No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROGER G. BABCOCK --PETITIONER

VS.

STATE OF FLORIDA --RESPONDENT(S)

INDEX TO APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ROGER G. BABCOCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D20-1797

Opinion filed February 19, 2021.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Sarasota County; Donna Marie Padar, Judge.

Roger G. Babcock, pro se.

PER CURIAM.

Affirmed.

NORTHCUTT, VILLANTI, and ATKINSON, JJ., Concur.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. **CASE NO. 1997 CF 15469**

ROGER G. BABCOCK,

Defendant.
_____/

ORDER DENYING
MOTTION TO VACTE SENTENCE

This matter is before the Court on Defendant's motion to vacate sentence filed January 9, 2020, ostensibly pursuant to Rule 3.850, Fla. R. Crim. P.[1]The Court has reviewed the motion, the court file, and is otherwise advised in the premises.

Case History

Upon a jury verdict, the Defendant was convicted of sexual battery by a person over 18 years of age upon a child under 12 years of age pursuant to Sec. 794.011(2)(a), Fla. Stat. (1997) and sentenced to life in the Department of Corrections (DOC) without the possibility of parole. The judgment and sentence were affirmed on direct appeal. *See Babcock v. State*, 752 So. 2d 604 (Fla. 2d DCA 2000) (Table).

[1] Based on Defendant's argument and the relief requested, the Court construes the motion as a motion to correct illegal sentence under Rule 3.800(a), Fla. R. Crim. P., which may be filed any time.

In 2001, the Defendant filed a motion for postconviction relief. After an evidentiary hearing, the Court on October 3, 2002, entered a final order denying the motion. The order was affirmed on appeal. *See Babcock v. State*, 853 So. 2d 414 (Fla. 2d DCA 2003) (Table).

Present Motion

Defendant alleges his sentence is illegal because the Court erroneously believed it was required to sentence him to life without eligibility for parole and failed to order a presentence investigation report for an individualized sentencing hearing.

Defendant's claims are without merit. Defendant was convicted of sexual battery by a person over 18 years of age upon a child under 12 years of age pursuant to Sec. 794.011(2)(a), Fla. Stat. (1997), a capital felony punishable as provided in Sec. 775.082(1), Fla. Stat. (1997). As written, the cross-referenced section provides that capital sexual battery is punishable by death. In *Buford v. State,* 403 So.2d 943 (Fla.1981), however, the Florida Supreme Court held that a sentence of death for capital sexual battery violates the Eighth Amendment. Following *Buford,* the maximum sentence for capital sexual battery became life imprisonment with the possibility of parole after twenty-five years.

In 1995, the Legislature eliminated the possibility of parole for convictions of capital sexual battery. *See* Ch. 95–294, § 4, at 2718, Laws of Fla. Thus, Sec. 775.082(1), Fla. Stat. (1997) provides that a person convicted of capital sexual battery "shall be punished by life imprisonment and shall be ineligible for parole." In the present case, Defendant's sentence was automatic upon his conviction—the Court had no discretion. *See Buford v. State,* 403 So. 2d at 954. Because a court has no sentencing discretion, "[a] guidelines scoresheet need not be prepared for the sentencing of a defendant for a capital offense." *Riggsby v. State*, 696 So. 2d 1337 (Fla. 2d DCA 1997). It is, thereupon

ORDERED that the motion is **DENIED**. Defendant is further advised that he has the right to appeal this order within 30 days from the date this order is rendered.

DONE AND ORDERED in Sarasota, Sarasota County, Florida this 23 day of April 2020.

COPY

Donna Marie Padar, Circuit Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing order was furnished by mail to **Roger G. Babcock DOC# 165844**, Cross City C.I., 568 NE 255th Street, Cross City, FL 32628 and **Office of the State Attorney**, 2071Ringling Blvd, 4th Floor, Sarasota, FL 34237 on this 23 day of April 2020.

By: COPY

Judicial Assistant

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

March 11, 2021

CASE NO.: 2D20-1797
L.T. No.: 97-CF-15469

ROGER G. BABCOCK v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's "motion for rehearing, issue an opinion proper, certification to the supreme court of Florida" is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ATTORNEY GENERAL, TAMPA
ROGER G. BABCOCK
KAREN E. RUSHING, CLERK

C. SUZANNE BECHARD, A.A.G.
12TH CIRCUIT COURT ADMINISTRATOR

ag

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

ROGER G. BABCOCK,
Petitioner,

Vs. Case No.: 97-15469-F

STATE OF FLORIDA,
Respondent,
_____/

MOTION TO VACATE SENTENCE

Petitioner, Roger G. Babcock, proceeding *pro se*, pursuant to Fla. R. Crim. P. 3.850 (2019), motions this Honorable Court to vacate his prison sentence and to conduct a de novo resentencing hearing in which to hear and determine the question of the probation of the Petitioner pursuant to the applicable provisions of §948.01, Fla. Stat. (1997). In support thereof, Petitioner shows the following:

PRELIMINARY STATEMENT

Petitioner, Roger G. Babcock, is the Defendant in a criminal case; Respondent, the State of Florida, is the Plaintiff. Pursuant to Fla. R. App. P. 9.220, the instant motion contains references to the appropriate pages of the supporting Appendix of Exhibits.

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STATEMENT OF THE CASE AND FACTS

On October 21, 1997, Petitioner was charged by information with one count of sexual battery in violation of §794.011(2)(a), Fla. Stat. (1997). Petitioner entered a plea of not guilty and proceeded to trial; during which period, Petitioner made a number of unsuccessful attempts to negotiate with the Office of the State Attorney (See Exhibit A).

On May 29, 1998, following a four-day jury trial, the jury returned its verdict finding the Petitioner guilty as charged (See Exhibit B, pgs. 6-7). At sentencing, defense counsel, the prosecutor, and the trial judge treated the proceeding as ministerial. The trial judge did not order a presentencing investigation pursuant to Fla. R. Crim. P. 3.710(a) or conduct a sentencing hearing pursuant to Fla. R. Crim. P. 3.720(b). Instead, the court simply sentenced the Petitioner to life imprisonment without the possibility of parole.

> THE COURT: Okay, is there any lawful reason not to impose sentence at this time?
> MR. WATSON (APD): No, judge.
> THE COURT: Any comment by either side?
> MS. JOHNS (ASA): No, sir.
> THE COURT: All right. Mr. Babcock, I'm sure you're aware the law—do you have a scoresheet on this?
> MS. JOHNS: No, sir, there is no scoresheet.
> THE COURT: If you'll still fill one out. You are aware the law requires you to be sentenced to life in prison on this charge, and you are sentenced to that at this time.
> (Exhibit B, pgs. 8-9, See Exhibit C, Judgment and Sentence).

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On June 1, 1998, defense counsel filed a Notice of Appeal from the May 29th judgment and sentence alleging as error "the trial courts [sic] prejudicial errors in the proceeding below" (See Exhibit D, Notice of Appeal). In appellate case number: 98-02165, appellate counsel filed the Petitioner's first appellate brief with the Clerk of the Second District Court of Appeals on July 14, 1999. (Exhibit D, Docket Statement for Babcock v. State).

On appeal, appellate counsel did not brief the issue of the trial court's erroneous belief that it was required to sentence the Petitioner to anything other than imprisonment; nor did counsel address the trial court's failure to receive and consider a presentencing investigation report prior to sentencing and to conduct the individualized sentencing hearing required by Fla. R. Crim. P. 3.720(b).

On January 12, 2000, the appellate Court issued a silent per curiam opinion affirming the May 29, 1998, judgment and sentence. Babcock v. State, 752 So.2d 604 (Fla. 2nd DCA 2000). Mandate issued on January 27, 2000.

On May 11, 2000, the Florida Supreme Court published its opinion in Maddox v. State, 760 So.2d 89 (Fla. 2000), to resolve the conflict issue of whether any unpreserved errors relating to sentencing can be raised on direct appeal in light of the adoption of section 924.051, enacted as part of the Criminal Appeal Reform Act of 1996 (the Act), and whether unpreserved sentencing errors should be corrected in those noncapital criminal appeals filed in the window period between

the effective date of the Act and the effective date of the amendments to rule 3.800(b) in Amendments to Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600, 761 So.2d 1015 (Fla. November 12, 1999)(hereinafter Amendments II). Id. at 94.

In Maddox, the Supreme Court ruled that section 924.051(3) specifically gives defendants the right to raise, and appellate courts authority to correct, fundamental sentencing errors on direct appeal:

"We conclude that nothing in the Act or our prior jurisprudence prevents appellate courts from addressing certain unpreserved sentencing errors on direct appeal. Thus, in those certain cases where the appellant's first appellate brief was filed before our recent enactment of rule 3.800(b) in Amendments II, we approve...that a narrow class of unpreserved sentencing errors can be raised on direct appeal as fundamental error." Maddox, 760 So.2d at 94-95.

"[F]or those defendants who did not have the benefit of our recently promulgated amendment to rule 3.800(b) in Amendment II, during this window period the appellate courts should continue to correct sentencing errors that constitute fundamental error. To hold otherwise would neither advance judicial efficiency nor further the interests of justice." Id. at 98.

In Bain v. State, 730 So.2d 296 (Fla. 2nd DCA 1999), approved, Maddox v. State, 760 So.2d 89 (Fla. 2000), the Court stated, "under the Criminal Appeal Reform Act our jurisdiction to review a sentence may be founded on an allegation either of a preserved sentencing error or of an unpreserved fundamental sentencing error." 730 So.2d at 304.

The circumstances of Petitioner's case satisfy these requirements. This Court has jurisdiction to correct the sentencing error in this case based on the Petitioner's allegation of fundamental error, as the Petitioner's first appellate brief was filed during the window period after the enactment of the Act but before the adoption of the procedural rules promulgated in Amendments II. Maddox, 760 So.2d at 98-99; Bain, 730 So.2d at 304.

POSTCONVICTION PROCEEDINGS

On November 29, 2001, Petitioner filed a Rule 3.850 motion for postconviction relief with the clerk of this court. In this motion, Petitioner alleged nine instances of ineffective assistance of trial counsel. Following an evidentiary hearing on limited grounds, the trial court entered a final order denying Petitioner's rule 3.850 motion. On May 9, 2003, in appellate court case number: 2D02-4846, the Second District Court of Appeal entered a silent order per curiam affirming the trial court's order denying Petitioner's rule 3.850 motion. See Babcock v. State, 853 So.2d 414 (Fla. 2nd DCA 2003)(Table).

Due to having previously filed a rule 3.850 motion, subsection (c)(5) requires the Petitioner to explain why the claim in the present motion was not raised in the former motion. "[I]f a previous motion or motions have been filed, the reason or reasons the claim or claims in the present motion were not raised in the

former motion or motions." Rule 3.850(C)(5), Florida Rules of Criminal Procedure (2019).

In this case, the reason the present claim was not raised in the former motion is because "A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time." Rule 3.850(b), Florida Rules of Criminal Procedure (2019).

The general rule in Florida is that when a sentence is within statutory limits, it is not subject to review by an appellate court. The only exception is "where the facts establish a violation of a specific constitutional right during sentencing." Howard v. State , 820 So.2d 337, 339-340 (Fla. 4th DCA 2002); See also, Branton v. State, 187 So.3d 382, 385 (Fla. 5th DCA 2016).

Where "the sentencing error can cause or require a defendant to be incarcerated or restrained for a greater length of time than provided by law in the absence of the sentencing error, that sentencing error is fundamental and endures and petitioner is entitled to relief in any and every legal manner possible, viz: on direct appeal although not first presented to the trial court, by postconviction relief under 3.850, or by extraordinary remedy." Reynolds v. State, 429 So.2d 1331, 1333 (Fla. 5th DCA 1983).

In the present motion, the Petitioner shows that the sentence imposed by this court exceeds the limits provided by the constitution or laws of the United States or

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Where "the sentencing error can cause or require a defendant to be incarcerated or restrained for a greater length of time than provided by law in the absence of the sentencing error, that sentencing error is fundamental and endures and petitioner is entitled to relief in any and every legal manner possible, viz: on direct appeal although not first presented to the trial court, by postconviction relief under 3.850, or by extraordinary remedy." Reynolds v. State, 429 So.2d 1331, 1333 (Fla. 5th DCA 1983).

