IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

vs.

JAMES MOSE BOYD,

Respondent.

CASE NO. 74,493

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellee in the court below and the prosecution in the trial court. Respondent was the Appellant in the court below and the defendant in the trial court.

The parties will be referred to by name. The following symbol will be used:

"R" Record on Appeal

SUMMARY OF THE ARGUMENT

Consecutive mandatory minimum sentences are forbidden where all the offenses were committed at the same time and place. This Court has already appliedthis rule to sexual battery prosecutions. Where Mr. Boyd was convicted of sexual battery of a child, the rule must also apply to him, rather than the exception which authorizes consecutive mandatory minimum sentences for each of multiple homicides on the basis that homicides are "separate and distinct" offenses.

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE MANDATORY MINIMUM SENTENCES IN COUNTS I-III WHERE ALL OFFENSES OCCURRED AS PART OF A SINGLE CRIMINAL EPISODE.

In Palmer v. State, 438 So.2d 1 (Fla. 1983) this Court held that a defendant convicted of thirteen (13) robberies, all of which occurred during a single criminal episode at a funeral home, could not be sentenced to consecutive mandatory minimum terms of imprisonment based on the use of a firearm during the commission of the offenses. The issue in Palmer, as this Court made clear, was **not** the authority of the trial court to impose consecutive sentences, which this Court did not deny. Indeed, Palmer left undisturbed the defendant's consecutive seventy-five (75) year prison sentences (975 years total). Nor did Palmer question the validity of the defendant's multiple convictions, all of which were allowed to stand.

The only issue before this Court, and the only issue decided by it was the propriety of the trial court's imposition of a mandatory minimum term which precluded eligibility for parole for 39 years pursuant to a statutory authority which specified only a three (3) year limit on such mandatory minimum sentencing. After all, the entire point of mandatory minimum sentencing is to deny the trial court its traditional sentencing discretion: once the statutory criteria for a mandatory sentence are met, whether it be using a firearm during a felony or committing the requisite crime, the court must impose the mandatory minimum term provided. Mandatory minimum sentencing is **not**, therefore, contrary to the state's apparent misconception, Petitioner's brief at page 11,

another sentencing alternative for the trial court to utilize or not as it sees fit. It is a restriction of the trial court's traditional sentencing discretion, which the legislature has implemented by enacting these various mandatory minimum sentencing schemes. Consistent with this purpose, the mandatory minimum sentence statutes must be strictly and narrowly construed. This Court did so in Palmer, declining to approve the consecutive imposition of mandatory minimum terms where all the offenses arose at the same time and place. On the other hand, where separate and distinct crimes are committed, consecutive mandatory minimum sentences may be imposed.

Two years later, this Court applied this latter part of the Palmer rule to cases where a person has been convicted of multiple homicides. This Court held that Palmer is not applicable to preclude imposition of consecutive minimum 25-year sentences as part of the life sentence prescribed for first degree murder because in a multiple homicide situation, "separate and distinct" offenses are committed.[1] State v. Enmund, 476 So.2d 165, 168 (Fla. 1985). Homicide is, after all, because of its very nature uniquely a crime which will ordinarily constitute a "separate and distinct" offense as to each of its multiple victims. Therefore, consecutive

[1] The portions of Enmund's opinion coyly omitted from the state's quotation on page 13 of its brief are:

> Palmer used one revolver to rob thirteen people at the same time. After analyzing subsection 775.087(2), Florida Statutes (1981), we held that three-year minimum mandatory sentences for firearm possession while committing a felony could not be made consecutive for offenses arising from a single criminal episode. Here, however, we have two separate and distinct homicides.

25-year mandatory minimum sentences may be imposed for each homicide committed, regardless of the temporal proximity of the offenses.

This Court has declined, however, to apply a similar exception to cases involving sexual battery. Thus, in Murray v. State, 491 So.2d 1120 (Fla. 1986), this Court applied the logic expressed in Palmer and Enmund to a case where a woman was abducted by two men at gunpoint, robbed while driven to a different location and sexually assaulted there by each man. This Court found that it was proper to sentence consecutively for the robbery and sexual assault because the two crimes occurred at different times, in different places, and were dissimilar in nature. In contrast, concurrent mandatory minimum sentencing for Murray's two sexual battery convictions was deemed proper due to the same "time, place, and nature" character of those crimes. Unlike homicide, then, sexual batteries are not presumed to be "separate and distinct" crimes for purposes of consecutive mandatory minimum sentencing.

