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May 29 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI - COA -
APPEAL FROM SPARTANBURG COUNTY
GENERAL SESSIONS COURT
Honorable Grace Knie, Circuit Court Judge

Appellate Case No. 2024-000761

PETITION FOR WRIT OF CERTIORARI

The State ..... Respondent,

v.

Mark Gilbert ..... Petitioner.

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Statement of Issues Presented

Question I: Did the trial court err in failing to dismiss the four indictments because they were multiplicitous and unduly prejudiced Mark Gilbert by leading the jury to believe Mr. Gilbert was charged with four different crimes when they were actually just one crime?

Question II: Did the trial court err in sentencing Mark Gilbert to a consecutive five year sentence on indictment № 19-GS-42-1035 when the sentence violated the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States of America and Article I, § 12 of the Constitution of the State of South Carolina?

Statement of the Facts

Procedural History

Mark Gilbert was arrested on October 2, 2018 and charged with a single count of Criminal Sexual Conduct with a minor between the ages of 11 and 14 years. The charges covered the period of time from January 5, 2016 until March 30, 2018. The original indictment was indictment № 19-GS-42-1035. Amended, or additional indictments were filed on January 8, 2020. He was indicted on three addition charges of Criminal Sexual Conduct with a minor between the ages of 11 and 14 years in indictment №s 20-GS-42-0001, 2, and 3.

He was tried on all four indictments on May 25-28, 2021. Judge Grace G. Knie tried the case. The jury convicted Mr. Gilbert on all charges. Judge Knie sentenced him to 20 years on indictment №s 20-GS-1, 2, and 3. She sentenced him to a consecutive 5 years on indictment № 19-GS-42-1035.

A Notice of Appeal was filed on June 4, 2021. The South Carolina Court of Appeals affirmed the conviction on March 13, 2024. A timely petition for rehearing was filed on March 27, 2024. The petition for rehearing was denied on April 9, 2024

Factual History

Mark Gilbert, at the time of trial, was a 50 year old disabled veteran from the United States Marine. App. at A368, l 22 to A369, l 25. He met his wife after his release from the service. After meeting her, he became a plumber through the plumbers union. In his words, he "settled" down. App. at A370, ll 24.

He and his wife with their children moved from New York to Myrtle Beach where he became employed as a maintenance manager at a local Best Western. They lived in a local hotel

until they were able to afford to buy a house. App. at A371, ll 5 to 21. His wife became employed at a local Costco in the photo lab. App. at A372, ll 22-25. When his wife obtained a full time job at the Costco as a photo lab manger in Spartanburg, they moved there. App. at A372, ll18-21. They purchased a house at on Jackson Street in Spartanburg. App. at A373, ll 10-18. While in Spartanburg he suffered several heart attacks starting in about 2015. App. at A374, ll 15-24. Also in about 2017 he had rotator cuff shoulder surgery. App. at A375, ll 12-22. He also had hernia surgery in about 2015 or 2017. App. at A376, ll 9-13. For six or seven years before the trial he had also been suffering from Type 2 diabetes. App. A376 at 18-24. [1]

His relationship with his children was good when they were younger. As they grew older there were confrontations about the children helping to keep the house clean. He was recovering from various health issues at the time and was not able to do much to help keep the house clean. App. at A377, ll 7-13.

On March 17, 2018, Mr. Gilbert took his wife to the hospital for a broken finger. Upon his return, he was confronted by his son and daughter with an allegation he had sexually molested his daughter. App. at A167, ll 4-24; A387, l 13 to A388, l 11; A332, ll 15 - 21. The minor child testified she told her mother several days after Mr. Gilbert left the house. App. at A167, l 25 to A168, l 2. A classmate of the minor child told the jury the minor child first told her about an alleged sexual abuse on the friend's birthday, which was on March 19, the day after the confrontation with his two children. App. at A251, 10 - 21. Around the middle of June, months