In the present motion, the Petitioner shows that the sentence imposed by this court exceeds the limits provided by the constitution or laws of the United States or

the State of Florida. The Petitioner shows that the sentencing error in this case can cause or require him to be incarcerated or restrained for a greater length of time than provided by law in the absence of the error. Thus, under rule 3.850 (b), the Petitioner may file the present motion to vacate his sentence at this time.

ARGUMENT

Petitioner argues that he was unlawfully deprived of his due process liberty interests as a direct result of the trial court's erroneous belief that it was required to sentence the Petitioner to prison as a capital felony offender, even though the decision to sentence the Petitioner as such an offender under §775.082(1) was discretionary; the act of pronouncing sentence without ordering a presentence investigation report and conducting an individualized sentencing hearing undermined the lawfulness of the sentence imposed; and this sentencing error is both patent and serious and should be corrected as fundamental error.

At sentencing, the record in this case shows the trial judge believing that the Petitioner was required to be sentenced to life imprisonment for the offense of capital sexual battery (Exhibit B, pgs. 8-9). This was fundamental error. See: §924.051(1)(a), Fla. Stat. (1997).

POINT ONE: Section 948.01 provides for the Petitioner the imposition of the life sentence called for by §775.082(1) in the discretion of the trial judge only after the

question of the probation of the Petitioner has been heard and determined by the court.

Except for an offense punishable by death, §948.01 provides the sentencing court an alternative, community-based method to punish the offender in lieu of incarceration. In relevant part, §948.01 states:

> "(1) Any state court having original jurisdiction of criminal actions may at a time to be determined by the court, with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury...
> (2) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation...
> (3) If, after considering the provisions of subsection (2) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to imprisonment, the court may place the offender in a community control program as provided in s. 948.10." section 948.01(1)-(3), Fla. Stat. (1997). (e.s.).

In Hicks v. Oklahoma, 447 U.S. 343 (1980), the United States Supreme Court ruled that where a State has provided for the "imposition of criminal punishment in the discretion of the trial [judge], it is not correct to say that the

defendant's interest in the exercise of that discretion is merely a matter of state procedural law." Id. at 346.

Eight justices agreed that the defendant in such a case "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent" provided for by state law, and that such an interest is constitutionally protected. Ibid.

In this case, Florida Statutes §948.01 provides for the imposition of criminal punishment in the discretion of the trial judge, and its provisions apply to the Petitioner whose offense is not punishable by death.[1] It directs the judge to hear and determine the question of the supervision of the Petitioner, and it gives the court authority to suspend the imposition of sentence and place the Petitioner in a program of community supervision upon such terms and conditions as the court may require.

Pursuant to Hicks, supra, the Petitioner has a substantial and legitimate expectation in §948.01 to be deprived of his liberty only after the question of his

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[1] See Ch. 59-130, §1, Laws of Fla. (amending §948.01(1) to extend the availability of community supervision to the defendant whose offense is punishable by life imprisonment.);c.f., State v. Taylor, 9 So.2d 708 (Fla. 1942)("In our opinion a court is without authority [under §948.01] to 'hear and determine the question of probation' of a defendant who has been found guilty of murder in the second degree, a crime which under the statute shall be punished by 'imprisonment in the state prison for life, or for any number of years not less than twenty years.' This authority is given courts of original jurisdiction 'except for an offense punishable by death or life imprisonment.'") See, §948.01(1), Fla. Stat. (1941).

placement in a community-based program has been heard and determined by the trial judge. In other words, the Petitioner has a fundamentally protected liberty interest in §948.01 to satisfy the propriety of his placement in a program of community supervision. To conclude otherwise would be a denial of due process of law guaranteed to the Petitioner by the Fourteenth Amendment. Hicks, 477 U.S. at 346; see also Hickerson v. Maggio, 691 F.2d 792 (5th Cir. 1982).

POINT TWO: The opinion in Scates v. State, 603 So.2d 504 (Fla. 1992), applies in this case to prohibit the sentencing language in §775.082(1), Fla. Stat. (1997), from absolutely precluding the trial court from exercising its discretion in §948.01 to withhold the sentence of life imprisonment and order a program of community supervision for the offense of capital sexual battery.

Section 775.082(1) provides:

> "(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole." §775.082(1), Fla. Stat. (1997).

As written, this section provides that the offense of capital sexual battery is punishable by death. In Buford v. State, 403 So.2d 943 (Fla. 1984), however, the Supreme Court held that the penalty of death for capital sexual battery violates the Eighth Amendment.

Following Buford, the maximum sentence for capital sexual battery became life imprisonment with the possibility of parole after twenty-five years. See Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984)("Death is no longer permissive for the sexual battery described in subsection §794.011(2), but life imprisonment with a twenty-five minimum is.").

In 1995, the Legislature eliminated the possibility of parole for convictions of capital sexual battery. See Ch. 95-294, §4, at 2718, Laws of Fla. Thus, the statute now reads that a person convicted of capital sexual battery "shall be punished by life imprisonment and shall be ineligible for parole." §775.082(1), Fla. Stat. (1997).

In Scates v. State, 603 So.2d 504 (Fla. 1992), the defendant was convicted under §893.13(1)(e)(1), Fla. Stat. (1989), of purchasing cocaine within 1,000 feet of a school. Section 893.13(1)(e)(1) provided for a minimum term of imprisonment of three years. However, Scates was sentenced to two years' probation and ordered to undergo drug rehabilitation pursuant to §397.12, Fla. Stat. (1989). In upholding this sentence, the supreme court held that "trial judges may refer a defendant convicted under section 893.13(1)(e)(1) to a drug abuse program pursuant to section 397.12 rather than impose a minimum three-year sentence." Scates, 603 So.2d at 506.

In reconciling the requirements of §893.13(1)(e)(1) to impose a three-year sentence with the mandate of §397.12 to find alternatives to prison for violations of chapter 893, the supreme court began its analysis with the "principle that, where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused." Id. at 505.

In the Petitioner's case, the statutes at issue are also susceptible to differing constructions; therefore, this Court must reconcile the requirements of §775.082(1) with the mandate of §948.01(1) to mean that a trial court may properly use community-based methods to punish the Petitioner in lieu of incarceration. See, e.g., State v. Winters, 346 So.2d 991 (Fla. 1977).

As stated, section 948.01(1) directs the trial judge to hear and determine the question of the probation of a defendant; it also provides for the imposition of community-based sanctions in the discretion of the trial judge, and it applies to the defendant whose offense is not punishable by death. The statute is intended to provide a meaningful alternative to prison for individuals capable of rehabilitation, Lawson v. State, 969 So.2d 222, 229 (Fla. 2007); see also, Ch. 83-131, s. 2(4), Laws of Fla., pg. 437.

On the other hand, §775.082(1) provides that individuals convicted of capital sexual battery "shall be punished by life imprisonment and shall be ineligible for parole." Of significance, however, is that while this provision does

call for a sentence of life imprisonment, it does not absolutely preclude trial judges from exercising their discretion to suspend the sentence and implement non-incarcerative sanctions upon such terms and conditions as the court may require.

This conclusion is directly supported by the Scates opinion in which the supreme court stated that when a statute does not contain specific language to the effect of restricting a trial court from withholding a sentence, and the word mandatory is not used, the omission "implies that the legislature intended a different construction, allowing trial judges greater discretion in sentencing decisions..." Scates, 603 So.2d at 505.

What this rule argues in this case is that the sentencing language in §775.082(1), which does not contain specific language to the effect of restricting a trial court from withholding its sentence, and the word mandatory is not used, is susceptible to differing constructions: one that requires a trial court to impose a sentence of life imprisonment, and one that does not preclude a trial court from exercising its discretion to suspend the sentence and implement community-based sanctions for the individual capable of rehabilitation.

Pursuant to §775.021(1), Fla. Stat. (1997), "[t]he provisions of this code...shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorable to the accused." §775.021(1), Fla. Stat. (1997).

Known as the rule of lenity, this rule requires that "[a]ny ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense." State v. Byars, 823 So.2d 740, 742 (Fla. 2002). Accordingly, this Court must construe the sentencing language in §775.082(1) to mean that the trial court was able to hear and determine the question of the probation of the Petitioner.

This conclusion is also directly supported by the Scates opinion in which the court stated, "statutes relating to the same subject and having the same purpose should be construed consistently." Scates, 603 So.2d at 505. In this case, the statutes at issue can be construed consistently because they relate to the same subject and have the same purpose – they both prescribe sanctions for criminal offenses and they both exist to punish the convicted defendant, deter similar criminal acts, protect society, and rehabilitate the offender. In other words, "[t]heir punishment provisions are alternatives to be applied by the trial judge according to the facts of each case." Ibid.

In sum, §948.01(1) applies to §775.082 to provide alternatives to prison for every criminal offense not punishable by death, and this application is not limited by any other provision of chapter 948. Thus, §775.082(1) is consistent with §948.01(1) to allow trial judges greater discretion in sentencing decisions, and this construction is not limited by any other provision of chapter 775.

POINT THREE: The phrase "shall be punished by life imprisonment and shall be ineligible for parole" is permissive sentencing language and does not require a trial court to automatically impose a sentence of imprisonment for the offense of capital sexual battery.

Stated plainly, the sentencing language in §775.082(1), when read in conjunction with other sentencing provisions of Florida's criminal code, does not specifically prohibit the application of §948.01(1)-(3). In so concluding, this Court must consider the legal effect of the omission from the sentencing language defined in §775.082(1), of the prohibition, found in numerous other sentencing statutes, that the proscribed sentence "shall not be suspended, deferred, or withheld."[2]

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[2] See, e.g., §893.135(1), Fla. Stat. (1997)(involving the offense of trafficking and providing, "[n]otwithstanding the provisions of §948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld"); §316.656(1), Fla. Stat. (1997)(involving the offense of manslaughter resulting from the operation of a motor vehicle and providing, "[n]otwithstanding the provisions of §948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any law violation of §316.193"); §775.0823, Fla. Stat. (1997)(involving offenses against justices of the peace and providing, "[n]otwithstanding the provisions of §948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld"); see also, §775.087(2) Fla. Stat. (1997)(involving the reclassification of offenses for the possession or use of a weapon and providing, "[n]otwithstanding the provisions of §948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld").

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In contrast with each of the other sentencing statutes, the sentencing language in §775.082(1) stands apart by the fact that these words precluding a judge from staying, suspending, or withholding the sentence are absent. Furthermore, and equally important, the restrictive language contained in the other sentencing statutes cannot be implied against the sentencing language in §775.082(1), which does not utilize such language. As stated in St. George Island Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989), "Where the legislature uses exact words in different statutory provisions, the court may assume they were intended to mean the same thing....Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted."

Since it must be presumed that the legislative inclusion of the proscription against staying, suspending, or withholding sentence has meaning where it is added to a penal statute, the exclusion of those words from a similar penal statute likewise must have meaning, namely, that such stay, suspension, or withholding of sentence is not precluded.

Second, this Court must also consider the legal effect of the legislature's 1995 amendment eliminating from §775.082(1) the mandatory sentencing language limiting the minimum term of imprisonment to (25) years for the offense of capital sexual battery and replacing it with permissive sentencing language

setting the maximum term of imprisonment to life. See, Ch. 95-294, §4, at 2718, Laws of Fla.

Had the legislature intended for the sentencing language in §775.082(1) to require an automatic prison sentence following the 1995 amendment eliminating the mandatory sentencing language from the statute, the legislature would have included language to that effect.[3] Thus, unless the capital felony is "punishable by death," the sentencing language in §775.082(1) permits the application of §948.01(1)-(3).

Third, and most importantly, this Court must further consider the numerous court decisions that have repeatedly concluded that notwithstanding the language "shall be punished by imprisonment" trial judges retain the right under §948.01(1) to impose community supervision in lieu of incarceration.

For example, §316.192(2)(a), the reckless driving statute, states:

> "Any person convicted of reckless driving shall be punished, upon first conviction, by imprisonment for a period of not more than 90 days..." §316.192(2)(a), Fla. Stat. (2003). (e.s.).

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[3] See, e.g., §775.084(4)(c), Fla. Stat. (1997)(setting sentences for violent career criminals and providing "mandatory minimum terms" of imprisonment); §790.235(1) Fla. Stat. (1997)(involving the offense of possession of a firearm by a violent career criminal and stating,"[a] person convicted of a violation of this section shall be sentenced to a mandatory minimum of 15 years imprisonment"); §893.135(1) Fla. Stat. (1997)(involving the offense of trafficking in controlled substances and providing, in numerous provisions, that a person convicted under this section "shall be sentenced to a mandatory minimum term of imprisonment.")

In Fonteyne v. State, 855 So.2d 99 (Fla. 2nd DCA 2003), however, the Court found that Fonteyne's one year sentence of probation for reckless driving was illegal because it exceeded the statutory maximum of 90 days for that offense. Id. at 99. "[A] term of probation is not to exceed the statutory maximum for incarceration. Therefore, the probationary term of one year could not have exceeded ninety days." Ibid.; see also, Whitehead v. State, 685 So.2d 894 (Fla. 5th DCA 1996).

Also, §790.221, the possession of a short barreled rifle, short barreled shotgun, machine gun statute, read: "Any person convicted of violating this section shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state penitentiary not to exceed 5 years." §790.221(2), Fla. Stat. (1977). (e.s.).

In McKendry v. State, 641 So.2d 45 (Fla. 1994), the Florida Supreme Court addressed the 1989 amendment to §790.221, Fla. Stat. The court held that the 1989 amendment replaced the permissive sentencing with mandatory minimum sentencing. In reaching its holding, the court examined the legislature's intent behind changing the language in the statute:

> "Legislative intent is also made clear by the 1989 amendment to section 790.221(2). Prior to 1989, section 790.221(2) read as follows: "any person convicted of violating this section is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state penitentiary not to exceed 5 years." Ch. 69-306, 10, at 1110, Laws of Fla. The 1989 amendment changed the statute to read "upon

> conviction thereof he shall be sentenced to a mandatory minimum term of imprisonment of 5 years." Ch. 89-312, 1, at 2042, Laws of Fla. The legislature specifically amended the statute to replace the permissive sentencing language limiting the maximum term of imprisonment to five years with mandatory sentencing language limiting the minimum term of imprisonment to five years. We find the 1989 amendment changing the language of section 790.221(2) to be a clear and unambiguous expression of the legislature's intent." (e.s.) McKendry, 641 So.2d at 47.

In Twining v. State, 380 So.2d 496 (Fla. 2nd DCA 1980), the Court so held that the six year term of probation for Twining's possession of a short barreled shotgun was excessive. "[T]he maximum period of probation which may be imposed [for a violation of §790.221(1)] is five years." Id. at 496. "[W]e remand for the trial court to impose a new term of probation consistent with this opinion." Ibid.

Then in State v. Dull, 249 So.2d 758 (Fla. 1st DCA 1971), the state charged Dull with the larceny of two calves. Following his plea of guilty, the trial court adjudicated Dull guilty and sentenced him to imprisonment in the state prison for a period of two years, but then stayed execution of this sentence pending consideration of whether it should be mitigated. Id. at 758.

Then at a subsequent hearing, the trial court set aside the sentence of two years imprisonment and instead withheld adjudication of guilt and placed Dull on probation for a period of three years. Id. at 759. At the time, §811.11, Fla. Stat. (1971), stated: "Whoever commits larceny by stealing any cow, heifer, or calf, the

property of another, shall be punished by imprisonment in the state prison for not less than two years nor more than five years." (e.s.)

On appeal the State argued that the trial court's order mitigating Dull's prison sentence was erroneously rendered and required reversal. The appellate court did not agree:

> "With regard to appellee Dull, the trial court set aside its former adjudication of guilt and placed him on probation under the supervision of the Parole Commission for a period of three years. This order was entered within the time prescribed by F.S. §948.01, F.S.A., and falls clearly within the authority of the trial judge in the exercise of his discretion to dispose of a case against a person convicted of a crime as in his discretion the ends of justice may require."

"The post-judgment order against appellee Dull setting aside the judgment of conviction and sentence rendered against him and placing him on probation is affirmed." Id. at 760-761.

Next is State v. Williams, 237 So.2d 69 (Fla. 2nd DCA 1970). In this case, Williams plead nolo contendere to the charge of manslaughter and was placed on 20 years probation, under which he was to pay a $3,000.00 fine and report each year to spend sixty days in jail. Id. at 69.

On appeal, the State claimed that the sentence of probation was illegal and assigned the conditions of probation as error. In rejecting this claim, the court of appeal stated:

> "[T]here is a clear distinction between a sentence on the one hand, which must be proceeded by an adjudication of guilt, and conditions of probation on the other hand, which can be imposed independently of an adjudication of guilt and imposition or pronouncement of sentence."

"Appellant urges that this 'sentence' be reversed on the authority of Ex parte Bosso, 41 So.2d 322 (Fla. 1949). We disagree. First, we are not concerned in this appeal with a sentence but with conditions of probation. Since Fla. Stat. §782.07, F.S.A., states that one guilty of manslaughter,'[s]hall be punished by imprisonment in the state prison not to exceed twenty years, or imprisonment in the county jail not to exceed one year, or by fine not exceeding five thousand dollars,' one would hardly expect the State to be the party appealing an order sentencing one pleading nolo contendere to manslaughter to payment of a fine and imprisonment. Secondly, Bosso is not applicable to the unique facts presented in this case. That case held, and quite correctly, that when a crime is punishable by fine or imprisonment but not both, a court cannot sentence one convicted of that crime to payment of the fine and additionally place him on probation." Id. at 70.

Finally, in Varnom v. State, 198 So.2d 64 (Fla. 1st DCA 1967), the defendant was charged by Information with the crime of robbery. At the time, the robbery statute, §813.011, Fla. Stat. (1966), stated:

> "Whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, shall be

punished by imprisonment in the state prison for life or for any lesser term of years, at the discretion of the court." (e.s.)

Varnom then proceeded to trial, and a jury returned a verdict of guilt. At sentencing, however, the trial judge pursuant to the provisions of §948.01, Fla. Stat., withheld adjudication of guilt and placed Varnom under the supervision of the Florida Probation and Parole Commission for a period of five years. Id. at 64. On appeal, the appellate court affirmed this disposition. Id.

As these case examples demonstrate, the sentencing language "shall be punished by imprisonment" has been repeatedly construed by the courts of this State to mean that a trial court is not precluded from staying and withholding the imposition of sentence and from placing a defendant on probation pursuant to the relevant provisions of §948.01.

Under Florida law, when a statutory provision has received definite judicial construction, a subsequent re-enactment will be held to amount to a legislative approval of the judicial construction. "The Legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." Collins Inv. Co. v. Metropolitan Dade County, 164 So.2d 806, 809 (Fla. 1964). Furthermore, when the legislature uses the same word or phrase on the same subject, even in different chapters of the Florida Statutes, it is presumed that the legislature intended for them to have the same meaning. Goldstein v. Acme Concrete Corp., 103 So.2d 202, 204 (Fla. 1958).

In 1995, the Legislature enacted the amendment to §775.082(1) and used the exact same words, "shall be punished," on the exact same subject of sentencing. Therefore, under Florida law, the legislature was acquainted with the judicial decisions on the subject and thus approved of a trial court's use of discretion in determining whether to impose community-based sanctions for the offense of capital sexual battery.

In conclusion, the sentencing language "shall be punished by life imprisonment and shall be ineligible for parole" is neither automatic nor mandatory; instead, it is permissive sentencing language. It neither requires a trial judge to impose à sentence of imprisonment nor prevents a trial judge from using community-based methods to punish the Petitioner in lieu of incarceration.

To conclude otherwise is a denial of due process of law guaranteed to the Petitioner by the Fourteenth Amendment. Hicks, 477 U.S. at 346.

POINT FOUR: A trial court's authority to impose community sanctions as an alternative to incarceration has been applied to the offense of capital sexual battery.

In Washington County Circuit Court case number: 2005-00059, defendant Johnny A. Easterling was charged with three counts of sexual battery in violation of §794.011(2)(a), Fla. Stat. (2003)(See Exhibit E, Charging Document of Johnny A. Easterling).

Subsequently, defendant Easterling entered a plea of no contest to all three counts of capital sexual battery in exchange for 2 years community control, followed by 13 years probation. The Honorable Allen L. Register, Circuit Court Judge, accepted this plea on November 7, 2006 (Exhibit E, Plea, Waiver, and Consent).

On November 20, 2006, Judge Register withheld sentence and placed defendant Easterling on community control for a period of 2 years to be followed by thirteen years of probation for all three counts of capital sexual battery (Exhibit E, Judgment of Guilt and Placing Defendant on Community Control).

This disposition was affirmed by the First District Court of Appeal in Easterling v. State, 989 So.2d 1285 (Fla. 1st DCA 2008).

POINT FIVE: The sentencing court's belief that it was required to pronounce the sentence of life imprisonment is both patent and serious and should be corrected as fundamental error.

The sentencing language in §775.082(1) is for sentencing judges to have the power to sentence capital felony offenders to life imprisonment; however, it is not to require such a sentence in lieu of the imperative to "hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury." §948.01(1), Fla. Stat. (1997).

The record in the present case shows the trial judge believing that he was required to impose the penalty of imprisonment; and therefore, had no discretion to sentence the Petitioner to anything other than life in prison (Exhibit B, pgs. 8-9). The trial judge did not hear and determine the question of the probation of the Petitioner, and there is no indication of whether the disposition would have been the same had the trial judge understood that sentencing under §775.082(1) was discretionary.

For this reason, the judicial act of summarily pronouncing sentence without ordering a presentence investigation report prior to sentencing and without conducting an individualized sentencing hearing prior to imposing sentence prejudicially undermined the correctness of the sentence imposed on the Petitioner.

In Maddox v. State, 760 So.2d 89, 98 (Fla. 2nd DCA 2008), the supreme court concluded that "for those defendants who did not have the benefit of our recently promulgated amendment to rule 3.800(b) in Amendment II, during this window period the appellate courts should continue to correct sentencing errors that constitute fundamental error. To hold otherwise would neither advance judicial efficiency nor further the interests of justice."[4]

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[4] See, e.g., Stephens v. State, 974 So.2d 455 (Fla. 2nd DCA 2008), where the court found that habeas corpus relief was necessary to avoid a manifest injustice resulting from a fundamental sentencing error due to the trial court's mistaken belief that it had no discretion in sentencing defendant as a habitual felony offender to life in prison for armed burglary conviction; Wright v. State, 779 So.2d 399, 400

"[I]n order to be considered fundamental, an error must be serious. In determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence." Maddox, 760 So.2d at 99 (citing Bain v. State, 730 So.2d 296, 304-305 (Fla. 2nd DCA 1999)).

Qualitative Effect

In this case, the qualitative effect of the trial court's decision to immediately impose a sentence of incarceration did result in a pervasive series of prejudicial errors that undermined the integrity of the sentencing process.

First, the trial court departed from the essential requirements of Rule 3.710(a) by not referring Petitioner's case for investigation and recommendation (Exhibit B, pgs. 8-9). Florida Rule of Criminal Procedure 3.710(a) requires that, before imposing a sentence other than probation, the sentencing judge must receive and consider a presentence investigation report prior to sentencing in all cases where the defendant has not been previously convicted of a felony, and the court

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fn. 2 (Fla. 2nd DCA 2000), holding that an improper imposition of a minimum mandatory term is a sentencing error of the type which may be raised for the first time on appeal by a defendant who has been sentenced during the "window" period established in Maddox; see also, Robinson v. State, 762 So.2d 909, 910 fn. 2 (Fla. 2000), where it is unclear from the record whether an unpreserved sentencing error resulting in a sentence in excess of the statutory maximum was raised for the first time before the district court, or for the first time before the supreme court, the error may be raised for the first time on appeal by a defendant sentenced during the "window" period established in Maddox, and it may be corrected on direct appeal as fundamental error.

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has discretion in sentencing. Hernandez v. State, 137 So.3d 542, 543-544 (Fla. 4th DCA 2014); Peer v. State, 983 So.2d 34, 35 (Fla. 1st DCA 2008)("Rule 3.710(a) clearly mandates that the trial court first order a PSI before sentencing a first felony offender to more than probation.").

The circumstances of Petitioner's case satisfy these requirements. The Petitioner has no prior felony convictions, and the trial court did not order probation but had the discretion to sanction the Petitioner pursuant to the applicable provisions of §948.01.

"The purpose of a presentence investigation report is to provide the sentencing judge with information that is helpful in determining the type of sentence that should be imposed." Novel v. State, 191 So.3d 406, 409 (Fla. 2016). "The rule and justice seem to require that when a sentencing judge has discretion in sentencing a first felony offender he should look into the background of the defendant to determine the best sentence for that defendant and society." Thomas v. State, 356 So.2d 846, 847 (Fla. 4th DCA 1978).

Absent consideration of a PSI report, the Petitioner was greatly prejudiced in that a PSI would have revealed evidence that might have prompted a different result by the sentencing judge. As the supreme court stated in Barber v. State, 293 So.2d 710, 711 (Fla. 1977), "The wording of Florida Rule of Criminal Procedure 3.710 mirrors the similarly of purpose of a pre-sentence investigation and that of a

granting of probation. Either a granting of probation or a pre-sentence investigation is required. Probation may be used to give the offender a chance to show by his deeds that he will live within the law; a pre-sentence investigation is used to determine if there is a substantial likelihood that the offender will do so. A favorable pre-sentencing report is generally the basis for granting probation; the two serve the same function."

In this case, the trial court did not order a PSI report or examine the pertinent information required by law prior to sentencing the Petitioner. Thus, absent the sentencing judge's review and consideration of a PSI report, the Petitioner was greatly prejudiced in that the sentencing judge lacked sufficient information to conclude that community sanctions offered the best means for punishing and rehabilitating the Petitioner.

Second, the trial court violated the Petitioner's due process rights by imposing sentence without affording the Petitioner adequate time to investigate and prepare for sentencing.

In sentencing proceedings, "defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense." Smith v. State, 525 So.2d 477, 479 (Fla. 1st DCA 1988). Adequate time to prepare a defense is a right that is inherent in the right to counsel. Ibid. (quoting Brown v. State, 428 So.2d 76, 80 (Fla. 1st DCA 1983)). Timely appointment and opportunity for adequate

preparation are absolute prerequisites for counsel to fulfill his constitutionally designed role of seeing to it that available defenses are raised and the prosecution put to its proof. Cf. United States v. Ash, 413 U.S. 300, 312-313 (1973). If no actual assistance for the accused's defense is provided, then the constitutional guaranty has been violated. United States v. Cronic, 466 U.S. 648, 653-654 (1984).

In the present case, the Petitioner received actual notice of the trial court's intention to pronounce sentence only minutes after the jury returned its verdict and immediately before the sentence was actually imposed (Exhibit B, pgs. 6-9). The notice did not provide any meaningful opportunity for the presentation of mitigation, allocution, and argument before determination of sentence.

Third, the trial court departed from the essential requirements of Rule 3.720 by not ordering a sentencing hearing and entertaining submissions and evidence by the parties that are relevant to the sentence.

Florida Rule of Criminal Procedure 3.720 requires the sentencing court, as soon as practical after determination of guilt and after the examination of any presentencing report, to order a sentencing hearing. Fla. R. Crim. P. 3.720. Under this rule, the requirement of a sentencing hearing is mandatory and may not be omitted at the discretion of the trial court. Mason v. State, 366 So.2d 171, 172 (Fla. 3rd DCA 1979).

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In State v. Scott, 439 So.2d 219 (Fla. 1984), the supreme court held: "Unarguably, the prisoner to be sentenced is facing a critical stage of the criminal proceedings, whether the sentence to be imposed is the immediate result of adjudication of guilt or the result of a successful Rule 3.850 challenge. Thus, a sentencing hearing is mandatory, Florida Rule of Criminal Procedure 3.720, and the prisoner is entitled to show legal cause why sentence should not be pronounced and to submit evidence relevant to the sentence." Id. at 221.

Rule 3.720(b) also makes it mandatory for the trial court, at the sentencing hearing, to entertain "submissions and evidence by the parties that are relevant to the sentence." Rule 3.720(b); Mask v. State, 289 So.2d 385 (Fla. 1973)(Rule 3.720(b) "now makes it mandatory for the trial court, at the sentencing hearing, to receive evidence by the parties of aggravating and mitigating circumstances."); Davenport v. State, 787 So.2d 32 (Fla. 2nd DCA 2001)(" Florida Rule of Criminal Procedure 3.720(b) provides that at a sentencing hearing, 'the court shall entertain submissions and evidence by the parties that are relevant to the sentence.' Under this rule, [the defendant is] entitled to make a statement and present argument to the court.").

In Gardner v. Florida, 430 U.S. 349, 358 (1977), the United States Supreme Court held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."

In Florida, the essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Scull v. State, 569 So.2d 1251, 1252 (Fla. 1993). "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties." Ibid. As the court explained in Spencer v. State, 615 So.2d 688, 691 (Fla. 1993), "First, the trial court should hold a hearing to: (a) give the defendant, his counsel, and the State an opportunity to be heard; (b) afford both the state and the defendant an opportunity to present additional evidence; (c) allow both parties to comment on or rebut information in any presentencing or medical report; and (d) offer the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial court should then...consider the appropriate sentence."

In the case at bar, it is undisputed that the Petitioner, and his counsel, Mr. Steve Watson, made several attempts through the Office of the State Attorney to defer sentencing under §775.082(1) (See Exhibit A). Canon 3(B)(7), Code of Judicial Conduct states, "A judge shall accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

Florida Statute §948.01(1) and Florida Rule of Criminal Procedure 3.720(b) both provide for the Petitioner the right to be heard by the sentencing judge on the

issue of sentencing. Section 948.01(1) by directing the court to "hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury..." and Rule 3.720(b) by requiring the court, at a sentencing hearing, to "entertain submissions and evidence by the parties that are relevant to the sentence."

The Petitioner, therefore, was, and is, entitled by these provisions to fair notice of the pendency of a sentencing hearing and reasonable opportunity to be heard on any matter that may have prompted the sentencing judge to impose community supervision as a suitable alternative to incarceration.

In other words, where Florida law vests the trial court with the authority to "stay and withhold the imposition of sentence," §948.01(2), the Petitioner, has a fundamentally protected liberty interest in demonstrating, through submissions and evidence, the propriety of his placement in a program of community supervision. To conclude otherwise would be to prejudicially violate the Petitioner's right to the due process of law that is guaranteed him by both the United States and Florida Constitutions. Cronic, 466 U.S. at 653-654; Hicks, 477 U.S. at 346; Gardner, 430 U.S. at 358; Scull v. State, 569 So.2d at 1252; State v. Scott, 439 So.2d at 221.

Finally, a trial judge's announced intention to make a specific ruling prior to hearing evidence or argument is paradigm of judicial bias and prejudice. Weibe v.

State, 761 So.2d 469, 473 (Fla. 4th DCA 2000)(quoting Gonzalez v. Goldstein, 633 So.2d 1183, 1184 (Fla. 4th DCA 1994)).

In this case, the trial court announced its intention to sentence the Petitioner to life in prison. At no point did the trial court hear mitigation, allocution, or argument prior to imposing sentence. The Petitioner was simply not afforded a reasonable opportunity to investigate and prepare for sentencing, obtain a PSI report, present witnesses in his own defense,[5] make a mitigating statement, and most importantly, show himself to be a suitable candidate for placement in a program of community supervision.

In conclusion, the summary imposition of sentence resulted in a "pervasive series" of prejudicial errors that undermined the integrity of the sentencing process, harmfully affected the Petitioner's sentence, and "produce[d] a fundamentally erroneous result." Bain v. State, 730 So.2d 296, 304 (Fla. 2nd DCA 1999).

Quantitative Effect

"In most cases, a fundamental sentencing error will be one that affects the determination of the length of the sentence such that the interests of justice will not be served if the error remains uncorrected." Maddox, 760 So.2d at 100.

In this case, the trial court did not base its sentencing decision on the exercise of discretion. Instead, it relied on what the court presumed was mandatory

[5] "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

language in §775.082(1) to preclude a discretionary decision provided for in §948.01(1). Section 948.01(1) required the trial judge to consider all of the sentencing options available to the Petitioner and exercise its discretion accordingly. The trial court's erroneous belief that it was required to impose a sentence of incarceration arbitrarily deprived the Petitioner of his fundamental due process liberty interests in sentencing.

Under Florida law, "trial judges may not 'refuse to exercise discretion' or 'rely on an inflexible rule for a decision that the law places in the judge's discretion'." Ayala v. Scott, 224 So.3d 755, 759 (Fla. 2017)(quoting Barrow v. State, 27 So.3d 211, 218 (Fla. 4th DCA 2010) approved, 91 So.3d 826 (Fla. 2012)). Instead, "[a] trial court is always required to exercise the discretion afforded it..."; Fazio v. Russell Bldg. Movers, 469 So.2d 844, 845 (Fla. 3rd DCA 1985), and "[i]t is error for the trial court to refuse or fail to exercise its discretion." Steinmann v. State, 839 So.2d 832, 832 (Fla. 4th DCA 2003); e.g., Hicks, 477 U.S. at 346.

A sentencing court that fails to exercise the discretion afforded it affects the determination of the type and length of the sentence that may be imposed on a defendant. For instance;

In Cromartie v. State, 70 So.3d 559 (Fla. 2012), the supreme court held that a trial judge's stated policy of always "rounding up" sentences to the next whole

year violated due process because it improperly extended the defendant's sentence in an arbitrary manner. Id. at 564.

In Cromartie, the trial judge sentenced the defendant to eight years, after "rounding up" from the 7.8 year minimum. Id. at 560. After the discovery of a scoresheet error led to resentencing, the court again "rounded up"-but this time from 6.16 years (the revised scoresheet minimum) to 7 years. Id. at 561.

When pressed about the increased effect of the rounding up, the trial judge stated, "I round off in years. What can I tell you? That's just my way. Id. The judge than shared her view that it really doesn't make a difference. I mean, I know it matters to your client, every month and every day he does. But I'm telling you in the real world whether you give somebody nine years or ten years doesn't much matter, you know. It just doesn't." Id. at 561.

In other words, instead of making an informed, discretionary decision, the trial judge relied on an inflexible rule to harmfully affect the determination of the length of Cromartie's sentence. This, the supreme court held, was "arbitrary and violated due process" where Cromartie's sentence, absent the arbitrary policy of rounding up, would have been at the "bottom of the guidelines." Cromartie, 70 So.3d at 563-564.

In Burdick v. State, 594 So.2d 267 (Fla. 1992), the supreme court held that a trial judge sentencing a defendant under the habitual offender statute was not

required to impose the maximum penalty provided in the statute, but rather had the discretion to sentence the defendant anywhere up to the maximum sanction. Id. at 269-271

"Because the trial court in this case did not indicate whether it believed it could in fact decline to impose a life sentence [under the habitual felony offender statute], we remand for the trial court to reconsider the sentence as within its discretion." Id. at 271.

In Patterson v. State, 206 So.3d 64 (Fla. 4th DCA 2016), the trial court's mistaken belief that it was bound by statute to structure the defendant's sentences to run consecutively required remand to allow the trial court discretion to run the sentences concurrently or consecutively.

Patterson was convicted of aggravated battery for an attack on another prisoner while incarcerated on a separate carjacking conviction, and the trial court sentenced him under the PRR statute to a consecutive fifteen year prison term with 463 days credit. Id. at 65.

At the sentencing hearing, the trial court stated that its only discretion was to give the credit for time served, and agreed with the State that the 15 year PRR sentence had to be served consecutively with the separate carjacking conviction. Ibid.

On appeal, however, Patterson argued, and the appellate court agreed, that the trial court erred by mistakenly believing that it lacked the discretion to impose the sentences concurrently.

The appellate court ruled the PRR statute "does not require the sentence to be imposed consecutively or concurrently." Moreover, "No one disputes that the trial court could sentence the defendant to consecutive sentences. But, it was not required to do so under §921.16. Rather, that section allows the trial court discretion to run the sentences concurrently or consecutively." Id. at 65-66.

Next, in Simpkins v. State, 784 So.2d 1203 (Fla. 2nd DCA 2001), the appellate court focused on "the guidelines sentence the trial court imposed while apparently under the belief that it had no discretion to instead sentence Simpkins as a youthful offender." Ibid.

Simpkins was convicted of armed robbery, a first degree felony, and flight from law enforcement. At sentencing, the court asked defense counsel a question relating to the guidelines; and, counsel mistakenly stated that robbery with a firearm was a life felony, but asked for leniency in light of Simpkins lack of prior record and various other circumstances. The trial court then imposed a guidelines sentence as if Simpkins was ineligible for sentencing as a youthful offender. Id. at 1204.

On appeal, however, this court reversed the guidelines sentence based on its finding that Simpkins was in fact eligible for sentencing under the Youthful Offender Act. "[W]e reverse Simpkins sentence and remand to the trial court for resentencing in light of its discretion to impose a youthful offender sentence." Id. at 1204-1205.

Finally, in Kelly v. State, 727 So.2d 1084 (Fla. 2nd DCA 1999), the Second District Court of Appeal determined that remand and reconsideration of sentence was necessary to give the trial court an opportunity to sentence the defendant without uncertainty about its discretion of whether to impose the minimum mandatory provision under the habitual violent felony offender statute. Id. at 1085.

Kelly was convicted of robbery with a deadly weapon and sentenced to 30 years with a 15 year minimum mandatory term as a HVFO. On appeal, Kelly argued, and this court agreed, that the trial court erred by imposing the 15 year minimum mandatory term under the HVFO statute when it indicated at sentencing that it had no discretion in deciding whether to impose the minimum mandatory term.

"A trial court's discretion in sentencing under the HVFO statute extends to the determination of whether to impose the minimum mandatory term." Ibid. (citing State v. Hudson, 698 So.2d 831, 833 (Fla. 1997)).

"Since the trial court erroneously indicated that it did not have discretion in imposing the fifteen-year minimum mandatory term, the appellant is entitled to be resentenced." On remand, the trial court must "recognize that imposition of the minimum mandatory provision is discretionary." Id. at 1085.

As these case laws demonstrate, a sentencing court is always required to exercise the discretion afforded it, and when that discretion is not exercised, the error has an obvious affect on the determination of the sentence that may be imposed on a defendant and on the deprivation of that defendant's liberty.

Thus, whether the error stems from a trial court's determination not to exercise its discretion, as in Cromartie, or a trial court's determination to impose a sentence while unaware of its discretion, the error has a quantitative impact on the deprivation of a defendant's freedom from bodily restraint.

In Petitioner's case, the trial court was unaware of its sentencing discretion and sentenced the Petitioner to life in prison. The consequence of this error could not be more obvious. A prison sentence is a far more coercive deprivation of the Petitioner's liberty and a far more punitive penalty than any non-prison sanction. See Foucha v. Louisiana, 504 U.S. 71, 80 (1992)(explaining "freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."). Second, the sanctions of probation and community control are not incarcerative sentences; instead, they are alternative non-incarcerative forms of

punishment. See §948.001(5), Fla. Stat. (1997)(Probation "means a form of community supervision requiring specified contact with parole and probation officers and other terms and conditions as provided in §948.03"); §948.001(2), Fla. Stat. (1997)(Community control "is an individualized program in which the freedom of an offender is restricted within the community, home, or non-institutional residential placement and specified sanctions are imposed and enforced.").

In conclusion, the trial court's decision in this case to impose a prison sentence while unaware of its discretion under §948.01(1), to consider the options of probation and community control, and whether to impose them in lieu of incarceration, was a significant deprivation of the Petitioner's fundamental due process "liberty" interest in sentencing. See, e.g., State v. Johnson, 616 So.2d 1, 3 (Fla. 1993).

Remand

It is the Petitioner's prayer that this Honorable Court vacate the Petitioner's prison sentence to allow the trial court to properly consider the Petitioner's sentence with the knowledge that it has discretion, rather than being of the belief that it was required to sentence the Petitioner in a particular way.

Under controlling precedent, if a trial court mistakenly believes that it does not have discretion in sentencing a defendant, and the reviewing court is unable to

determine from the record whether the trial court would have imposed the same sentence if it had understood its discretion, then the sentence imposed should be vacated and the case remanded for the trial court to exercise its sentencing discretion and consider all sentencing alternatives. Goldwire v. State, 73 So.3d 844, 846 (Fla. 4th DCA 2011)(quoting Munnerlyn v. State, 795 So.2d 171, 171 (Fla. 4th DCA 2001); Torres v. State, 17 So.3d 1282, 1282-1283 (Fla. 2nd DCA 2009)(citing Hines v. State, 817 So.2d 964, 965 (Fla. 2nd DCA 2002)); Crumitie v. State, 605 So.2d 543, 544 (Fla. 1st DCA 1992).

The Petitioner's case satisfies these requirements. The trial court mistakenly believed that it was required to sentence Petitioner to incarceration and there is no indication in the record of whether the trial court would have imposed the same sentence had it understood that it had the discretion to sentence the Petitioner pursuant to the applicable provisions of §948.01, Fla. Stat. (1997).

Accordingly, this Honorable Court should vacate the Petitioner's sentence to allow the trial court to properly consider the alternatives of probation and community control with the knowledge that it has discretion, rather than being of the belief that it is required to sentence the Petitioner in a particular way. See Burdick v. State, 594 So.2d at 271 (finding that "because the trial court in this case did not indicate whether it believed it could in fact decline to impose a life

sentence, we remand for the trial court to reconsider the sentence as within its discretion); Goldwire, 73 So.3d at 846-847.

CONCLUSION

In the instant motion, the Petitioner has convincingly demonstrated that the trial court was under no legal obligation to require a sentence of incarceration. Therefore, reconsideration of sentence would entitle the Petitioner to a reasonable expectation of imminent release from his present imprisonment.

Under Florida law, probation and community control are valid sentencing alternatives to imprisonment, §921.187(1)(a), Fla. Stat. (1997), and have been found by the legislature to "alleviate prison overcrowding while still providing a sufficient measure of public safety and assuring an element of punishment." Ch. 83-131, s. 2(4), Laws of Fla., pg. 437.

In this case, however, an informed decision to place the Petitioner in a program of community supervision is likely only after the trial court receives and considers evidence that the Petitioner is able to return to the community without unduly diminishing the punishment appropriate for the crime or unreasonably compromising public safety.

Reconsideration of the Petitioner's sentence, therefore, must include a presentencing investigation report and a de novo sentencing proceeding in which the trial court is "permitted to consider any and all information that reasonably

might bear on a proper sentence for a particular defendant, given the crime committed." Howard v. State, 820 So.2d 337, 340 (Fla. 4th DCA 2002)(quoting Wasman v. United States, 468 U.S. 559, 563 (1984)).

In conclusion, the sentencing alternatives of probation and community control are sentencing options available to the Petitioner, and they are reasonable expectations of imminent release from prison for individuals capable of rehabilitation. The Petitioner, therefore, is entitled to demonstrate at a sentencing hearing that he is capable of rehabilitation upon such terms and conditions as the court may require.

WHEREFORE, based on the foregoing facts, arguments, and authorities, it is the Petitioner's prayer that this Honorable Court vacate his prison sentence and conduct a de novo resentencing hearing in which to hear and determine the question of the probation of the Petitioner pursuant to the applicable provisions of §948.01, Fla. Stat. (1997).

Respectfully submitted,

/s/ Roger G. Babcock
Roger G. Babcock, DC # 165844

OATH

Under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be

frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English.

/s/ Roger G. Babcock
Roger G. Babcock, DC # 165844

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition for motion to vacate sentence (with Appendix of Exhibits A through E) has been delivered to: **Clerk of the Court**, P.O. Box 3079, Sarasota, Florida 34230-3079; **Office of the State Attorney**, 2071 Ringling Blvd. Ste 400, Sarasota, Florida 34237-7000, by placing the same into the hands of institutional mailroom officials for further delivery by U.S. Mail, postage pre-paid, this 9 day of January 2020.

Roger G. Babcock
Roger G. Babcock, DC # 165844
Cross City Correctional Institution
568 N.E. 255th Street
Cross City, Florida 32628

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IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

ROGER G. BABCOCK,
Appellant,

vs. Case No.: 2D20-1797

STATE OF FLORIDA,
Appellee,
_____/

MOTION FOR REHEARING, ISSUE AN OPINION PROPER, CERTIFICATION TO THE SUPREME COURT OF FLORIDA

Appellant, Roger G. Babcock, proceeding pro se, pursuant to Rule 9.330, Florida Rule of Appellate Procedure (2020), motions this Court to rehear, and set aside, its disposition rendered on February 19, 2021, and to enter an order granting Appellant the relief in which he is entitled. In support thereof, Appellant shows the following:

The trial court cites the case of Buford v. State, 403 So. 2d 943 (Fla. 1981), for the conclusion that the penalty of imprisonment in §775.082(1), Fla. Stat. (1997), for the offense of capital sexual battery is automatic upon conviction, precluding the mandatory language in §948.01(1), requiring the court to hear and determine the question of the probation of the defendant.

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On February 19, 2021,[1] a panel from this Court issued a silent per curiam opinion affirming the trial court's order denying Appellant's motion to vacate sentence.

On rehearing, it is the Appellant's position that this panel has overlooked or misapprehended the Legislature's specific intent to distinguish the case of Buford v. State from controlling in the Appellant's.

Rehearing Point One: The defendant in Buford was statutorily mandated by the remedial provisions in § 775.082(2) to be automatically sentence to imprisonment and to the minimum mandatory sentence in § 775.082(1), requiring twenty-five years incarceration before becoming eligible for parole. The Appellant was not.

In Buford, supra, the Florida Supreme Court held that the penalty of death for the crime of capital sexual battery violated the Eighth Amendment. At resentencing, the Court stated:

> "The sentence of death imposed for the conviction of sexual assault is vacated. Section 775.082(1), Florida Statutes, mandates a punishment of life imprisonment with a requirement that defendant serve no less than twenty-five years before becoming eligible for parole. This is an automatic sentence, and the Court has no discretion. Sufficient factors are present in this case to create an exception to Florida Rule of Criminal

[1] Pursuant to Appellate rule 9.330(a)(1), the instant motion is timely filed if placed into the hands of institutional mailroom officials for further delivery by U.S. Mail, postage pre-paid, on or before March 6, 2021. See Thompson v. State, 761 So.2d 324 (Fla. 2000) (mailbox rule).

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> Procedure 3.180 requiring the presence of the defendant at sentencing. See Anderson v. State, 267 So. 2d 8 (Fla. 1972). The defendant, for the crime of sexual battery upon a child under eleven years of age, shall be imprisoned for life, with no eligibility for parole during the first twenty-five years."
> Buford, 403 So. 2d at 954.

In relevant part, s. 775.082, Florida Statutes (1981), reads:

> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

Florida Statutes § 775.082(1), (2) (1981).

By its express terms, s. 775.082(1) is not a remedial statute. "A remedial statute is designed to correct an existing law, redress and existing grievance, or introduce regulations conductive to the public good. "Fonte v. AT&T Wireless Servs, Inc., 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005) (quoting Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981).

Instead, Florida Statutes s. 775.082(1) is a penal statute that defines capital felonies; it does not contain the word "automatic," and it is highly unlikely that the

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Florida Supreme Court would have deliberately added that word to the statute where the legislature clearly had not.

Yes, the penalty prescribed by s. 775.082(1), Fla. Stat. (1981), is life imprisonment, and yes, the phrase "shall be punished by imprisonment" is permissive sentencing language, McKendry v, State, 641 So. 2d 45, 47 (Fla. 1994), while the phrase "shall be required to serve no less than 25 years" is mandatory sentencing language,[2] but it was neither of these provisions that empowered the court to declare subsection (1) an "automatic sentence" for the defendant in Buford.

Otherwise, Buford would never have been sentenced to death at his original sentencing because this construction of these two penalty provisions would have automatically precluded it. Clearly, this conclusion was not Legislature's intent for the plain meaning of s. 775.082(1), Fla. Stat.

On the other hand, Florida Statutes s. 775.082(2) is a remedial statute. It exists to assure that a life sentence will be imposed on individuals previously sentenced to death if capital punishment as a penalty is declared unconstitutional. As the Supreme Court recently explained in Hurst v. State, 202 So. 3d 40, 65 (Fla. 2016).

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[2] See, e.g., Stoletz v. State, 875 So. 2d 572, 576 (Fla. 2004) (acknowledging that the phrase "for not less than 5 years" in s. 322.28(2)(a)(2), Fla. Stat. (1999), established a mandatory minimum period of license revocation).

> "The State contends that s. 775.082(2) exists only to assure that a life sentence will be imposed on individuals previously sentenced to death if capital punishment as a penalty is declared unconstitutional generally or for any given capital offense. See, e.g. Atkins v. Virginia, 536 U.S. 304 (2002) (holding capital punishment for intellectually disabled persons unconstitutional); Coker v. Georgia, 433 U.S. 584 (1977) (holding capital punishment as a penalty for raping an adult woman violates the Eighth Amendment). We agree with the State." (e.s.) Hurst, 202 So. 3d at 65.

Thus, when the court in Buford declared the penalty of death for the crime of capital sexual battery unconstitutional, it was s. 775.082(2) that required the court to mandate the penalty of life imprisonment in s. 775.082(1) an "automatic sentence" for the defendant in Buford.

In conclusion, it is the Florida Legislature that has distinguished the opinion in Buford from controlling in the Appellant's case.

First, the Appellant could not have been sentenced to death; and therefore, the "automatic sentence" in s. 775.082(1) could not have been applied to him. Second, the phrase "and shall be required to serve no less than 25 years" was omitted from s. 775.082(1) by the legislature in Ch. 95-294, § 4, at 2718, Laws of Fla. The Appellant's crime occurred in 1997. Third, "[w]hen the legislature amends a statute by omitting words, [courts] presume it intends the statute to have a different meaning than that accorded it before the amendment." Capella v. Gainesville, 377 So. 2d 658, 660 (Fla. 1979). With respect to the statutory phrase "shall be punished by imprisonment," the Florida Supreme Court defines its

meaning as discretionary sentencing language. McKendry, 641 So. 2d at 47. Finally, the opinion in Scates v. State, 603 So. 2d 504 (Fla. 1992), is the controlling authority in the Appellant's case.

Rehearing Point Two: The Appellant believes that a written opinion by this panel would provide (1) a legitimate basis for Supreme Court review, and (2) an explanation for an apparent deviation from prior precedent. See, Florida Rule of Appellate Procedure, Rule 9.330(2)(D).

As previously noted, the case of Buford v. State, 403 So. 2d 943 (Fla. 1981), is cited for the conclusion that the penalty of imprisonment prescribed in § 775.082(1), Fla. Stat. (1997), for the offense of capital sexual battery was an automatic sentence upon conviction, leaving the court with no discretion to hear and determine the question of the probation of a defendant and reduce the sentence under the provisions of § 948.01(1), Fla. Stat. (1997).

In contrast, the Appellant, on rehearing in the trial court, on appeal before this panel, and now on rehearing before this panel, has tirelessly demonstrated that the only way the opinion in Buford can be construed to have any precedents in this case is by (1) disregarding the legislature's removal of the mandatory sentence language in s. 775.082(1), or (2) the misapprehension of the Buford court's use (albeit sub silencio) of s. 775.082(2), which required the court to automatically

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sentence the defendant in Buford to imprisonment, or (3) permitting the holding in Buford to supersede, and directly conflict with, the holding in Scates v. State, 603 So. 2d 504 (Fla. 1992), which controls the outcome of the Appellant's case.

Thus, the scope of the holding in Buford is the deciding factor in this case. For this reason, the Appellant believes that a written opinion by this panel on the lawfulness of the applicability of Buford to the facts of his case would provide either a legitimate basis for Supreme Court review or an explanation for the apparent deviation from long-standing precedent that prohibits courts, under fundamental principles of separation of powers, from invoking limitations or judicially altering the wording of statutes where the legislature clearly has not done so. See, Commercial Coating Corp. v. Dept. of Envtl. Regulation, 548 So. 2d 677, 679 (Fla. 3rd DCA 1989) ("In construing statutes [,] courts may not invoke a limitation or add words to the statute not placed there by the legislature.")

Rehearing Point Three: I express a belief, based on a reasoned and studied professional judgment (although pro se), that this appeal requires immediate resolution by the Supreme Court and (a) is of great public importance, or (b) will have a great effect on the administration of justice throughout the state. See, Florida Rule of Appellate Procedure, Rule 9.125(e)(3).

In 1995, the Florida Legislature eliminated the mandatory sentencing language from s. 775.082(1) for the offense of capital sexual battery. Although the

amended statute does provide for a penalty of life imprisonment upon conviction, it does not contain any language to the effect of restricting trial judges from the mandate to hear and determine the question of the probation of the Appellant or from exercising their discretion to reduce the sentence under § 948.01(1), Fla. Stat. (1997), for an offense not punishable by death.

For this reason, the judicial act of summarily imposing sentence without ordering a presentence investigation report prior to sentencing and without conducting an individualized sentencing hearing prior to imposing sentence prejudicially undermined the correctness of the sentence imposed on the Appellant and unlawfully deprived him of the due process liberty interests in sentencing that the Due Process Clause and the opinion in Hicks v. Oklahoma, 447 U.S. 343 (1980), entitles him.

In light of the foregoing, this court should certify the following question to the Florida Supreme Court for immediate resolution:

> "Do the provisions of section 948.01, Florida Statutes (1997), authorize the imposition of a sentence other than as provided in section 775.082(1), Florida Statutes (1997)?"

WHEREFORE, based on the foregoing facts, arguments, and authorities, Appellant prays this court to set aside its prior disposition and to enter an Order granting Appellant the relief to which the law entitles him.

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Respectfully submitted,

Roger G. Babcock
Roger G. Babcock #165844

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this document in the hands of prison officials for mailing to: **Clerk of the Court**, P.O. Box 327, Lakeland, Florida 33802-0327; **Office of the Attorney General**, Criminal Appeals Division, 3507 E. Frontage Rd., Ste. 200, Tampa, Florida 33607-7013, on this 3d day of March 2021.

/s/ Roger G. Babcock
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ROBERT LEWIS BUFORD, Appellant, v. STATE OF FLORIDA, Appellee
Supreme Court of Florida
403 So. 2d 943; 1981 Fla. LEXIS 2764
No. 54010
July 23, 1981

Editorial Information: Subsequent History

Rehearing Denied October 14, 1981.

Editorial Information: Prior History

An Appeal from the Circuit Court in and for Polk County, William A. Norris, Jr., Judge - Case No. CF77-2715.

Counsel Jack O. Johnson, Public Defender, and James R. Wulchak and Douglas A. Lockwood, Asst. Public Defenders, Bartow, for appellant.

Jim Smith, Atty. Gen., and Charles Corces, Jr. and Richard G. Pippinger, Asst. Attys. Gen., Tampa, for appellee.

Judges: Before ADKINS, J. SUNDBERG, C.J., BOYD, OVERTON and ALDERMAN, JJ., Concur ENGLAND, J., Concurs as to the conviction and dissents as to the sentence.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment of the Circuit Court, Polk County (Florida), convicting him of murder in the first degree, sexual battery upon a child under eleven years of age, and burglary with intent to commit a sexual battery and sentencing him to death.Murder conviction and death sentence were proper because ample evidence supported the jury determination of premeditation, and the trial judge was not required to request a presentence investigation before sentencing defendant.

OVERVIEW: Defendant was convicted of murder, sexual battery upon a child under eleven years of age, and burglary with intent to commit a sexual battery, and defendant was sentenced to death. Defendant appealed. The court ruled that there was ample evidence from which the jury could have found premeditation to commit murder. Further, the court held that if the evidence showed that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it was deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. Also, the court found that where a person struck another with a deadly weapon and inflicted a mortal wound, the very act of striking such person with such weapon in such manner was sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. The court affirmed the judgment convicting and sentencing defendant, concluding that the trial judge was not required to request a presentence investigation before sentencing defendant.

OUTCOME: The judgment convicting and sentencing defendant to death for murder was affirmed, and the death sentence imposed for the sexual assault conviction was vacated, where murder in the first degree through premeditation required proof of premeditated design to kill, there was ample evidence that defendant acted with premeditation, and the court had no discretion in sentencing defendant for the sexual

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assault conviction.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview

If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > General Overview

Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed.

Criminal Law & Procedure > Accusatory Instruments > Multiplicity
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Penalties
Criminal Law & Procedure > Sentencing > Consecutive Sentences

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of the facts which the other does not.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy
Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > General Overview
Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments

The double jeopardy clause protects against multiple punishments for the same offense.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Capital Murder > Penalties
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Adults > General Overview
Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Under Fla. Stat. Ann. § 794.011 (2), whoever being eighteen years or older commits a sexual battery upon a person eleven years of age or younger, is guilty of a capital felony.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder >

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Penalties
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Under Fla. Stat. Ann. § 782.04, murder in the first degree is defined as the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any sexual battery.

Criminal Law & Procedure > Sentencing > Imposition > Factors

In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Criminal Law & Procedure > Sentencing > Appeals > General Overview
Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials
Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

In reviewing the propriety of a death sentence, the court must weigh heavily the advisory opinion of life imprisonment by the sentencing jury. The facts justifying the death sentence must be clear and convincing in order to overrule the jury's recommendation.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Postconviction Proceedings > Parole

Fla. Stat. Ann. § 775.082(1) mandates a punishment of life imprisonment with a requirement that defendant serve no less than 25 years before becoming eligible for parole. This is an automatic sentence, and a trial court has no discretion.

Opinion

Opinion by: ADKINS

Opinion

{403 So. 2d 944} ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and guilty of sexual battery upon a child under eleven years of age, and imposing two sentences of death. Defendant was also adjudged guilty of burglary with intent to commit a sexual battery and sentenced to a term of years.

In the early morning hours of Sunday, November 6, 1977, Lewis Wright, father of the victim, fell asleep on the living room sofa while he and his children were watching television. His children were on a pallet on the living room floor. Wright awakened about 2:30 or 3:00 o'clock a. m., turned off the television, and went to his bedroom. He did not notice if all of his children were still sleeping on the pallet. On his way to the bedroom he observed that the back door of the house was open, but assumed that the children's grandmother had visited the house while he was sleeping and had exited through the back door.

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{403 So. 2d 945} Lewis Wright awoke again about 7:00 o'clock a. m. and noticed that the victim, his seven-year-old daughter, Toni, was missing. Wright notified police; shortly thereafter the victim's body was discovered next to a nearby church. She was lying on her back in a flower bed, with her dress pulled up around her chest and her underpants a short distance away. There were injuries to her head and dried blood on her head and face. Pieces of a shattered and blood-stained concrete block were found nearby.

At approximately 3:00 o'clock a. m. on Sunday, November 6, 1977, the defendant returned to his father's home where he was greeted by his sister, Annette Buford. She observed him breathing hard, as if he had just been running and saw him carrying his t-shirt and tennis shoes. He had white oxydized paint on his bare back and appeared to be drunk. Defendant told his sister if anyone came looking for him to say that he had been at home since 11:00 o'clock p. m. In a few moments defendant broke down and stated that he might have killed a lady with a brick. He started to implicate a person known as "Fat Boy", but immediately stopped, saying he was not going to involve anyone else.

While at his father's home later in the day, the defendant talked both of leaving home and of turning himself over to police. On Monday night defendant went to the police station, after his sister had talked with police about his role in the crime. He was arrested for murder, sexual battery, and burglary with intent to commit sexual battery. After being advised of his legal rights, defendant signed a written waiver of these rights and blurted out, "I did it." He was again advised of his rights in the interrogation room, and he again waived these rights. In his statement defendant said he broke into Wright's house through a back window. Upon entering, he saw the girl lying there, picked her up, and carried her out the back door. He took her to the church area, had her lie down and remove her clothes. He removed his clothing and then inserted his finger into her vagina. He did not move his finger; he just put it in and later took it out. He admitted penetration with his penis. When the victim started screaming, the defendant picked up a concrete block and dropped it twice on the victim's head. The defendant said he was not trying to kill her but to stop her from screaming. The victim had recognized the defendant.

After the statement was concluded, the defendant signed a consent form to search his room at his father's house for the jeans he had been wearing on the night of the incident. These jeans were recovered. A lab analysis of a blood spot on the jeans indicated that it was of the same type as the victim's blood.

With defendant's consent, the officers secured blood and hair samples from him. While the doctor was examining defendant and taking samples, the doctor pointed out various cuts and scratches on defendant's body. When the doctor was noting a set of scratches, the defendant said, "Those were not made by the little one."

A pubic hair that was discovered in the victim's vagina was consistent in characteristics with the sample taken from the defendant. Both the pubic hair found on the decedent and the sample taken from the defendant contained an unusual "starchy" substance. The child was too young to have pubic hair of her own; she was only seven years old.

At trial, the defendant testified that although he had participated in the sexual battery, a man known as "Fat Boy" had raped and killed Toni. Defendant said he refused to climb inside the Wright home because he was known by them. His testimony was that Fat Boy climbed through the window while defendant stood outside. When Fat Boy did not return for a while, defendant left. A few minutes later defendant met Fat Boy again. This time Fat Boy was carrying Toni Wright. Upon questioning her, Toni said that she knew defendant but did not know Fat Boy. Fat Boy carried Toni to the church area and commanded her to lie down. Defendant admitted having sexual intercourse with Toni while Fat Boy

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watched. Toni did not **{403 So. 2d 946}** scream while defendant was on top of her. Defendant got dressed and was planning to leave when Fat Boy commenced sexual intercourse with Toni. Toni started screaming. Defendant turned around to face them and saw Fat Boy drop a concrete block on the girl's head. Fat Boy picked up the brick to drop it again and defendant charged at him to prevent it. Fat Boy threw defendant against the wall and dropped the brick again. Fat Boy left when defendant refused to allow him to go home with him.

The police officers learned about Fat Boy and his alleged involvement in the incident from the defendant's sister before the trial took place. After an investigation, Fat Boy was eliminated as a suspect by virtue of an alibi. Defendant was charged by indictment with the offenses of first-degree murder, capital sexual battery, and burglary with intent to commit a sexual battery. The jury found defendant guilty on all three counts. The case then proceeded into the penalty phase of the bifurcated trials. The jury recommended to the court that it impose a life sentence on both the murder and sexual battery convictions. The trial court then made the following findings of fact:

> In making the following findings of fact and conclusions of law the Court has taken into consideration only the testimony produced at trial and no other factors.
>
> As to Count One of the Indictment wherein defendant was convicted of First Degree Murder the Court makes the following findings of fact:
>
> 1. As an aggravating circumstance, the capital felony, that is, the murder of Toni Annette Wright, a black female, age seven (7) years, was committed while the defendant, Robert Lewis Buford, was engaged in the commission of the crime of sexual battery. F.A. 921.141(5)(d). The evidence is conclusive that the crime of sexual battery was complete and that sufficient penetration occurred. The defendant's free and voluntary statement to law enforcement officers supports this finding together with his testimony in his own behalf during the trial. The defendant attempted to repudiate his previous confession to create an accomplice by the name of "Fat Boy", however, the Court specifically rejects this testimony as being an untrue and a total fabrication.
>
> 2. As a further aggravating circumstance the Court finds that the capital felony was especially heinous, atrocious and cruel. F.A. 921.141(5)(h). The testimony amply supports a finding that this seven (7) year old child was abducted from her home, while asleep by a nineteen (19) year old adult male, that she was taken to a secluded spot where the defendant brutally sexually assaulted her. After he had fulfilled his lustful desires and ascertained that the victim would be in a position to identify him, the defendant snuffed out the life of this child by crushing her head with a concrete block dropped at heights from at least waist high. The testimony of the pathologist, Dr. Robert Smith, reveals at least three (3) separate crushing wounds and the defendant "admits" to dropping the thirty-two (32) pound concrete block on the victim's head twice. The Court specifically rejects as untrue and as a fabrication, the defendant's testimony that the victim was killed by this so called accomplice "Fat Boy". Dr. Robert Simth viewed the victim's body at the scene and testified that the child was covered with sand and that there was evidence of an extensive struggle. The Court finds that the struggle was between the defendant and the seven (7) year old child and that no other person was involved. The pathologist testified that he found numerous abrasions over the entire body of this child, with extensive amounts of blood coming from the nose and mouth areas. Three (3) severe wounds were found in the head area, two (2) on the right side and one (1) almost in the midline in the back of the head, indicating at least three (3) separate blows. The skull was extensively fractured resulting in numerous fragments of the skull becoming depressed directly into the brain. Multiple recent abrasions were found on the child's right arm and on her right chest area.

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{403 So. 2d 947} The pathologist was of the opinion that any of the three (3) separate blows would have been sufficient to cause death and that the child may have lived for at least an hour after the first blow but that she would have lost consciousness fairly rapidly.

The pathologist also testified that he visually observed extensive trauma to the genital area and that his autopsy revealed acute perforation of the hymen resulting in acute hemorrhaging from the hymenal area. The autopsy revealed numerous bleeding points in the lining of the vagina itself and the presence of five (5) cc's of seminal fluid within the vagina.

Although the defendant in his statement and in his testimony denied that the victim made any outcry while she was being sexually abused the Court rejects this testimony as being unbelievable and patently untrue and finds as a matter of common understanding and knowledge that a seven (7) year old virginal child would suffer excruciating pain as her vagina was being penetrated first by the defendant's finger and then by his adult penis.

The standard jury instructions define heinous as meaning extremely wicked or shockingly evil. Atrocious is defined as outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless. In the Court's experience of seven (7) years as an Assistant Prosecuting Attorney and six (6) months on the bench, I am not aware of a case where a defendant's conduct more clearly falls within the definition of heinous, atrocious, and cruel.

3. The other aggravating circumstances: F.S. 921.141(5)(a); 921.141(5)(b); 921.141(5)(c); 921.141(5)(e); 921.141(5)(f); 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving both the charge of first degree murder and the charge of sexual battery, the Court makes the following findings:

1. The defendant has no significant history of prior criminal activity. F.S. 921.141(6)(a), and this a mitigating factor.

2. As to F.S. 921.141(6)(b), there is no evidence that the capital crimes were committed while the defendant was under the influence of extreme mental or emotional disturbance. The defendant's mother testified that for several weeks prior to the crime the defendant had been using alcohol and marijuana extensively but the Court finds that this alcohol and marijuana usage do (sic) not result in extreme mental or emotional disturbance.

3. As to F.S. 921.141(6)(c), there is absolutely no evidence that the victim was a participant in the defendant's conduct or that she consented to the act.

4. As to F.S. 921.141(6)(d), the defendant attempted to establish by his testimony that he was merely an accomplice to these offenses and that his participation was relatively minor, however, he did "admit" to having sexual intercourse with this seven (7) year old child, and as the Court has stated above, his testimony that this so called "Fat Boy" was an accomplice is rejected as being untrue.

5. As to F.S. 921.141(6)(e), there is no evidence that the defendant was under extreme duress or under the substantial domination of any person.

6. As to F.S. 921.141(6)(f), there is no believable evidence that the defendant lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of law was substantially impaired. On the contrary, the fact that the defendant sought to eliminate Toni Annette Wright because she would be in a position to identify him supports a finding that the defendant appreciated the criminality of his conduct.

7. As to F.S. 921.141(6)(g), the defendant was nineteen (19) years at the time of these offenses and his age is therefore, a mitigating circumstance. The Court notes, in passing, that as to sexual battery the legislature found that the age of the defendant was a factor to be taken into account in determining whether the sexual battery is a capital crime.

{403 So. 2d 948} As to Count Two of the indictment wherein the defendant was convicted of sexual battery wherein the victim was eleven (11) years of age or younger and the defendant was over eighteen (18) years of age, the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony was especially heinous, atrocious and cruel. F.A. 921.141(5)(h). In support of this finding the Court readopts the findings contained in paragraph 2 above.

2. The other aggravating circumstances to-wit: F.S. 921.141(5)(a)(b)(c)(d)(e) (f)(g), are inapplicable to this charge.

The trial jury has rendered its advisory sentence to the Court recommending that a sentence of life imprisonment be imposed on the defendant as to each of these capital crimes. Our Florida Supreme Court has stated that the recommendation of the trial jury is to be accorded great weight by the trial judge but I perceive the law still to be that the recommendation of the trial jury is not binding on the trial judge and that I still have the awesome responsibility of making the ultimate determination of whether the aggravating circumstances do in fact outweigh any mitigating circumstances and accordingly whether the death penalty should be imposed. In the following cases the trial judge declined to follow the recommendation of the trial jury and the imposition of the death penalty was subsequently affirmed by the Florida Supreme Court: *Hoy vs. State*, 353 So.2d 826 (1977); *Barclay vs. State*, 343 So.2d 1266 (1977); *Dobbert vs. State*, 328 So.2d 433 (1976); *Douglas vs. State*, 328 So.2d 18 (1976); a case originating from this Circuit; *Gardner vs. State*, 313 So.2d 675 (1975); and, *Sawyer vs. State*, 313 So.2d 680 (1975). A review of the factual statements in these cases leads the Court to the conclusion that this defendant's conduct was at least equal to the conduct of the defendants in each of those capital cases.

It is the ultimate finding and determination of the Court that as to the charge of first degree murder, the aggravating circumstances substantially outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to the contrary notwithstanding.

As to the charge of sexual battery, the aggravating circumstances outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to the contrary notwithstanding.

Upon appeal the defendant says that he could not be convicted and sentenced for both the first-degree felony murder and the underlying felonies, sexual battery and burglary, relying upon the principles enunciated in *Pinder v. State*, 375 So.2d 836 (Fla. 1979). *Pinder* was a prosecution for first-degree murder, sexual battery and burglary. The Court commented that the jury could have found defendant guilty of first-degree murder only on the basis of evidence that the defendant killed the victim during the perpetration of the burglary or sexual battery, as there was no evidence of premeditation. Therefore, the Court held, defendant could not be convicted of felony murder and the underlying felony upon which the murder conviction was based. If, in addition to the killing, the defendant commits more than one felony, only one of the felonies need be considered the underlying felony and the defendant may be convicted and sentenced for the other felonies. The Court relied upon *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), and *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

In the case *sub judice* there was ample evidence from which the jury could have found premeditation. Although the defendant, at one point, declared that he did not intend to kill the victim; nevertheless, he also said that he dropped the concrete block on the victim "because she knowed me." He also stated that after the sexual **{403 So. 2d 949}** battery he took a cement block, held it "a little higher than the waist right here" and dropped it on the child. He did it again. This time he lifted it higher. He bent down to see if she was still alive and she was not.

If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. *Green v. State*, 93 Fla. 1076, 113 So. 121, 122 (1927). Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. *See Rhodes v. State*, 104 Fla. 520, 140 So. 309, 310 (1932).

There being adequate proof of premeditation, the principles announced in *Pinder* are not applicable to this case.

Defendant also said that the offenses are not sufficiently distinguishable to permit the imposition of cumulative punishment. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of the facts which the other does not. *Brown v. Ohio.* Murder in the first degree through premeditation requires proof of a fact not required in sexual battery: premeditated design to kill.

It is true, as asserted by defendant, that the double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). In the absence of proof of premeditated design, this principle would be applicable to the case *sub judice*. The two offenses are sufficiently distinguishable so as to permit two convictions and two punishments.

Defendant also complained that the court improperly limited cross-examination of two state witnesses regarding their knowledge of defendant's non-violent nature. Witnesses Barnes and Hayes were friends of the defendant. Barnes testified as to activities of the defendant until 11:00 o'clock p. m. the night of the homicide. Hayes testified as to his activities until 2:00 o'clock a. m. the same night. On cross-examination the attorney for defendant asked Barnes if he found defendant "to be a quiet, non-violent person." On cross-examination counsel for defendant asked Hayes if he had known defendant "to get violent or anything like that." There were no facts elicited by the state upon direct examination relative to defendant's propensity for violence. It is true that cross-examination extends to the entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. *Coxwell v. State*, 361 So.2d 148 (1978). However, the attempted cross-examination in the case *sub judice* was in no way relative to the direct examination of the witnesses. It was improper cross-examination.

In addition the question itself was improper. Defendant had a right to produce evidence of his non-violent character, but this is done through his own witnesses. In any event, he could only have elicited evidence of his general reputation in the community, not specific instances of non-violence. *Prevatt v. State*, 82 Fla. 284, 89 So. 807 (1921); *Reddick v. State*, 25 Fla. 112, 5 So. 704 (1889).

Defendant next contends that section 921.141, Florida Statutes (1977), is unconstitutional because it restricts the mitigating circumstances to be considered to those enumerated in the statute. He says this violates the Eighth and Fourteenth Amendments to the United States Constitution. This question

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was raised when defendant moved to dismiss or quash the indictment. Also he requested a jury instruction stating that mitigating circumstances which the jury could consider were not limited to those listed in the statute. The trial court denied the motion to dismiss or quash and also denied the requested instruction. The **{403 So. 2d 950}** record does not show that the trial judge precluded defendant from offering any evidence of mitigation. The trial judge correctly ruled that the standard jury instructions adequately covered the instructions on mitigating circumstances.

Defendant argues that the death penalty statute is unconstitutional in light of *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), where the Supreme Court held that the limited range of mitigating circumstances which could be considered by the sentencer under the Ohio statute was incompatible with the Eighth and Fourteenth Amendments. The identical attack was made upon the Florida statute in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S. Ct. 1548, 59 L. Ed. 2d 796 (1979). There the Fifth Circuit held that the Florida statute as applied and construed by the Supreme Court of Florida conforms to the decision rendered in *Lockett v. Ohio*. In several cases this Court has recognized the relevance of non-enumerated mitigating circumstances and utilized them in determining the propriety of the sentence. *See Buckrem v. State*, 355 So.2d 111 (Fla. 1978); *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977); *Messer v. State*, 330 So.2d 137 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla. 1976); *Jones v. State*, 332 So.2d 615 (Fla. 1976); *Chambers v. State*, 339 So.2d 204 (Fla. 1976); *Halliwell v. State*, 323 So.2d 557 (Fla. 1975). It is clearly established that all relevant evidence pertaining to the character of the defendant and circumstances of the crime may be considered by the sentencer in Florida. *Lockett* does not invalidate our statute.

Defendant says the imposition of the death sentence upon him for the murder conviction, where he did not possess a purpose to cause the death of the victim, is unconstitutional. This assertion is without foundation in the record. There was sufficient proof of premeditation.

Section 794.011(2), Florida Statutes (1977), provides that whoever being eighteen years or older commits a sexual battery upon a person eleven years of age or younger, is guilty of a capital felony. The defendant was nineteen years of age at the time of the offense and his victim was seven years of age. In his motion to dismiss, defendant challenged the constitutionality of this statute, contending that punishment by death for the crime of sexual battery constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. By denying the motion to dismiss and imposing the death penalty, the trial court held that the statute was constitutional. This question has not been decided under present Florida law. We have recently considered sexual battery cases in which the penalty had been imposed, but we reduced the sentence to life imprisonment in both cases because of the particular circumstances. *Purdy v. State*, 343 So.2d 4 (Fla.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 153, 54 L. Ed. 2d 114 (1977); *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 920, 98 S. Ct. 393, 54 L. Ed. 2d 276 (1977).

Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), involved the sentencing of a man convicted of rape upon the verdict of a Georgia jury. The Georgia jury recommended the death penalty and the trial court imposed a death sentence. The Georgia Supreme Court affirmed. The Supreme Court of the United States held that the punishment of death for the rape of an adult woman violates the cruel and unusual punishment clause of the Eighth Amendment because it is grossly disproportionate and excessive in relation to the crime committed. The Court has yet to decide whether the same holds true for the rape of a child under eleven years of age. In its plurality opinion (Justices White, Stewart, Blackmun, and Stevens) the Court noted that Georgia was the only state which authorized a sentence of death when the rape victim was an adult woman. Only two other jurisdictions (Florida and Mississippi) provided capital punishment when the victim was a child. It was then said in the opinion:

{403 So. 2d 951} Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. [153] at 187, 96 S. Ct. 2909, [at 2931,] 49 L. Ed. 2d 859, is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Ga.Ann.Code § 26-3102 (1976 Supp.); *Gregg v. Georgia*, *supra*, at 165-166, 96 S. Ct. 2909 [at 2921-2922], 49 L. Ed. 2d 859. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. Here, the first two of these aggravating circumstances were alleged and found by the jury.Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies--rape, murder, and kidnaping--but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.433 U.S. at 598-599, 97 S. Ct. at 2869 (footnotes omitted).

Justices Brennan and Marshall concurred in the judgment as each believed that the death penalty in all circumstances is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Justice Powell concurred in the judgment, but would not prejudge the issue of capital punishment in the case of an outrageous rape resulting in serious, lasting harm to the victim. Justice Burger and Rehnquist dissented. The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.

We point out that section 782.04, Florida Statutes (1977), defines murder in the first degree as the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any sexual battery. Since the death sentence *sub judice* is sustained under the conviction of premeditated murder, the constitutionality of the statute imposing the death penalty for sexual battery becomes academic. Capital punishment can be inflicted only once.

The defendant says that the death sentence should be vacated in the murder conviction because there was no evidence to support the finding of the trial judge that the crime was heinous, atrocious, and cruel. Defendant refers us to *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), where we held that atrocious means outrageously wicked and vile and that cruel means designed to inflict a high degree of **{403 So. 2d 952}** pain with utter indifference to, or even enjoyment of, the suffering of others. Defendant insists that when the facts of this case are compared with previous decisions of this Court the findings of the trial judge

cannot be upheld. He cites *Halliwell v. State*, 323 So.2d 557 (Fla. 1975). In *Halliwell* the killing arose from a love triangle in which defendant flew into a violent rage after the husband of the woman he loved had beaten her. It was an emotional type of homicide. However, hours later the defendant dismembered the body. We held that the dismemberment of the body after death was not relevant in fixing the death penalty. Since the dismemberment was not relevant, a killing committed in an emotional rage was not heinous, atrocious, or cruel. In the case *sub judice* there was no emotional rage. The defendant kidnapped a seven-year-old child for the purpose of sexually abusing her and when he felt she could identify him, defendant proceeded to kill her with a cement block.

In *Burch v. State*, 343 So.2d 831 (Fla. 1977), cited by defendant, there was evidence that the defendant was mentally disturbed at the time of the offense. We held this to be a mitigating factor and that this factor was obviously considered by the jury in recommending life and improperly rejected by the trial judge. When this mitigating circumstance was weighed against the aggravating circumstances, the judge's rejection of the jury's recommendation was overturned by this Court. In *Burch* we did not say that the act was not especially heinous, atrocious, or cruel.

In *Chambers v. State*, 339 So.2d 204 (Fla. 1976), the defendant and the victim shared a long-standing relationship which included severe and disabling beatings. Also, the victim had consented to the beatings which caused death. We held that the totality of circumstances and the weighing of mitigating and aggravating circumstances did not warrant the imposition of the death penalty on the defendant.

Jones v. State, 332 So.2d 615 (Fla. 1976), cited by defendant, resulted in the approval of the jury's recommendation of a life sentence because the defendant's mental illness was considered as a factor to be weighed.

The imposition of the death penalty was held to be proper in *Washington v. State*, 362 So.2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937, 99 S. Ct. 2063, 60 L. Ed. 2d 666 (1979), where the victim was kidnapped and held captive for twenty-four hours before being stabbed to death while tied, spread-eagled and helpless, on a bed, crying out and moaning as the stabbing continued.

Alford v. State, 307 So.2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976), involved a defendant twenty-seven years of age who was convicted of the murder of a thirteen-year-old female. The victim's body was discovered lying atop a trash pile. She had been raped and shot to death, execution style. Her nude body was found blindfolded, with bullet wounds in her head, chest, back and arm. We upheld the death sentence and described the act as being especially heinous, atrocious, and cruel.

The homicides in *Proffitt v. State*, 315 So.2d 461 (Fla. 1975), *aff'd*, *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) (stabbing a man asleep in his bed), and *Spinkellink v. State*, 313 So.2d 666, (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976) (shooting a sleeping companion), were heinous, atrocious, and cruel. So the instant case certainly qualified as one which is heinous, atrocious and cruel. The mental anguish suffered by the victim preceding the killing is a factor that may be considered in determining whether the act was especially heinous, atrocious, or cruel. *Knight v. State*, 338 So.2d 201 (Fla. 1976).

Defendant also cites, in support of his position, the case of *Purdy v. State*, 343 So.2d 4 (Fla.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 153, 54 L. Ed. 2d 114 (1977). Purdy involved a sexual battery on a child and the imposition of the death sentence was based primarily on the aggravating circumstance of heinous, atrocious, and cruel. We held that the evidence failed to show that the sexual battery of this child was especially aggravated under the terms of the death **{403 So. 2d 953}** sentence law. We pointed out there was no evidence of physical abuse other than the sexual assault and the victim was not physically harmed. The case *sub judice* was more than a sexual assault. There was a kidnapping

and physical harm which resulted in death. In *Washington v. State* we observed that the mental anguish experienced by a kidnapped victim awaiting eventual death bears upon the atrocity of the crime. This contention is without merit.

Defendant then contends that the trial court erred in not finding the additional mitigating factors which were present in the evidence. He complains that the trial court rejected the mitigating circumstances of extreme mental or emotional disturbance or impaired mental capacity, discounting the effects of defendant's consumption of alcohol, drugs, and marijuana. Obviously the ability of the defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished or impaired mental capacity because of excessive consumption of alcohol, drugs, and marijuana. In view of the testimony presented, the trial judge correctly rejected defendant's "drinking" and "drug use" as a mitigating factor. *Jones v. State*, 332 So.2d 615 (Fla. 1976), does not avail defendant because in Jones there was extensive psychiatric evidence to the effect that the defendant did not know the difference between right and wrong.

Defendant raises the possibility that he was a mere accomplice and that this theory was not considered by the trial judge. During the course of the investigation and during the trial, the defendant did attempt to implicate Fat Boy. This theory was rejected by the trial judge in weighing the evidence produced at the trial.

Defendant contends that the trial court committed error in rejecting the jury's recommendations of life imprisonment, relying upon *Tedder v. State*, 322 So.2d 908 (Fla. 1975). In *Tedder* we pointed out that the recommendation of the jury should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

In *Malloy v. State*, 382 So.2d 1190 (Fla. 1979), the Court said:

> We have repeatedly stated that in reviewing the propriety of a death sentence, this Court must weigh heavily the advisory opinion of life imprisonment by the sentencing jury. The facts justifying the death sentence must be clear and convincing in order to overrule the jury's recommendation. Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, in doing so, we must determine if there was a reasonable basis for the jury's recommendation.*Id.* at 1193. (Citations omitted.)

If defendant's testimony were accepted as creating a reasonable doubt, he should not be found guilty of murder in the first degree for his participation in the murder would not be proved. Defendant said he was leaving the scene, turned around when the victim screamed, and saw Fat Boy drop a concrete block on her head.

A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

This case is unlike *Neary v. State*, 384 So.2d 881 (Fla. 1980), where an accomplice receiving lesser punishment played a significant role in the perpetration of the criminal act. Here the defendant committed the murder or Fat Boy did it. This question was settled by the verdict of guilty.

The trial court reviewed other cases where this Court has affirmed the death penalty after a recommendation by the jury of life imprisonment. The trial judge made a specific finding that defendant's actions in the case *sub judice* at least equaled the conduct in those cases. This finding is supported by the evidence. Consequently, it comes to this Court with the presumption of correctness.

{403 So. 2d 954} In *Hoy v. State*, 353 So.2d 826 (Fla. 1977), *cert. denied* 439 U.S. 920, 99 S. Ct.

293, 58 L. Ed. 2d 265 (1978); *Barclay v. State*, 343 So.2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892, 99 S. Ct. 249, 58 L. Ed. 2d 237 (1978); *Dobbert v. State*, 328 So.2d 433 (Fla. 1976), *aff'd*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); *Douglas v. State*, 328 So.2d 18 (Fla.), *cert. denied*, 429 U.S. 871, 97 S. Ct. 185, 50 L. Ed. 2d 151 (1976); and *Sawyer v. State*, 313 So.2d 680 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S. Ct. 3226, 49 L. Ed. 2d 1220 (1976), this Court found compelling reasons to reject the jury's recommendations.

Unquestionably the Court in each of these cases was swayed by the extreme heinousness and atrociousness of the crimes. So was the trial court in the instant case. In all of the above cases, with the exception of Dobbert, the victim was an adult. Here it was a seven-year-old child. She had been kidnapped, subjected not only to sexual abuse, but to the anguish of perceiving that she was about to have her head crushed, and this mental anguish bears on the atrocity of the crime. *Washington v. State*. The trial judge exercised a reasoned judgment, and the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ.

The trial judge was not required to request a presentence investigation before sentencing the defendant. *Hargrave v. State*, 366 So.2d 1 (Fla.), *cert. denied*, 444 U.S. 919, 100 S. Ct. 239, 62 L. Ed. 2d 176 (1979); *Thompson v. State*, 328 So.2d 1 (Fla. 1976).

The sentence of death imposed for conviction of sexual assault is vacated. Section 775.082(1), Florida Statutes, mandates a punishment of life imprisonment with a requirement that defendant serve no less than twenty-five years before becoming eligible for parole. This is an automatic sentence, and the Court has no discretion. Sufficient factors are present in this case to create an exception to Florida Rule of Criminal Procedure 3.180 requiring the presence of defendant at sentencing. *See Anderson v. State*, 267 So.2d 8 (Fla. 1972). The defendant, for the crime of sexual battery upon a child under eleven years of age, shall be imprisoned for life, with no eligibility for parole during the first twenty-five years.

We have carefully reviewed the evidence in this case and find that the judgments of guilt and the sentence of death for murder, as well as the sentence to a term of years, were appropriate. These judgments and sentences of the trial judge are therefore affirmed.

SUNDBERG, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

ENGLAND, J., concurs as to the conviction and dissents as to the sentence.