas Corpus alleging that he is being illegally detained in the custody of William Hamilton, Warden, at South Bay Correctional and Rehabilitation Facility in Palm Beach County, Florida.

JURISDICTIONAL STATEMENT

Petitioner, Warren Tarver, submits that this Court has habeas corpus jurisdiction concerning his claim that he is being illegally incarcerated based upon a nonexistent capital felony. See *Young v. Florida Commission on Offender Review,* 225 So.3d 940, 942 (Fla. App. 5th Dist. 2017) (...the proper venue for such a filing is the court where he is imprisoned, as he challenges being incarcerated based on what he claims is a nonexistent felony).

Wherefore, pursuant to 79.01 and 79.09, Florida Statutes, this court has jurisdiction in this matter.

STATEMENT OF CASE AND FACTS

On August 8, 1995, Petitioner, Warren Tarver was charged by information in the Seventeenth Judicial Circuit Court, Broward County, Florida, with five (5) counts of F.S. §794.011(2)(a). See Exhibit I. On December 4, 1997, Tarver was found guilty on all five (5) counts. See Exhibit II. On January 9, 1998, Tarver was sentenced to life in prison on counts I-IV and life in prison on count V to run consecutive to counts I-IV. See Exhibit III. Tarver was then committed to the Florida Department of Corrections (See Exhibit IV) and is now being held in the custody of William Hamilton, Warden, at South Bay Correctional and Rehabilitation Facility, 600 Highway 27 South, South Bay, Florida 33493.

Tarver now respectfully brings before this Honorable Court an issue concerning his imprisonment.

NATURE OF RELIEF SOUGHT

Tarver seeks to have this Court issue his petition for writ of habeas corpus and thereafter order his immediate release.

ARGUMENT

Tarver first submits that the crux of the issue here is that he is being held in custody under the authority of a nonexistent capital felony. As found in *Young v. Florida Commission on Offender Review,* 225 So.3d 940, 942 (Fla. App. 5th Dist. 2017), the proper venue for filing such a claim is arguably the circuit where the petitioner is imprisoned.

> "An argument can be made that the proper venue for such a filing is the circuit where [Young] is imprisoned, as he challenges being incarcerated based on what he claims is a nonexistent capital felony." Id at 942.

In Young's case, however, it is apparent that the Florida Supreme Court and the 5th DCA recognized that *Young* had alleged in his petition that his **life sentence was illegal** and thus found that his second claim was a sentencing issue.

> "Young's current challenge to his life sentence began as a petition for writ of certiorari, filed with the Florida Supreme Court, in which he posed two questions... 2. Can a person be held under a capital felony when the capital punishment was abolished for 794.011? The Supreme Court treated Young's filing as a petition for habeas corpus, transferred it to the Putnam County Circuit Court, and proposed that the petition might be considered as a rule 3.800(a) motion." Id at 941.

> "In Young's second claim he alleges that his life sentence is illegal because capital sexual battery is no longer a capital felony....However, at its roots, Young's second claim challenges his sentence." Id at 942.

Such is not the case with Tarver. Here, Tarver submits that section 794.011(2)(a) cannot operate as a legal basis for imprisonment, because Sexual Battery is held to be unconstitutional as a "capital felony." Therefore, under these circumstances, the appropriate venue in which to file this type of pleading would arguably be the circuit where the petitioner is imprisoned.

Next, the circumstance and principle of law under which this petition is being brought is academic. Here, Tarver is imprisoned under the authority of a statute or section that does not exist. This position is supported by the following:

First, the Florida Legislature enacted §794.011(2)(a), which denotes the act of sexual battery upon a child less than 12 years of age by a person 18 years of age or older. Here, it states in plain language that a person who commits this offense "commits a capital felony, punishable as provided in ss. 775.082 and 921.141," which is the capital felony sentencing scheme. "A capital felony is one that is punishable by death." *Heuring v. State,* 513 So.2d 122,123 (Fla. 1987).

Because the term "capital felony" is not defined in 794.011, the term is to be construed in its plain and ordinary sense. See *State v. Brake,* 796 So.2d 522, 528 (Fla. 2001) ([w]here a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense); and also *State v. Fuchs,* 769 So.2d 1006, 1009 (Fla. 2000) ([i]n the absence of a statutory definition, it is permissible to look to case law or related statutory provisions that define the term).

It is apparent, based upon the plain language used, that the offense delineated in §794.011(2)(a) was initially intended to be punishable by death. See *Mills v. Moore,* 786 So.2d 532, 538 (Fla. 2001) ([w]hen Section 775.082(1) is read in pari materia with Section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum penalty of death). However, subsequent to the enactment of section 794.011(2)(a), it was held in *Buford v. State*, 403 So.2d 943, 951 (Fla. 1981), that it is unconstitutional to impose the penalty of death for this offense. Based upon this finding held in *Buford,* the Florida Legislature, and not the court, was required to amend section 794.011 (2)(a) so that it would comport with the change of law held in *Buford.*

> "It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction however wise it may seem to alter the plain language. If the legislature did not intend the results mandated by the statute's plain language then the appropriate remedy is for it to amend the statute." *Overstreet v. State* 629 So.2d 125 (Fla. 1993).

Instead of amending section 794.011(2)(a), the Florida Legislature left the statute as written. As a result, the courts in Florida rendered rulings governing the continued use of the unamended statute. See *Donaldson v. Sack,* 265 So.2d 499 (Fla. 1972); *Reino v. State*, 352 So.2d 853, 858 (Fla. 1977); *Batie v. State*, 534 So.2d 694 (Fla. 1988); *Buford v. State*, 403 So.2d 943 (Fla. 1981); *Rusaw v. State*, 451 So.2d 469 (Fla. 1984); *Perez v. State*, 545 So.2d 1357 (Fla. 1989); *Gibson v. State*, 721 So.2d 363, 367 (Fla. App. 2d Dist. 1998). This, however, constitutes an abrogation of legislative power. See *State v. Rife*, 789 So.2d 288, 292 (Fla. 2001):

> "When faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" *State v. Cohen* 696 So.2d 435, 436 (Fla. 4th DCA 1997) *(quoting Holly v. Auld* 450 So.2d 217,

> 219 (Fla. 1984) (Emphasis omitted). This principle is "not a rule of grammar, it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature." *State v. Brigham,* 694 So.2d 793, 797 (Fla. 2d DCA 1997).

As written, §794.011(2)(a) prescribes the sentence of death. Legislatively, this element of the statute establishes that section 794.011(2)(a) is a capital felony. However, the prescribed punishment of death in section 794.011(2)(a) has been held by the Florida Supreme Court to be unconstitutional, rendering this section a nonexistent part of the statute.

Conversely, it may be argued that an amendment to 794.011(2)(a) is not required based upon the provision included in 775.082(2). This section provides that "in the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in section (1)[1]." On its face, however, this section is applicable only to a person "previously sentenced to death for a capital felony." More importantly, there is no provision included in this section directing the courts to impose a life sentence pursuant to 775.082(1) upon a person who is convicted of a former capital felony committed after the death penalty is held to be unconstitutional. This would be an abrogation of legislative power for the court to direct such a sentence, considering the plain language used in this section. It would also be impractical considering that the former capital felony would no longer be a capital felony. . .

Also, what appears here to be a sentencing issue is not. The only relevance that sentencing has here is the legislature's failure to amend the felony designation and the prescribed punishment pronounced within the authority being challenged. This becomes relevant because the failure to amend renders the authority nonexistent.

