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CLERK SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

RICHARD MURL BOOMER, JR.,

Petitioner, :

vs. :

Case No. 79,638

STATE OF FLORIDA, :

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, RICHARD MURL BOOMER, JR., was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision of the Second District rendered March 20, 1992.

STATEMENT OF THE CASE AND FACTS

On March 23, 1987, in **Case** No, CF87-1107A1, the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, filed a three-count information charging the Petitioner, RICHARD BOOMER, with two counts of sexual battery on a child under 12 years of age in violation of section 794.011, **Florida** Statutes (1985), and one count of lewd assault on a child in violation of section 800.04, Florida Statutes (1985). The alleged offenses occurred between November 1, 1986, and December 31, 1986. A second information **was** filed that same day in Case No. CF87-1147A1, charging the Petitioner with lewd assault on a child in violation of section 800.04, Florida Statutes (1985). The alleged offense occurred between the September 1, **1985**, and June 1, 1986.

All charges were tried by a jury **before** the Honorable Dale Durrance on July 27-28, 1987. The jury found the Petitioner guilty of sexual battery on a child under 12, attempted sexual battery on a child under 12, unnatural and lascivious act on a child under **12**, and lewd assault on a child. On September 1, 1987, the court sentenced the Petitioner in Case No. CF87-11073 to life imprisonment for the sexual battery in Count I and to **30** years for attempted sexual battery on Count 11, to run consecutive to Count I. The Petitioner was sentenced to 60 days incarceration on Count 111, to run concurrently. On the charge of lewd assault on a child in Case No. CF87-1147A1, the Petitioner was sentenced to 15 years imprisonment, to run consecutive to **the** sentence in Count II in Case No. 87-1107A1. The guidelines recommended 7-9 years incarcer-

ation. On September 8, 1987, the trial court filed its written reasons for the departure sentence. The cases were appealed to the Second District Court of Appeal.

On August 17, 1990, the Second District issued a mandate in both cases, holding that the thirty-year and fifteen-year consecutive sentences constituted an improper departure from the guidelines. The case **was** remanded with directions to sentence the Petitioner within the guidelines for Count II in Case No. CF87-1107 and for Count I in Case No. **CF87-1147A1**.

On January 18, 1991, Judge Durrance re-sentenced the Petitioner to nine years imprisonment on Count II in Case No. **CF87-1107A1**, and **to** nine years imprisonment on Count I of **CF87-1147A1**, to run concurrently with each other, but consecutive to the life **sentence** on Count I in Case **CF87-1107A1**. The guidelines recommended seven to nine years. The Petitioner filed his notice of appeal on February 19, 1991.

On appeal, Petitioner raised one issue, whether the court exceeded the guidelines on remand. The Second District Court of Appeal rejected the argument in its **per curiam** opinion dated March 20, 1992. In that opinion, the Second District expressed direct conflict with the decision of the Fifth District in Wood v. State, 17 F.L.W. D311 (January 24, 1992), on the same issue.

SUMMARY OF THE ARGUMENT

This court should take jurisdiction in this case on the basis of conflict with another district court of appeal on the issue of whether a guidelines sentence, which is made to run consecutive to a non guidelines sentence, is an upward departure from the guidelines sentence.

ARGUMENT

ISSUE

WHETHER THE DECISION IN Boomer v. State, Case Number 91-00533 (Fla. 2d DCA March 20, 1992), IS IN CONFLICT WITH Wood v. State, 17 F.L.W. D311 (Fla. 5th DCA January 24, 1992).

On remand, the trial court sentenced the Petitioner to eoncurrent nine-year sentences **and** made the sentences consecutive to the sentence of life imprisonment for capital sexual battery. The Second District Court of Appeal held that the sentence **was** not an upward departure sentence and expressed direct conflict with Wood v. State, 17 F.L.W. D311 (Fla. 5th DCA January 24, 1992).

In Wood, a guidelines sentence of life imprisonment was made consecutive to two nonguidelines sentences **as** a habitual offender totalling eighty years. The Fifth District held that the life sentence was a departure sentence because, by being consecutive, the defendant would not commence serving the life sentence (guidelines sentence) until the expiration of the nonguidelines sentence of eighty years. In other words, the defendant had been sentenced to something in addition to the recommended guidelines sentence, which would amount to an upward departure.

This court should take jurisdiction in order to resolve the conflict because there would be a discrepancy between the districts regarding the propriety of consecutive sentences when one of the sentences is not within the guidelines.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the Fifth District Court of Appeal so as to invoke discretionary review.

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court for resentencing within the guidelines. We hold that the sentence is not an upward departure and affirm.

In Boomer v. State, 564 So. 2d 1232 (Fla. 2d DCA 1990), this court affirmed the appellant's convictions and his sentence of life imprisonment on one count of sexual battery on a child under the age of twelve. We found that consecutive sentences of thirty years and fifteen years on two other counts, attempted sexual battery and lewd assault, constituted an improper departure from the guidelines. Accordingly, we remanded with directions that the appellant be sentenced within the guidelines on those two offenses.

The appellant's sentencing guidelines scoresheet placed him in a recommended range of seven to nine years. On remand, the trial court imposed concurrent sentences of nine years imprisonment. It then made these two concurrent sentences consecutive to the sentence of life imprisonment which the appellant received on the sexual battery count. The appellant argues that by making the guidelines sentences consecutive to the nonguidelines sentence for the capital felony, the trial court departed from the recommended range of the guidelines.

We have found only one other case in Florida addressing this issue. That is the decision of the Fifth District Court of Appeal in Wood v. State, 17 F.L.W. D311 (Fla. 5th DCA Jan. 24, 1992). In that case, a guidelines sentence of life imprisonment was made consecutive to two nonguidelines sentences (habitual offender) totaling eighty years. The court said that the life

imprisonment sentence was a departure sentence because, by being consecutive, the defendant does not commence service of the life sentence until after the expiration of the other sentences of eighty years and, thus, has been sentenced to something in addition to life imprisonment which is a departure from the recommended guidelines sentence.

We respectfully disagree with the reasoning of our sister court in Wood v. State and hold that the sentence imposed upon the appellant in this case is not an upward departure sentence, We express direct conflict with the decision in Wood v. State.

Affirmed.

RYDER, A.C.J., and DANAHY and LEHAN, JJ., Concur.