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[1] The testimony about the health problems of Mr. Gilbert primarily comes from his own testimony. His wife did not testify. Most of the health problems were also confirmed by the testifying minor child. App. at A178, l 13 to 177, l 14. The minor child testified one heart attacked occurred during or just before one of the alleged assaults and Mr. Gilbert went to the hospital. Rec. on App. at A179, l 16 to 189, l 2. The hospital record was not introduced.

after Mr. Gilbert left the house, the Department of Social Services was called because of the condition of the home. App. at A168, l 22 to A169, l 10. When DSS visited the home because of the condition, the minor child was specifically asked if she had been sexually abused. She responded that she had not been abused.. App. at A169, ll 11 - 16. She and her brother were moved out of the house on the day of the DSS visit. App. at A168, ll 5 - 10. She stated that she did not tell DSS she had been abused because she did not know what would happen to her. App. at A169, ll 19 - 24. DSS also asked her brother. Nicholas, if any abuse had occurred. Notwithstanding his alleged knowledge to the contrary, he told them no abuse had occurred. App. at A310, ll 2 - 7. Previously she had testified that she thought about telling her teacher. During that testimony she stated that if she told the teacher, "I didn't think anything would change or that I would get taken away from my family." App. at A166, ll 6 - 8. In July of 2018, DSS visited the minor child after a report of sexual abuse was made. At that time the minor child told the DSS official she had been abused. App. at A171, ll 16 - 20. On cross examination, the minor child admitted, or appeared to admit that she had told an interviewer that Mr. Gilbert had abused her for a period of time after he left the house on March 18, 2018. When confronted with her prior testimony she stated:

> Q. (By Mr. Shealy) The reason I ask is, again while you were being interviewed, you had told the CAC interviewer that, in fact, this continued even after you had told Nicholas what happened.
> A. Did I say that?
> Q. You did, yes ma'am.
> A. Okay. Then - - then that's probably true, yeah.
> * * *
> Q. I believe it was 40 minutes in. Well nearly 40 minute in.
> A. Yeah. It did - - the abuse did happen up until a couple of days before he was gone.
> App. at A210, ll 14 to A211, l 1.

She had testified that she told Nicholas, her brother, a couple of days before or the day before Mr. Gilbert left the house. App. at A210, ll 10 - 11.

After he left the house in March, Mr. Gilbert had a meeting with his wife at a Chinese restaurant in Wellford, SC. App at A389, ll 16- 22. After having dinner, as he walked outside, his wife told him that Hunter, his stepson, was present. When Hunter confronted him a fight resulted. App. at A392, l 2 - 9. After this altercation, he decided to stop his disability check from going into the joint checking account. App. at A392, ll 20 - 24.

In response to the solicitor's question, "There is no reason for her [his daughter] to go full nuclear with this kind of humiliating information if she's making it up, is there? App. at A398, ll 23 - 25. Mr. Gilbert simply responded, "I wouldn't know."

The minor child in her testimony chronicled over the period of time set forth in the indictment. The first occurrence allegedly occurred when she was 12 years of age and she woke up from a nightmare and got into the bed with her parents. App. at A152, l 9 to A153, l 16. The mother did not testify to confirm any incident like this happened. She made allegations of Mr. Gilbert making her bathe with him while he was taking a shower. She further testified that her mother and perhaps her brothers knew Mr. Gilbert made her bathe with him while he was taking a shower. App. at A219, ll 6- 20. As his wife did not testify, she did not confirm this story.

She testified that the alleged abuse occurred "Multiple times a week. Like four and seven." App. at A164, 21 -25. According to the indictments, this would have been from January 5, 2016 until March 30, 2018, a total of approximately 116 weeks. Notwithstanding the over 450 hundred sexual acts with his penis, a dildo or his finger, the result of the examination of the minor child was normal. App. at A286, ll 8 - 15.

