047

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 77,853

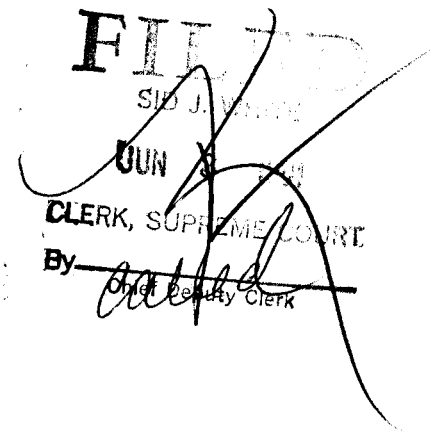
BERLIE DANIELS, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



PETITIONER'S BRIEF ON THE MERITS

LOUIS O. FROST, JR.
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FOURTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Berlie Daniels, was the Appellant before the First District Court of Appeal and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee before the First District Court of Appeal and prosecuted Petitioner in the Circuit Court. The decision of the First District did not contain a Statement of the Facts of this cause. Therefore, Petitioner will refer to the original Record on Appeal. References to the Record on Appeal (Volume I), which contains the pleadings filed in this cause, will be "R." followed by the appropriate page number(s). References to the transcript of the proceedings (Volume II), will be "T." followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

This cause is before the Court pursuant to the following certified question from the First District Court of Appeal:

> "GIVEN THE LEGISLATIVE INTENT UNDERLYING CHAPTER 88-131, LAWS OF FLORIDA, AND THE COURT'S DECISIONS IN STATE V. ENMUND, 476 SO.2D 165 (FLA. 1985), AND STATE V. BOATWRIGHT, 559 SO.2D 210 (FLA. 1990), DOES A TRIAL JUDGE HAVE THE DISCRETION, UNDER SECTIONS 775.021 (4) AND 775.084, FLORIDA STATUTES (SUPP. 1988), TO IMPOSE CONSECUTIVE LIFE TERMS, EACH WITH A FIFTEEN YEAR MINIMUM MANDATORY TERM OF INCARCERATION, FOR FIRST DEGREE FELONIES COMMITTED BY AN HABITUAL VIOLENT FELONY OFFENDER?"

The "Per Curiam." opinion by the First District noted that Appellant asserted that the trial court erred: (1) in imposing three consecutive 15 year minimum, mandatory sentences for offenses which arose from the same incident; (2) denying his Motions for Judgment of Acquittal; and (3) in permitting improper comments in the presence of the jury. The Court affirmed each of the three points but then certified the above question. As the opinion did not describe the facts of this cause, Petitioner will include the Statement of the Case and Facts described in the initial brief before the District Court of Appeal; Respondent, in his Answer Brief, adopted Petitioner's Statement of the Case and Facts. The Statement of the Case and Facts contained the following relevant facts for this appeal:

Respondent filed an Information charging Petitioner with Armed Sexual Battery, Attempted Sexual Battery, Armed Burglary and Armed Robbery (R. 32-33). Each charge allegedly occurred on July

16, 1989, against the same victim, E[redacted] S[redacted]. The case proceeded to trial and produced the following relevant facts.

E[redacted] S[redacted] 85, lives with H[redacted] F[redacted] and R[redacted] D[redacted] (T. 159). R[redacted] is her 18 year old great-grandson (T. 160). F[redacted] is 100 years old and blind (Id). Mrs. S[redacted] sleeps in the front bedroom of her house, F[redacted] in the back bedroom and R[redacted] sleeps in the hallway between the bedrooms (T. 160). On July 16, 1989, on Saturday night, S[redacted] went to bed around 9:00 P.M. (T. 161). R[redacted] was not there that night (T. 161). There are two windows to S[redacted]s bedroom (Id).

S[redacted] heard a man call to her twice; she woke up and saw a man in her room (T. 162). She started hollering - the man said, "shut up that hollering, if ya don't I'll kill you." (T. 162). S[redacted] testified the man had a butcher knife in his hand (Id). The butcher knife belonged to S[redacted] according to her testimony (T. 163). S[redacted] identified Petitioner as the man in her room and stated she was scared to death (Id).

Petitioner stood at the bed with the knife in his hand and told her to stop hollering and she did so (T. 167). Petitioner supposedly asked S[redacted] for a pistol; she told him she did not have one (T. 167). Petitioner asked S[redacted] for money and she gave him some money (T. 168). He then continued to ask S[redacted] for a gun; he went with her through the house looking for a gun (T. 169). No gun was found and Petitioner and S[redacted] then returned to her bedroom (T. 170). H[redacted] F[redacted] was not involved in these incidents; Petitioner did not bother him (T. 169).

Once Petitioner and S[redacted] returned to her room, he removed his and S[redacted]s clothes (T. 170). Petitioner placed his private part inside of S[redacted]s private part, according to her testimony (T. 172). S[redacted] twice asked for water and Petitioner allowed her to get up and get some water (T. 172-73).

