IN THE SUPREME COURT OF FLORIDA

EDGAR GEROLD BATIE,

Petitioner,

v.

CASE NO. 72,060

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This case involves the novel issue of whether a person convicted of "capital" sexual battery is eligible for post-conviction release pending appeal. It is before this court because the First and Fourth District Courts of Appeal have split on this issue, and the First District certified the conflict.

II STATEMENT OF THE CASE AND FACTS

An information filed in the circuit court for Alachua County on December 5, 1986 charged Gerold Batie with four counts of sexual battery upon a child less than twelve years old and one count of lewd and lascivious act (R 577-579). Batie pled not guilty to these offenses (R 581).

Subsequently, the state filed a notice of intent to use the hearsay statements of the alleged child victim (R 592-593) and a motion to preclude Batie from introducing character witnesses (R 614-615). The court granted the states' motion (R 275-276).

Batie proceeded to trial before the honorable Stan Morris and was found guilty of three of the four counts of sexual battery and one count of lewd and lascivious act (R 646-648).

The court adjudged Batie guilty of those offenses and sentenced him to serve three concurrent life sentences without the possibility of parole for twenty-five years (R 691-692). As to the Lewd and lascivious act conviction, the court sentenced him to serve ten years probation, concurrent with the other convictions (R 692-693).

The court also denied his request for post-conviction release:

> Pursuant to Florida Statute 903.133, conviction of this type of sexual battery, it's strictly prohibited by the statue, and no longer should be subject to bail on appeal. There's a statutory prohibition about giving bail on appeal, and I must follow the statute.

(R 694)

Batie subsequently filed a Motion to Remand to Set Bond (Appendix A) to review the court's order denying his request for post-conviction release. The First District Court of Appeal denied the motion (Appendix B), but it certified that its decision was in conflict with Nussdorf v. State, 495 So.2d 819 (Fla. 4th DCA 1986).

Batie timely filed his notice invoking this court's discretionary jurisdiction based upon the certified conflict.

III SUMMARY OF THE ARGUMENT

The First District Court of Appeal said that for purposes of post-conviction release pending appeal a person convicted of sexual battery of a person under the age of eleven years old was not eligible for bail. This court in Buford v. State, 403 So.2d 943 (Fla. 1981) said a court could not sentence a person convicted of that crime to death although the legislature had defined it as a capital crime.

This court, however, has not said the other option in capital sentencing, life without parole for twenty-five years, was inapplicable to a person convicted of capital sexual battery. It has not said that because the determination of the appropriate sentence, with certain constitutional limitations, is a matter peculiarly within the legislature's jurisdiction.

On the other hand, this court has extended the implications of Buford to matters within its exclusive jurisdiction: the rules of practice and procedure the courts follow. For example, the state can charge a person with committing a "capital" sexual battery by information rather than indictment. It can also try him before a six man jury instead of a twelve man one. If death is not a possible sentence, the special procedural considerations given capital cases do not apply.

Rule 3.691 Fla. R. Cr. P. permits courts to release persons convicted of any felony pending appeal, except those convicted of committing a capital felony. Thus anyone convicted

of committing a sexual battery should be eligible for consideration for post-conviction release because no sexual battery is a capital offense.

The Trial and Appellate Courts justified denying Batie post conviction release by relying upon § 903.133 Fla. stats. (1985). But that Section is a red herring. It prohibits post conviction release for anyone convicted of committing a first degree felony. It makes no mention of post conviction release of those convicted of capital or life felonies. Because courts cannot legislate, capital sexual battery remains a capital felony for purposes of punishment (except for the imposition of the death penalty), and that statute has no application to this case.

If it does, it violates Article V section 2 of the state constitution giving this court exclusive jurisdiction to promulgate the rules of practice and procedure for the courts of this state.

IV ARGUMENT

ISSUE PRESENTED

THE DISTRICT COURT OF APPEAL ERRED IN DENYING BATIE'S MOTION TO REMAND TO SET BOND BECAUSE CAPITAL SEXUAL BATTERY IS NOT A CAPITAL CRIME FOR PURPOSES OF APPLYING RULE 3.691 FLA. R. CR. P.

After Batie was convicted of three counts of sexual battery upon a person less than eleven years old, he asked for post-conviction bail, but the court refused to grant it (R)694, citing §903.133 Fla. Stats. (1985). That statute, however, is irrelevant to this case; instead the court should have conducted the hearing described in Rule 3.691 FL. R. Cr. P. That rule permits the trial court to release all convicted felons pending a review of their appeal except those convicted of capital felonies. The question this court must answer here is whether Batie was convicted of a capital crime.