Standard of Review

As the trial court erred as a matter of law in failing to quash the indictments, this issue is a matter of law. The standard of review is *de novo*. "When a question of law is presented, our standard of review is plenary." *State v. Cochran*, 369 S.C. 308, 312–13, 631 S.E.2d 294, 297 (Ct. App. 2006); "[W]hether convictions are multiplicitous is a question of law subject to unlimited review." *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48, 60 (2006)

Argument

Question I

Did the trial court err in failing to dismiss the four indictments because they were multiplicitous and unduly prejudiced Mark Gilbert by leading the jury to believe Mr. Gilbert was charged with four different crimes when they were actually just one crime?

The law is clear that the four indictments in this case, took one crime and broke it into four separate crimes. Each indictment covers the exact same period of time, January 5, 2016 until March 30, 2018. All allege the crime of criminal sexual conduct with a minor second degree. The only differences in the four indictments are the words "fellatio," "digital penetration," "sexual intercourse," and "penetration of the vagina with an object." The phrase "penetration of the vagina with an object" would be included in the indictments that allege "digital penetration" and "sexual intercourse." As a matter of law, the indictments in this case are multiplicitous. "An indictment is multiplicitous when a single offense is charged in more than one count." *People v. Jagdharry*, 118 A.D.3d 722, 723, 987 N.Y.S.2d 91, 93 (2014). An indictment which is multiplicitous also violates the double jeopardy provision of the Fifth Amendment to the United States Constitution and Article I, § 12 of the Constitution of the State

of South Carolina. "Thus, the multiplicitous bar is at the core of the prohibition against double jeopardy" *Quintano v. People*, 105 P.3d 585, 590 (Colo. 2005)

In this case, Mr. Gilbert is charged with a violation of South Carolina Code § 16-3-655(B)(1). Each indictment alleges a violation of the same statute. The statute provides:

> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
> (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age

The crime is a sexual battery. Sexual battery is defined as:

> (h) "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes. South Carolina Code § 16-3-651(h)

Each allegation in each indictment is a sexual battery. A sexual battery is what the legislature intended to punish. The indictments only differ in the means used to accomplish the sexual battery. Nothing in the statute suggests that the legislature intended a separate punishment for each means of performing a sexual battery. In fact, as the legislature places each means of committing the sexual battery within a single definition, the legislative intent is clear no consecutive punishment was intended.[2] The legislature did not intend for each different type of sexual battery to be a separate crime. As indicted, the State has alleged a single continuous crime form January 5, 2016 to March 30, 2018. The State could have indicted for different acts on specific days. They elected not to take this approach. Indictment 20-GS-42-002 uses the phrase

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[2] As the legislative intent is clear the acts are all different means of committing the same crime, there is no need to discuss the principle that the legislature is also prohibited from passing laws that violate the double jeopardy provision.

"penetration of the vagina with an object" without identifying what the object was. As such, the conduct alleged in 20-GS-42-001, "digital penetration of the vagina" and 20-GS-1035, "sexual intercourse," that is with his penis, would both qualify as an "object" under indictment 20-GS-42-002. What the state has done through a creative use of the indictment, is to make the jury believe Mr. Gilbert has committed four different crimes on his daughter and is therefore, an especially bad person.

Under the analysis used by the Court of Appeals in this case, the prosecutor could have divided up the 27 months into three segments of nine months each. He then could have obtained four indictments in each of the three segments and had 12 charges against Mr. Gilbert. Nothing in the opinion of the court of appeals would prevent such a practice. No court should tolerate such a practice.

Our courts have held that such a creative use of an indictment is not proper. As the South Carolina Supreme Court has said, "The statute prohibits obscenity; the indictments relate to one crime only, and the description of more than one method of violation does not create a new crime." *State v. Pee Dee News Co.*, 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985). In *State v. Sheppard,* 248 S.C. 464, 150 S.E.2d 916 (1966), the South Carolina Supreme Court held that when a statute gives different means of committing the crime of driving under the influence, only one crime has been alleged when the different means are alleged in one indictment. The Court said:

> The act of operating a motor vehicle with impaired faculties is the gravamen of the offense, and the offense is not multiplied because the condition of impairment was produced by the ingestion of more than one of the substances listed in the statute. The indictment charges only one offense which may be established by proof that

> the defendant operated a motor vehicle while under the influence of intoxicating liquor or of narcotic drugs, either or both.
> *Id.* at 466-467, 150 S.E.2d at 917.