Petitioner, who had his clothes on at this time, told S[redacted] to take his penis and put it in her mouth (T. 184). S[redacted] told him, "she'd die before she'd put it in her mouth." (T. 184). Petitioner wasn't close enough to touch S[redacted] at this time (T. 185). He made no attempt to have S[redacted] commit oral sex upon him after she refused to do so (T. 184-185). Petitioner then left S[redacted]

S[redacted] testified Petitioner had been drinking; she smelled whiskey on his breath (T. 174). The following Monday night some relatives of S[redacted] brought Petitioner back to her house (T. 175). The relatives asked her if Petitioner was the one who attacked her - S[redacted] initially said, "Yes." (T. 175). S[redacted] relatives then began beating Petitioner - S[redacted] then said Petitioner <u>was not</u> the person who attacked her (T. 175). S[redacted] stated she said this to keep her relatives from getting into trouble by beating Petitioner (<u>Id</u>).

Respondent also introduced evidence that a fingerprint from the butcher knife belonged to Petitioner (T. 203). Respondent then rested its case. Petitioner moved for a judgment of acquittal (T. 205-207). On the Attempted Sexual Battery charge, Petitioner specifically argued he only merely talked/asked about sexual battery - he did not actually try to commit sexual battery

upon S[redacted] (T. 206). The trial court denied the motion without comment (T. 207).

Petitioner then offered the testimony of John Johns. Johns was the Probation Officer of Petitioner since May, 1989 (T. 210). On July 11, 1989, Petitioner made his monthly report to Johns. Petitioner asked Johns to be evaluated by a mental health counselor because he was hearing voices (T. 211). He stated he felt schizophrenic; Johns told Petitioner he would set an appointment for him with the Clay County Mental Health Department (T. 211). Johns contacted Clay County Mental Health, but was told there was a six-week waiting period (Id). Johns contacted Petitioner's aunt and he told her Petitioner was on the six-week waiting list (T. 211-212).

Johns testified that on July 11, 1989, (5 days before the offenses were committed) Petitioner was "kind of spacey" (T. 212). Petitioner did not make a whole lot of sense; he was hearing voices and wanted some help (T. 212).

R[redacted] D[redacted] who lives with S[redacted], also testified for Petitioner. On the night in question, R[redacted] D[redacted] was at his aunt's house (T. 218). The house is directly behind E[redacted] S[redacted] house, about 100 yards away (T. 218). R[redacted] saw Petitioner on the Saturday night of the attack on S[redacted] Petitioner was drinking rum, whiskey and coke (T. 219). R[redacted] could smell the odor of alcohol on Petitioner (T. 221). He appeared to be intoxicated, according to R[redacted] D[redacted] (T. 222, 224).

Jimmy Hayes testified next for Petitioner. Hayes worked with Petitioner at Cargill, a chicken processing plant (T. 261).

Hayes and Petitioner caught chickens at Cargill (Id). Hayes worked with Petitioner for 3-4 years (T. 262). While Petitioner was working, he was hit on the head with a large heavy-duty fan (T. 262-63). He was dizzy and could not get up for a while (T. 263). Petitioner then complained about headaches and dizziness (T. 264). Petitioner then rested his case and renewed his Motions for Judgment of Acquittal (T. 269). The court again denied the motions (T. 269-270).

The court, during jury charge conference before closing arguments, decided to give instructions on insanity and voluntary intoxication (T. 275-76,289-90). During closing argument, after Petitioner argued the insanity and voluntary intoxication defenses, Respondent made the following arguments and comments before the jury:

> "...there was absolutely, absolutely no evidence given to you by these people that this defendant..." (T. 311)

Petitioner objected and stated, "It is not the defendant's burden to...." Respondent interrupted and stated, "on the issue of insanity is it {sic} {it is}, Your Honor." (T. 311). The court noted, "on the issue of insanity is what he's speaking about. Clarify that for us." Respondent responded, "There was absolutely no evidence presented by these people on the issue of insanity." Petitioner then moved for a mistrial and the court overruled the motion (T. 311).

After arguments concluded, the court gave the standard jury instructions on voluntary intoxication and insanity (T. 329-331). The jury then returned a guilty verdict (T. 339-340).

The Circuit Court next conducted a sentencing hearing. The court found that Petitioner was a Habitual Violent Felony Offender (T. 367). Petitioner argued to the court that it could not sentence him to consecutive minimum, mandatory sentences on his charges because all his charges arose out of one incident (T. 363-364).

The court then sentenced Petitioner to life in prison on the Sexual Battery With a Deadly Weapon offense with a 15 year minimum, mandatory sentence (T. 367-68). On the Attempted Sexual Battery charge, Petitioner received a 30 year sentence to run concurrently with the life sentence. On the Burglary While Armed charge, Petitioner received life with a 15 year minimum, mandatory sentence to run consecutively to the other life sentence (Id). On the Armed Robbery charge, Petitioner received another life sentence with a 15 year minimum, mandatory sentence to run consecutively to the other life sentences (Id). (R. 114-120).