The bottom line here is this; §794.011(2)(a) is no longer punishable by death and a capital felony is one that is punishable by death. Because 794.011(2)(a) was not amended and continues to prescribe death as a punishment, it is void and thereby a nonexistent capital felony statute and may not operate to serve as a basis for imprisonment. See *Moore v. State,* 924 So.2d 840, 841 (Fla. 4th DCA 2006) ("One cannot be convicted of a non-existent offense. The conviction is illegal and cannot be allowed to stand.") See also *Gironda v. State,* 236 So.2d 193 (Fla. 1972) (conviction obtained under statute declared unconstitutional must be reversed); and *Miller v. State,* 988 So.2d 138, 139 (Fla. 1st DCA 2008) (explaining that fundamental error and a manifest injustice results when a defendant is convicted of an offense for which the defendant could not have been convicted as a matter of law).

CONCLUSION

Wherefore, based upon the argument presented in this petition, Tarver is entitled to the relief sought in this petition.

[1] It should be noted that those sentenced to death were sentenced as such after a hearing was conducted before a jury determining that the harshest penalty be imposed.

DECLARATION

I, Warren Tarver, under penalty of perjury, pursuant to Florida Statutes Section 92.525, hereby declare that I have read the foregoing petition for writ of habeas corpus and the facts as stated herein are true and correct filed this 14th day of November, 2019.

Warren Tarver, #L13572 pro se
South Bay Correctional and
Rehabilitation Facility
P.O. Box 7171
South Bay, FL 33493

95-12342

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

vs.

WARREN TARVER

INFORMATION FOR

I-V. - SEXUAL BATTERY UPON A CHILD
VI-VII. - INDECENT ASSAULT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

on one or more occasions between the 1st day of October, A.D. 1994, up to and including the 12th day of July, A.D. 1995, in the County and State aforesaid, being a person of the age of eighteen (18) years or older, did commit sexual battery upon Cherie Vanderpool, a person less than twelve (12) years of age, by causing his penis to penetrate or unite with the mouth of Cherie Vanderpool, contrary to F.S. 794.011(2).

COUNT II

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

on one or more occasions between the 1st day of October, A.D. 1994, up to and including the 12th day of July, A.D. 1995, in the County and State aforesaid, being a person of the age of eighteen (18) years or older, did commit sexual battery upon Cherie Vanderpool, a person less than twelve (12) years of age, by causing his mouth to penetrate or unite with the sexual organ of Cherie Vanderpool, contrary to F.S. 794.011(2).

COUNT III

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

on or about the 28th day of November, A.D. 1994, in the County and State aforesaid, being a person of the age of eighteen (18) years or older, did commit sexual battery upon Cherie Vanderpool, a person less than twelve (12) years of age, by causing his penis to penetrate or unite with the vagina of Cherie Vanderpool, contrary to F.S. 794.011(2).

COUNT IV

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

on one or more occasions between the 30th day of November, A.D. 1994, up to and including the 12th day of July, A.D. 1995, in the County and State aforesaid, being a person of the age of eighteen (18) years or older, did commit sexual battery upon Cherie Vanderpool, a person less than twelve (12) years of age, by causing his penis to penetrate or unite with the vagina of Cherie Vanderpool, contrary to F.S. 794.011(2).

COUNT V

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

on the 13th day of July, A.D. 1995, in the County and State aforesaid, being a person of the age of eighteen (18) years or older, did commit sexual battery upon Cherie Vanderpool, a person less than twelve (12) years of age, by causing his penis to penetrate or unite with the vagina of Cherie Vanderpool, contrary to F.S. 794.011(2).

COUNT VI

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

between the 1st day of October, A.D. 1994, up to and including the 31st day of October, A.D. 1994, in the County and State aforesaid, did handle, fondle or make an assault upon Cherie Vanderpool, a child under the age of sixteen years in a lewd, lascivious or indecent manner, to-wit: did rub his foot against the vaginal area of Cherie Vanderpool, contrary to F.S. 800.04(1).

COUNT VII

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that WARREN TARVER

between the 1st day of October, A.D. 1994, up to and including the 31st day of October, A.D. 1994, in the County and State aforesaid, did handle, fondle or make an assault upon Cherie Vanderpool, a child under the age of sixteen years in a lewd, lascivious or indecent manner, to-wit: did rub the breast of Cherie Vanderpool with his hand, contrary to F.S. 800.04(1).

Black male, height 5'9", weight 160 lbs, brown eyes, brown hair
D.O.B. 8\28\59; Pompano Beach, Florida
SS# 267-53-1215

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me ***DENNIS SIEGEL,*** duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn, certifies and says that testimony has been received under oath from the material witness or witnesses for the offense(s), and the allegations as set forth in the foregoing Information would constitute the offense(s) charged, and that this prosecution is instituted in good faith.

Dennis Siegel
Assistant State Attorney, 17th Judicial Circuit of Florida

SWORN TO AND SUBSCRIBED before me this 8 day of August, A.D. 1995

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Nadine Turner
Deputy Clerk

To the within Information, Defendant pleaded _____.

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By _____
Deputy Clerk

BW:emb 8-7-6.bw

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

WARREN TARVER

Defendant

CASE NO: 95-12342CF10A

JUDGE JOEL T. LAZARUS

VERDICT

COUNT I

WE, THE JURY, FIND AS FOLLOWS AS TO THE DEFENDANT IN THIS CASE: (CHECK ONLY ONE)

X A. The Defendant is Guilty of Sexual Battery Upon a Child, as charged in the Information.

_____ B. The Defendant is Not Guilty.

SO SAY WE ALL, THIS 4TH DAY OF DECEMBER, 1997, AT FORT LAUDERDALE, BROWARD COUNTY, FLORIDA.

Terrance P. Cassidy Jr.
AS FOREPERSON (Signature)

TERRANCE P. CASSIDY JR.
AS FOREPERSON (Print Name)

Filed In Open Court,
ROBERT E. LOCKWOOD,
ON DEC 04 1997
BY S. Kasper

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

WARREN TARVER

Defendant
_____/

CASE NO: 95-12342CF10A

JUDGE JOEL T. LAZARUS

VERDICT

COUNT II

WE, THE JURY, FIND AS FOLLOWS AS TO THE DEFENDANT IN THIS CASE: (CHECK ONLY ONE)

__X__ A. The Defendant is Guilty of Sexual Battery Upon a Child, as charged in the Information.

_____ B. The Defendant is Not Guilty.

SO SAY WE ALL, THIS 4TH DAY OF DECEMBER, 1997, AT FORT LAUDERDALE, BROWARD COUNTY, FLORIDA.

Terrence P. Cassidy Jr
AS FOREPERSON (Signature)

TERRENCE P. CASSIDY JR
AS FOREPERSON (Print Name)

Filed In Open Court,
ROBERT E. LOCKWOOD,
Clerk
ON DEC 04 1997
BY S Kasper

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

WARREN TARVER

Defendant
_____/

CASE NO: 95-12342CF10A

JUDGE JOEL T. LAZARUS

VERDICT

COUNT III

WE, THE JURY, FIND AS FOLLOWS AS TO THE DEFENDANT IN THIS CASE: (CHECK ONLY ONE)

__X__ A. The Defendant is Guilty of Sexual Battery Upon a Child, as charged in the Information.

_____ B. The Defendant is Not Guilty.

SO SAY WE ALL, THIS 4TH DAY OF DECEMBER, 1997, AT FORT LAUDERDALE, BROWARD COUNTY, FLORIDA.

Terrance P. Cassidy Jr.
AS FOREPERSON (Signature)

TERRANCE P. CASSIDY, JR.
AS FOREPERSON (Print Name)

Filed In Open Court,
ROBERT B. [illegible]
DEC 04 1997
BY: S Kasper

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

WARREN TARVER

Defendant

CASE NO: 95-12342CF10A

JUDGE JOEL T. LAZARUS

VERDICT

COUNT IV

WE, THE JURY, FIND AS FOLLOWS AS TO THE DEFENDANT IN THIS CASE: (CHECK ONLY ONE)

X A. The Defendant is Guilty of Sexual Battery Upon a Child, as charged in the Information.

_____ B. The Defendant is Not Guilty.

SO SAY WE ALL, THIS 4TH DAY OF DECEMBER, 1997, AT FORT LAUDERDALE, BROWARD COUNTY, FLORIDA.

