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Rule 6

IN THE SUPREME COURT  
OF FLORIDA

TOMMY

Petitioner,

v.

CASE NO. 77,886

STATE OF FLORIDA,

Respondent.

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JURISDICTIONAL BRIEF OF RESPONDENT

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Petitioner, Tommy Saavedra, below,  
will be referred to herein as "Petitioner". Respondent,  
the State of Florida, below, will be referred to  
herein as "Respondent .

STATEMENT OF THE CASE AND FACTS

The following facts are taken from the below:

During the early morning hours of June 25, 1987, police officer Robert Benfield received a report that a sexual battery had occurred at Tallulah Avenue. When he arrived at the scene, the victim, K.A., informed him that her assailants lived next door at 360 Tallulah Avenue. Benfield went to the home described **and** knocked on the door, but no one answered. The lights were out and the house was dark. Officers McLean and Pease arrived and, in the windows of the house with a flashlight, saw two persons lying on a bed. The officers then began to knock on the side of the house to arouse the occupants.

Officer Benfield went to the rear of the house and knocked on the back door. A boy (later identified as appellant's son, Tommy Saavedra, Jr.) appeared at the door. Officer Benfield testified that he identified himself and told the boy that he needed to speak to an adult; that he asked permission to enter; and, that the boy responded and opened the door. Officer Benfield entered the house and walked into a nearby bedroom, where he found an adult male (later identified as the co-defendant Teater) and a small boy (later identified as Robbie Methvin) in bed. Officer Benfield asked Teater to get out of the bed and arrested him. Officer Benfield testified that he did not hurry into the house, and did not feel that his life was threatened when he was outside the house. By the time Officer Benfield had arrested Teater, Officers Pease and McLean had entered **the** house and had arrested appellant whom they found in an adjacent bedroom. Officer McLean testified that he did not feel that his life was in danger when he secured the outside of the house. Officer Pease testified that when he entered the home after Officer Benfield, the boy at the back door told him he could enter.

The prosecuting witness testified that at approximately 10:30 p.m., there was a power failure in the neighborhood and that she **sat** on her front porch with her sister. **Next** door she saw appellant and Teater talking to her brother, her cousin, Tommy Saavedra, Jr., and Robbie Methvin. When the power failure ended, she went next door, got her brother and her cousin, Tommy Saavedra, Jr., and Robbie Methvin. When the power failure ended, she went next door, got her brother and her cousin, returned home and thereafter went to bed. At 2:00 a.m., she **was** awakened by appellant who was kneeling beside her on her bed and sharp in her side. Appellant and Teater led her from her home to a nearby park. She recognized both defendants throughout the attack, she saw the defendants again in the backseat of the police car; the car light was lit, she was on her front porch, and got a clear look at their faces and identified them as her attackers.

At trial, K.A. testified that her attackers were dressed in black karate suits. They took her to some bushes in the rear of her house, tore off her clothes, pushed her to the ground and performed vaginal intercourse with her. They then took her to a slide in a park located behind her home and again performed vaginal intercourse. Teater then unsuccessfully attempted anal intercourse. The men **led** her to a concrete circle in the middle of the park and again vaginal intercourse. They told her to remain on the ground for ten minutes while they She waited three or four minutes and then ran home.

Saavedra v. State, 16 FLW at D908, 909.

SUMMARY OF ARGUMENT

This Court should refuse to accept jurisdiction in the instant case because, contrary to                    assertions, none of the cases cited conflict with the                    below and the appellate court did not expressly construe a constitutional provision.

ARGUMENT

ISSUE

THIS COURT SHOULD DECLINE TO ACCEPT  
DISCRETIONARY JURISDICTION IN THIS CASE  
AS THE OPINION BELOW DOES NOT CONFLICT  
WITH THE CITED CASELAW,

The State respectfully submits that this Honorable Court should refuse to accept discretionary jurisdiction in this case as the **cases** cited by Petitioner do not conflict with the opinion below.

Petitioner first that the opinion below conflicts with Padron v. State, 328 So.2d 216 (Fla. 4th DCA 1976). The State disagrees.

In Padron, the Fourth District Court of Appeal recognized that the determination of voluntariness of a consent to search is to be made from the totality of the circumstances. The defendant in Padron **denied** consent to the police to search his house. His sixteen year old son denied consent. After being forced out of the house to evidence," late at night with extremely cold temperatures, and with a sick younger brother, the sixteen year old finally consented to the search.