SUMMARY OF ARGUMENT

The First District Court of Appeal improperly decided that Section 775.084(4)(a)(b) (Habitual Violent Felony Offender), permit the imposition of consecutive minimum, mandatory terms for offenses committed during a single criminal episode. This Court has held that consecutive minimum terms for offenses committed during a single criminal episode are improper unless there is express legislative intent to allow such terms. See State v. Boatwright, 559 So.2d 210 (Fla. 1990); Murray v. State, 491 So.2d 1120 (Fla. 1986).

The First District erroneously found that Section 775.021, Florida Statutes, contained express intent to permit such consecutive terms. This Court, in Palmer v. State, 438 So.2d 1 (Fla. 1983), explicitly rejected this argument. Although the legislature expressed its intent to punish habitual offenders more severely in Chapter 88-131, Laws of Florida, and Section 775.084, et. seq., Florida Statutes, it manifested this intent by doubling or increasing the statutory maximum penalty for applicable offenses. E.g. A third degree felony penalty increases from 5 to 10 years; a second degree felony from 15 to 30 years; a first degree felony from 30 years to life.

There is no express legislative intent to require minimum, mandatory terms for each offense classified under the habitual offender statute, unlike the express requirement of minimum terms for each offense of first degree murder or capital sexual battery where the minimum term is contained with the statutory

definition of the offense. See State v. Boatwright, supra; State v. Enmund, 476 So.2d 165 (Fla. 1985). The sentences imposed in this case were pursuant to a sentence enhancement scheme, not the statutory definition of the offense where legislative intent is clear and unequivocal.

Even if the consecutive minimum terms for offenses reclassified under the Habitual Felony Offender statute were proper, the three consecutive life sentences were illegal. The first life sentence was for Armed Sexual Battery, a life felony. The First District Court of Appeal in Johnson v. State, 568 So.2d 579 (Fla. 1st DCA 1990), decided that the Habitual Violent Felony Offender statute does not apply to life felonies. This issue was not decided below and is, therefore, not technically before the Court. However, a review of Johnson v. State, supra, is necessary to ensure a consistent disposition in this cause. Petitioner was also convicted of two first degree felonies, punishable by life.

The First District in Gholston v. State, 16 FLW D46 (Fla. 1st DCA, December 12, 1990), decided the Habitual Felony Offender statute did not apply to such offenses. This issue was also not decided below because Johnson and Gholston were decided after the briefs were filed in this cause. This Court should review these cases because if the decisions of the First District were correct, then the three consecutive life sentences were illegal and the Court need not address the certified question of the legality of stacked minimum, mandatory terms.

This cause presents two other issues. The trial court erred in denying the Motion for Judgment of Acquittal on the

charge of Attempted Sexual Battery. Petitioner merely asked the victim to perform oral sex upon him. The victim refused and Petitioner made no other attempt to commit sexual battery. Petitioner's acts were not attempted sexual battery, he merely expressed an intent to commit an offense without any overt act toward the commission of the offense. See Adams v. Murphy, 394 So.2d 411 (Fla. 1981); Fleming v. State, 374 So.2d 954 (Fla. 1979). Even if Appellant attempted the offense, he abandoned it after the victim refused to perform sex on him. See Dixon v. State, 559 So.2d 354 (Fla. 1st DCA 1990). Additionally, the prosecutor in this case deprived Petitioner of a fair trial by arguing that the burden of proof on the issue of insanity was upon the defense, (T. 311), contrary to Yohn v. State, 476 So.2d 123 (Fla. 1985).

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY STACKED THREE MINIMUM, MANDATORY TERMS FOR OFFENSES ARISING OUT OF THE SAME CRIMINAL EPISODE BECAUSE, ALTHOUGH PETITIONER WAS CLASSIFIED AS A HABITUAL VIOLENT FELONY OFFENDER, THERE IS NO EXPRESS LEGISLATIVE AUTHORITY TO STACK MINIMUM, MANDATORY TERMS PURSUANT TO SECTIONS 775.084 AND 775.021(4), FLORIDA STATUTES, AND State v. Boatwright, 559 So.2d 210 (Fla. 1990), AND Murray v. State, 491 So.2d 1120 (Fla. 1986).

A. The sentences in this cause - Petitioner received three consecutive life sentences each with a 15 year minimum, mandatory term pursuant to Section 775.084(4)(b)1: The equivalent of a life sentence with at least a 45 year minimum, mandatory term.

Petitioner was convicted of Burglary While Armed, Sexual Battery With a Deadly Weapon, Armed Robbery and Attempted Sexual Battery. Petitioner received the following sentences for these offenses: Sexual Battery With a Deadly Weapon - life with a 15 year minimum, mandatory term; Attempted Sexual Battery - 30 years to run concurrently with the life sentence; Burglary While Armed - life with a 15 year minimum, mandatory term to run consecutively with the first life sentence; Armed Robbery - life with a 15 year minimum, mandatory term to run consecutively with the second life term. Section 775.084(4)(b)1, Florida Statutes, permits a sentence of life with no eligibility for release for 15 years. Conse-

quently, Petitioner received the equivalent of a life sentence with at least a 45 year minimum, mandatory term.

