IN THE SUPREME COURT OF FLORIDA

JOSEPH L. WISE,	:	
	:	
Petitioner,	:	
	:	
vs.	:	SUPREME COURT NO. 72,915
	:	DISTRICT COURT OF APPEAL,
THE STATE OF FLORIDA,	:	2nd DISTRICT NO. 88-1581
	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

In the trial court, the Petitioner was the Defendant and the Respondent was the State of Florida. Appendix citations shall be labeled "App." followed by a letter corresponding to the appropriate document. All Appendix citations refer to the Appendix found in Record on Appeal. Thus citations will appear as R.App.C, etc.

STATEMENT OF THE CASE AND FACTS

On April 12, 1988, the Petitioner was convicted of sexual battery upon a child under 12 years old, attempted sexual battery on a child under 12 years old, lewd and lascivious act in the presence of a child under 16 years old and child abuse (contributing to the delinquency of a minor). The Petitioner was remanded to the custody of Lee County Sheriff. On May 11, 1988, the Petitioner's motion for a new trial was denied. On May 18, 1988, the Petitioner was sentenced to life in prison without the possibility of parole for 25 years on Count I. On Counts II and III he was sentenced to 5 years imprisonment, to run concurrent with each other and the life sentence. He was given 60 days to serve for his conviction on the misdemeanor charge.

Subsequent to his sentencing he filed a notice of appeal and sought supersedeas bail. (R.App.D,E).

The court considered the testimony that was heard at the Petitioner's sentencing and the Petitioner's PSI to determine the Petitioner's eligibility for supersedeas bail. The record revealed that the Petitioner is 33 years old and had been employed in the local fire department for 13 years. He rose to the rank of captain and had the respect of all those that worked for him. The record further revealed that he had never been arrested for nor convicted of any crime. Furthermore, his parents live within the county. The transcript of the comments made by those knowledgeable of the Petitioner's character which were introduced for the purpose of sentencing were considered by

the Judge on the issue of bail. The Court held the Petitioner was not entitled to bail, citing as authority Batie v. State, 521 So.2d 295 (1st DCA 1988). (R.App.F,G).

The Petitioner sought review in the Second District Court of Appeal. The Second District, following Batie v. State, supra, denied Petitioner relief, however acknowledged conflict with Nussdorf v. State, 495 So.2d 819 (4th DCA 1986).

The Petitioner filed his notice to invoke discretionary jurisdiction of this Court and on October 25, 1988 this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Petitioner was convicted of capital sexual battery. Florida Rule of Criminal Procedure 3.691(a) states that a criminal defendant shall be admitted to bail on appeal unless the felony for which he was convicted was a capital felony. Petitioner contends that for purposes of this rule he was not convicted of a capital felony. Petitioner believes that certain issues regarding criminal trials fall under the exclusive constitutional jurisdiction of this Court to control the practice and procedure of trials throughout the State. The Petitioner contends that the issue of bail is one such issue. Since this Court has held that the death penalty cannot be imposed for a conviction of capital sexual battery, it has consistently found that in those areas which are within its exclusive jurisdiction to regulate practice and procedure of the courts that defendants are treated more like defendants in all the other felonies prosecuted in Florida and different from first degree murder, the only capital crime remaining in Florida. Thus a defendant charged with capital sexual battery can be tried by a six person jury, just like all other Florida felonies. A person charged with capital sexual battery can be charged by information and not indictment, like every other felony charge in the State of Florida. Thus, Petitioner contends that this Court should treat the issue of bail in a capital sexual battery case like it treats bail in every other felony case in Florida. The Defendant should be entitled to bail in appeal under that rationale.

THE DISTRICT COURT OF APPEAL ERRED IN DENYING PETITIONER'S RIGHT TO SUPERSEDEAS BAIL ON HIS APPEAL FROM HIS CONVICTION OF CAPITAL SEXUAL BATTERY BECAUSE THAT OFFENSE BECAUSE THAT OFFENSE IS NOT A CAPITAL CRIME FOR THE PURPOSES FLORIDA RULE OF CRIMINAL PROCEDURE 3.691

The Petitioner was convicted of sexual battery of a person under 12 years of age, in violation of Florida Statute 794.011(2). He requested the trial court to set bail while he was appealing his conviction. The trial court refused bail based upon the holding of the First District Court of Appeal in Batie v. State, 521 So.2d 295 (1st DCA 1988)[S.Ct. #72,060].