Terrence P. Cassidy Jr.
AS FOREPERSON (Signature)

TERRENCE P. CASSIDY, JR.
AS FOREPERSON (Print Name)

FILED IN OPEN COURT,
BROWARD COUNTY, FL.
ON DEC 04
BY S Kasper

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

WARREN TARVER

Defendant
_____/

CASE NO: 95-12342CF10A

JUDGE JOEL T. LAZARUS

VERDICT

COUNT V

WE, THE JURY, FIND AS FOLLOWS AS TO THE DEFENDANT IN THIS CASE: (CHECK ONLY ONE)

X A. The Defendant is Guilty of Sexual Battery Upon a Child, as charged in the Information.

_____B. The Defendant is Not Guilty.

SO SAY WE ALL, THIS 4TH DAY OF DECEMBER, 1997, AT FORT LAUDERDALE, BROWARD COUNTY, FLORIDA.

Terrence P. Cassidy Jr.
AS FOREPERSON (Signature)

TERRENCE P. CASSIDY, JR.
AS FOREPERSON (Print Name)

[illegible] OF THE CIRCUIT COURT,
BROWARD [illegible]
FILED FOR RECORD
ON: DEC 04 1997
BY S Kasper

DIVISION: Criminal 12	**SENTENCE** as to Count I	
THE STATE OF FLORIDA VS. WARREN TARVER		**CASE NUMBER** 95-12342CF10A
PLAINTIFF	**DEFENDANT**	

The Defendant, being personally before this Court, accompanied by his attorney, JAMES ONGLEY and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One)
- [✓] and the Court having on DECEMBER 4, 1996 deferred imposition of sentence until this date.
- [ ] and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
- [ ] and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $ _____, pursuant to F.S. 775.063, plus $ _____ at the 5% surcharge required by F.S. 960.25

[✓] 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 Broward County, Florida.

[ ] The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

[✓] For a term of Natural Life.

[ ] For a term of _____

[ ] Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete either paragraph.

_____ Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

FORM 1BDF070
REVISED 9/93

DIVISION: CRIMINAL 12	SENTENCE (AS TO COUNT I)	CASE NUMBER 95-12342CFAA

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.

SPECIAL PROVISIONS
(As to Count I)

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

MANDATORY/MINIMUM PROVISIONS:

FIREARM ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING ____ It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER ____ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER ____ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by 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 _____ years before release in accordance with Florida Statute 775.0823.

CAPITAL OFFENSE ✓ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL ____ The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court a set forth in a separate order or stated on the record in open court.

DIVISION: CRIMINAL	SENTENCE (AS TO COUNT I)	CASE NUMBER
42		95-12342CF10A

OTHER PROVISIONS

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN — ____ It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

CONTINUING CRIMINAL ENTERPRISE — ____ It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

RETENTION OF JURISDICTION — ____ The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT — ✓ It is further ordered that the defendant shall be allowed a total of 911 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT — ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS — ✓ It is further ordered that the sentence imposed by this court shall run ____ consecutive to ✓ concurrent with (check one) the sentence set forth in count ~~II, III, IV~~ of this case.

IN THE 17th Judicial Circuit in ... for Broward

DIVISION: Criminal LL	SENTENCE as to Count II	
THE STATE OF FLORIDA VS. WARREN TARVER		CASE NUMBER 95-12342CF10A
PLAINTIFF	DEFENDANT	

The Defendant, being personally before this Court, accompanied by his attorney, JAMES ONGLEY, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One)
- [X] and the Court having on DECEMBER 4, 1997 deferred imposition of sentence until this date.
- [ ] and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
- [ ] and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $ _____, pursuant to F.S. 775.063, plus $ _____ at the 5% surcharge required by F.S. 960.25

[X] 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 Broward County, Florida.

[ ] The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

[X] For a term of Natural Life.

[ ] For a term of: _____

[ ] Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete either paragraph.

_____ Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

FORM 1B5F070
REVISED 9/93

DIVISION: CRIMINAL L2	SENTENCE (AS TO COUNT II)	CASE NUMBER 95-12342CF10A

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.

SPECIAL PROVISIONS
(As to Count II)

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

MANDATORY/MINIMUM PROVISIONS:

FIREARM ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING ____ It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER ____ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER ____ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by 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 _____ years before release in accordance with Florida Statute 775.0823.

CAPITAL OFFENSE ✓ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL ____ The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court a set forth in a separate order or stated on the record in open court.

DIVISION: CRIMINAL	SENTENCE	CASE NUMBER
12	(AS TO COUNT II)	95-12342CF10A

OTHER PROVISIONS

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN	____ It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.
CONTINUING CRIMINAL ENTERPRISE	____ It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.
RETENTION OF JURISDICTION	____ The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).
JAIL CREDIT	✓ It is further ordered that the defendant shall be allowed a total of 911 days as credit for time incarcerated prior to imposition of this sentence.
PRISON CREDIT	____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	✓ It is further ordered that the sentence imposed by this court shall run ____ consecutive to ✓ concurrent with (check one) the sentence set forth in count ~~I, III, IV~~ of this case.

DIVISION: Criminal	SENTENCE as to Count III	
LZ		
THE STATE OF FLORIDA VS. WARREN TARVER		CASE NUMBER 95-12342CF10A
PLAINTIFF	DEFENDANT	

The Defendant, being personally before this Court, accompanied by his attorney, JAMES ONGLEY and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One)
- [X] and the Court having on DECEMBER 4, 1997 deferred imposition of sentence until this date.
- [ ] and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
- [ ] and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $ _____, pursuant to F.S. 775.063, plus $ _____ at the 5% surcharge required by F.S. 960.25

[X] The Defendant is hereby commited to the custody of the Department of Corrections.

[ ] The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida.

[ ] The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

[X] For a term of Natural Life.

[ ] For a term of _____

[ ] Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete either paragraph.

_____ Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

FORM 1BOP070
REVISED 9/93

DIVISION: CRIMINAL L2	SENTENCE (AS TO COUNT III).	CASE NUMBER 95-12342CF10A

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.

SPECIAL PROVISIONS
(As to Count III)

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

MANDATORY/MINIMUM PROVISIONS:

FIREARM ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING ____ It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER ____ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER ____ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by 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 _____ years before release in accordance with Florida Statute 775.0823.

CAPITAL OFFENSE ✓ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL ____ The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court a set forth in a separate order or stated on the record in open court.

DIVISION: CRIMINAL	SENTENCE (AS TO COUNT III)	CASE NUMBER
L2		95-12342CF10A

OTHER PROVISIONS

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN — ____ It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

CONTINUING CRIMINAL ENTERPRISE — ____ It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

RETENTION OF JURISDICTION — ____ The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT — ✓ It is further ordered that the defendant shall be allowed a total of 911 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT — ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS — ✓ It is further ordered that the sentence imposed by this court shall run ____ consecutive to ✓ concurrent with (check one) the sentence set forth in count ~~I, II, IV~~ of this case.

17th Judicial Circuit in ... for ...

DIVISION: Criminal L2	SENTENCE as to Count IV	
THE STATE OF FLORIDA VS. WARREN TARVER		CASE NUMBER 95-12342CF10A
PLAINTIFF	DEFENDANT	

The Defendant, being personally before this Court, accompanied by his attorney, JAMES ONGLEY and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One)
- [X] and the Court having on DECEMBER 4, 1997 deferred imposition of sentence until this date.
- [ ] and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
- [ ] and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $ _____, pursuant to F.S. 775.063, plus $ _____ at the 5% surcharge required by F.S. 960.25

[X] 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 Broward County, Florida.

[ ] The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

[X] For a term of Natural Life.

[ ] For a term of _____

[ ] Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete either paragraph:

_____ Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

FORM 1B(P)70
REVISED 9/93

DIVISION: CRIMINAL 62	SENTENCE (AS TO COUNT III)	CASE NUMBER 95-12342CF10A

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.