The court held that:

In the instant case, under the totality of the circumstances mentioned above, we most respectfully disagree with the trial court's conclusion that the consent did "not constitute a yielding to the majesty of the law by

the defendant's son, but rather a yielding by **the** officer to the desires of the defendant's son not to leave the house. If the true motive was the protection of the evidence, there were available to him alternatives other than all of **the** occupants out of the house on an extremely cold night. the son to make a choice between permitting the search or the unreasonable alternative (under these circumstances) of evacuating the house effectively stripped his "consent" of any voluntary character.

Padron, supra at 218.

In contrast, the factual scenario in the instant case presents no evidence of police nor was the express refusal to consent to a search ignored in favor of the child's consent. As in Padson, the court below examined the totality of the circumstances and achieved a different result because the circumstances were different.

As Padron v. State, is not in conflict with the opinion below, Padron offers no basis for jurisdiction.

next contends that this Court should assume jurisdiction of this case because the court below construed the Fourth to the United States A review of the opinion below, reveals that this contention is false. The appellate court cited to U.S. Supreme Court cases which construe the Fourth but the court below merely examined the applicable caselaw and engaged in no constitutional construction of its own. This no basis for jurisdiction pursuant to Rule

which requires that a court must expressly construe a constitutional provision in order to confer jurisdiction upon this Court.

Petitioner further argues that the court below should have considered the case of Illinois v. Rodriguez, 497 U.S.

111 L.Ed.2d 148, 110 S.Ct. 2793 but Respondent would point out that Rodriguez involved the warrantless entry an apartment based on the consent of a nonresident third party, which is distinguishable from the consent in this case given by a resident relative. Even the Court held that a consent search is not unreasonable if police reasonably believe that the person giving the consent possessed common authority over the premises, and the facts of the instant **case** show that the police possessed this reasonable belief.

Petitioner next contends that the opinion below conflicts with Carawan v. State, 515 So.2d 161 (Fla. 1987). In Carawan, this Court held that multiple punishments cannot be predicated upon a single act. The defendant in Carawan was convicted under three separate statutes for firing a single blast. In contrast Petitioner was convicted of separate and distinct acts of rape which occurred during a single ongoing transaction. Not only is Carawan factually distinguishable from the opinion below, but as the appellate court correctly determined in its opinion in this case; "We find further that Carawan, supra, does not apply

because its holding is limited to separate punishments arising from one act, not one transaction. 15 FLW D2732, 34 (Fla. 1st DCA Nov. 8, 1990).

Carawan v. State thus no basis for "conflict" jurisdiction.

Similarly, Petitioner's reliance on State v. Smith, 547 So.2d 613 (Fla. 1989) is misplaced. Petitioner cites Smith for the proposition that the legislative enactment which overruled Carawan (Chapter 88-131, Section 7, Laws of Florida) is not to be retroactively applied to offenses occurring before the effective **date** of Chapter 88-131. Respondent asserts that because Carawan does not apply to the instant case and does not conflict with the opinion below, Smith does not apply here and offers no basis for "conflict jurisdiction.

Smith v. State, 539 So.2d 601 (Fla. 3d DCA 1989), was a case whose result was based on Carawan, and is thus inapplicable.

Petitioner argues that the opinion below conflicts with Wade v. State, 386 So.2d 76 (Fla. 4th DCA 1979). Regarding Wade, the court below stated:

Appellant's reliance on Wade v. State, supra, appears to us misplaced. In that case, the defendant was convicted of two separate violations of the sexual battery statute for a single attack on the victim. The Fourth DCA held that the attack constituted only a single

violation of the statute, and vacated both convictions and remanded with instructions for the trial court to re-sentence for only one violation. the Wade court did not articulate the underlying facts which it relied upon in making its determination that the attack constituted only a single sexual battery. Therefore, we do not find Wade particularly helpful in analyzing the facts at hand.

Saavedra, supra at D909, 910. It is clear that because the court in Wade failed to any factual background to explain its ruling and failed to construe the meaning of "single attack", that there is no basis for that Wade conflicts with the opinion below.

As none of the cases cited by Petitioner conflict with the opinion below and as the court below did not expressly construe a constitutional provision, Respondent submits that this Court should decline to accept jurisdiction in this case.

CONCLUSION

Based on the above Respondent respectfully urges this Honorable Court to decline accepting jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to WM. J. SHEPPARD, MICHAEL R. YOKAN, Sheppard and White, P.A., 215 Street, Jacksonville, Florida 32202, this \_\_\_\_ day of June, 1991.