The Petitioner sought bail pursuant to Florida Rule of Criminal Procedure 3.691(a). That Rule provides that persons who have been adjudicated guilty of the commission of any offense not capital, may be admitted to bail pending appeal of the conviction. The question that this Court must answer here is whether the Petitioner was convicted of a capital crime.

In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court held that a person convicted of this offense could not be sentenced to death, although the Legislature had provided death as a possible sentence. Since that time, this Court has been analyzing the exact nature of this crime called capital sexual battery. It is axiomatic that in Florida jurisprudence the Legislature will define the crime and punishment while the Supreme Court has exclusive constitutional jurisdiction regarding the rules of practice and procedure of the courts of the State.

In State v. Hogan, 451 So.2d 844 (Fla. 1984), this Court crystalized the distinction outlined above. This Court held that

the definition of the crime, that is, its label as a capital offense for sentencing purposes, was within the purview of the Legislature and consequently held that an attempt to commit this offense was a first degree felony, as set out in the statute that defines attempts. This was a legislative area and this Court acknowledged the power of the Legislature to define and set the punishment for offenses. However, this Court in Hogan also held that in the area of practice and procedure, a jury of twelve persons was not required. This Court started down a path of defining capital as something completely different than the only other capital offense, first degree murder. First degree murder, of course, is a capital offense and a twelve person jury is required. Capital sexual battery is demonstrably different and a six person jury will suffice. It must be remembered that all other felonies in the State of Florida are prosecuted with six person juries.

In Heuring v. State, 513 So.2d 122 (Fla. 1987), this Court again determined that in the area of practice and procedure, capital sexual battery would be treated like every other felony in the State and not like first degree murder. This Court held that the charging document in a capital sexual battery case could be an information and need not be an indictment. Again, in the area where this Court has exclusive jurisdiction, this Court has determined to treat the capital sexual battery like other lesser felonies and thus, different from first degree murder.

In Rusaw v. State, 451 So.2d 459 (Fla. 1984), this Court rejected a capital sexual battery defendant's argument that since

death was not a possible penalty, then capital sexual battery was no longer a capital crime. He argued the crime must be a first degree felony. This Court said in the area of defining the crime and its punishment, the Legislature's determination will control. It found that the alternative legislative penalty of life imprisonment without the possibility of parole for 25 years was constitutional and thus the Legislature's determination stood.

Bail has been considered by this Court to be within the sphere of practice and procedure. In Bernhardt v. State, 288 So.2d 490 (Fla. 1974), this Court held a provision of Florida's probation revocation statute invalid in that it attempted to deprive the court of its ability to set bail on persons charged with violating probation. It is the Petitioner's contention that the issue of bail is within the sphere of practice and procedure. This Court should be consistent in its treatment of those issues within its sphere as they relate to this crime called capital sexual battery. That is, the right to bail in this case should be the same as all other felonies in this State and different from first degree murder. Consequently, bail should be granted while a capital sexual battery defendant appeals his conviction.

Batie, supra, was relied upon by the trial court and the Second District Court of Appeal to deny Petitioner bail. The court in Batie surmised that the Legislature somehow by its failure to act, prohibited bail after conviction for those convicted of capital sexual battery. That court reasoned that if the Legislature denied bail in other sexual battery cases of a lesser degree, then certainly they meant to deny bail in the more

serious capital sexual battery cases. Petitioner does not concede that the Legislature can dictate which class of defendants can be admitted to bail on appeal but even if the Legislature could legislate a denial of bail in particular instances, it did not do so regarding this particular offense.

CONCLUSION

The Petitioner requests this Court to enter an Order quashing the opinion of the District Court and compelling the trial court to grant the Petitioner a hearing regarding bail on appeal.

Respectfully submitted,

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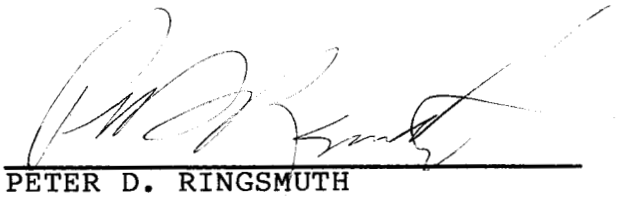
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits has been furnished by mail to The Honorable DAVIS G. ANDERSON, JR., Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 18th day of November, 1988.

Respectfully submitted,



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