The provisions of Section 775.084 and Section 775.084 (4)(e), provide that the provisions of Chapter 947 (Parole) do not apply to a person sentenced as a habitual offender. A habitual offender is also not eligible for gain time, except that the Department of Corrections may grant up to 20 days of incentive gain time each month as provided for in Section 944.275(4)(b), Florida Statutes. Therefore, it is difficult to determine the effect of the three consecutive life sentences regarding Petitioner's chance for release after he has served the 45 year minimum, mandatory term. However, by the meaning of the language used in Section 775.084(4)(b)(1) (shall not be eligible for release for 15 years), Petitioner could theoretically be eligible for release after 45 years. This language implies that a life sentence under 775.084(4)(b)(1) is unlike a life sentence under the guidelines (no opportunity for release - life literally means life). This construction raises the question of how an inmate earns gain time on a life sentence after the minimum, mandatory term. Section 775.084(4)(b)(1) does not answer this question.

The Court does not have to answer this perplexing question in this appeal because the only issue before this Court is whether the minimum, mandatory terms can be stacked. The question of whether and how Petitioner can earn gain time after his minimum, mandatory term is not ripe at this time and the statutes in this area may change concerning the issue of future parole or gain time for habitual offenders.

B. Petitioner's offenses occurred during the same criminal episode at the same place and during a single time period.

Petitioner's offense of Burglary While Armed, Armed Robbery and Sexual Battery With a Deadly Weapon all occurred at the same place and against the same victim. Although it is unclear from the record exactly how time passed between the offenses, the offenses occurred one after another in an unbroken series of events. In the appeal before the First District, the State did not contest Petitioner's argument that his offenses arose from a single criminal episode. Based upon time, space and sequence, Petitioner's offenses were unquestionably a single criminal episode.

C. This Court's decisions on consecutive minimum, mandatory terms.

This Court has held that consecutive minimum, mandatory terms are improper for offenses arising from a single criminal episode, unless there was an express legislative intent to allow such consecutive terms. See Palmer v. State, 438 So.2d 1 (Fla. 1983); Murray v. State, 491 So.2d 1120 (Fla. 1986). This Court in State v. Boatwright, 559 So.2d 210 (Fla. 1990), reviewed these cases and wrote that each decision was based upon legislative intent.

In Palmer v. State, supra, the defendant robbed, with a firearm, 13 people at the same time. The Court considered whether

it was appropriate to stack the 13 minimum, mandatory terms for the use of a firearm where the offenses occurred during a single criminal episode. The Palmer court found the consecutive minimum, mandatory terms were inappropriate because there was no express authority in Section 775.087 for such sentences. This Court in Palmer also found that Section 775.021(4), Florida Statutes, did not authorize the stacking of consecutive minimum, mandatory terms. Section 775.021(4) states:

> (4)(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.

In Murray v. State, 491 So.2d 1120 (Fla. 1986), this Court considered whether consecutive minimum, mandatory terms of armed robbery and sexual battery were appropriate. The Murray Court noted that consecutive minimum, mandatory sentences were appropriate if the offenses arose from separate incidents occurring at separate times and places. 491 So.2d at 1123. The Court found that the offenses were sufficiently separate in nature, time and place to justify consecutive minimum, mandatory terms. But see, State v. Ames, 467 So.2d 994 (Fla. 1985).

This Court last considered this issue in State v. Boatwright, 559 So.2d 210 (Fla. 1990). In Boatwright, the defendant

received two consecutive life sentences with two 25 year minimum, mandatory terms for sexual battery upon a child less than 12 years. This Court then considered whether the two consecutive minimum, mandatory terms were permissible under State v. Enmund, 476 So.2d 165 (Fla. 1985). Chief Justice Ehrlich reviewed the decisions in Enmund, supra, Palmer, supra, and Murray, supra. The Boatwright decision concluded that minimum, mandatory terms under 775.087(2) (use of a firearm) were permissible if the offenses were sufficiently separated temporally and/or geographically. See State v. Thomas, 487 So.2d 1043 (Fla. 1986). Under the facts in Boatwright, the Court concluded that consecutive minimum, mandatory terms were permissible pursuant to the reasoning in Enmund, supra: under Section 921.141, Florida Statutes, a person convicted of a capital felony (including Boatwright's offense) must serve a 25 year sentence for each offense. Justice Ehrlich decided that the legislature intended that the minimum, mandatory terms could be imposed either consecutively or concurrently in the trial court's discretion.

The principles established by State v. Boatwright, supra, and its progeny are that: (1) unless there is contrary intent, consecutive minimum, mandatory terms are proper if the offenses are separated temporally and geographically; and (2) if the offenses are arguably a part of a single criminal episode, then consecutive, minimum, mandatory terms are proper if there is express legislative intent authorizing consecutive terms. This Court has rejected the argument that Section 775.021(4), by itself, is express legislative intent which authorizes consecutive

terms. See State v. Boatwright, supra, 559 So.2d at 212 n.3; Palmer v. State, supra, 438 So.2d at 3-4.