In Buford v. State, 403 So.2d 943 (Fla. 1981) this court said sexual battery of a person under the age of eleven years old was not "capital" sexual battery. A person convicted of that crime could not be sentenced to death. In State v. Hogan, 451 So.2d 844 (Fla. 1984) this court explored the ramifications of this holding, and in doing so it reached two results which, superficially, gave this court's opinion a "chameleon-like appearance." Hogan at 845. First, for purposes of sentencing, this court said:

> ...just because a portion of a crime designated 'capital' cannot be carried out, the degree is not lessened, at least for the purposes of setting penalties for 'attempt' crimes.

Id. at 845

Thus, for purposes of sentencing, a crime remains capital except that a court cannot impose death.

On the other hand, this court also held that for purposes of Rule 3.170 Fla. R. Crim. P., a defendant charged with "capital" sexual battery was only entitled to trial before a six man jury instead of one before a twelve man jury. Id. at 845.

The "chameleon-like appearance," however, is mere illusion. Hogan is about the balance of power existing between the legislative and judicial branches. It is also about the limits this court has imposed upon itself when it intrudes into those areas traditionally considered the exclusive domain of the legislature.

That is, traditionally, the legislature defines crimes and assigns the punishment given for violators of those crimes. With few restrictions (such as the constitutional one in Buford), the legislature can punish a criminal however it sees fit.

Likewise, this court has the exclusive right to make rules governing the practice and procedure of the courts.

Thus, even though this court can declare a death sentence unavailable for those who have sexually battered persons under the age of eleven years old, it is unwilling to go further than that and say what the appropriate punishment is. Rusaw v. State, 451 So.2d 469 (Fla. 1984). This court will interfere with the legislative power to prescribe sentences as

little as required. If the legislature wants to retain all but the death penalty for "capital" sexual battery, this court, out of deference to the legislative right to define crimes and prescribe punishment, will let it do so.

For example, in Rusaw v. State, 451 So.2d 469 (Fla. 1984) this court rejected Rusaw's argument that if capital sexual battery was no longer a capital crime, if must be a first degree felony. Regarding penalties, all Buford did was eliminate death as a possible sentence. It did not eliminate the other legislatively assigned punishment.

On the other hand, when rules of criminal procedure and their interpretation are involved, this court has chosen to extend the rationale of Buford to the fullest extent. If a person can no longer be executed for committing a crime the legislature has defined as capital, then that person does not get the benefits or liabilities attaching to that type of crime. For example, he will no longer be tried by a twelve man jury, a right defined by Rule 3.170 Fla. R. Crim. P. Hogan at 845. accord, Heuring v. State, 513 So.2d 122 (Fla. 1987)("capital" sexual battery can be tried by information rather than indictment.) There is, therefore, no "Chameleon-like appearance" in this court's opinion in Hogan. This court in Hogan recognized the exclusive domains of this court and the legislature and the limits of this court's power to intrude into the legislative prerogatives.

Thus, what does "capital" mean as used in rule 3.691 Fla. R. Crim. P.? Except for persons convicted of capital offenses,

all convicted persons are eligible for post-conviction release if they meet certain prerequisites not important for this case. Because "capital" is used in a rule created by this court, it has the exclusive right to say what that word means. Hogan. According to the rationale of Hogan and Heuring, a person convicted of "capital" sexual battery should be eligible for post-conviction release. The court in Nussdorf v. State, 495 So.2d 819 (Fla. 4th DCA 1986) reached the correct result.

The court in this case did what this court said the court in Hogan could not do. In Hogan the Fourth District reasoned that if capital sexual battery was no longer a capital crime, it must be a life felony. Therefore, attempted "capital" sexual battery (which is what Hogan was convicted of committing) was a second degree felony.

Here, the First District, though not as explicit as the Fourth District in Hogan, has also redefined "capital" sexual battery as a first-degree felony. It did this so that §903.133 Fla. Stats. (1985) could apply to Batie.1

> Nevertheless we are left with the impression that section 794.011(2) may still describe a capital crime after Buford, at least for some purposes. We believe that one such purpose is in the application of Rule 3.691, since we find it unlikely that the legislature, in enacting section 903.133, intended to deny persons convicted of sexual batter on persons 12

1903.133 Bail on appeal; prohibited for certain first degree felony convictions.-Notwithstanding the provisions of §903.132, no person adjudged guilty of a felony of the first degree for a violation of §782.04(2) or(3), §787.01, §794.011(4), §806.01, §893.13, or §893.135 shall be admitted to bail pending review either by post-trial motion or appeal.

