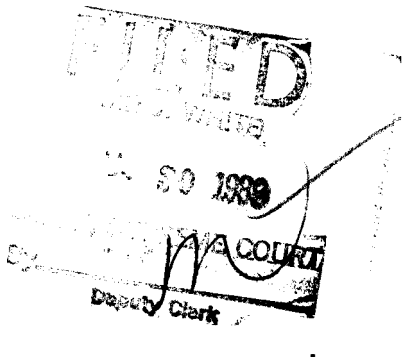
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA)
Petitioner,)
vs.) CASE NO. 74,493
JAMES MOSE BOYD,)
Appellee.)



PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATE EI

James Mose Boyd, was the defendant in the trial court and the Appellant below, and will be referred to herein as "Boyd" or "Respondent". The State of Florida, was the prosecution in the trial court and the appellee below, and will be referred to herein as "Petitioner" or "the State". The record on appeal contains three volumes and one supplemental volume. The first three volumes shall be referred to by the symbol "R" followed by the appropriate page number in parentheses. The forth supplemental volume will not be referred to in this brief. This case comes before this court on a question certified to be of great public importance by the District court of Appeal. Boyd v. State, 14 F.L.W. 1718 (Fla. 4th DCA July 18, 1989).

STATEMENT OF THE CASE

Respondent was charged in a five count amended information with kidnapping (Count I) and four counts of sexual battery by a person of the age eighteen years or older upon T[redacted] B[redacted], the victim, a person under the age of twelve years; by causing his penis to penetrate or unite with the anus of T[redacted] B[redacted] (Count 11); by causing his penis to penetrate or unite with the mouth of T[redacted] B[redacted] (Count 111); by causing his mouth to unite with the penis of T[redacted] B[redacted] (Count IV); and by causing his finger(s) to penetrate the anus of T[redacted] B[redacted] (Countv). (R 331). He was tried by jury. (R 333). The jury returned verdicts of guilty as charged to all counts. (R 301-302). Respondent was adjudicated guilty in accordance with the verdicts of the jury. (R 332).

Respondent's motion for a new trial (R 334) was denied (R 315). Respondent was sentenced on May 4. 1988, to three consecutive terms of life in prison with a 25 year mandatory minimum for Counts I, 11, and 111. (R 336-338). Counts II and III are capital felonies. On Count IV, Respondent was sentenced to life imprisonment with a 25 year mandatory minimum to run concurrent to the sentence imposed in Count 11. (R 339). He was sentenced on Count V to life imprisonment with as 25 year mandatory minimum to run consecutive to the sentence imposed in Count II (R 340); it should be noted that the judge at sentencing orally designated the sentence "to run concurrent and not

consecutive" to the sentence imposed in Count 11. (R326). Credit was given for time served.

Notice of Appeal from the judgment and sentences was filed on May 9, 1988. (R 341). Respondent's Brief was filed on October 20, 1988. Petitioner's Brief was filed on March 27, 1987. The Fourth District Court of Appeal reversed and remanded for the imposition of concurrent rather that consecutive mandatory minimum sentences. The Fourth District Court did certify the following question to the Supreme Court of Florida as a question of great public importance:

> WHETHER THE HOLDING IN STATE V. ENMUND PERMITTING CONSECUTIVE MANDATORY MINIMUM SENTENCES IS RESTRICTED TO CASES INVOLVING MULTIPLE HOMICIDES COMMITTED DURING A SINGLE CRIMINAL EPISODE OR WHETHER IT MAY BE CONSTRUED TO INCLUDE OTHER CAPITAL FELONIES.

On July 26, 1989, Petitioner filed a timely notice to invoke discretionary jurisdiction of this Court.

STATEMENT OF THE FACTS

Shortly after noon on July 17, 1986, T[redacted] B[redacted], the victim, then eight years old, was walking from his school to his grandmother's house. (R 85, 23-24). He was approached by a man whom he described as being a "big" "black" man with "a long beard". (R 25,26). He also described the man as a bum. (R 135). The man told T[redacted] he couldn't find his child. (R 25). He asked T[redacted] to go with him (R 16), which T[redacted] did because the man said he knew T[redacted]'s cousin D[redacted] D[redacted] and T[redacted] hadn't told him her name (R 27). T[redacted] accompanied the man on foot to an abandoned house. (R 27). They went inside and the man shut the door, putting an "iron bar" against it. (R 27).