D. The basis of the First District's decision that the consecutive minimum, mandatory terms were proper in this cause.

Based upon the phrasing of the certified question, the First District obviously based its decision upon its interpretation of the legislative intent expressed in Chapter 88-131, Laws of Florida, Section 775.021(4) and Section 775.084, Florida Statutes. Petitioner will review each of these alleged expressions of legislative intent to demonstrate that the express legislative intent concerning Section 775.084 does not authorize consecutive, minimum, mandatory terms in this cause.

1. The legislative intent in Chapter 88-131 and Section 775.084.

Although the First District's opinion did not explicate its decision, the certified question implies that the legislative intent in Chapter 88-131, Laws of Florida, authorized the consecutive, minimum, mandatory terms in this case. The relevant portion of the expression of intent in Chapter 88-131 concerning habitual offenders is as follows:

> Providing legislative findings and intent as to career criminals; providing for enhanced prosecution of and penalties for career criminals; ....amending Section 775.084, Florida Statutes, deleting provisions

> for the sentencing of habitual violent felony offenders; providing for extended terms of imprisonment; ....amending 775.021, Florida Statutes, providing legislative intent as to the rules of construction for determining criminal penalties .... Chapter 88-131, preamble, Laws of Florida, page 700.

The preamble to Chapter 88-131 does not expressly authorize the sentences imposed in this cause. The legislative expression of intent unquestionably evinces a desire to punish, more severely, repeat offenders. Petitioner does not question this intent. However, the statutory expression of this intent is found in the provisions of Section 775.084. Section 775.084 essentially reclassifies an offense for a Habitual Felony Offender (H.F.O.) or Habitual Violent Felony Offender (H.V.F.O.) and increases the statutory maximum penalty. For example, under Section 775.084(4)(a)3, a habitual offender convicted of a third degree felony can be sentenced up to 10 years, instead of up to 5 years, the regular statutory maximum for third degree felonies. The entire reclassification scheme in Section 775.084(4)(a) is as follows:

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
>
> 3. In the case of a felony of the third degree, for a term of

> years not exceeding 10, and such offender shall not be eligible for release for 5 years.

The sentencing scheme for habitual violent felony offenders under Section 775.084(4)(b) is as follows:

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual violent felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
>
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

Given the reclassification and attendant doubling of the statutory maximum penalty for applicable crimes, the question in this cause is whether the intent to increase the punishment for habitual offenders includes the stacking of consecutive minimum, mandatory terms. The express and explicit expression of the legislature's intent does not include the authorization of stacked minimum, mandatory terms. The legislature intended to increase the punishment for habitual felony offenders and habitual violent felony offenders and it did so by increasing the statutory maximum terms for third, second and first degree felonies. The proof here "is in the pudding." The pudding (the statutory provisions of Section 775.084) does not contain any reference to minimum,

mandatory sentences. Consequently, there is no legislative intent to authorize the consecutive minimum, mandatory terms in this cause.

2. Section 775.021(4)(a)(b)1.2., Florida Statutes.

The certified question implies that Sections 775.021(4)(a)(b) contain the legislative intent which authorizes consecutive, minimum, mandatory sentences. Section 775.021(4)(a) provides for separate punishments for separate criminal offenses committed during one criminal transaction or episode. Section 775.021(4)(b) states that the intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode and not to allow the principle of lenity set forth in Section 775.021(1), Florida Statutes. Although the First District apparently believed Section 775.021 (4)(a)(b) expressly authorized consecutive minimum, mandatory terms, a close examination of these sections reveal that these sections do not expressly authorize consecutive minimum, mandatory terms.

This Court has previously construed the provisions of Section 775.021(4)(a) concerning the authorization of consecutive minimum, mandatory terms. In Palmer v. State, supra, this Court considered whether Section 775.021(4), Florida Statutes (1985), authorized consecutive mandatory terms. Section 775.021(4), Florida Statutes (1985), is identical to Section 775.021(4)(a), Florida Statutes (1990). Each section requires

separate sentences for each criminal offense and gives the judge discretion to order concurrent or consecutive sentences. In Boatwright, supra, the Court noted that Section 775.021(4) did not, by itself, authorize separate consecutive minimum, mandatory sentences. Both Section 775.021(4), Florida Statutes (1985) and 775.021(4)(a) abrogate the "single transaction rule" and simply require a separate sentence for each separate criminal offense, Section 775.021(4), Florida Statutes (1985) abolished the rule of lenity which limited a sentence to the highest degree of conviction among several offenses committed during a single criminal episode. See Kaden, "End of Single Transaction Rule," 57 Fla. Bar J. 693 (1983).

