

**IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

DARREL DEON HARVEY,
Defendant,

v.

CASE: LT: 2017 CF 000526

STATE OF FLORIDA,
Plaintiff.

_____ /

MOTION TO CORRECT ILLEGAL SENTENCE - 3.800(a)

COMES NOW, the Defendant, DARREL DEON HARVEY, pro se, pursuant to Florida Rule 3.800(a) moves this Honorable Court for an order vacating the sentence imposed on count I, in case number 2017-CF-000526 where the general verdict, as a matter of law, constitutes a nullity.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On March 24, 2017, the State charged Darrel D Harvey (“defendant”) with three counts as follows:

COUNT I On February 12, 2017, did unlawfully and knowingly travel any distance within this State, for the purpose of engaging in any illegal act described in Chapter 800, or Chapter 827, Florida Statutes, or to otherwise engage in other unlawful sexual conduct with a child or a person believed to be a child, after using a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to do so, a child or another person believed to be a child, to engage in or to otherwise engage in **other unlawful sexual conduct** with a child or another person believed to be a child, contrary to Section 847.0135(4)(a), Florida Statutes

COUNT II On February 12, 2017, did unlawfully and knowingly travel use a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to do so, a child or another person believed to be a child, to commit or to otherwise engage in **other unlawful sexual conduct** with a child or another person believed to be a child, contrary to Section 847.0135(3)(a), Florida Statutes

COUNT III On February 12, 2-17, did unlawfully alter, destroy, conceal or remove items of evidentiary value from his cell phone when law enforcement contacted him, for the purpose of impairing verity or availability, knowing that a criminal trial, proceeding, or an investigation by a law enforcement agency was pending or about to be instituted, contrary to Section 918.13, Florida Statutes.

On May 23, 2018, the defendant was found guilty by a jury trial in Leon County of Traveling to Meet a Minor, Soliciting a Child for Unlawful Conduct

Using a Computer Service or Electronic Device, and Tampering with Physical Evidence.

On June 14, 2018, trial judge Robert Wheeler sentenced the defendant to three years incarceration in the Florida Department of Corrections, followed by five years sex offender probation in Leon County on Count One. Concurrent three-year sentence on Count Three. Count to was dismissed.

On July 2, 2018, the defendant filed a direct appeal of his judgment and sentence through his privately retained attorney. Defendant has consistently alleged that the information charging him with a crime was fundamentally defective and that the trial court lacked jurisdiction over his criminal prosecution. His private attorney refused to file a petition for habeas corpus.

Defendant attempted to file one on his own during the direct appeals process; on February 26, 2019, the petitioner filed for a petition for writ of habeas corpus, 1D19-707. The petition was dismissed under *Logan v. State*, 846 So. 2d 472, 479 (Fla. 2003) (announcing that "we will not entertain pro se extraordinary writ petitions from criminal petitioners seeking affirmative relief in the context of pending trial court criminal cases, where it is clear from the face of the petitions that the petitioners are represented by counsel in the pending criminal proceedings and the petitioners do not clearly indicate that they are seeking to discharge counsel in those proceedings").

On August 19, 2019, the defendant filed a second petition for writ of habeas corpus, 1D19-1423. The petition was dismissed under *Johnson v. State*, 974 So. 2d 363, 363-64 (Fla. 2008) (clarifying that "the rule we announced in *Logan* . . . applies to pro se filings in this Court by litigants represented by counsel in criminal proceedings pending in a district court of appeal").

On July 2, 2020, defendant filed a third petition for writ of habeas corpus, SC20-940, affirmatively requesting a discharge of counsel. The Florida Supreme Court transferred the petition to this Court (The petition for writ of habeas corpus is hereby transferred, pursuant to *Johnson v. State*, 974 So. 2d 363, 364 (Fla. 2008), to the First District Court of Appeal for consideration as a request to discharge counsel in Case No. 1D18-2729. This Court denied the discharge of counsel.

On October 13, 2020 defendant's direct appeal was affirmed - citation.

On November 16, 2020, defendant filed a 3.850 motion to vacate the sentence. This Court summarily denied in part November 20, 2020, without an evidentiary hearing.