When Respondent first took the victim to the abandoned house he told the victim to take his cloths off R 29). Respondent then started sucking on the victim's penis (R 29). Afterwards the Respondent forced the victim to suck on his penis. Respondent then ejaculated in the victim's mouth. (R 30-31). The Respondent then took his cloths off and stuck his penis in the victim's anus. (R 32). The victim, an 8 year old boy, began to scream from the pain. Respondent put his hand over the victim's mouth to keep him quiet. (R 33). The Respondent then put his finger in the victim's anus and began moving it in and out (R 34-35). The Respondent released the boy after warning him that if he told anyone the Respondent would kill the victim's family. (R 37). The victim ran to his grandmother's house and told his

family about what happened. (R 38).

The police had been summoned by T[redacted] mother and met with her at his school. (R **90**). The officer received the call at about 2:00 P.M. (R 110). As police were obtaining information from T[redacted] mother regarding his disappearance, they saw him running about a block away. (R **91**). He met with the police, told them what had happened (R 38), and took them to the house in which the assault had occurred (R **45**).

T[redacted] the victim, was shown hundreds of photographs of black and white males but did not identify any of them as being his assailant. (R **46**, **127-128**). Several times after the incident, T[redacted] spotted men off at a distance and told his mother that they looked like the man, but upon getting a closer look he decided that they were not the one. (R **99**).

About a year later the victim was shopping at Bass Brothers with his teenage cousin P[redacted] (R **48**). When he saw the Respondent he told his cousin that the Respondent was the man who had molested him (R **49**). P[redacted] told the victim to go back and make sure that the Respondent was actually the man who molested him (R **49**). The victim looked again and was still positive that the Respondent was the man the molested him (R **49**). At the time T[redacted] spotted the Respondent he was sitting on a crate and there were other men who were standing around (R **72**). P[redacted] and T[redacted] went home to tell T[redacted]s mother who promptly called the police. (R **50**). When the police arrived they asked the victim to

look again. The victim was still positive that the Respondent was the man that molested him. (R **55).**

On cross examination the victim stated that when he and his mother came into the courtroom his mother did not know which person was the man who had molested him. His mother asked the victim to point out to her which man was the man that had molested him. The victim pointed to the Respondent. (R 70).

SUMMARY OF THE ARGUMENT

The imposition of consecutive mandatory minimum sentences for separate criminal offenses which arise during a single criminal episode is permissible in Section 775.021, Florida Statute. The purpose of the statute is to convict and sentence a defendant for each criminal offense committed in the course of one criminal episode or transaction.

The Supreme Court of Florida has never held that sexual battery on a child less than 12 years is not a capital felony. The statutorily enacted laws of Florida provide that capital defendant's who receive life sentences are ineligible for parole for at least 25 years. Moreover, the legislature specifically limited sentencing guidelines to non-capital offenses. Therefore, the Supreme Court's conclusion that consecutive stacking of minimum life sentences for homicides is equally applicable to capital sexual battery.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN IMPOSING CONSECUTIVE MANDATORY MINIMUM SENTENCES FOR SEPARATE DISCREET ACTS ARISING OUT OF ONE CRIMINAL EPISODE

The district court below in its opinion concluded that this Court has consistently prohibited consecutive stacking of minimum mandatory sentences arising out of one criminal episode except where there are "two separate and distinct" homicides. State v. Enmund, 476 So.2d 165, 168 (Fla. 1985). The district court noted that "neither the Supreme Court nor the legislature has made its position clear with regard" to cases like the one at bar involving the capital felonies of multiple sexual batteries on a child under the age of twelve. In its opinion the Fourth District Court of Appeal noted:

> If one purpose of punishment is deterrence, as it surely must be, then the rationale which precludes consecutive mandatory minimum sentences cries out for reexamination. IN the case of concurrent sentences, all after the first are for the most part illusory. There is, in effect, only one punishment imposed. The message which such sentencing imparts to the criminal element in our society is that if one commits on sexual battery, he may as well commit several because the punishment will be the same for two or four or eight as for one. There is something wrong with that logic, as any victim would surely attest.