The same rule should apply in this case. The crime is committing a sexual battery on a minor at least 14 years of age and over 11 years of age.. The definition of "sexual battery" simply lists the different means of accomplishing the sexual battery. The legislature did not intend for each to be a separate crime. The State below argued that each different act was a separate crime. App. at A109, l 16. This is simply not correct. As in *Shepard*, they are simply the means of accomplishing the crime. They were not intended by the legislature to be different crimes. All the mean of accomplishing a sexual battery are included within one statute with one punishment. As Justice Thrugood Marshall said, "But the Constitution does not permit a State to punish as two crimes conduct that constitutes only one 'offence' within the meaning of the Double Jeopardy Clause." *Missouri v. Hunter*, 459 U.S. 359, 370 (1983)(Marshall dissenting). The State indicting Mr. Gilbert on four different charges was improper. Trial counsel correctly pointed out to the trial judge that the state by using a date range of January 5, 2016 until March 30, 2018, had alleged a "continuing course of conduct." App. at A112, l 3. Thus, the state divided one crime into four separate crimes. South Carolina has not formally recognized a sexual crime as being a continuous course of conduct.

In *State v. Church*, 223 Wis. 2d 641, 589 N.W.2d 638 (Ct. App. 1998) the Wisconsin court was faced with a multiplicitous indictment for the charge of child enticement. The crime of child enticement could be committed in many different ways. In holding the statute permitted only one crime and one punishment, the Court said, "We conclude that there is no basis on which we might conclude that the legislature intended more than a single punishment for a single act of

enticement of a single child, thus confirming our preliminary conclusion that the two convictions are multiplicitous because they are the same in law and in fact." *Id.* at 641, 665, 589 N.W.2d at 648.

Some courts have used the phrase "unit of prosecution" to determine if the charges are multiplicitous. As one court said, "In a unit of prosecution case, the court asks how the legislature has defined the scope of conduct composing one violation of a statute. Under this test, the statutory definition of the crime determines what the legislature intended as the allowable unit of prosecution. There can be only one conviction for each unit of prosecution." *State v. Thompson*, 287 Kan. 238, 245, 200 P.3d 22, 28 (2009). The unit of prosecution here is a sexual battery. A sexual battery is the scope of the conduct. The fact that the legislature uses different means of accomplishing the sexual battery does not change the fact that the unit of prosecution is the sexual battery. The legislature determines the unit of prosecution and not the solicitor or the courts. "But once Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution,' that prescription determines the scope of protection afforded by a prior conviction or acquittal." *Sanabria v. United States*, 437 U.S. 54, 69–70 (1978). As the United Supreme Court further explained, "[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." *Bell v. United States*, 349 U.S. 81, 84 (1955).

Various states across our country has enacted laws that provide for a prosecution for the sexual assault of a child by a continuous course of conduct. "Because Ramsey's acts constituted a continuous course of conduct under § 13–1417, they could be properly charged in one count."

State v. Ramsey, 211 Ariz. 529, 535, 124 P.3d 756, 762 (Ct. App. 2005). "To find a defendant guilty of Continuous Sexual Assault of a Minor Under the Age of Fourteen Years, each juror must find that the defendant committed three (or more) specific predicate acts; unanimity is not required on which acts the defendant committed because the acts themselves are not criminalized." *State v. Young*, 150 Haw. 365, 375, 502 P.3d 45, 55 (Ct. App. 2021)(referring to HRS § 707–733.5)("A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.") N.H. Rev. Stat. Ann. § 632-A:2, III