SPECIAL PROVISIONS
(As to Count III)

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

MANDATORY/MINIMUM PROVISIONS:

FIREARM ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING ____ It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER ____ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER ____ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by 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 _____ years before release in accordance with Florida Statute 775.0823.

CAPITAL OFFENSE ✓ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL ____ The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court a set forth in a separate order or stated on the record in open court.

DIVISION: CRIMINAL	SENTENCE	CASE NUMBER
L2	(AS TO COUNT IV)	95-12342CF10A

OTHER PROVISIONS

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN — ____ It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

CONTINUING CRIMINAL ENTERPRISE — ____ It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

RETENTION OF JURISDICTION — ____ The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT — ✓ It is further ordered that the defendant shall be allowed a total of 911 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT — ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS — ✓ It is further ordered that the sentence imposed by this court shall run ____ consecutive to ✓ concurrent with (check one) the sentence set forth in count ~~I, II, III~~ of this case.

DIVISION: Criminal 12	**SENTENCE** as to Count V	
THE STATE OF FLORIDA VS. WARREN TARVER		CASE NUMBER 95-12342CF10A
PLAINTIFF	DEFENDANT	

The Defendant, being personally before this Court, accompanied by his attorney, JAMES ONGLEY and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer maners in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One) [X] and the Court having on December 4, 1997 deferred imposition of sentence until this date.
[ ] and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
[ ] and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:
The Defendant pay a fine of $ _____, pursuant to F.S. 775.063, plus $ _____ at the 5% surcharge required by F.S. 960.25

[ ] 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 Broward County, Florida.

[ ] The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

[X] For a term of Natural Life.

[ ] For a term of _____

[ ] Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete either paragraph.

_____ Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

FORM 1302070
REVISED 9/93

DIVISION: CRIMINAL L2	SENTENCE (AS TO COUNT IV) .	CASE NUMBER 95-12342CFIUA

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.

SPECIAL PROVISIONS
(As to Count IV)

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

MANDATORY/MINIMUM PROVISIONS:

FIREARM ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING ____ It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL ____ It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER ____ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER ____ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by 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 _____ years before release in accordance with Florida Statute 775.0823.

CAPITAL OFFENSE ✓ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL ____ The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court a set forth in a separate order or stated on the record in open court.

DIVISION: CRIMINAL	SENTENCE (AS TO COUNT IV)	CASE NUMBER
42		95-12342CF10A

OTHER PROVISIONS

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN — ____ It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

CONTINUING CRIMINAL ENTERPRISE — ____ It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

RETENTION OF JURISDICTION — ____ The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT — ✓ It is further ordered that the defendant shall be allowed a total of 911 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT — ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS — ✓ It is further ordered that the sentence imposed by this court shall run ✓ consecutive to ____ concurrent with (check one) the sentence set forth in count I, II, III IV of this case.

CONSECUTIVE/ CONCURRENT AS TO OTHER CONVICTIONS — ____ It is further ordered that the composite term of all sentences imposed for the courts specified in this order shall run
____ consecutive to ____ concurrent with (check one) the following:
____ Any active sentence being served.
____ Specific sentences:

PSI ORDERED YES [X] NO [ ]

In the event the above sentence is to the Department of Corrections, the Sheriff of Broward County, Florida, 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 his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the Court further recommends ____

DONE AND ORDERED in Open Court at Broward County, Florida, this 9 day of JANUARY, 1998.

____
JUDGE

17 th Jud l Circuit in and for Browar County

Criminal Division

UNIFORM COMMITMENT TO CUSTODY OF DEPARTMENT OF CORRECTIONS

THE Circuit Court of BROWARD County in the FALL Term, 1997 in the case of

STATE OF FLORIDA

VS.

WARREN TARVER 95-12342 CF10A

(DEFENDANT) (CASE NUMBER)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETINGS:

The above named defendant having been duly charged with the offense specified herein in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of indictment/information, Judgment and Sentence, and Felony Disposition and Sentence Data form which are hereby made parts hereof;

Now therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant, together with any pertinent investigation Report prepared in this case, into the custody of the Department of Corrections of the State of Florida; and this is to command you, the said Department of Corrections, by and through your Secretary, Regional Directors, Superintendents, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correction system to which you, the said Department of Corrections, may cause the said defendant to be conveyed to thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

CIRCUIT COURT 17th JUDICIAL CIRCUIT BROWARD COUNTY, FLORIDA

WITNESS the Honorable JOEL T. LAZARUS
Judge of said Court, as also
ROBERT E. LOCKWOOD, Clerk, and the
Seal thereof, this 9 day of JANUARY, 1998

ROBERT E. LOCKWOOD, Clerk

BY Sherri Kasper
Deputy Clerk

FORM REVISED 9/95

EXHIBIT IV

APPENDIX "E"

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

WARREN TARVER,
Petitioner

CIRCUIT CIVIL DIVISION: AB

v

CASE NO. 50-2019-CA-014747-XXXX-MB

WILLIAM HAMILTON, etc.,
Respondent. /

Provided to South Bay Corr. and Rehab. Facility on December 3, 2019 for mailing.
W. J.

MOTION FOR REHEARING

Petitioner, WARREN TARVER, files this pro se Motion for Rehearing pursuant to F.R.Civ.P., Rule 1.530(b). Petitioner respectfully files this motion where this Court may have overlooked or not considered certain points in its denial of his pleading. Petitioner's concerns are as follows:

Legislative Intent —

In denying Tarver's petition, this Court relied upon the finding held in State v Kwitowski, 250 So.3d 210 (Fla. 2d DCA 2018), which addresses the legislature's intent for continuing to classify 794.011(2)(a) as a capital felony, in view of the decision held in Buford v State, 403 So.2d 943, 950-51 (Fla. 1981). In Kwitowski, the court points to the Criminal Code and the alternative in 775.082(1) to support its theory that there is more than one definition for the term "capital felony." This, however, is not supported by sound reasoning.

Contrary to the opinion stated in Kwitowski, the Criminal Code

does not point toward defining felony offenses. Instead, it points toward the severity of offenses as enacted by the Florida Legislature. From this it could be surmised that the Florida Legislature views 794.011(2)(a) as being so egregious that it warrants the classification of a capital felony, which brings us to the elements demonstrating Florida's intent for allowing 794.011(2)(a) to remain a capital felony, notwithstanding the ruling held in Buford.

In Buford, it was held that 794.011(2)(a) does not meet the level of egregiousness needed to warrant capital punishment. However, though the Florida Legislature may not agree with Buford's finding on egregiousness, it does not have the authority to supercede a court decision by continuing to classify the offense a capital felony, which also prescribes the punishment of death for the offense. This conflict of views appears to be the case as reasoned in Kwitowski.

Next, the alternative sentence stipulated in 775.082(1) also does not support the theory of there being two definitions for the term "capital felony" as found in Kwitowski. In 775.082(1), there is a requirement for a hearing to be conducted pursuant to 921.141 in determining whether the death penalty will be imposed. This stipulation affords the court pardoning power to sentence a person to life in prison based upon a jury's mitigating factors and recommendation.

Also, contrary to the finding in Kwitowski, the stipulation in 775.082(2) is not a foreseen means by which to continue classifying capital felonies as such in the event that the death penalty is held to be unconstitutional for the offense. A more reasonable and logical discernment here would be that 775.082(2) was stipulated so that those already sentenced to death, upon the recommendation of a jury, would be

appropriately resentenced. In applying reasonable logic, once the offense is no longer punishable as a capital felony the next highest level is a life felony. A life felony is punishable by a term of years with the maximum being life in prison. Because it would have already been determined by a jury that a person previously sentenced to death be given the maximum penalty, logic dictates that in the event the death penalty is held to be unconstitutional then the person would be resentenced to life in prison, which is the maximum penalty for a life felony. Even more supporting of this reasoning is that no stipulation was made in 775.082 that the classification of these capital felonies would remain the same in the event that the death penalty was held to be unconstitutional.