The Legislature and the courts have always extended to children who are victims of crimes great protection. Therefore, the Petitioner, the State of Florida, maintains

that there is no prohibition against the imposition of consecutive minimum mandatory sentences for separate discreet acts of capital sexual battery given the logical interplay of subsection 794.011(2) and 775.021(4), Florida Statutes.

Florida Statute, Section 775.021(4)(a) and (b) states:

> (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

This statute was amended to further specify the intent of the legislature. It became effective on July 1, 1988.. However the Petitioner maintains that this amendment merely clarified the statute but did not change it. Thus, the amended statute can be considered in interpreting the intent of the Legislature regarding the stacking of minimum mandatory sentences in capital felony cases involving sexual battery on a child.

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative

intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Legislative intent is determined primarily from a statute's language. St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). A court will follow the literal, plain meaning of the language unless such an interpretation would lead to an absurd or illogical result. Id. It is the duty of this Court to construe a statute to effectuate the intent of the legislature. Parker v. State, 406 So.2d 1089, 1092 (Fla. 1981).

The plain language used in the aforementioned statute clearly indicates that the Legislature intends that separate offenses arising out of one criminal episode be punished separately; and, that, the sentencing judge may order the sentences to be served concurrently or consecutively. imposed.

In the instant case the Respondent was found guilty of one count of false imprisonment and four counts of sexual battery on a child eight years old. The separate sexual acts require different elements of proof and constitute four separate crimes as to which four separate sentences can be imposed. Begley v. State, 483 So.2d 70 (Fla. 4th DCA, 1986).

The false imprisonment obviously is a separate crime from the other four crimes requiring different elements of proof. Therefore a separate sentence could be imposed on the count of false imprisonment.

The Legislative intent is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction. Respondent would argue to this Court that the law is contrary to Section 775.021. Respondent would rather the Court take the stand that the five different criminal offenses committed by the Respondent were not separated by a sufficient amount of time to warrant an imposition of separate consecutive sentences. Respondent's argument leads to the natural conclusion that if a defendant is going to commit various sexual acts against a young child do so in a short period of time, in one place, and as many times as the defendant wants. In accordance to Respondent's argument the defendant can only be convicted of, but not sentenced for, the various sexual batteries because the offenses of sexual battery are not sufficiently separate and distinct from one another. In reality one sentence can be imposed no matter how many despicable acts of sexual battery is committed against the child. This cannot be the Legislative intent behind section 775.021. The Legislature clarified its intent in the 1988 amendment quoted above. The court has consistently treated sexual battery on a child as a capital felony even though the death penalty is no longer a possible sanction. State v. Hogan, 451 So.2d 844 (Fla.

1984); Buford v. State, 403 So.2d 943 (Fla. 1981).

In State v. Enmund, 476 So.2d 165 (Fla. 1985) the Florida Supreme court quashed a decision of a District Court of Appeal which had held that minimum mandatory life sentences could only be concurrent and not consecutive. The Supreme Court found that Palmer v. State, 438 So.2d 1 (Fla. 1983) had not usurped the trial court's discretion to impose the 25 year minimum mandatory sentence in capital cases concurrently or consecutively.

In Enmund, supra, the court vacated the defendant's two death sentences and remanded to the trial court and the following occurred:

> At resentencing, the trial court granted Enmund's motion to vacate the life sentence for the robbery conviction and sentenced him to life imprisonment with no eligibility for parole for twenty-five years for each of the homicides. The court directed that the two twenty-five year minimum mandatory would run consecutively, thereby making Enmund ineligible for parole for fifty years. On appeal, the district court held that the minimum mandatories could only be concurrent, not consecutive.

Id. at 167.