In the case at bar, there was likewise only one victim who was assaulted in one place, without any temporal or physical break in the chain of events. With the sole exception that in the present case the victim was a child, it is on all fours with Murray insofar as the sexual battery convictions are concerned. Thus, as in Murray, the offenses for which Appellant was convicted were not "separate and distinct" in a way justifying imposition of consecutive minimum mandatory terms. See also, Wilson v. State, 467 So.2d 996 (Fla. 1985) [kidnapping and sexual battery convictions held not

to support consecutive mandatory minimum sentences].[2] Based on this analysis the coincidence of sanction for sexual battery of a child and first degree murder is not, standing alone, sufficient to authorize consecutive mandatory minimum sentences under Palmer, in the absence of a showing that the offenses for which sentence is to be imposed are separate and distinct. Boatwright v. State, 512 So.2d 955 (Fla. 1st DCA 1987) [declining to extend Enmund to capital sexual battery convictions; question certified].[3]

The state's laudable concern for children's rights is not overlooked by the disposition required in the instant case. Sexual battery against a child is already punishable by more than sexual battery against an adult, even where sexual battery is committed with a weapon or with brutal force. No greater penalty exists short of the death penalty.[4] Nevertheless, the state's attempts to equate sexual battery of a child on all points with first degree murder must fail. The former is, in the final analysis, awful as it is, simply not as heinous and final a crime as the latter, a fact recognized by the courts. Thus, the death penalty does **not** apply to sexual battery of a child, Buford v. State, 403 So.2d 844 (Fla. 1981); child sexual battery, unlike murder, may be charged

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[2] The same reasoning has been applied to preclude consecutive mandatory minimum sentences under a different mandatory sentencing statute. Vickery v. State, 515 So.2d 396 (Fla. 1st DCA 1987) [trafficking and conspiracy to traffic in cocaine].

[3] Supreme Court Case No. 71,240; oral argument heard April 27, 1988.

[4] Mr. Boyd parenthetically notes that it is the Constitution which prohibits death for child sexual battery, not the "grace" of this Court. Buford v. State, 403 So.2d 844 (Fla. 1981). See Petitioner's brief at page 17.

by information rather than indictment, Heuring v. State, 513 So.2d 122 (Fla. 1987); a defendant charged with child sexual battery is not entitled to a twelve-man jury, State v. Hogan, 451 So.2d 844 (Fla. 1984); nor must the jury in such a prosecution be advised of the penalties the defendant faces as required in R.Crim.P. 3.390(a) for "capital offenses." Disinger v. State, 526 So.2d 213 (Fla. 5th DCA 1988). Consequently, there is, contrary to the state's argument, a difference between the way in which child sexual battery and first degree murder are prosecuted, because there is a difference in the character of the crimes: one is a sexual battery, atrocious to be sure, but from which the victim, with help from resources society and his family can supply, recovers; the other involves the final extinction of a life which can never be restored. The sentencing sanctions for child sexual battery and murder may, therefore, overlap, but they are not, nor should they be, identical.

The state's oft-repeated concern that a perpetrator "gets off free" if he commits more than one sexual assault against a child is likewise unfounded. The state forgets that the 25 year mandatory minimum term is not the defendant's whole sentence, nor is his release upon the expiration of that time guaranteed. The robber in Palmer did not get off free for committing thirteen (13) robberies instead of just one: he received consecutive prison terms totalling 975 years. Nothing in Palmer prohibits consecutive life sentences from being imposed, nor multiple convictions from being entered. It is, moreover, hardly likely that the parole commission, which is the ultimate arbiter of the defendant's actual

release date on parole, will ignore the fact that the defendant was convicted for more than one sexual battery in making that determination. It must be its misinterpretation on this matter which leads the state to argue that, under Mr. Boyd's argument, "the defendant can only be convicted of, but not sentenced for, the various sexual batteries." Respondent's Brief at page 11. The state's hysterical rhetoric exhorting this Court to storm the barricades of Palmer is grounded neither upon logic, legal reasoning, nor fact, and should be firmly rejected. Mr. Boyd makes no challenge in this appeal to his consecutive life sentences as a result of his multiple convictions for sexual battery. For the state to argue that all but the first sexual battery were "free" is an insult to intelligence.

The instant case is not a same transaction case nor a double jeopardy case, and the state's references to Section 775.021(4), Florida Statutes and to "Blockburger"[5] analysis is simply inapposite. The sole issue in this case, as in Palmer, is the propriety of the consecutive mandatory minimum portion of Mr. Boyd's sentence, not the validity of consecutive sentences or any sentence at all. Mr. Boyd's attack on his consecutive mandatory minimum sentences is squarely based on this Court's previous holdings in Palmer and Murray, which require that he be granted relief. This Court should therefore approve the decision of the Fourth and First District Courts of Appeal and order that a single mandatory 25-year term be imposed in this case.

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[5] United States v. Blockburuer, 284 U.S. 99 (1932).

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Boyd requests that this Court affirm the decision of the Fourth District Court of Appeal below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL COBURN ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 18th day of September, 1989.

Of Counsel