IN THE SUPREME COURT OF FLORIDA

QUARRY JONES,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 81,970

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(904)252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
FLORIDA'S RIGHT TO PRIVACY PROVISION OF THE STATE CONSTITUTION RENDERS SECTION 800.04, FLORIDA STATUTES (1991), UNCONSTITUTIONAL AS APPLIED TO THE PETITIONER WHERE THE TWO TEENAGERS ENGAGED IN A CONSENSUAL, ROMANTIC SEXUAL RELATIONSHIP.	
CONCLUSION	30
CERTIFICATE OF SERVICE	31

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Barrows v. Jackson
346 U.S. 249 (1953) 13, 14

Cook v. State
18 Fla. L. Weekly D1584 (Fla. 5th DCA July 9, 1993) 9

Eisenstadt v. Baird
405 U.S. 438 (1972) 12, 13, 14, 15

Griswold v. Connecticut
381 U.S. 479 (1965) 5, 11, 13

In re Adoption of Brock
25 So.2d 659 (Fla. 1946) 18

In re Guardianship of Barry
445 So.2d 365 (Fla. 2d DCA 1984) 23

In re Guardianship of Browning
568 So.2d 4 (Fla. 1990) 15

In re T.W.
551 So.2d 1186 (Fla. 1989) 2-5, 7, 9, 15, 17-20, 23-27

Jones v. State, State v. Rodriguez/Williams
18 Fla. L. Weekly D1375 (Fla. 5th DCA June 4, 1993) 2, 3, 5, 8-10, 21-22, 25, 27

LeCroy v. State
533 So.2d 750 (Fla. 1988) 19

Loving v. Virginia
388 U.S. 1 (1967) 15

Marshall v. State
18 Fla. L. Weekly D1585 (Fla. 5th DCA July 9, 1993) 9

Moore v. City of East Cleveland, Ohio
431 U.S. 494 (1977) 15

Parham v. J.R.
442 U.S. 584 (1979) 18

Planned Parenthood of Cent. Mo. v. Danforth
428 U.S. 52 (1976) 18

TABLE OF CITATIONS (Continued)

Public Health Trust v. Wons
541 So.2d 96 (Fla. 1989) 16

Pugh v. Barwick
56 So.2d 124 (Fla. 1952) 18

Rasmussen v. South Florida Blood Service, Inc.
500 So.2d 533 (Fla. 1987) 16

Rodriguez/Williams v. State
Supreme Court Case No. 81,992 9, 20, 27, 28

Roe v. Wade
410 U.S. 113 (1973) 15

Schofield v. State
18 Fla. L. Weekly D1662 (Fla. 2d DCA July 23, 1993) 9

Simmons v. State
10 So.2d 436 (Fla. 1942) 26

Skinner v. Oklahoma
316 U.S. 535 (1942) 15

Stanley v. Georgia
394 U.S. 557 (1969) 15

State v. S.L.W.
465 So.2d 1231 (Fla. 1985) 19

Winfield v. Division of Pari-Mutual Wagering
477 So.2d 544 (Fla. 1985) 16, 17, 20, 26

OTHER AUTHORITIES:

Article I, Section 23, Florida Constitution 2, 5, 7, 15, 16, 25, 26

Article V, Florida Constitution 9

Section 39.02, Florida Statutes 19
Section 743.065, Florida Statutes (1991) 18
Section 800.04, Florida Statutes (1991) passim

Rule 9.030(a)(2)(A)(i), Florida Rules of Appellate Procedure 9
Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure 9
Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure 9
Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure 9

TABLE OF CITATIONS (Continued)

Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard
62 Yale L.J. 55 (1952) 26

Comment, Rape Reform and A Statutory Consent Defense
74 J. Crim. L. and Criminology 1518 (1983) 26

