IN THE SUPREME COURT OF FLORIDA

EDGAR GEROLD BATIE,

Petitioner,

v. CASE NO. 72,060

STATE OF FLORIDA,

Respondent.

_____/

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RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent will accept and use the designations as set forth in Petitioner's brief.

STATEMENT OF THE CASE AND FACTS

Respondent will accept the Statement of the Case and Facts as set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

Appellee argues that the right to post-conviction bond is not an issue solely for the Court, but an issue on which the legislature and the Court share responsibility. This shared responsibility is evidenced by a history of interlocking legislative and judicial actions in this area. These actions evidence a legislative intent that denial of post-conviction bond is part of the punishment plan for certain offenses. Such legislative determination should be given great weight in the sentencing arena.

Finally, Appellee argues that Nussdorf v. State, 495 So.2d 819 (Fla. 4th DCA 1986), should be overruled as it is internally inconsistent and ignores prior relevant Supreme Court rulings.

ARGUMENT

ISSUE

IS A DEFENDANT WHO HAS BEEN CONVICTED OF SEXUAL BATTERY ON A PERSON LESS THAN TWELVE YEARS OLD ELIGIBLE FOR APPELLATE BAIL.

Petitioner's argument is that this Court can and should interpret its rule in such a manner as to allow a person convicted of a violation of Section 794.011(2), Florida Statutes, sexual battery on a child under eleven (11), to be eligible for bond on appeal.

Petitioner's argument ignores the basis for Rule 3.691, Florida Rules of Criminal Procedure, its history and the effect the construction he desires would have on the trial courts.

It is axiomatic that there is no fundamental right to bond after conviction. Gallie v. Wainwright, 362 So.2d 936 (Fla. 1978). In fact, Florida's Constitution provides no pretrial entitlement to bond for this offense:

> **Pretrial release and detention.** -- Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. . .

Article I, Section 14, Florida Constitution (1972).

In light of the constitutional provision on pretrial release, this Court adopted the post-conviction release provision found in Rule 3.691, Florida Rules of Criminal Procedure. This rule was promulgated in 1972, see, Florida Bar, Re: Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972).

In interpreting this rule the District Courts held [in cases such as Bamber v. State, 300 So.2d 269 (Fla. 2nd DCA 1974)] that it superseded statutory prohibitions of bail, such as the prohibitions found in Section 903.132, Florida Statutes (1969). In response the legislature, pursuant to its authority under Article V, Section 2(a), Florida Constitution[1], struck that portion of the rule inconsistent with the statute. Chapter 76-138, Laws of Florida.

Subsequently, the legislature adopted Section 903.133, Florida Statutes (Chapter 80-72, Laws of Florida) and amended it in 1982 (Chapter 82-392, Laws of Florida). Each time, the legislature indicated it was repealing any portion of Rule 3.691, Florida Rules of Criminal Procedure, inconsistent with the new statute. This legislation restricting availability of bond

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[1] That provision states: "The supreme court shall adopt rules for the practice and procedure in all courts . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."

during appellate review has repeatedly been found Constitutional. Greene v. State, 238 So.2d 296 (Fla. 1970); Hart v. State, 405 So.2d 1048 (Fla. 4th DCA 1981); Barts v. State, 447 So.2d 410 (Fla. 1st DCA 1984).

The interaction of court and legislature was succinctly articulated in Jimenez v. State, 508 So.2d 1257 (Fla. 3rd DCA 1987):

> ". . . it is a judicial function and thus the proper subject of a rule to control the procedure by which a defendant's rights to bail may be exercised, it is a legislative function and thus the proper subject of a statute to declare what persons are entitled to bail. **Palladino v. Turner**, 263 So.2d 206 (Fla. 1972); **Greene v. State**, 238 So.2d 296 (Fla. 1970)."

Id at page 1258.