In interpreting its statute, the New Hampshire Supreme Court has said, "We review the pattern statute, RSA 632–A:2, III, to determine whether the 'pattern of sexual assault' should be treated like a 'course of conduct,' that is, whether the pattern itself is the sole *actus reus* element, or whether the individual acts of sexual contact underlying the pattern also constitute legal elements of the pattern crime." *State v. Fortier*, 146 N.H. 784, 789–90, 780 A.2d 1243, 1250 (2001). The Court ultimately determined that in proving a "course of condcut" unanimity was not required on the specific act but only as to whether the state proved a course of conduct. Thus, in states recognizing criminal sexual conduct as a crime involving a course of conduct, multiple counts, such as in this case, would be barred by double jeopardy. Hawaii so provides by statute. "No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the period of the offense charged under this section, or the other offense is charged in the

alternative. A defendant may be charged with only one count under this section, unless more than one victim is involved, in which case a separate count may be charged for each victim." Haw. Rev. Stat. Ann. § 707-733.6. What the Court of appeals has done in this case is permitted the solicitor to indict Mr. Gilbert for a course of conduct crime, and then permitted the state to indict him for any of the means of committing the course of conduct. This type of crime should not be permitted.

This Court has raised into question as to whether South Carolina recognizes a course of conduct crime. In *State v. Baker*, 411 S.C. 583, 592, 769 S.E.2d 860, 865 (2015), this court said, "Given the expansive time frame and lack of specificity as to this time frame, we can only conclude Baker was prejudiced by the defects in the indictments. Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." While this court did not use the phrase "course of conduct" and the specific argument as to the indictment in this case alleging a course of conduct was not specifically argued below, the principle of violating constitutional and statutory restrictions should apply in this case.

The South Carolina legislature has not enacted a course of conduct statute involving criminal sexual conduct cases. The court of appeals in this case has by judicial decision decided we not only have a course of conduct statute, but have a course of conduct for any means used to comment the alleged criminal sexual conduct. This court should grant the petition for writ of certiorari, reverse the court of appeals decision and remand for a new trial.

The State indicting Mark Gilbert for one crime in four different indictments prejudiced Mr. Gilbert in his defense.

In arguing the Motion to Quash, trial counsel correctly pointed out to the judge the four indictments "may improperly prejudice a jury by suggesting that a defendant has committed several crimes, when again, he's only committed one." App. at A102, ll 16 - 19. The State elected to break down this one charge into four separate charges for a reason. The record does not reflect the exact reason. Aside from the "separate crime" argument, the State gave no reason for the decision for four indictments.

As one court has stated, "The vice of multiplicity is that it may lead to multiple sentences for the same offense. In addition 'the prolix pleading may have some psychological effect upon the jury by suggesting to it that defendant has committed not one but several crimes" *People v. Getman*, 188 Misc. 2d 809, 811, 729 N.Y.S.2d 858, 860 (Co. Ct. 2001)(internal citations omitted). The danger of such a belief by the jury in this case is very real. "[A] 'multiplicitous indictment' may improperly prejudice a jury by suggesting that a defendant has committed several crimes, not one." 41 AM. JUR. 2d *Indictments and Informations* § 197 (2021). To reach this conclusion of actual prejudice to Mr. Gilbert, one need go no further than the comments of the trial judge at sentencing. When defense counsel argued the sentences could not run consecutive without violating double jeopardy, the trial judge stated, "Mr. Shealy sir, I agree with the State that - - that the defendant is subject to consecutive sentences." Appeal at A508, ll 7 - 9. If one trained in the law believed Mr. Gilbert had in fact committed more than one crime, can we expect any less of a conclusion from a lay jury?

As stated by one court, "The reasons for requiring the Government to elect among counts

in some cases are, rather, primarily those of promoting the order and efficiency of the trial and avoiding the risk that 'the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes.'" *United States v. Ketchum*, 320 F.2d 3, 8 (2d Cir. 1963)(internal citations omitted)

This case was a credibility case. No physical evidence was presented to convict Mr. Gilbert. No pictures were admitted. No confession was admitted. As noted in the statement of facts, the examination by the doctor was normal notwithstanding over two years of alleged abuse. The jury, recognizing that this was a credibility case, asked to hear the testimony of Mr. Gilbert and his daughter.[3] App. at A486, ll 5 - 8. With four indictments against him, the jury had to have received the subtle message that Mr. Gilbert is a bad man. Mr. Gilbert was prejudiced by this action.