The Supreme Court, in overruling the district court, discussed the test in Blockburser v. United States, 284 U.S. 99 (1932) and section 775.021(4), Fla. Stat., (1983) and held Enmund could be sentenced for the underlying felony of robbery. The court then addressed the district court's conclusion that the capital felonies required concurrent

sentences and held they did not, stating:

> We also quash the district court's holding that Enmund's minimum mandatory twenty-five year sentences should be concurrent instead of consecutive. In reaching this conclusion, the court relied on Palmer v. State, 438 So.2d 1 (Fla. 1983). We find, however, that Palmer does not control the instant situation.
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> * * *
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> Section 921.141, Florida Statutes (1983), provides that a person convicted for a capital felony shall be sentenced to death or to life imprisonment without eligibility for parole for twenty-five years. Any such person not sentenced to death "shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole." Section 775.082(1), Fla. Stat. (1983). We hold that the legislature intended that the minimum mandatory time to be served from a conviction of first-degree murder may be imposed either consecutively or concurrently, in the trial court's discretion, for each and every homicide. See Section 775.021(4), Fla. Stat.(1983).
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> * * *
>
> Palmer is not analogous to this situation and we hold that the district court should not have reversed the trial court's exercise of its discretion.

Id. at 168

In State v. Enmund, 476 So.2d 165 (Fla. 1985 the Supreme Court held that section 775.021(4), Florida Statutes incorporated the legislature's intent to impose separate sentences for separate convictions. (See Justice Shaw's concurring opinion p.170) In Enmund the court stated:

> In Hegstrom we considered the issue of multiple punishments for discrete crimes arising out of the same offense. After analyzing Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and Albernaz v. United States, 450 U.S. 333, 101 S.Ct

> 1137, 67 L.Ed.2d 275 (1981), we held that the fifth amendment presents no substantive limitation on the legislature's power to prescribe multiple punishments, and that double jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense. 401 So.2d at 1345.

In Boatwright v. State, 512 So.2d 955 (Fla. 1st DCA, 1987) the district court concluded that Murray v. State, 491 So.2d 1120 (Fla. **1986)** implicitly extends the prohibition against consecutive stacking of minimum mandatory sentences arising out of one criminal episode to capital sexual batteries even though the Florida Supreme Court has rejected the so called Palmer claim to capital homicides.

The fact that the legislature has not included sexual battery on a person over 12 years of age within the sentencing guidelines suggest that Murray, supra, has no application to the imposition of consecutive sentences in a capital felony case. There is something to be said for depriving criminal defendants such as Respondent of their liberty to prowl the bedrooms of our young children and the streets where they walk for at least 50 years so that victims such as T[redacted] B[redacted] can live their lives secure in the knowledge that this gross violator of their person is behind bars.

Given the Supreme Court's clear policy of treating the instant offense as a capital felony for sentencing

purposes, the district court in Boatwright, supra., usurped the legislative perogative to afford the trial court discretion when punishing offenders such as Respondent who commit multiple capital felonies in one criminal context. See Section 775.021(4) Fla. Stat. (1987). Furthermore the district court in Boatwright incorrectly relied on Pratt v. State, 472 So.2d 799 (Fla. 3rd DCA 1985) as authority for applying the rationale of Palmer to two capital felonies.

In Pratt, the state confessed error and the opinion identifies the offenses as a sexual battery, but, does not state whether it was sexual battery on a child under 12. Moreover, there was apparently only one sexual battery. The Third District concluded that Wilson v. State, 467 So.2d 996 (Fla. 1985) was controlling. In Wilson, the court applied Palmer, supra, because there were no capital felonies involved. The Supreme Court in deciding Wilson was not presented with the juxtaposition of Enmund and Hoqan.

The only basis for concluding that separate and discreet sentences are not permitted is in the flawed 4-3 decision in Palmer v. State, 438 So.2d 1 (Fla. 1983). The Supreme Court of Florida, in State v. Enmund, 476 So.2d 165 (Fla. 1985) refused to extend the Palmer analysis to capital felony because the legislative intent was clear. Moreover, the legislature has had ample opportunity to remove sexual battery on a child less than 12 from the capital felony statute. In the era of heightened concern for violent acts perpetrated on children by both strangers and family members,