More important, only the legislature has the authority under seperation of powers to enact such a classification. Under the rules of statutory construction the court has no authority to legislate from the bench by giving interpretation on intent where there is no ambiguity in the wording or meaning of the language. See State v Rife, 789 So.2d 288, 292 (Fla. 2001) and Overstreet v State, 629 So.2d 125 (Fla 1993). In fact, it appears that the Florida Legislature inadvertantly failed to amend 794.011(2)(a) subsequent to Buford where the prescribed punishment, as well as the entire section, went unchanged.

Moreover, the definition of the term "capital" is well established in Florida Supreme Court decisions held on different grounds but in one unified conclusion. This unified conclusion points to only one defining factor in determining what constitutes a "capital" criminal offense. See Adams v State, 56 Fla 1, 14, 48 So. 219, 224 (1908) ([a] capital case is a case in which a person is tried for a capital crime. A capital crime is one for which the punishment of death is inflicted); Donaldson v Sack, 265 So.2d 499, 501-02 (Fla 1972) ([m]urder in the first degree is not a capital offense when it cannot be punished by death); Rusaw

v. State, 451 So.2d 469 (Fla. 1984) ([s]exual battery is not punishable by death. Buford. Further we held in Rowe v State, 417 So.2d 981 (Fla. 1982), that murder in the first-degree is the only existing capital felony in Florida); and Heuring v State 513 So.2d 122 (Fla. 1987) (a capital felony is one that is punishable by death).

Constitutionality of 794.011(2)(a) —

The most essential aspect of Tarver's habeas corpus claim is that the authority under which he is being held is, as a matter of law, constitutionally defective and void of any lawful authority. This particular point was not addressed by this Court in its denial though raised by Tarver in his petition. To reitterate this point, Tarver asserts that, as a matter of procedure, 794.011(2)(a) prescribes the penalty of death as a punishment. As a matter of law, it is unlawful to impose the penalty of death for this offense. The question of importance, therefore, is whether it is constitutionally sound to imprison a person under the authority of a statute that unlawfully prescribes death as a punishment, which is contrary to the constitutional standards promulgated by the Florida and United States Supreme Courts? Viewing this from a logistical perspective, the defect in the statute renders it void nullifying it to serve as a basis for imprisonment.

Final Note —

Also worthy of noting are two seperate desenting opinions concerning the full courts' view of this conundrum. As opinned by Barkett, J. in Batie v State, 534 So.2d 694 (Fla. 1988): "I believe

that Buford v State, 403 So.2d 943 (Fla. 1981) and Reino v State, 352 So.2d 853 (Fla. 1977), require the quashing of the opinion of the district court. In Reino, this Court stated:

> "It is apparent that all capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptually inconsistent to conclude that the procedural advantages inuring to a defendant in a capital case fall with abolition of the death penalty and then conclude that the substantive disadvantages (limitation on entitlement to bail and unlimited statute of limitations) remain viable. Id at 858 (emphasis added)."

Subsequent to the writing of this opinion, a desenting opinion was written in Perez v State, 545 So.2d 1357 (Fla. 1989), by Overton, J, which stated:

> "The majority allows Perez to be charged by infomation and tried before a six-man jury as if this was a life felony, but still holds that the statute of limitations for a capital offense applies. In my view, this is illogical. There is no legal justification to overrule the basic principles adopted in Reino."

Based upon these desenting opinions, there can only be one absolute resolution to this debate. The Florida Legislature, who is empowered to classify the felony level of a criminal offense, must amend 794.011(2)(a) so that it comports with the constitutional standard held in Buford and also give a clear definition to the term "capital felony." Any action of the court to do so would be an abrogation of legislative authority. See State v Rife, 789 So.2d 288, 292 (Fla. 2001) ("When faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'").

CONCLUSION

Tarver respectfully submits that he is entitled to habeas corpus relief based upon the aforementioned points that this Court may have overlooked or not considered.

Warren Tarver

Respectfully submitted,

Warren Tarver #L13572
pro se

DECLARATION

I, Warren Tarver, under penalty of perjury, pursuant to Florida Statutes Section 92.525, hereby declare that I have read the foregoing motion for rehearing and that the facts as stated herein are true and correct filed this 5th day of December, 2019.

Warren Tarver

Warren Tarver #L13572
South Bay Correctional and
Rehabilitation Facility
P.O. Box 7171
South Bay, Florida 33493

APPENDIX "F"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D19-3936
L.T. NO.: 50-2019-CA-014747-XXXX-MB

WARREN TARVER
Appellant

vs

WILLIAM HAMILTON
Appellee.

* * * * * * * * * * * *

BRIEF OF THE APPELANT

* * * * * * * * * * * *

WARREN TARVER DC# L13572
South Bay Correctional and
Rehabilitation Facility
P.O. Box 7171
South Bay, Florida 33493
pro se

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the Petitioner and will be referred to here as Appellant and his proper name. Appellee was the Respondent but will not be referred to here where no response was given or required of Appellee in this matter. In this brief, the following symbols will be used:

> "P" will denote Appellant's PETITION FOR WRIT OF HABEAS CORPUS and will be followed by the appropriate page number where needed.
>
> "O" will denote ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS and will be followed by the appropriate page number where needed.
>
> "R" will denote MOTION FOR REHEARING and will be followed by the appropriate page number where needed.
>
> "OR" will denote ORDER DENYING PETITIONER'S MOTION FOR REHEARING and will be followed by the appropriate page number where needed.

STATEMENT OF THE CASE

On November 14, 2019, Tarver submitted a petition for writ of habeas corpus in the Fifteenth Judicial Circuit Court claiming that he is being held in custody under the authority of a nonexistent capital felony (see P-4). On November 26, 2019, the lower court issued an order denying Tarver's pleading (see O) On December 9, 2019, 2019, Tarver filed a motion for rehearing (see R). On December 13, 2019, the lower court issued an order denying Tarver's motion, conceding to a point of law argued by Tarver (see OR-2), but held to its previous reasoning as grounds for the denial

(see OR-2,3). Tarver now appeals before this Honorable Court the lower court's denial of his habeas corpus claim.

SUMMARY OF THE ARGUMENT

On appeal, Tarver submits that the lower court has misapprehended the gist of his habeas corpus claim. In its denial of the petition and motion for rehearing, the lower court reasoned that Tarver had argued "that the definition of a capital felony, along with the Florida Legislature's intent, indicates that death is the only available punishment for capital felonies." However, the point of law asserted by Tarver in his petition was that the punishment of death must be a possibility, otherwise the offense is not a capital offense.

More important, the issue appealed here by Tarver is that his imprisonment is unlawful because the authority which sanctions his imprisonment is void of any lawful authority. This premise is based upon the fact that the offense is not defined by law as a capital felony and the authority, as written, has been found to be unconstitutional thereby rendering it void of lawful authority.

Tarver also submits that the lower court's finding on legislative intent is not dispositive of this issue. Here, the lower court has strayed from the rules governing statutory construction by looking beyond the plain language used in the statutes in question regarding intent. In view of these circumstances, Tarver asserts that habeas corpus relief is warranted upon proper review of the claim.

ARGUMENT

Standard of Review

> If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended. Zuckerman v Alter, 615 So.2d 661,663(Fla.1993). See also Kephart v Hadi, 932 So.2d 1086,1091(Fla. 2006) and Mesen v State, 271 So.3d 164,172(Fla. 2d DCA 2019).
>
> "When faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" State v Cohen, 696 So.2d 435,436(Fla. 4th DCA 1997)(quoting Holly v Auld, 450 So.2d 217,219(Fla. 1984) (emphasis omitted).
>
> The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review. Kephart v Hadi, 932 So.2d 1086,1089(Fla. 2006).