Dore, Of Rights Lost and Gained
6 Fla. St. U. L. Rev. 609 (1978) 16

IN THE SUPREME COURT OF FLORIDA

QUARRY JONES, Petitioner,	)	
vs.	)	CASE NO. 81,970
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The defendant, age eighteen, was charged and convicted of violating Section 800.04, Florida Statutes (1991), Florida's "statutory rape" law, when he engaged in sexual intercourse with his girlfriend, who was fourteen years old. (R 22-27, 29, 33-34, 36, 50, 222, 258-259) At trial, the defendant was precluded from presenting argument that the sexual act here was consensual and therefore should not be criminal. (R 13-17) Additionally, the defendant moved for a judgment of acquittal on the ground that the statutory rape law should not apply to this situation involving consensual sexual activity between girlfriend and boyfriend who were both experimenting with their sexuality. (R 91-93) The state argued that consent was not an issue under the statute and

therefore the motion for judgment of acquittal should fail. (R 94, 97-98) The trial court denied the motion, finding the statute constitutional. (R 98-99)

The defendant was convicted and sentenced to four and one-half years imprisonment, to be followed by six months probation. (R 200, 269) He appealed his conviction and sentence to the District Court of Appeal, Fifth District of Florida. (R 273)

On appeal, the defendant argued that, since Section 800.04, Florida Statutes (1991), did not allow consent to be raised as a defense and since this was a noncoercive, romantic, consensual sexual act, the statute was unconstitutional as applied to this defendant. Jones v. State, State v. Rodriguez/Williams, 18 Fla. L. Weekly D1375 (Fla. 5th DCA June 4, 1993). (Appendix A) The district court recognized that, pursuant to the constitutional right to privacy of Article I, Section 23 of the Florida Constitution and the decision of In re T.W., 551 So.2d 1186 (Fla. 1989), the state must show a "compelling state interest" rather than the more relaxed federal standard of "significant state interest" in order to constitutionally override Florida's privacy amendment. Jones v. State, 18 Fla. L. Weekly at D1376.

However, the district court chose to disregard this Court's precedent in In re T.W., supra, and instead applied a lesser standard, believing that the issue raised in T.W., that the right to privacy compels the law to accept a minor's right to consent to an abortion, was much different from the issue raised

here, of a minor's right to consent to the act which could give rise to the necessity for the abortion, i.e. sexual intercourse. Jones v. State, supra. The district court felt free to do so for two reasons: (1) since the court was certifying the case to this Court for resolution, this Court could consider the policy concerns and recede from or clarify T.W., [Jones v. State, 18 Fla. L. Weekly at D1376], and (2) the sole reason for the strict standard announced by this Court in In re T.W. was that "four members of the Florida Supreme Court favored a policy of readily accessible abortions for pregnant minors." Jones v. State, 18 Fla. L. Weekly at D1377 (Cobb, J., concurring specially).

The district court, applying a relaxed standard, concluded that "the minor's right to consensual sex is not substantially burdened" by the state forbidding consensual sex for those under the age of sixteen (and providing stiff criminal penalties to the young men involved), and upheld the constitutionality of Section 800.04. Jones v. State, 18 Fla. L. Weekly at D1376.

Notice to invoke this Court's discretionary review was timely filed. This Court postponed a decision on jurisdiction and ordered briefs on the merits. This brief follows.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal, Fifth District, refused to follow the clear holding of this Court in In re T.W., 551 So.2d 1186 (Fla. 1989), that the state, when infringing on Florida's constitutional right to privacy, must show a "compelling state interest" and the "least restrictive means available" in order to curtail that right. The district court, while certifying the issue to this Court, begged the question, instead saying simply that the minor's rights have not been "substantially burdened" by requiring a delay of years in order to exercise that constitutional right. This Court should accept the certification from the district court, wherein the district court expressly construed a provision of the Florida Constitution and declared portions of a state statute valid, and should entertain the case on the merits, reaffirming the holding in In re T.W., with which the district court's decision is in direct conflict.

The petitioner has standing in the instant case to litigate the issue of his consensual partner's right to privacy and to challenge the application of Section 800.04, Florida Statutes (1991). He and the young woman had a close personal relationship and he has been subjected to criminal sanctions for that relationship. The petitioner presented the issue below in arguing against the state's motion in limine to preclude argument of consent as a defense and in his motion for judgment of acquittal. He is thus entitled to assert that "the offense which [he

is] charged with is not, or cannot constitutionally be a crime." Griswold v. Connecticut, 381 U.S. 479 (1965).