> years of age and older the right to post-trial release while granting that right to persons convicted of sexual battery on younger victims.

slip opinion at pp 3-4.

The First District has in effect said that "capital" sexual battery, for purposes of §903.133 is a first degree felony for which post-conviction bail is unavailable. That, however, is incorrect. Hogan. No court has the authority to redefine crimes or the punishment for them. The legislature is the proper forum to resolve the conflict, not the courts.

Logically, the analysis should end here. This case involves an interpretation of Rule 3.691, not §903.133. This court's interpretation of "capital" in Hogan and Heuring suggest that the peculiarities of the criminal rules concerning capital crimes do not apply to capital sexual battery. Therefore, Batie is eligible for further consideration for post-conviction release.

The trial court, however, denied bail for Batie because §903.133 "strictly prohibited it." (R)694 That section, however, makes no mention of denying bail to those convicted of a capital or life felony. It, therefore, has no relevance to this case, because the punishment for capital sexual battery remains the same except for the possibility of the death sentence. Rusaw v. State, 451 So.2d 469 (Fla. 1984). If the Fourth District in Hogan could not make "capital" sexual

battery a first degree felony, the First District here had no authority to do the same.2

§903.133 presents another problem because it limits a trial court's discretion in determining whether bail should be granted. If the statute is procedural the legislature had no authority to enact it because it would encroach upon an area solely within this court's jurisdiction.

This court solved the problem in Bernhardt v. State, 288 So.2d 490 (Fla. 1974). It held that a statute prohibiting admitting a probationer who been arrested on a felony charge to bail was an unconstitutional infringement upon this court's power to prescribe rules of practice and procedure:

> Insofar as Section 949.10 purports to deprive the court of its discretion in determining whether bail should be granted, this portion of the statute is superseded by Rule 3.790 Fla.Cr. P.R....

Id at 497. Accord, Rolle v. State, 314 So.2d 624 (Fla. 1st DCA 1975); Bamber v. State, 300 So.2d 269 (Fla. 2d DCA 1974)

Two District Courts of Appeal have rejected this holding as it applies to §903.133. In State v. Jimenez, 508 So.2d 1257 (Fla. 3rd DCA 1987) the court, relying upon Palladino v. State, 263 So.2d 206 (Fla. 1972) and Greene v. State, 238 So.2d 296 (Fla. 1970), said the legislature could properly determine who

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2If a court could redefine the punishment for crimes, a more compelling argument in this case, would have been to reduce "capital sexual battery only one step, to a life felony. That reduction, however, would not have brought the crime within §903.133.

is eligible for bail. That reasoning, however, is suspect in light of this court's ruling in Bernhardt which impliedly overruled Palladino and Greene. Bamber, supra, at 270.

The Fourth District Court of Appeal in Hart v. State, 405 So.2d 1048 (Fla. 4th DCA 1981), although recognizing Bernhardt, nevertheless said the legislature could deny bail on appeal to a convicted drug trafficker. The court solved the practice and procedure dilemma by saying that denying bail to a convicted drug trafficker was "...simply another aspect of the punishment provisions of the statutory scheme." Id. at 1053. But, it cited Greene for that proposition, and it made no effort to distinguish Bernhardt. It made no effort to explain how §903.133 did not limit the discretion of the court to admit persons convicted of first degree felonies to bail. It did not because it could not.

Moreover, bringing capital sexual battery within §903.133, opens the statute to a constitutional attack on equal protection grounds. The Northern District Court of Florida has already declared the statute unconstitutional on those grounds. Scarlett Barts v. Sprouce, TCA 84-7104-WS, (N.D. Fla. June 15, 1984). The legislature could have had no rational purpose in denying bond to those convicted of a first degree felony but permitting it for those convicted of a life felony.

§903.133, therefore, presents a Gordian knot that is best left ignored than untied. The better solution is to interpret Rule 3.691 as Hogan and Heuring suggest: capital sexual battery is not a capital crime for purposes of that rule.

V CONCLUSION

Based upon these arguments, Batie respectfully asks this honorable court to quash the District Court's opinion denying his Motion to Remand and Remand to the trial court to exercise its discretion in setting a bond for Batie's post-conviction release.

Respectfully submitted,

MICHAEL E. ALLEN
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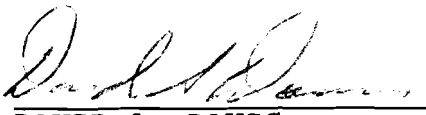
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, 32302, and mailed to petitioner, Gerold Batie, #108205, 1320-10, Post Office Box 628, Lake Butler, Florida, 32054, this 14 day of March, 1988.

DAVID A. DAVIS