The matter on appeal is concerning the lower court's determination of legislative intent regarding the capital felony classification and capital punishment prescribed in §794.011(2)(a), which is the determining factor of the lower court in deciding the lawfulness of Tarver's imprisonment. Being that the interpretation of the statutes involved is a purely legal matter, the de novo standard of review is applicable. The questions in this matter are as follows:

> WHETHER F.S. §794.011(2)(a) IS BY LEGAL DEFINITION A CAPITAL FELONY OFFENSE?

There has been much controversy in the Florida courts on whether §794.011(2)(a)

should retain its capital felony classification in lieu of the finding held in Buford v State, 403 So.2d 943(Fla. 1981). On one hand, the courts have found that a capital felony is an offense which may be punished by death. See Mills v Moore, 786 So.2d 532,538(Fla. 2001). On the other hand, the courts have reasoned that "capital sexual battery" retains its capital felony classification based upon the severity of the offense though the penalty of death is held to be unconstitutional for the offense. See Kwitowski v State, 250 So.3d 210,217(Fla. 2d DCA 2018). However, the position that Tarver holds on the subject is expressed in the common meaning of the term "capital offense" and its denotative value.

In Ballentine's Law Dictionary, Third Edition, the term capital felony is defined, "An offense which may be punished capitally, that is by the execution of the death penalty. The test of a 'capital crime' is not the punishment which is imposed, but that which may be imposed." This definition is widely viewed among the courts in Florida as the common meaning of the term. In fact, the Florida Legislature views the term as such based on the plain language used in F.S.§775.082(1), which states, "A person who has been convicted of a capital felony **shall be punished by death** if the proceeding **held to determine sentence** according to the procedure set forth in s. 921.141 **results in findings** by the court that such person shall be punished by death...," Florida Statutes (1994) ex post facto. In the plain language of this statute, death is not only prescribed to be a possible punishment for the conviction of a capital offense

but is emphatically instructed to be the ultimate punishment sought.

Here is why Tarver argues that §794.011(2)(a) should no longer be classified as a capital felony offense. For one, as defined, death must be a possible punishment for a capital offense. As held in Buford, it is unconstitutional to impose the penalty of death upon a person convicted of §794.011(2)(a). Next, as prescribed in §794.011(2)(a), it is unambiguously required that sentencing be imposed under both "ss.775.082 and 921.141." As a matter of procedure, such a sentence cannot be carried out because the death penalty is no longer applicable here and thus cannot be considered for sentencing in accordance with the required procedure held in §921.141. Even more problematic, the alternative punishment in subsection (1) of section 775.082 must first be determined by the procedural requirements held in §921.141, which are no longer applicable to §794.011(2)(a) in lieu of Buford.

The position held here by Tarver is not an unreasonable one and is shared in theory by two Florida Supreme Court Justices in their dissenting written opinions. In Batie v State, 534 So.2d 694(Fla.1988), Barkett, J., opinned, "I believe that Buford v State, 403 So.2d 943(Fla.1981) and Reino v State, 352 So.2d 853(Fla. 1977), require the quashing of the opinion of the district court. In Reino, this Court stated:

> It is apparent that all capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptually inconsistent to conclude that the procedural advantages <u>inuring</u> to a

> defendant in a capital case fall with abolition of the death penalty and then conclude that the substantive disadvantages (limitations on entitlement to bail and unlimited statute of limitations) remain viable. Id at 858 (emphasis added)."

Also, in Perez v State, 545 So.2d 1357(Fla. 1989), Overton, J, opinned:

> "The majority allows Perez to be charged by information and tried before a six-man jury as if this was a life felony, but still holds that the statute of limitations for a capital offense applies. In my view, this is illogical. There is no legal justification to overrule the basic principles adopted in Reino."

As a matter of process, Tarver submits that there is only one adequate and final solution to the conflict surrounding this issue. The Florida Legislature must amend §794.011(2)(a) so that it comports with the decision held in Buford. Until such time, the courts in Florida should hold to that which was decided in Buford and not substitute the terms of the plain language used in §794.011(2)(a) with its own independent reasoning in an attempt to justify the continued unlawful use of the statute as an authority for imprisonment.

WHETHER THE PLAIN LANGUAGE IN 794.011(2)(a) AND 775.082 MAY BE GIVEN JUDICIAL CONSTRUCTION?

It is apparent here that the lower court's denial of Tarver's habeas corpus claim is predicated upon its finding on legislative intent. Tarver submits here that the lower court's finding on legislative intent is an improper application of statutory construction and will be explained as follows:

794.011(2)(a) —

"A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age **commits a capital felony, punishable as provided in ss. 775.082 and 921.141.**" Florida Statutes (1993), ex post facto.

The term "capital offense" is defined, "a crime for which the death penalty may be imposed." Black's Law Dictionary, Tenth Edition. In its denial, the lower court ultimately found that §794.011(2)(a) may be classified as a capital felony offense while conceding that "in Florida the term 'capital felony' only has one meaning, but that meaning does not impose a mandatory consideration of the death penalty" (OR-2), citing Kwitowski v State, 250 So.3d 210,217(Fla. 2d DCA 2018) as a basis for its reasoning. This reasoning, however, is the court's misinterpretation of the legislative intent expressed in §794.011(2)(a), which is in direct conflict with the decision held in Mills v Moore, 786 So.2d 532,538(Fla. 2001). In Mills v Moore, it states that "there can be no doubt that a person convicted of a capital felony faces a maximum penalty of death."

Even more compelling on this point of law is the fact that the legislature requires in §794.011(2)(a) that the punishment be provided by the terms held within §775.082 and §921.141, which is to first determine by hearing before a jury whether the offense is to be punished by death. If it is determined that the offense is not to be punished by death then a life sentence is to be imposed under subsection

(1) of section 775.082.

In short, Tarver submits that §794.011(2)(a) should have been amended by the Florida Legislature and may no longer be classified as a capital felony in lieu of Buford. Additionally, any judge who gives construction to a statute other than that which is given by the words used in the plain language of the statute abuses the rules of statutory construction. See Meyer v Caruso, 731 So.2d 118,126(Fla. 4th DCA 1999). "It is fundamental that judges do not have the power to edit statutes so as to add requirements that ~~that~~ the legislature did not include. See Holly v Auld, 450 So.2d 217(Fla. 1984)(courts lack power to construe unambiguous statutes to extend, **modify, or limit** express terms)." Also see Overstreet v State, 629 So.2d 125(Fla. 1993). "It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. If the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute."

775.082—

(1) A person who has been convicted of a capital felony **shall be punished by death** if the proceeding **held to determine sentence** according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and;

> (a) if convicted of murder in the first degree or of a capital felony under s. 790.161, shall be ineligible for parole, or
>
> (b) if convicted of any other capital felony, shall be required to serve no less than 25 years before becoming eligible for parole.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

The lower court contends here that even when it is found to be unconstitutional to impose the penalty of death upon a person convicted of a capital felony, the clause in subsection (2) of section 775.082 allows for a capital felony to retain its capital felony classification. This reasoning by the lower court is based upon the finding held in Donaldson v Sack, 265 So.2d 499,502(Fla. 1972), which holds that the entire statute is not made void by the constitutional infirmity found in a particular portion of the statute (OR-2). Tarver contends, however, that this reasoning is a form of judicial fiat because its application is misplaced.

Considering this point of law from a more practical view, the decision held in Donaldson applies only to those who were already sentenced to death (after conducting the required hearing prescribed in §775.082(1)) in the event that the death penalty is held to be unconstitutional. In fact, there is no provision anywhere in the plain

language of section 775.082 that stipulates or infers that a capital felony retains its capital felony classification in the event that the death penalty is held to be unconstitutional. Again, to modify the terms of the plain language used in this section of the statute is an abrogation of legislative power.

WHETHER A PERSON MAY BE IMPRISONED UNDER AN AUTHORITY THAT HAS BEEN FOUND TO BE UNCONSTITUTIONAL?