On December 3, 2020, defendant filed a motion for rehearing. The motion was denied on December 4, 2020.

On December 9, 2020, the defendant filed a notice of appeal 1D20-3563. That appeal was affirmed on March 12, 2021.

ISSUE PRESENTED

THE TRIAL COURT VIOLATED DEFENDANT'S DUE PROCESS RIGHT WHEN THE TRIAL COURT IMPOSED A SENTENCE ON A VERDICT THAT HAS BEEN CONSIDERED A NULLITY, AS A MATTER OF LAW

MEMORANDUM OF LAW

The case is controlled by the holding in *O'Bryan v. State*, 692 So.2d 290

(Fla. 1st DCA 1997):

Although one of the crimes on which the court instructed conformed to the information, the court failed to instruct on the information's alternative offense and instead instructed on an uncharged offense. The jury's general verdict makes it impossible to determine of which offense appellant was found guilty. See *Owens v. State*, 593 So.2d 1113 (Fla. 1st DCA 1992). Because the court instructed the jury on a crime not charged, the resulting verdict is a nullity. *Gaines v. State*, 652 So.2d 458 (Fla. 4th DCA 1995); *Moore v. State*, 496 So.2d 255, 256 (Fla. 5th DCA 1986) ("A verdict which finds a person guilty of a crime with which the accused was not charged is a nullity.").

This Court must vacate the sentence and grant the defendant's motion because the jury instructions failed to include the charged offense of "other unlawful sexual conduct" as written in the statute and charged in the information. Count I in the information excluded the solicitation of any illegal act under or in Chapter 794 (Sexual Battery), Chapter 800 (Lewd and Lacivous), or Chapter 827 (Child Abuse). Therefore those offenses, written in the statute, omitted by the State, are uncharged offenses. The trial court failed to instruct the jury of the

statute's alternative language of "other unlawful sexual conduct" as charged in amended information and written in the statute. Instead the trial court chose to instruct the jury of "unlawful sexual conduct" absent of the statutory term "other" therefore an uncharged offense. The trial judge instructed the jury regarding unlawful sexual conduct, rather than "other unlawful sexual conduct", and returned a verdict of guilty "as charged." Either the information and the verdict do not correlate with the jury instructions; or, the information does not correlate with the jury instructions and the verdict. The jury was entitled to proper instructions on the law from the trial judge based on the statute. A verdict which finds a person guilty of a crime with which the accused was not charged is a nullity. Alternatively, a verdict which is not in conformance with the jury instructions is defective. Either way, the defendant has been illegally sentenced.

The offense "other unlawful sexual conduct" is not defined by statute, but the ordinary meaning of "other" is defined as "being the one or ones distinct from that or those first mentioned" see <https://unabridged.merriam-webster.com>. In this case, "other" meant some act distinct from unlawful sexual conduct. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse

or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct." Therefore defendant was charged, by information, for soliciting an act that is distinct from the acts incorporated under the definition of sexual conduct, which is what the ordinary meaning of the word "other" means. The jury instructions were not in conformance with this alternative offense charged.

The statutory language of the phrase "other" can not be construed as mere surplusage, and the basic tenets of statutory construction dictate that this Court is obligated not to treat it as such. See *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Schs., Inc.*, 3 So.3d 1220, 1233 (Fla. 2009) (recognizing that an "elementary principle of statutory construction [is] that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." (citation omitted)). Therefore the absence of the word "other" makes the verdict based on an uncharged offense and thereby a nullity.

CONCLUSION

WHEREFORE Darrel Deon Harvey respectfully requests this honorable Court vacate the sentence imposed on count I, in case number 2017-CF-000526 because, as a matter of law and general verdict, the sentence is a nullity, or in the alternative have the State clarify what underlying statutory law the defendant solicited that would supports the general verdict.

CERTIFICATE OF STYLE AND FONT

I CERTIFY that this Brief was prepared using Times New Roman 14-point font.

UNAUTHORIZED OATH

Under penalties of perjury, I declare that I have read the forgoing motion and the facts stated in it are true.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by email to the State Attorney, of the Second Judicial Circuit, Tallahassee, Florida 32399-1050 on this 9th day of May 2022.

Darrel Deon Harvey, pro se



Darrel Harvey