Sections 775.021(4) and 775.021(4)(a) do not address the question of consecutive minimum, mandatory terms. These sections simply authorize separate sentences. If Section 775.021(4) did not authorize consecutive, minimum, mandatory terms under Section 775.087, Florida Statutes in Palmer v. State, it should not authorize such sentences under Section 775.084. In State v. Boatwright, supra, (discussing Palmer v. State) the court found no express legislative intent to allow consecutive mandatory terms because Section 775.087(2) provided for a penalty enhancement by reclassification of an underlying offense. This situation was different from a capital felony because Section 921.141, Florida Statutes, which defines the offense of a capital felony, explicitly required a minimum term for each offense.

A sentence under 775.084(4)(b), Florida Statutes, is a penalty enhancement by reclassification of an underlying offense.

Consequently, the present sentences are identical to the type of sentences reviewed in Palmer v. State. There is no explicit requirement in the definitions of the underlying offense in this case that any minimum, mandatory sentence must be imposed for each offense. See Section 794.011(3), Florida Statutes.

Section 775.021(4)(b), Florida Statutes (1990) does not authorize consecutive minimum, mandatory terms. Section (4)(b) was obviously passed to overrule this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987). Section 775.021(4)(b) states that exceptions to the rule of construction embodied in the section 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. These exceptions unequivocally demonstrate that Section 775.021(4)(b) was designed to preclude an argument that the legislature did not intend double punishments for offenses committed during a single transaction. See Carawan, supra.

Section 775.021(4)(b) was obviously not designed to deal with the issue before this Court: Whether consecutive, minimum, mandatory sentences are permissible under Section 775.021(4)(a). The current version of Section 775.021 contains the same language as the statute reviewed in Palmer v. State. In Palmer and Boatwright, this Court held that there must be an explicit expression of legislative intent on the issue of consecutive minimum terms. Sections 775.021(4)(a)(b) do not contain such a clear and unequivocal expression of legislative intent.

3. The conviction for Armed Sexual Battery, Section 794.011(3), Florida Statutes: Section 775.084(4)(b) does not apply to life felonies: Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990).

The conviction for Armed Sexual Battery, Section 794.011(3), Florida Statutes, creates possible problems for the consistent disposition of this cause. A violation of Section 794.011(3), Florida Statutes is a life felony punishable as provided in Sections 775.082, 775.083 or 775.084. Although Section 794.011(3) refers to punishment as provided for in Section 775.084, the current Sections of 775.084 do not provide for the punishment of a life felony as a habitual felony offender or habitual violent felony offender. The First District Court of Appeal in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990) held that the provisions of Section 775.084(4)(a) (Habitual Offender) do not apply to a life felony. Assuming Barber, supra, is correct and would apply to Section 775.084(4)(b), the sentence of life with a 15 year minimum, mandatory sentence was illegal.

There was no objection to the sentence below and the trial judge obviously sentenced Petitioner as though Section 775.084(4)(b) did apply to life felonies. Barber v. State, supra, was decided after the briefs were filed in this cause and the issue was not presented to the First District on Appeal. Petitioner acknowledges through, the undersigned counsel who handled the appeal below, that this issue should have been raised below. This issue is not technically before the court because it

was not a part of the decision below. However, a complete resolution of the issues presented by the opinion and certified question require a consideration of the issue of whether Section 775.084(4)(b) applies to life felonies.

If the Court finds that the conviction for Armed Sexual Battery could not be reclassified as a Habitual Violent Felony Offender sentence, then that portion of the sentence must be vacated and remanded for sentencing under the guidelines. The Court must then consider whether the other two consecutive life sentences with 15 year minimum terms are legal. If this issue is not reviewed in this cause, Petitioner would have the right to file a Motion to Correct the Illegal Sentence under Rule 3.800, Florida Rules of Criminal Procedure. The context of the issues in this case and the principles of judicial consistency and economy should convince the Court to consider whether Section 775.084(4)(b) applies to life felonies.

Petitioner was convicted of Armed Sexual Battery, Section 794.011(3), a life felony. The Barber court determined Section 775.084(4)(a) was rational and did not violate equal protection and due process because the legislature may have determined that the punishments for life felonies were sufficient to keep the felon in prison for an extended period of time. 564 So.2d at 1173. The rationale of Barber v. State, supra, was that because there was no express provision for the enhancement of life felonies in Section 775.084(4)(a), it did not apply to life felonies. In Section 775.084(4)(b) (Habitual Violent Felony

Offender) there is also no provision for the enhancement of a life felony.

The First District in Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990) directly held that Section 775.084(4)(b) (Habitual Violent Felony Offender) did not apply to life felonies. Obviously, the rationale of Barber concerning the legislative intent as to Habitual Felony Offenders also applied to Habitual Violent Felony Offenders. The rationale of Barber and Johnson is correct because; (1) there are no express provisions for the enhancement of a life felony in either Section 775.084 (4)(a) or 775.084(4)(b), (2) the determination of legislative intent was logical because the entire Habitual Offender statute increases the maximum statutory penalty for each applicable offense; the maximum statutory penalty for life can't be increased. Consequently, Section 775.084(4)(b) should not apply to life felonies.

