IN THE SUPREME COURT OF FLORIDA

THOMAS WAYNE SLAUGHTER,

Petitioner,

v. CASE NO. 73,743

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

A. E. (NED) POOSER, IV
ASSISTANT ATTORNEY GENERAL
FLA. BAR #183336

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

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The court below correctly held that the crimes of sexual battery by force, sexual activity by person in familial custodial authority, and incest each requires proof of an element that the other does not, and therefore, is not in "direct and express conflict" with this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987).

An amendment to the Committee Note to Fla.R.Crim.P. 3.701(d)(7) merely clarified the intent of the rule, not changed it. Therefore, application of this rule to appellant's crimes, which occurred prior to such amendment, does not violate the ex post facto clause.

ARGUMENT

ISSUE

THE OPINION OF THE DISTRICT COURT IS NOT IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioner urges that the District Court's opinion that appellant's separate convictions of sexual battery by force [Sec. 794.011(5), Fla. Stat. (1985)], sexual activity with a child 12-18 years old by a person in familial or custodial authority [Sec. 794.041(2)(b), Fla. State. (1985)], and incest [Sec. 826.04, Fla. Stat. (1985)], occurring from one sexual episode; and, sexual battery by force, and sexual acitivity by a person in familial or custodial authority in a second such episode, is in "direct and express conflict" with this Court's decisions in Carawan v. State, 515 So.2d 161 (Fla. 1987), and Huckaby v. State, 343 So.2d 29 (Fla. 1977). Petitioner's contention is wrong for the following reasons:

First, in Carawan, this Court stated that

> if each offense indeed requires proof of a fact that the other does not, the court then must find that the offenses in question are separate, and multiple punishments are presumed to be authorized... .

515 So.2d at 168.

Sexual battery requires proof of lack of consent and the use of force, which are not present in either sexual activity by a person in familial or custodial authority, or incest.

Sexual activity by a person in familial or custodial authority requires proof that the victim is not over the age of 18. Neither sexual battery, nor incest has an age-cap element.

Incest is limited to sexual intercourse between certain male and female relations--a relationship which is not necessary in either sexual battery or sexual activity by a person in familial or custodial authority.

Thus, Carawan supports the decision below, rather than being in "direct and express conflict."

Secondly, petitioner's reliance upon Huckaby, supra., is misplaced. There, the defendant's crime pre-dated Ch. 76-66, Laws of Florida, which created Sec. 775.021(4), Fla. Stat. (1977), and which "abrogated the single transaction rule." Borqes v. State, 415 So.2d 1265, 1266 (Fla. 1982). This statute provided that

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

(emphasis supplied).

Petitioner also alleges that this Court's clarification of the intent of Fla.R.Crim.P. 3.701(d)(7) occurred subsequent to the instant offenses, and, therefore, cannot be applied to him. In support petitioner cites Miller v. Florida, 428 U.S. ____, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), Williams v. State, 14 FLW 250 (Fla. 2d DCA, January 20, 1989), Jackson v. State, 533 So.2d 888 (Fla. 3d DCA 1988), and Rubier v. State, 530 So.2d 523 (Fla. 3d DCA 1988). Such authority is inapplicable for the following reasons:

First, Miller held that applying a change in the sentencing guidelines subsequent to the commission of the offense and which results in a harsher penalty is violative of the ex post facto clause of the United States Constitution. Here, the referred-to amendment merely clarified an existing rule, not changed it.

Secondly, none of the three District Court cases relied upon by petitioner involved the issue of retroactive application of Rule 3.701(d)(7). Jackson held that victim injury was not an element of battery on a law enforcement officer. In Rubier, the State conceded that victim injury was not an essential element of attempted third-degree murder. Williams held that victim injury is not an element of robbery; or, of attempted murder, unless specifically pled in the charging document.

CONCLUSION

Based upon the record, argument and citation of authorities, respondent requests that this Court deny the petition for review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

A. E. (NED) POOSER, IV
Assistant Attorney General
Fla. Bar #183336

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U. S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 16th day of March, 1989.

A. E. (NED) POOSER, IV
Assistant Attorney General