Tarver respectfully submits here that the lower court failed to properly address the issue here in his petition. In his petition, Tarver argued that "the prescribed punishment of death in section 794.011(2)(a) has been held by the Florida Supreme Court to be unconstitutional, rendering this section a nonexistent part of the statute" (P-4). As a purely legal matter, this Court may render its own independent finding on the issue under the de novo standard of review. The principle is that in matters of law, the trial court is not in a superior position to evaluate questions, and the appellate court may reach its own conclusion independent of the decision of the lower court. For example, because issues of statutory construction and interpretation of a written instrument can be equally determined by either level of court, the de novo standard is appropriate for such review. See e.g. Fla. Dept. of Revenue v New Sea Escape Cruises Ltd., 894 So.2d 954(Fla. 2005).

Without any deniability, the issue decided in Buford was that it is unconstitutional to impose the penalty of death for a conviction of §794.011(2)(a). Prior to the Buford decision, the penalty of death was prescribed in §794.011(2)(a) and enforceable pursuant to §775.082 and §921.141. The prescribing and enforcement of this

penalty hinged on the capital felony classification designated within the statute.

As held by the courts in Florida, a capital offense is one that is punishable by death. See Mills v Moore, 786 So.2d 532, 538(Fla. 2001). Also, the classification of a capital offense is not based upon the penalty sought or that which is imposed but by that which may be imposed. See Fitzpatrick v United States, 178 U.S. 304, 307, 44 L.Ed. 1078, 1080(1900), and Rakes v United States, 212 U.S. 55, 57, 53 L.Ed. 401, 402 (1909).

As written, §794.011(2)(a) continues to prescribe the penalty of death, notwithstanding the decision held in Buford. As a matter of law, once Buford was decided, the unamended prescribed penalty of death remaining in §794.011(2)(a) is held to be unconstitutional thereby rendering the statute void.

What also should be considered are the conflicting opinions between the Reino and Rusaw courts. In Reino v State, 352 So.2d 853, 858(Fla. 1977), the court found that "all capital crimes, substantive as well as procedural, became inapplicable upon abolition of the death penalty." See 76-275, Section 1, Laws of Florida. However, subsequent to this finding, the court in Rusaw v State, 451 So.2d 469(Fla. 1984), found that "[j]ust because death is no longer a possible punishment for the crime described in subsection 794.011(2)(a) does not mean that the alternate penalty suffers from any defect."

Regardless of which of the two cases this Court may favor, the fact remains that Buford held the unamended language prescribing punishment in

§794.011(2)(a) to be unconstitutional. By failing to amend this language, the construction of the statute was left unconstitutionally written. As such, how can this section of the statute be constitutionally sound and operate as a lawful instrument of authority?

Also, in its closing remarks, the lower court reasoned that the "Petitioner has not been sentenced to death and thus no constitutional right has been violated."

First, the issue here is not sentencing. The issue is whether the legislature failed to uphold its duty to act upon the constitutional standard promulgated by the court in Buford. Just as citizens are to abide by the laws written by its legislature, so is the legislature to act in accordance with the constitutional standards required of it by the courts. This unconstitutional dereliction of duty by the Florida Legislature resulted in an unlawful deprivation of Tarver's liberty. More importantly, Tarver suffered injury where the erroneous capital felony classification does not apply and where it negates the mitigating discretion of the court in sentencing that would exist had the applicable life felony classification been applied. See 76-275, Section 1, Laws of Florida.

In closing, Tarver would like to make one very significant point that has been lost in the scheme of things. According to the record, Tarver's habeas corpus was summarily denied by the lower court. However, the lower court's summary denial was rendered on the merits without the issuance of the writ. Moreover, when the lower court rendered its summary denial it apparently concluded that a prima facie

claim had been filed. As a matter of process, the court was then required to issue the writ once that conclusion had been reached. See Rule 1.630(d)(4), Florida Rules of Civil Procedure.

Also, considering that this Court has habeas corpus jurisdiction, and that the matter is before this Court under the de novo standard of review, the entire matter may be resolved by this Court in the interest of time, cost, and wise management of judicial resaurces.

CONCLUSION

Based on the foregoing argument and cited authorities, it has been demonstrated that the lower court has misapprehended and erroneously denied Appellant's petition for writ of habeas corpus. As such, Appellant is entitled to such relief deemed applicable and just by this Court.

Respectfully submitted,

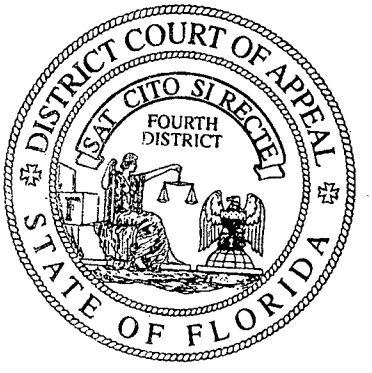
Warren Tarver DC# L13572

CERTIFICATE OF SERVICE

I, Warren Tarver, hereby certify that the foregoing Brief of the Appellant was placed in the hands of prison officials for the purpose of forwarding by U.S. Mail to William Hamilton, Warden, c/o Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401 on this 20th day of February, 2020.

Warren Tarver

Warren Tarver DC# L13572
South Bay Correctional and
Rehabilitation Facility, P.O. Box 7171
South Bay, Florida 33493



I hereby certify that the above and foregoing is a true copy of instrument filed in my office.
Lonn Weissblum, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
Per _____
Deputy Clerk

APPENDIX "G"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D19-3936

WARREN TARVER
Appellant

Provided to South Bay Corr. and Rehab. Facility on 7-6-2020 for mailing.

VS

WILLIAM HAMILTON
Appellee

MOTION FOR REHEARING AND CLARIFICATION

Appellant, Warren Tarver, respectfully files this motion for rehearing and clarification, pursuant to Florida Rules of Appellate Procedure, Rule 9.330, to bring to this Court's attention points of law that may have been overlooked, misapprehended or not considered in the PCA decision rendered by this Court. Appellant further seeks clarification as to which point of law this decision is based upon where a PCA decision does not make clear this Court's position in the matter. As grounds, Appellant states as follows:

If this Court will allow one point to be made on rehearing, Appellant submits that it is irrefutable and uncontested that death is prescribed as a possible punishment in the statutory authority in question on appeal. It has also been decided by state and federal courts that death must be a possible punishment in order to define a felony offense as

"capital." See Mills v. Moore, 786 So.2d 532, 538 (Fla. 2001), Fitzpatrick v United States, 178 U.S. 304, 307, 44 L.Ed. 1078, 1080 (1900) and Rakes v United States, 212 U.S. 55, 57, 53 L.Ed. 401, 402 (1909). Even the Fifteenth Judicial Circuit Court points out that "the possibility of death is the defining feature of a capital felony." See O, pg 2. As such, the question thus becomes whether the plain language of the statutory authority in question may be deemed constitutionally sound when the death penalty is found to be unconstitutional as punishment for the offense?

Further, though this Court may have considered all of the facts and laws of the issue at bar and has affirmed the denial handed down by the Fifteenth Judicial Circuit Court, it is unclear to Appellant whether this Court's PCA decision is predicated upon the Fifteenth Circuit's finding on the capital felony classification of the offense or whether the language of the statutory authority is constitutionally sound as written? Appellant seeks clarification here because the true nature of his claim is the constitutionality of the language used in the statutory authority he is being held under, which the Fifteenth Circuit did not decide in its denial of the petition. Here, the Fifteenth Circuit ultimately relied upon the finding in Rusaw v State, 451 So.2d 469, 470-71 (Fla. 1984), which only addresses that court's view of the capital felony "classification" of the offense, which is merely an element of the issue raised here. More important, this finding relied upon by the Fifteenth Circuit may be viewed as an abrogation of legislative power by the Rusaw Court based on its misplaced view concerning the sentencing issue decided in Donaldson v Sack, 265 So.2d 499, 501-502 (Fla. 1972). See BRIEF OF THE APPELLANT, pgs 9-10 and REPLY BRIEF OF APPELLANT, pgs 4-5.