If this Court finds that Section 775.084(4)(b) does not apply to the life felony of Armed Sexual Battery, Section 794.011(3), Florida Statutes, then the first life sentence with a 15 year minimum, mandatory sentence should be set aside and remanded for sentencing under the guidelines. If the Court finds that Section 775.084(4)(b) does apply to a life felony, then the Court must consider the issue of consecutive, minimum, mandatory terms discussed above.

4. The convictions for Armed Burglary and Armed Robbery: Section 775.084(4)(b), Florida Statutes does not apply

to first degree felonies punishable by a term of years not exceeding life, Gholston v. State, 16 FLW D46 (Fla. 1st DCA, December 12, 1990).

As with the conviction for Armed Sexual Battery, the convictions for Armed Burglary and Armed Robbery present problems for the consistent disposition of this case. After the briefs were filed in this cause, the First District in Gholston v. State, supra, held that Section 775.084 does not apply to first degree felonies, punishable by a terms of years not exceeding life. Based upon the rationale in Barber v. State, supra, the Gholston court found that because such first degree felonies already had life as a possible punishment, Section 775.084 could not enhance the penalty. Petitioner's convictions for Armed Burglary, Section 810.01(2)(b), Florida Statutes, and Armed Robbery, Section 812.13(2)(a), Florida Statutes, are both first degree felonies, punishable by a term of years not exceeding life. If Gholston v. State, is correct, then Petitioner should not have been sentenced to two life consecutive terms with two 15 year minimum, mandatory terms. If Section 775.084 did not apply, Appellant should have been sentenced under the sentencing guidelines. Consequently, if this Court adheres to Barber and Gholston, all three of Petitioner's consecutive life sentences were illegal and the sentences should be set aside and remanded for sentencing under the guidelines.

As with the issue of the life felony conviction for Armed Sexual Battery, counsel did not raise this issue in the

First District Court of Appeal. Counsel concedes these issues should have been raised below. Generally, this fact would preclude the raising of the issue in this appeal. However, Barber and Gholston were decided after this cause was briefed and the First District obviously overlooked the effect of Barber and Gholston upon this case. Moreover, a complete disposition of this cause requires a review of Barber and Gholston. Additionally, if this Court follows Barber and Gholston, it will be unnecessary to answer the certified question. If none of the three life sentences under Section 775.084 were valid, then the Court need not answer nor decide the question about consecutive minimum, mandatory terms. Under these special circumstances, Petitioner submits that is appropriate for this Court to review Barber and Gholston even though they were not discussed in the decision below.

ISSUE II

PETITIONER DID NOT COMMIT ATTEMPTED SEXUAL BATTERY, BY MERELY ASKING THE VICTIM TO PERFORM ORAL SEX ON HIM, WHEN PETITIONER ABANDONED HIS INTENT TO COMMIT THE OFFENSE WHEN THE VICTIM STATED SHE WOULD NOT PERFORM THE ACT .

Petitioner, while he was several feet away and not close enough to touch the victim, told her to take his penis and put it in her mouth (T. 184). She told Petitioner "she'd die before she'd do that." (Id). After this response, Petitioner made no other effort to commit the offense of Sexual Battery. The only acts committed by Petitioner which could arguably support a Sexual Battery were removing his clothes and telling the victim to take his penis and put it in her mouth. Although Petitioner's request obviously expressed an intent and desire to commit Sexual Battery, it does not constitute an attempt and Petitioner abandoned his "attempt" after the victim indicated she would not comply with his request.

An attempt consists of two essential elements: A specific intent to commit the crime and an overt act, beyond mere preparation, done toward its commission and the intent and act must be such that they would have resulted, but for interference of some cause preventing the carrying out of the intent, in the completed commission of the crime. State v. Coker, 452 So.2d 1135 (Fla. 2d DCA 1984). See also Adams v. Murphy, 394 So.2d 411 (Fla. 1981); Fleming v. State, 374 So.2d 954 (Fla. 1979). Section 777.04,(1), Florida Statutes.

The overt act must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime and some appreciable fragment of the crime must be committed and it must proceed to the point that the crime would be consummated unless interrupted. State v. Coker, supra. No appreciable fragment of the crime of Sexual Battery (by union of the mouth and penis in this case) occurred in this cause. Petitioner did not attempt to place his penis in the victim's mouth. If he had attempted to place his penis in her mouth, but she would not open it, then he would have committed the crime of Attempted Sexual Battery. However, Petitioner did not physically touch the victim. When he asked S[redacted] to commit oral sex upon him, he was across the room several feet away.

Even if Petitioner did somehow attempt to commit Sexual Battery, he voluntarily abandoned his attempt when the victim stated she would not perform the act. After Petitioner asked the victim to perform oral sex on him, she stated she would not do such an act. Petitioner then completely abandoned his attempt because there was no additional act or effort to commit sexual battery after the victim stated she would not perform oral sex.