The statute, as applied to the facts here, cannot be squared with the right of privacy embodied in Article I, Section 23 of the Florida Constitution and the holding in In re T.W., supra. The Florida right of privacy protects against governmental interference personal relationships such as that which the young woman and man shared. The sweeping "state interests" asserted by the respondent are inapplicable to this case, were in fact rejected by the district court, and do not overcome the substantial personal rights involved. Moreover, the state failed to even attempt to demonstrate in the district court that the prosecution of this young man is the "least intrusive means" to further the "interests" which the state broadly asserted.

While the district court agreed with much of what the petitioner argued, it, however, ultimately relied on its personal moral opinion to decline to give effect to the right of privacy which it itself recognized as applicable in this case. "Because we believe that the minor's right to consensual sex is not substantially burdened by requiring a delayed exercise of such right . . . we uphold the constitutionality of section 800.04." Jones v. State, State v. Rodriguez/Williams, 18 Fla. L. Weekly D1375, 1376 (Fla. 5th DCA June 4, 1993). As the district court itself recognized, its ultimate ruling is difficult to square with this Court's decision in T.W. and the Florida Constitution's right of privacy.

The petitioner presented to the lower courts and now presents to this Court a narrow issue -- that the application of section 800.04 to this case infringes upon the rights to be "let alone" and "free from governmental intrusion into [one's private] life" embodied in the Florida Constitution. Teenage men and women engaging in a romantic, consensual sexual relationship have the right to be "let alone" and this Court should vindicate that right.

A. Jurisdiction

Explaining that the constitutional questions involved are questions of importance "beyond the boundaries of this court," the District Court of Appeal, Fifth District, certified this case " to the Florida Supreme Court as one of exceptional importance." Jones v. State, State v. Rodriguez/Williams, 18 Fla. L. Weekly D1375, 1376 (Fla. 5th DCA June 4, 1993). Since it was certifying this case to this Court for ultimate resolution, the district court believed that it was at liberty to recede from this Court's precedent. Thus, the district court wrote that although it is obliged to apply Supreme Court precedent " in cases with similar facts or issues specifically covered by the Supreme Court's opinion, [and] also to give such effect to its opinion on related issues as appears intended by the Supreme Court," it was going to follow a modified standard in this case in light of the certification:

> However, particularly because the Supreme Court must ultimately decide this issue and will have that opportunity to do so through our certification, we are at liberty to consider the possibility that the different policy concerns raised in this case might cause the Supreme Court to recede from, or at least clarify, the broad rule of law announced in T.W.

Id. at D1375.

The district court recognized that this case presents questions of great and exceptional importance and that this Court's resolution and guidance are necessary. Given the importance of the questions involved, the fifth district has now

certified multiple cases to this Court in which the questions are presented. Jones v. State, supra; the companion cases of Rodriguez/Williams v. State, Sup. Ct. Case No. 81,992; Cook v. State, 18 Fla. L. Weekly D1584 (Fla. 5th DCA July 9, 1993); Marshall v. State, 18 Fla. L. Weekly D1585 (Fla. 5th DCA July 9, 1993). See also Schofield v. State, 18 Fla. L. Weekly D1662 (Fla. 2d DCA July 23, 1993), in which the second district followed Jones v. State, supra.

Under Article V of the Florida Constitution and the Rules of Appellate Procedure, jurisdiction is expressly conferred upon this Court. See Fla. R. App. P. 9.030(a)(2)(A)(v) (the Florida Supreme Court has jurisdiction to review decisions of the district courts of appeal that "pass upon a question certified to be of great public importance"). As the discussion in this brief and the district court's decision demonstrate, there can be little question about the "great" and "exceptional" importance of the questions presented. This Court also has jurisdiction under Article V because the district court "expressly construed a provision of the [Florida] constitution," see Fla. R. App. P. 9.030(a)(2)(A)(ii); expressly declared valid portions of a state statute, see Fla. R. App. P. 9.030(a)(2)(A)(i); and ultimately ruled in a manner which is in conflict with the precedent of this Court in In re T.W., supra, see Fla. R. App. P. 9.030(a)(2)(A)(iv), as the district court itself suggested in its opinion.

This Court's decision will have a substantial effect on how Florida will treat the fundamental rights of citizens who,

albeit mature, happen to be younger than sixteen. This Court's holding that under our constitution

> [t]he right of privacy extends to "[e]very natural person." Minors are natural persons in the eyes of the law and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights,"

In re T.W., 551 So.2d at 1193 (citations omitted), will be of little value unless the lower courts are given the guidance they have requested. Whatever action this Court takes in this case, Florida's courts will rely on that decision -- in cases such as those of Gregory K., Kimberly Mays, and others where citizens under the age of sixteen assert their fundamental constitutional rights.

There can be little debate about the exceptional importance of the issues now before the Court in this case. The Court has jurisdiction and should take this opportunity to resolve the issues and provide to the lower courts the guidance which they need and have sought.

B. Standing and Preservation

The district court of appeal rejected the state's argument there that the defendants lacked standing to challenge the unconstitutional application of Section 800.04, Florida Statutes (1991), to their cases. The fifth district noted:

> The state urges that the young men involved in these appeals lack standing

> to assert the young women's rights to privacy even if such rights exist. We reject this argument. The state relies on State v. Phillips, 575 So.2d 1313 (Fla. 4th DCA 1991), rev. denied, 589 So.2d 292 Fla. 1991). We disagree with the analysis of Phillips. We find that the boyfriend who assists the minor child in achieving her constitutional right to engage in sexual activity (if, in fact, she has such a right) has the same standing as the doctor who assists the minor in obtaining her constitutionally protect right to have an abortion. Suppose, for example, the State, while recognizing the minor's right to an abortion, makes it a second degree felony for any doctor to perform an abortion on a minor without parental consent. Would the State urge that the doctor could not assert as a defense the minor's right to an abortion? We think not. And even if the State took such a position, we doubt any court would lend it credence.
>
> We hold, therefore, that the young men's position is similar to the appellants' in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 239 (1972), and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and that they have standing to raise the alleged constitutional rights of their sexual partners as a defense to their prosecution.

Jones v. State, 18 Fla. L. Weekly at D1375.

In Griswold v. Connecticut, 381 U.S. 479, 481 (1965), the United States Supreme Court held that physicians, who had been prosecuted under a state statute prohibiting the sale/distribution of contraceptives, had standing to challenge the constitutionality of the application of the statute in their cases. The Court noted that because the physicians had a relationship with those who sought to obtain contraceptives, "they

[had] standing to raise the constitutional rights" of privacy of the people "with whom they had a professional relationship." Griswold, 381 U.S. at 481. The Court also relied on the fact that the criminal sanctions had been applied against the physicians: "Certainly the accessory should have standing to assert that the offense which he is charged with is not, or cannot constitutionally be a crime." Id. at 481 (emphasis supplied).

There is a closer and more intimate relationship between the young men and the young women in these cases than the "professional" relationship involved in Griswold. Moreover, like the defendants in Griswold, the criminal sanctions here have been sought and obtained against the petitioner. As in Griswold, not only is the petitioner entitled to assert "that the offense which [they] are charged with is not, or cannot constitutionally be a crime," Id. at 481, the young man also has standing to assert the interests of the young woman with whom he shared a special, close, intimate and personal relationship. Paraphrasing the Griswold court's analysis:

> The [privacy] rights of [the young women], pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who [like the Petitioner here] have this kind of [close] relation to them.

Griswold, 381 U.S. at 481.

In Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972), the United States Supreme Court reaffirmed the "third-party standing" analysis it applied in cases such as Griswold. The

Court held that a distributor of contraceptives, who "was neither a doctor nor a druggist," Eisenstadt, 405 U.S. at 444, had standing to assert the privacy rights of the individuals to whom the contraceptives had been distributed, even though no "professional" or "intimate" relationship existed. Id. at 444-46.

In language directly applicable to the state's assertion that the petitioner herein should not be granted standing, the Eisenstadt court rejected the state's assertion that the third-party standing analysis of Griswold only applied to physician-patient cases, explaining that its application is much broader:

> [T]he doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another.

Eisenstadt, 405 U.S. at 445.