The legislature's adoption by implication of the major portions of Rule 3.691, Florida Rules of Criminal Procedure, and this Court's reciprocal adoption of the legisaltive enactment, Chapter 76-138, Laws of Florida, see Florida Bar, Re: Rules of Criminal Procedure, 343 So.2d 1247, 1262 (Fla. 1977), establish this area is not one given exclusively to either the judiciary or the legislature but, one where each has a sphere of operation.

Having determined that the area of post-conviction bail is an area of concern to both this Court and the legislature, we turn to an examination of the problem at hand. Appellee contends

the holdings in Rusaw v. State, 451 So.2d 469 (Fla. 1984) and State v. Hogan, 451 So.2d 844 (Fla. 1984), control this case.

In Rusaw, the defendant contended that because death was not a possible penalty he was entitled to have his offense classified as a life felony and his sentence reduced. In Hogan, the defendant claimed a right to the same type of sentence reduction. In both cases this Court said no. In Hogan, supra, the court looked to the legislature's intent. It determined that the legislature intended that penalties flowing from the conviction are the penalties of a capital offense. The court further reasoned that the legislature and the court intended that certain procedural rights, such as twelve member jurys and extra preemptory challenges attach only when the possibility of a death sentence exists.

Just as in Hogan, supra, the instant case deals with penalty classification. As the Fourth District Court of Appeals acknowledged in Hart, supra, denying bail after conviction was a legitimate exercise of the legislature's power to punish criminals and the provision merely required the defendant to begin serving a mandatory sentence.

In the instant case, evidence of this intent is found in the statement of objectives of Chapter 80-72, Laws of Florida. In abrogating the application of Rule 3.691, Florida Rules of Criminal Procedure, the legislature said it was:

> ". . . to prevent a defendant convicted of a crime of inherent gravity from skipping bail. . ."

A further expression of this intent is found in Section 775.082(2), Florida Statutes, which states:

> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

Thus, as these provisions relate to the sentencing and punishment of convicted criminals and not procedural rights of people presumed innocent, the legislative classification is the appropriate one. For the court said in Rusaw, supra, "it is well settled that the legislature has the power to define crime and to set punishments." Id. at page 470.

Additionally, as the court said in Hogan, supra:

> Sexual battery of a child, therefore, while still defined as a "capital" crime by the legislature, is not capital in the sense that a defendant might be put to death. Because the death penalty is no longer possible for crimes charged under subsection 794.001(2), a twelve-person jury is not required when a person is tried under that statute. Our construction of the statute and rule is in accordance with

> what we believe the legislature intended when it passed the statute, as did we when we enunciated the rule.

Id. at page 845, 846.

Thus, contrary to the position of the Petitioner, this Court has ruled that offenses may be classified as capital for some purposes but not for others. Hogan, supra. Nussdorf v. State, 495 So.2d 819 (Fla. 4th DCA 1986), which held that a capital offense cannot be capital for some purposes and not for others is wrong. Nussdorf cites Rusaw but not Hogan, and therefore incorrectly states the announced position of this Court. In fact, the Nussdorf, supra, opinion is internally inconsistent; for while using sweeping language declaring Section 794.011(2), Florida Statutes, not to be a capital felony, it approved Nussdorf's sentences of life imprisonment with a twenty-five (25) year mandatory provision. This sentence is available for punishing only "capital felonies" pursuant to Section 775.082, Florida Statutes. It should be overruled and the opinion of the First District in this case affirmed.

Finally, the construction the Petitioner desires would have this incongruous result: (1) If you are convicted of sexual battery punishable by life with a mandatory twenty-five (25) years, you are eligible for bond; (2) If you are convicted of sexual battery punishable as a first degree felony, you are not eligible for bond. Thus the most serious offense, the one where a mandatory

twenty-five (25) year sentence is required, is eligible for release on bond and the lesser offense is not. Such a construction clearly was not intended when this Court passed its rule and the legislature modified it thereby implicitly approving the remainder of it. Therefore, this court should overrule Nussdorf, supra, and affirm the denial of bail sub judice.

CONCLUSION

Based on the above cited legal authorities, Appellee prays this Honorable Court affirm the judgment rendered in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 21st day of April, 1988.

EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL