

neg A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

GEORGE BOATWRIGHT,

Respondent.

FILED
SID J. WHITE

NOV 3 1987

CLERK, SUPREME COURT
CASE NO. 71,240
By _____
Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0290

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	

ISSUE PRESENTED

WHEHTEH THE PROHIBITION AGAINST IMPOS-
ING CONSECUTIVE MINIMUM MANDATORY
SENTENCES FOR SEPARATE AND DISCRETE
ACTS ARRISING OUT OF ONE CRIMINAL
EPISODE APPLIES TO CAPITAL SEXUAL
BATTERY.

CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>Blockburger v. United States,</u> 284 U.S. 99 (1932)	11
<u>Boatwright v. State,</u> 12 F.L.W. 2212 (Fla. 1st DCA September 11, 1987)	1
<u>Buford v. State,</u> 403 So.2d 943 (Fla. 1981)	9
<u>Murray v. State,</u> 491 So.2d 1120 (Fla. 1986)	8,9
<u>Palmer v. State,</u> 438 So.2d 1 (Fla. 1983)	9,10
<u>Pina v. State,</u> 479 So.2d 107 (Fla. 1985)	3
<u>Pratt v. State,</u> 472 So.2d 799 (Fla. 3d DCA 1985)	2,10
<u>Scott v. State,</u> 453 So.2d 798 (Fla. 1984)	13
<u>State v. Enmund,</u> 476 So.2d 165 (Fla. 1985)	3,9,10
<u>State v. Hogan,</u> 451 So.2d 844 (Fla. 1984)	9
<u>Wilson v. State,</u> 467 So.2d 996 (Fla. 1985)	10

TABLE OF CITATIONS

OTHER AUTHORITY

PAGES

Section 775.021(4), Fla. Stat.

10,11

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 71,240

GEORGE BOATWRIGHT,

Respondent .

PETITIONER'S BRIEF ON THE MERITS

IN STATEMENT

George Boatwright, was the defendant in the trial court and the appellant below, and will be referred to herein as "Boatwright" or "Respondent. The State of Florida, was the prosecution in the trial court and the appellee below, and will be referred to herein as "Petitioner" or "the State". The record on appeal contains eleven volumes, the first four volumes shall be referred to by the symbol "R" followed by the appropriate page number in parentheses. There are seven volumes of trial transcripts which are consecutively paginated and shall be referred to by the symbol "T" followed by the appropriate page number in parentheses. This case comes before this court on a question certified to be of great public importance by the District Court of Appeal. Boatwright v. State, 12 F.L.W. 2212 (Fla. 1st DCA September 11, 1987).

STATEMENT OF THE CASE

On March 3, 1986, by second amended information, George Boatwright was charged with one count of burglary with the intent to commit sexual battery, one count of kidnapping with the intent to commit sexual battery, and two counts of sexual battery on a child less than 12 years of age. (R 97-98).

Boatwright was tried by a jury and convicted of all counts on March 22, 1986. (T 1-1031).

On June 12, 1986, Boatwright was sentenced to 2 separate consecutive life sentences without parole eligibility for 25 years. (R 152). The trial court entered an extensive written sentencing order. (R 138-149).

On June 12, 1986, the trial court appointed the public defender's office to handle Boatwright's appeal. (R 149). On June 27, 1986, Boatwright filed his timely notice of appeal. (R 154).

On June 12, 1987, the First District Court of Appeal entered a written opinion reversing and remanding the cause for resentencing minimum mandatory sentences for separate and discrete acts of capital sexual battery were improper on authority of Pratt v. State, 472 So.2d 799 (Fla. 3d DCA 1985). On June 26, 1987, petitioner filed a motion for rehearing asking the court to reconsider his decision reversing the position of consecutive

minimum mandatory sentences for separate and discrete acts of capital sexual battery citing this court's opinion in State v. Enmund, 476 So.2d 165 (Fla. 1985) and Pina v. State, 479 So.2d 107 (Fla. 1985) which hold that the judicially created prohibition against the consecutive stacking of minimum mandatory sentences did not apply to capital felonies. On September 11, 1987, the First District Court of Appeal declined to grant the petitioner's motion for rehearing, but, did certify the following question as one of great public importance:

Whether the Florida Supreme Court, in State v. Enmund, meant to permit a trial judge, in his discretion, to stack minimum mandatory sentences in all cases concerning capital felonies, or whether it meant to restrict the scope of its holding in that decision to cases involving homicide.

On October 2, 1987, petitioner filed a timely notice to invoke discretionary jurisdiction of this court.

STATEMENT OF THE FACTS

In the early morning hours of June 22, 1985, Officer David Houser was called to [REDACTED] Avenue to investigate a reported burglary. (T 359-360). Upon arriving, he found a scared little girl and an upset mother and father. (T 360). An evidence technician, called to the scene of the purported burglary, determined that entry to the residence had occurred through a window to the little girl's bedroom. (T 361).

