

IN THE SUPREME COURT OF FLORIDA

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EDGAR GEROLD BATIE, :  
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 Petitioner, :  
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 v. :  
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 STATE OF FLORIDA, :  
 :  
 Respondent. :  
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CLERK OF THE COURT  
By: *pl*  
CASE NO. 72-060

REPLY BRIEF OF PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

EDGAR GEROLD BATIE,  
Petitioner,

v.

CASE NO. 72,060

STATE OF FLORIDA,  
Respondent.

---

REPLY BRIEF OF PETITIONER ON THE MERITS

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.  
CRIM. P.

This case focuses upon whether a court can consider post-conviction release for a person convicted of "capital" sexual battery. No statute prohibits a court from considering it, and Rule 3.691 Fla R. Crim. P. permits such release if the defendant has not committed a capital crime. Batie's crimes were not capital, and the trial court simply erred when it said §903.133 Fla. Stats. (1986) prevented it from considering post-conviction bail for Batie.

The state in its brief presented the legislative history of §903.132 and §903.133. That discussion implied that a legislative act can amend or modify a rule of criminal procedure (see pages 5-6 of respondent's brief). That, of course, is incorrect because this court has exclusive jurisdiction over the practice and procedure used in state

courts. In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla 1973). The legislature can repeal a rule, but it cannot enact one. Only this court has the authority to create or amend a rule of criminal procedure.

When required, this court has maintained this authority over the rules of procedure when the legislature has sought to create or amend a rule of procedure. e.g. Livingston v. State, 441 So.2d 1083 (Fla. 1983). This court has also recognized the limits of its authority, and it has abolished a rule of procedure because it invaded the legislature's right to define crime and prescribe punishment. e.g. L.H. v. State, 408 So.2d 1039 (Fla. 1982).

When this court has struck legislation, it may have adopted the unconstitutional statute as a rule of criminal procedure, but this did not mean this court tolerated legislative meddling with the procedural rules it had promulgated. In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204, 205 (Fla 1973). To the contrary. While the distinction between substance and procedure may blur at times, a distinction exists, and this court has jealously maintained its exclusive jurisdiction over procedural rules. Seeking to weaken this court's exclusive rulemaking authority, the state claims the rule on post-conviction release is an area in which the legislature and judiciary "each has a sphere of operation." (Respondent's brief at page 6). The camel is trying to get his nose in the tent.

How then do §903.132 and §903.133 affect Rule 3.691, at least as they apply in this case? Not at all. First, those statutes were a legislative attempt to regulate practice and procedure. The staff analysis of the SB 509 (which became Chapter 76-138 Laws of Florida) acknowledged that the bill was probably an unconstitutional attempt to regulate practice and procedure:

The attempted repeal of Rules of Criminal Procedure 3.130(a) and 3.691(a) is probably invalid since it operates as an amendment to the rules. To assure validity, the rules should be repealed in their entirety.

(See, appendix A)

The preamble to Chapter 76-138 also seems to accept that entitlement to bail is a procedural matter not within legislative control:

WHEREAS, the Second District Court of Appeal in Bamber v. State, 300 So.2d 269 (Fla. 2nd DCA 1974), recently ruled that entitlement to bail is a procedural matter and one not properly within the purview of the Legislature...

Chapter 76-138 Laws of Florida

That law, and by implication, §903.133, thus are messages to this court for it to amend the rules to reflect the legislature's intent. It is an intent that merits respect but not obedience.

Second, as mentioned above, even if §903.133 could modify Rule 3.691, it would have no effect here because that section does not exclude persons convicted of "capital" sexual battery from being released upon post-conviction bail. Capital sexual battery remains a capital crime (except for the imposition of a

death sentence), and no court has the authority to redefine it a first degree felony. State v. Hogan, 451 So.2d 844 (Fla. 1984).<sup>1</sup>

On page 9 of its brief, the state said Batie argued that a capital offense must be treated as a capital offense in all situations. Not so. (See initial brief pp 6-8).

Finally, the Fourth DCA's analysis in Nussdorf v. State, 495 So.2d 819 (Fla. 4th DCA 1986) while not citing State v. Hogan, 451 So.2d 844 (Fla. 1984) used its rationale, and it is not "internally inconsistent." (Respondent's brief at page 9) "Capital" sexual battery is not a "capital" crime for purposes of applying the criminal rules; it is, however, a "capital" crime for sentencing (except for imposing a sentence of death). Nussdorf recognized, as this court did in Hogan, the constitutional limits placed upon the courts and legislature of this state. Nussdorf was correctly decided, and this court should reverse the First DCA's order in this case and remand to the trial court for further consideration of post-conviction release under Rule 3.691 Fla. R. Crim. P.

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<sup>1</sup> §903.133 prohibits post-conviction release for only certain first degree felonies.

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,

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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 a copy has been mailed to petitioner, Gerold Batie, #108205, 1320-10, Post Office Box 628, Lake Butler, Florida, 32054, this 27 day of April, 1988.



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DAVID A. DAVIS