Wherefore, Appellant respectfully asks that this Court reconsider its PCA decision of the Fifteenth Judicial Circuit Court's denial of his petition for writ of habeas corpus and/or clarify its decision to affirm the denial of the claim.

Respectfully submitted,

Warren Tarver

CERTIFICATE OF SERVICE

I, Warren Tarver, hereby certify that the foregoing motion for rehearing was placed in the hands of prison officials for the purpose of forwarding by U.S. Mail to William Hamilton, c/o Mitchell A. Egber, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401 on this 6th day of July, 2020.

Warren Tarver DC#L13572
South Bay Correctional and
Rehabilitation Facility
P.O. Box 7171
South Bay, Florida 33493

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FOURTH DISTRICT
STATE OF FLORIDA

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.
Lonn Weissblum, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
Per _____
Deputy Clerk

APPENDIX "H"

IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARREN TARVER
Petitioner

vs

WILLIAM HAMILTON, Warden
Respondent

Lower Tribunal No(s)
4D19-3936
50-2019-CA-014747-XXXX-MB

PETITION FOR WRIT OF HABEAS CORPUS

Comes now, Petitioner, Warren Tarver and files this Petition for Writ of Habeas Corpus to bring to this Court's attention a claim of manifest injustice. As grounds, Petitioner presents the following:

JURISDICTIONAL STATEMENT

Petitioner submits before this Honorable Court that he is being held under the authority of a nonexistent capital felony statute, which is a violation of his constitutional right to due process of law. Because this issue is a claim of manifest injustice, Petitioner files this petition pursuant to §79.01 and §79.09, Florida Statutes, and under any or all of the jurisdictional basis described in Article V, Section 3(b)(3) and 3(b)(7)-(9), Florida Constitution. See also Baker v State, 878 So.2d 1236, 1246(Fla. 2004). "This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts." ANSTEAD, C.J., Florida Supreme Court.

STATEMENT OF THE CASE AND FACTS

On August 08, 1995, Petitioner was charged by information with five counts of sexual battery pursuant to §794.011(2)(a), Florida Statutes (1994), which is classified a capital felony offense. On December 4, 1997, Petitioner was convicted after trial by a six

member jury and thereafter sentenced on January 09, 1998, to life in prison pursuant to §775.082(1), Florida Statutes, which is the capital felony sentencing authority.

On November 14, 2019, Petitioner filed a petition for writ of habeas corpus in the Fifteenth Judicial Circuit Court pursuant to §79.01, Florida Statutes, claiming that he is being detained under the unlawful authority of a nonexistent capital felony statute, where the felony classification and the prescribed punishment are unconstitutional and cannot be applied. On November 25, 2019, the petition was denied based on the court's finding that the felony classification of the offense is valid.

On December 5, 2019, Petitioner filed a motion for rehearing and argued that the defining element, which classifies the felony level of the offense, is nonexistent and that the statute, as classified, cannot serve as a basis for charging the offense or administering the prescribed sentence. On December 13, 2019, the court denied the motion for rehearing finding that, though the "defining feature" which classifies the felony level within the statute is nonexistent, the classification of the offense is valid because the alternate punishment delineated in the prescribed sentencing statute is constitutionally sound and may be imposed.

On February 20, 2020, Petitioner filed an appellate brief, after filing a timely notice of appeal and motion for extension of time in the Fourth District Court of Appeal. On June 25, 2020, a PCA decision was rendered by the Fourth District affirming the lower court's denial.

On July 06, 2020, Petitioner filed a timely motion for rehearing and clarification where it appeared to Petitioner that the Fourth District may not have given due consideration to the gist of the issue on appeal and where the rendering of a PCA decision did not reasonably express its affirmation of the denial. On August 4, 2020, the Fourth District Court of Appeal denied Petitioner's motion for rehearing without comment or expressed reasoning for its affirmation.

Petitioner now presents the matter before this Court for adequate resolution.

RELIEF SOUGHT

Petitioner submits that immediate release is warranted where the authority in question is void of lawful authority to sanction his detention and where double jeopardy would exists upon remand for new trial under amendment of the charges and/or statute.

ARGUMENT

Petitioner respectfully submits that this Court should set a precedent by settling what appears to be a conflict between two separate findings made by this Court. The findings in question are concerning the definition of the term "capital felony" and its application.

In the most current ruling made by this Court, it was found that the possibility of punishment by death is the defining element which describes a capital felony. See Mills v Moore, 786 So.2d 532,538(Fla. 2001) (there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death). However, in a prior ruling (currently followed by the subordinate courts in this state), it was found by this Court that the possible punishment of death is not a requirement for the classification of a capital felony offense. See Rusaw v State, 451 So.2d 469,470-71(Fla. 1981) ([i]t is well settled that the legislature has the power to define crimes and to set punishments. The legislature, by setting sexual battery of a child apart from other sexual batteries, has obviously found that crime to be of special concern). Nonetheless, the question of importance here is whether the legislature has the power to classify a criminal offense as a "capital felony" and prescribe punishment under the capital felony sentencing statute where the death penalty is the defining element but is not applicable to the offense for punishment?

Petitioner further submits that this conflict is paramount and relative to his claim of being detained under an unlawful authority. Here, Petitioner asserts that he was arrested and detained under the authority of a statute that erroneously classifies the offense a capital felony. He was then charged by information, tried and convicted by a six person jury and was not subject to the possibility of being punished by death based upon a finding made by this Court and the U.S. Supreme Court that it is unconstitutional to punish the offense by death. See Buford v State, 403 So.2d 943,951(Fla. 1981). "The reasoning of the justices in Coker v Georgia compels us to hold that a sentence of death is

grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."

In view of these conflicting findings, it is unclear as to how both may be applicable. However, according to the federal courts, it was ultimately decided that the death penalty must be a possible punishment in all capital cases. "The test is not the punishment which is imposed, but that which may be imposed under the statute." See Fitzpatrick v United States, 178 U.S. 304,307, 44 L.Ed. 1078, 1080 (1900), and Rakes v United States, 212 U.S. 55, 57, 53 L.Ed. 401, 402 (1909). Should this Court decide to resolve the apparent conflict by finding that the possibility of being punished by death is required in order to classify an offense as a capital felony, then Petitioner's detention would be sanctioned under the authority of an unlawful and void statute, which would violate his constitutional right to due process of law.

CONCLUSION

Wherefore, Petitioner is entitled to the relief sought in this petition as demonstrated.

Respectfully submitted,

Warren Tarver, pro se

CERTIFICATE OF SERVICE

I, Warren Tarver, hereby certify that the foregoing petition was placed in the hands of prison officials for the purpose of forwarding by U.S. Mail to William Hamilton, Warden, c/o Ashley Moody, Attorney General, The Capitol PL-01, Tallahassee, Florida 32399-1050 on this 28 day of August, 2020.

APPENDIX "I"

Supreme Court of Florida

WEDNESDAY, OCTOBER 28, 2020

CASE NO.: SC20-1316
Lower Tribunal No(s).:
061995CF012342A88810

WARREN TARVER vs. MARK S. INCH, ETC.

Petitioner(s) Respondent(s)

The petition for writ of habeas corpus is hereby denied as successive. *See Jenkins v. Wainwright*, 322 So. 2d 477, 478 (Fla. 1975) (declaring that once a petitioner seeks relief in a particular court by means of a petition for extraordinary writ, he has picked his forum and is not entitled to a second or third opportunity for the same relief by the same writ in a different court). No motion for rehearing will be entertained by this Court.

POLSTON, LABARGA, LAWSON, MUÑIZ, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

db
Served:

LANCE ERIC NEFF
WARREN TARVER
HON. BRENDA D. FORMAN, CLERK
CELIA TERENZIO