Esther Manning testified that she lived at [REDACTED] Avenue, and on June 22, 1986, her sleep was disturbed by the barking of a dog. (T 429). Manning looked out her window and observed a little girl standing in the street. (T 429-430). The little girl appeared to be scared and confused. (T 430). Manning directed her daughter to call the police. The little girl then went up the street. (T 430). Manning was able to identify the little girl as A [REDACTED] R [REDACTED] D [REDACTED] (T 430-431).

C [REDACTED] C [REDACTED] testified that she was living at [REDACTED] Avenue on the morning of June 22, 1985, with her husband and two girls, A [REDACTED] R [REDACTED] D [REDACTED] and P [REDACTED] A [REDACTED] C [REDACTED]. (T 441-442). A [REDACTED] R [REDACTED] D [REDACTED] was 5 years of age on June 22, 1985. (T 442). C [REDACTED] testified that she was awakened on the morning of June 22 by a knock on the door, and when she and her husband opened the door they found M [REDACTED] [A [REDACTED] R [REDACTED] D [REDACTED]] out on the porch dressed in her nightgown. (T 443). ———was

barefoot and dirty. (T 450). M [REDACTED] told Mrs. C [REDACTED] that a man had taken her from her bedroom. (T 450).

A [REDACTED] R [REDACTED] D [REDACTED] testified that she was living at [REDACTED] Avenue with her parents on the day in question. (T 480-481). A [REDACTED] testified that she was sleeping in her bedroom when she was awakened by a man. (T 482). She had never seen the man before. The man told her to look out the window and ask her to sit on the window seal. He then pushed her out of the window and she jumped to the ground below. (T 482-484). The man took A [REDACTED] by the hand and led her down the street and into some woods. (T 486).

When they entered the woods, the man put A [REDACTED] on the ground, pulled up her nightgown and took her underwear off. The man pulled down his pants and attempted to have vaginal and then anal intercourse with her. (T488-489). The man ask A [REDACTED] her age and name. (T 490). The man then gave A [REDACTED] directions to the road and remarked to her that "we'll do it again in 3 years when I'm (sic) 8 years old." (T491).

Doctor Carole Lynn Newman testified that she was a physician, specializing in obstetrics and gynecology, and had examined A [REDACTED] D [REDACTED] within hours of this incident. (T 551-555). Doctor Newman indicated that there was a one centimeter laceration on the bottom-most part of the victim's vagina. (T 562). This one centimeter tear would have been consistent

with attempted penetration of the victim's vagina by an adult male's sex organ, (T573-574). This injury "most likely" would have been accompanied by the experience of pain to the victim. (T 575). Doctor Newman also testified that an accumulation of mucus around the child's anal area led her to conclude that there had been an attempted anal penetration by a male adult. (T 576-577).

Lethenia Meadows, a crime lab analyst with FDLE specializing in forensic serology, testified that stains on A██████'s nightgown and panties were of the same blood type as Boatwright's. (T 712-713).

Police officers testified that Boatwright admitted that he tried to have sex with the victim in the woods. (T 762). Officer John Michael McKim testified that he was a police officer assigned to the crime laboratory of the sheriff's department. McKim compared fingerprints taken from the dresser in the victim's room with Boatwright's fingerprints and concluded that the latent print discovered in A██████'s bedroom was left by the defendant. (T 797).

SUMMARY OF ARGUMENT

This court has never held that sexual battery on a child less than 12 years is not a capital felony. The statutorily enacted laws of Florida provide that capital defendant's who receive life sentences are ineligible for parole for at least 25 years. Moreover, the legislature specifically limited sentencing guidelines to non-capital offenses. Therefore, this court's conclusion that consecutive stacking of minimum mandatory life sentences for homicides is equally applicable to capital sexual battery.

ARGUMENT

ISSUE PRESENTED

WHETHER THE PROHIBITION AGAINST
IMPOSING CONSECUTIVE MINIMUM MANDATORY
SENTENCES FOR SEPARATE AND DISCRETE
ACTS ARISING OUT OF ONE CRIMINAL
EPISODE APPLIES TO CAPITAL SEXUAL
BATTERY.

The district court below in its opinion filed after rehearing on September 11, 1987, concluded that Murray v. State, 491 So.2d 1120 (Fla. 1986) implicitly extends this court's prohibition against consecutive stacking of minimum mandatory sentences arising out of one criminal episode to capital sexual batteries even though this court has rejected the so called Palmer¹ claim to capital homicides. The State noting the great protection the legislature and the court's have always extended to children who are victims of crimes, takes exception to the conclusion of the district court below.

The real issue here is whether the legislature's failure to remove the crime of sexual battery of a child of less than 12 from the capital felony classification may be considered evidence that there is still a legislative intent to allow a life sentence without parole eligibility for 25 years even though this court has abandoned death as the possible penalty. This court has

Palmer v. State, 438 So.2d 1 (Fla. 1983)

consistently treated sexual battery on a child as a capital felony even though the death penalty is not longer a possible sanction. State v. Hogan, 451 So.2d 844 (Fla. 1984); Buford v. State, 403 So.2d 943 (Fla. 1981).