The First District recently reviewed the law of abandonment of an attempted offense in Dixon v. State, 559 So.2d 354 (Fla. 1st DCA 1990). The Dixon court noted that abandonment is a valid defense only where the defendant is charged with attempting to commit an offense and the defendant voluntarily abandons the attempt before committing the substantive crime. 559 So.2d at 355 citing Hoeber, "The Abandonment Defense of Criminal Attempt

and Other Problems of Temporal Individuation, 74 Calif.L.Rev. 377 (1974); 2 W.LaFave A. Scott, Jr., Substantive Criminal Law, §.6.3(b)(1986).

Petitioner unquestionably voluntarily abandoned his attempt to commit sexual battery after the victim did not accede to his requests. After the victim stated she would not perform oral sex, Petitioner made no other physical act towards the commission of the substantive offense. This case represents an expression of criminal intent coupled with a request to commit a sexual act. Petitioner's acts did not constitute an attempt, or in the alternative, were an abandonment of the attempted offense.

ISSUE III

THE PROSECUTOR AND THE TRIAL COURT DEPRIVED PETITIONER OF A FAIR TRIAL AND HIS RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE BY INDICATING TO THE JURY THAT APPELLANT HAD THE BURDEN OF PROOF ON THE ISSUE OF INSANITY.

During closing argument, the prosecutor improperly commented on Petitioner's insanity defense. Counsel for Petitioner argued there was reasonable doubt on the issue of whether Petitioner was sane at the time of the offense. See (T. 172-78). Petitioner also presented testimony on insanity. See (T. 210-212). The prosecutor stated "there was absolutely, absolutely no evidence given to you by these people that this defendant" ....Petitioner objected and stated "It is not the defendant's burden to....." (T. 311). Respondent interrupted and stated:

> "On the issue of insanity is it {sic} {it is} Your Honor" (T. 311).

The initial objection by Petitioner was perhaps a bit premature; the State was apparently about to argue that there was no evidence in the case from the defense witnesses that Petitioner was actually insane. This argument would have been proper. However, once Petitioner objected to the statement on the grounds that the defendant did not have the burden on insanity, the State improperly replied that "on the issue of insanity is it {sic} {it is} Your Honor" (T. 311). The trial court did not correct the misstatement nor did he clarify the issue for the jury. The Court merely stated "on the issue of insanity is what he's speaking about. Clarify that for us" (T. 311). However, neither the judge

or prosecutor clarified the issue; the State just responded there was absolutely no evidence presented by these people (defense witnesses) on the issue of insanity. Petitioner then moved for a mistrial and the trial court denied it. According to the trial transcript, these proceedings took place before the jury.

The prosecutor indicated to the jury, by answering an objection to the court, that Petitioner had the burden of proof on the issue of insanity. The trial court reinforced this notion by stating, in effect, that Respondent meant Petitioner had the burden on insanity, but not on other issues: The court stated "on the issue of insanity is what he's speaking about." Clarify that for us" (T. 311). These statements told the jury that Petitioner had the burden of proof of insanity.

The Defendant does not have the burden of proof on the issue of insanity. The Standard Jury Instructions, 3.04(b) state:

> "All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the state must prove beyond a reasonable doubt that the defendant was sane."

The prosecutor did not argue that there was no reasonable doubt as to sanity to make the presumption vanish and require him to prove beyond a reasonable doubt that Petitioner was sane. See Yohn v. State, 476 So.2d 123 (Fla. 1985). Under Yohn, supra, the prosecutor could have made this argument. However, the prosecutor's comment that the burden of proof was upon Petitioner, coupled with the judge's comment, were improper under Yohn v. State.

It is reversible error for the prosecutor to indicate that the Defendant has the burden of proof (except where legally required) on any aspect of the State's case. See Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983); Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983); Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978). This comment deprived Petitioner of his right to remain silent and the presumption of innocence. Romero v. State, supra. In this case, the prosecutor told the jury Petitioner had the burden of proof on the issue of insanity, instead of arguing that there was no reasonable doubt on sanity to make the presumption vanish.

The State argued below that the error, if any, in these comments was cured by the jury instruction given by the trial court. The trial court did properly advise the jury on the issue of insanity. However, this instruction, coupled with the prosecutor's and trial court's comments during trial, must have confused the jury in this case. Although the judge instructed the jury that if there was a reasonable doubt on sanity from the evidence, the presumption of sanity vanished and the State must prove beyond a reasonable doubt that Petitioner was sane, this instruction did not remove the earlier comment that the burden was upon Petitioner.

This confusion was manifest because after the prosecutor stated the burden was upon Petitioner, the trial court asked the prosecutor to clarify the situation; the prosecutor did not clarify the issue and the trial judge did not correct this oversight. The judge's comments gave the imprimatur of judicial

authority on the improper comment, notwithstanding the later jury instruction. Therefore, this cause should be reversed and remanded for a new trial.

CONCLUSION

The three consecutive life sentences should be set aside or, in the alternative, the three consecutive minimum, mandatory terms of 15 years should be reduced to one 15 year minimum term. This cause should be remanded for a new trial based upon Issue III and the conviction for Attempted Sexual Battery should be set aside based upon Issue II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050 this 30th day of May, A.D. 1991.

James T. Miller

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER