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CLERK, SUPREME COURT.
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IN THE SUPREME COURT OF FLORIDA

RICHARD MURL BOOMER, JR.,

Petitioner,

vs.

Case No. 79,638

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MO
~~PUBLIC DEFENDER~~ GORMAN
TENTH JUDICIAL
TENTH JUDICIAL CIRCUIT
MEGAN OLSON
ASSISTANT PUBLIC
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FLORIDA BAR NUMBER 656150

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by two informations filed by the State with several felonies (R1-5). He was convicted of sexual battery on a child under twelve, a capital felony, attempted sexual battery on a child under twelve and unnatural and lascivious and lewd assault act on a child under twelve (R6, 12).

He was sentenced to **life** imprisonment for the capital felony and consecutive thirty and fifteen year prison terms on the remaining felonies (R8-14).

The sentences imposed on the non-capital felonies, constituted upward departure from the recommended guideline range of seven to nine years incarceration and were reversed on appeal by the Second District Court of Appeal and resentencing within the guidelines was ordered (R16-22).

On remand the trial judge sentenced the Petitioner to two nine year prison terms which were run concurrent with one another but consecutively to the previously imposed life sentence on the capital felony (R31-33, 35-38).

On Appeal, the only issue of merit raised was the validity of the sentence imposed by the trial court on remand. Petitioner argued that the consecutive sentences constituted a guidelines departure. The Second District Court of Appeal acknowledging a contrary decision by the Fifth District Court of appeal in Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1982), held that imposing a guidelines sentence consecutively to a non-

guidelines sentence was not a guidelines departure. Boomer v.
State, 17 F.L.W. D774 (Fla. 2d DCA March 20, 1991 [sic] 1992).

SUMMARY OF THE ARGUMENT

A guidelines departure occurs when a trial judge runs the sentence imposed on a non-capital felony consecutive to the sentence imposed for a capital felony.

ARGUMENT

ISSUE 1

TRIAL JUDGE RAN THE PETITIONER'S GUIDELINE SENTENCE CONSECUTIVE TO THE SENTENCE IMPOSED ON A NON-GUIDE- LINE OFFENSE.

The issue of whether a guidelines departure sentence occurs when a defendant is sentenced for both a guidelines and a non-guidelines felony and the sentences are run consecutively **has** become an issue of conflict among at least two Florida Courts.

The Second District Court of **Appeal** determined in the present case, **a trial judge** could run a guidelines sentence consecutive to the sentence imposed on **a** life felony and that such **a** sentence was not a departure. The Court did not discuss **its** reasons for this holding, but only noted that **the** decision was contrary to the recent opinion of the Fifth District Court of **Appeal** in Wood v. State, 17 F.L.W. D311 (Fla. 5th DCA 1992).

In Wood, the defendant **was** sentenced to a total of eighty years of imprisonment on two felony **counts** pursuant to the habitual offender statute. He then received a guidelines **life** sentence which was imposed to run consecutively to the two other offenses. The Fifth District Court of **Appeal** held that running the guidelines life sentences consecutive to the habitual offender enhanced offense constituted **a** guidelines departure. The Court determined that in running the life sentence consecutive to the eighty year sentence the life sentence would **not** commence to run until **the**

defendant had served the eighty year sentence thus, the defendant would ultimately serve more than life on the guidelines sentence.

The logic employed in Wood is correct. The repeatedly stated purpose and goal of the sentencing guidelines is uniformity in sentencing. Branan v. State, 554 So.2d 512 (Fla. 1990). Departures from the recommended guidelines range, absent valid written reasons, are not allowed. ~~Williams v. State~~, 492 So.2d 1308 (Fla. 1986). In this vein, when the recommended guidelines sentence **is** life imprisonment, a trial court may not impose consecutive sentences without providing written reasons for departure. Rease v. State, 493 So.2d 454 (Fla. 1986). The desire to maintain consistency in sentencing is also reflected in the requirement that concurrent or consecutive sentences, whichever is closer to the recommended guidelines range, must be imposed where statutory maximums or minimums preclude sentencing within the applicable guidelines range. Branan v. State, 554 So.2d 512 (Fla. 1990).

Clearly there is a distinction between cases where all of the counts before the court for sentencing are scoreable under the guidelines and those cases where some of the counts are non-scoreable such as capital felonies, or are removed from the guidelines limitations through the application of the habitual offender statute. In cases where all of the counts are encompassed by the guidelines a departure sentence **is** easy to discern. Any overall period of incarceration which is **less** than or exceeds the guidelines range is a departure. In cases where both guidelines

and non-guidelines counts are preset a departure sentence should be no less discernible. If trial courts are required to run multiple **counts** concurrently or consecutively to best approximate the guideline range, so too should they be required to run guideline and non-guidelines counts concurrently or consecutively, if applicable, to reflect the guidelines range.

In instances where a person is sentenced for both capital or habitualized felonies and non-capital felonies a departure sentence occurs when the guidelines sentence is run consecutive to the sentences imposed **for** the non-guideline counts. In such cases, the guidelines sentence does not commence to **run** until the non-guidelines sentence has been served. Thus, as in the present **case**, a person convicted of a capital felony may not begin the service of his guideline sentence until a minimum of twenty-five years has passed. This sentencing scheme **is** in complete opposition with **the** stated desire of having **a** defendant sentenced as close to the recommended guidelines range as possible. The sentences in such cases should be structured to run concurrently. If a trial judge does wish to exceed the guidelines he may **do so** by simply using the contemporaneous capital felony conviction as the basis **for** departure. Bunney v. State, 17 F.L.W. s383 (Fla. July 2, 1992).

The decision of the Second District Court of Appeal should be rejected and the analysis in Wood, Supra, which **is** consistent with the purpose of the sentencing guidelines and should be adopted by this court.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Second District Court of Appeals decision on the Petitioner's case should be reversed and the case remanded for sentencing within the guidelines.

APPENDIX

PAGE NO.

1. **Second District Court of Appeal** opinion
filed March 20, 1991.

A1

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

RICHARD MURL BOOMER, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 91-00533

opinion filed March 20, 1991.

Appeal from the Circuit Court
for Polk County; J. Dale
Durrance, Judge.

James Marion Moorman, Public
Defender, and Cynthia J. Dodge,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Sue R.
Henderson, Assistant Attorney
General, Tampa, for Appellee.

MAR 20 1992
CLERK OF DISTRICT COURT
TALLAHASSEE, FLORIDA

PER CURIAM.

The appellant claims that the trial court improperly
imposed an upward departure sentence upon him on remand by this

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

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

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

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

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

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

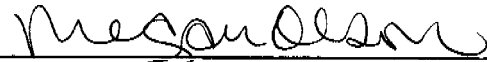
Affirmed.

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

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Sue R. Henderson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14th day of August, 1992.

Respectfully submitted ,



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