In Enmund, supra, this court quashed a decision of a District Court of Appeal which had held that minimum mandatory life sentences could only be concurrent and not consecutive. This court found that Palmer v. State, 438 So.2d 1 (Fla. 1983) had not usurped the trial court's discretion to impose the 25 year minimum mandatory sentence in capital cases concurrently or consecutively. There is much logic in this view as Palmer was a 4-3 decision of dubious construction which should be narrowly construed.

Moreover, the fact that the legislature has not included sexual battery on a person over 12 years of age within the sentencing guidelines suggest that Murray, supra, has no application to the imposition of consecutive sentences in a capital felony case, There is something to be said for depriving criminal defendants such as George Boatwright of their liberty to prowl the bedrooms of our young children for at least 50 years so that victims such as A [REDACTED] R [REDACTED] D [REDACTED] can live their lives secure in the knowledge that this gross violator of their person is behind bars.

Given this court's clear policy of treating the instant offense as a capital felony for sentencing purposes, the district court's opinion below would usurp the legislative prerogative to afford the trial court discretion when punishing offenders such as Boatwright who commit multiple capital felonies in one criminal context. See §775.021(4) Fla. Stat. (1983). Therefore, the district court may not rely on Pratt v. State, 472 So.2d 799 (Fla. 3d DCA 1985) as authority for applying the rationale of Palmer to two capital felonies.

In Pratt, the state confessed error and the opinion identifies the offenses as a sexual battery, but, does not state whether it was sexual battery on a child under 12. Moreover, there was apparently only one sexual battery. The Third District concluded that Wilson v. State, 467 So.2d 996 (Fla. 1985) was controlling. In Wilson, the court applied Palmer, supra, because there were no capital felonies involved. This court was not presented with the juxtaposition of Enmund and Hogan and must answer that question now.

In Enmund, supra, the court vacated the defendant's two death sentences and remanded to the trial court and the following occurred:

At resentencing, the trial court granted Enmund's motion to vacate the life sentence for the robbery conviction and sentenced him to life imprisonment with no eligibility for parole for twenty-five years for each

of the homicides. The court directed that the two twenty-five year minimum mandatory would run consecutively, thereby making Enmund ineligible for parole for fifty-years. On appeal, the district court held that the minimum mandatorics could only be concurrent, not consecutive.

Id. at 167.

This court, in overruling the district court, discussed the test in Blockburger v. United States, 284 U.S. 99 (1932) and section 775.021(4), Fla. Stat. (1983) and held Enmund could be sentenced for the underlying felony of robbery. The court then addressed the district court's conclusion that the capital felonies required concurrent sentences and held they did not, stating:

We also quash the district court's holding that Enmund's minimum mandatory twenty-five year sentences should be concurrent instead of consecutive. In reaching this conclusion, the court relied on Palmer v. State, 438 So.2d 1 (Fla. 1983). We find, however, that Palmer does not control the instant situation.

* * *

Section 921.141, Florida Statutes (1983), provides that a person convicted for a capital felony shall be sentenced to death or to life imprisonment without eligibility for parole for twenty-five years. Any such person not sentenced to death or to life imprisonment without eligibility for parole for twenty-five years. Any such person not sentenced to death "shall be punished by life imprisonment and shall be required to serve no less

than 25 years before becoming eligible for parole." Section 775.082(1), Fla. Stat. (1983). We hold that the legislature intended that the minimum mandatory time to be served from a conviction of first-degree murder may be imposed either consecutively or concurrently, in the trial court's discretion, for each and every homicide. See §775.021(4), Fla. Stat. (1983).

Palmer is not analogous to this situation and we hold that the district court should not have reversed the trial court's exercise of its discretion. (Emphasis supplied).

Id. at 168.

Therefore, to the extent that this court's opinion vacated a trial court's imposition consecutive minimum mandatory twenty-five year sentences as to the separate convictions for capital felonies-sexual battery on a five-year old- the opinion is contrary to established present. Boatwright twice sexually battered five-year old A [REDACTED] R [REDACTED] D [REDACTED] and the trial court did not abuse his discretion by imposing consecutive sentences as to the two counts of sexual battery.

Moreover, the legislature has had ample opportunity to remove sexual battery on a child less than 12 from the capital felony statute and has chosen not to do so. In this era of heightened concern for violent acts perpetrated on children by both strangers and family members, it is unlikely the

legislature's failure to take any action regards to redefining the sentencing criteria for the defense may be read as an indication that they would concur with the district court below. See also Scott v. State, 453 So.2d 798 (Fla. 1984) where this court upheld separate convictions and sentences for manslaughter and child abuse in recognition of the legislature's clear intent to protect children and punish those who hurt them. Consecutive twenty-five minimum mandatory sentences are not as harsh as death in the electric chair and this court should consider the fact that Boatwright was spared that fate only by the grace of this tribunal and not the duly elected representatives of the people.

CONCLUSION

This court should answer the certified question in the affirmative and hold that the trial court did not abuse its discretion in sentencing Mr. Boatwright to consecutive twenty-five year mandatory sentences for the sexual batteries he committed upon this small child.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



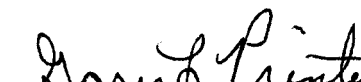
GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600/488-0290

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to David P. Gauldin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 2nd day of November, 1987.



GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR APPELLEE