This court may, of course, dismiss three of the improper indictments and let the one improper indictment stand. Mr. Gilbert urges the court not to take this action but to reverse his conviction. The reasoning for this request is simple. Only a reversal will deter the State from using multiplicitous indictments in the future. If there is no punishment for an improper act, there is no deterrence.

Question II

Did the trial court err in sentencing Mark Gilbert to a consecutive five year sentence on indictment № 19-GS-42-1035 when the sentence violated the double jeopardy provisions

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[3] After the court reporter played for the jury the testimony of the minor child and Mr. Gilbert, the trial stated, "[Y]ou all have heard the testimony of the victim and the - - the defendant in this case." App. at A496, ll 15-17. No objection was made to the court's use of the word "victim."

of the Fifth Amendment to the Constitution of the United States of America and Article I, § 12 of the Constitution of the State of South Carolina?

As stated by the United States Supreme Court, "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). This same prohibition applies to South Carolina through the Fifth Amendment and Article I, § 12 of the State Constitution. As discussed above, nothing in South Carolina Code § 16-3-655(B)(1) even suggests an intent by the state legislature to make a consecutive sentence for using different mean of committing a violation of the statute prohibiting a sexual battery. A similar analysis was used in *Matthews v. State*, 300 S.C. 238, 387 S.E.2d 258 (1990). The Court in *Matthews,* a post conviction relief case, found no intent on the part of the legislature to impose consecutive sentences for the crime of possession of marijuana with intent to distribute and trafficking marijuana.

The law establishes that only one crime was committed in this case. As alleged in the indictment there was one continuous crime of a sexual battery upon the minor child. *Blockburger v. United States*, 284 U.S. 299 (1932), as applied by the South Carolina Supreme Court in *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018), prohibits this. In *Greene*, the court held where there was one homicide only one punishment could be imposed. Here, as indicted by the State, there is only one continuous act of sexual battery. Therefore, there can be only one punishment. Thus, the consecutive sentence, as well as the other concurrent sentences would have to be reversed.

Blockburger has been interpreted to be a different elements case. Here the only element in the statute, and therefore the only element required to convict, is a sexual battery. A sexual battery is the common element as to all four indictments. Each indictment does not contain an element different from the other. They contain a fact different from the other. Here, the different facts are part of single element - the sexual battery. The State has not shown that each indictment required proof of an element different from the other. Thus, the four indictments fail a simple *Blockburger* analysis.

The court of appeals erred in failing to recognize that indictment № 20-GS-42-002 alleges the crime of penetrating the vagina with an object. As such, the penetration of the vagina with a dildo, finger, or penis would also be penetrating the vagina with an object. The jury in this case was never instructed to differentiate among the various means of committing the act. As such, the consecutive sentencing on indictment № 19-GS-4201035 would violate the double jeopardy clause of the federal and state constitutions. The court of appeals failed to consider that the five year consecutive sentence in indictment № 19-GS-42-1035, for actual sexual intercourse, would be included under indictment № 20-GS-42-002, which alleges Mr. Gilbert used an object. Criminal sexual conduct with an object would include criminal sexual conduct using a penis. Thus, Mr. Gilbert has been punished twice for what is legally the same act. No reading of the statute would exclude a penis from being an object. In the jury instructions in this case, the jury was never told that "an object" means something different from the other means of committing the crime.

This Court should grant the petition for writ of certiorari as to the second issue and declare the consecutive sentence violates the double jeopardy provisions of both the state and

federal constitutions.

CONCLUSION

As to Question I, this Court should reverse the conviction of Mark Gilbert and order a new trial on a single indictment. As to Question II, in the event this Court does not fully reverse on Question I, this Court should vacate the consecutive sentence imposed on Mr. Gilbert.

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