Thus, in Barrows v. Jackson, 346 U.S. 249 (1953), a seller of land was found to have standing to challenge racially-restrictive land use provisions on behalf of "prospective non-Caucasian purchasers." Eisenstadt, 405 U.S. at 445 (emphasis supplied), discussing Barrows v. Jackson. The sellers had third-party standing to assert the rights of minority potential buyers because they had an interest in defending those rights and because there was some nexus or relationship between the sellers and prospective buyers.

The relationship between the young women and young men in these cases is certainly more substantial, close and intimate

than the relationship between the distributors and purchasers in Eisenstadt or the sellers and potential buyers in Barrows. Moreover, the young men surely have a substantial interest in vigorously defending the privacy rights of the young women -- indeed, young women and young men each are affected by the state's interference with their privacy rights "to be let alone and free from governmental intrusion," while the young man here additionally faces 4½ years of incarceration should the rights involved in these cases not be vindicated.

Under all relevant precedent, there is no question that the young man here has standing to challenge as unconstitutional the application of Section 800.04, Florida Statutes, in this case and the refusal of the trial court, pursuant to that statute, to allow a consent defense. The district court thus found that the petitioner had standing.

The petitioner presented these issues to the trial court and thus preserved the issue for appeal. He objected to the state's motion in limine which precluded him from arguing consent. He also argued in his motion for judgment of acquittal that he had committed no crime as the statute should not apply in this situation where there was a consensual, on-going boyfriend - girlfriend relationship, of which the consensual sexual activity was a part. The issue was thus preserved for appeal.

C. The Right To Be Let Alone And Its Infringement In This Case

The issue in the case of the petitioner is whether the

"statutory rape" law (Fla. Stat. § 800.04), as applied to these special facts, can be squared with the rights to be "let alone" and "free from governmental intrusion" expressly embodied in Article I, Section 23 of the Florida Constitution. As applied to the facts and circumstances here, the "statutory rape" statute violates Article I, Section 23 and this Court's analysis in cases such as In re T.W., 551 So.2d 1186 (Fla. 1989), addressing the constitutional rights of privacy which Floridians enjoy.

Freedom of choice in matters of personal relationships has long been among the liberties protected in our American Constitutional system. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499 (1977). A host of cases has thus consistently acknowledged that citizens have rights to a "private realm" into which "the state cannot enter" -- where the state intrudes into that realm, "the usual judicial deference to the legislature is inappropriate." Id. These personal privacy rights prohibit state intrusion into activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); Roe v. Wade, 410 U.S. 113, 152 (1973); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); Roe v Wade, 410 U.S. at 152; contraception, Eisenstadt v. Baird, 405 U.S. at 453-54; Roe v. Wade, 410 U.S. at 152; abortion, In re T.W.; Roe v. Wade; individuals' living arrangements, Moore v. City of East Cleveland, Ohio; private possession of obscene materials, Stanley v. Georgia, 394 U.S. 557 (1969); and other situations involving "an individual's control over, or the autonomy of, the intimacies of personal identity." In re Guard-

ianship of Browning, 568 So.2d 4, 10 (Fla. 1990).

In November of 1980, the voters of the State of Florida approved a constitutional amendment which added the following to Florida's express Declaration of Rights:

> Right of Privacy - Every natural person has the right to be let alone and free from governmental intrusion into his private life ...

Fla. Const., Art. I, § 23. Given the inclusion of this provision in our state Constitution's Declaration of Rights, this Court has consistently held that Florida's right of privacy is far broader than its federal counterpart. See, e.g., Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544, 548 (Fla. 1985) (Florida privacy rights "much broader" than federal counterparts).[1]

The Florida right thus protects the autonomy of the individual to be let alone, to make personal decisions and to personal autonomy -- it protects, from governmental interference, the physical and psychological zone of liberty of the individual and the individual's freedom "to lead his private life according to his own beliefs." Public Health Trust v. Wons, 541 So.2d 96, 98 (Fla. 1989); see also Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533, 535 (Fla. 1987) (the Florida right of

---

[1] The broad scope of the Florida right is manifested by the language chosen for the constitutional provision. The drafters of the provision chose the phrases "right to be let alone" and to be "free from governmental intrusion into his private life" as a means of expressing the broad personal interests which the provision was intended to encompass. See Dore, Of Rights Lost and Gained, 6 Fla. St. U. L. Rev. 609, 652-53 n.268 (1978). This Court has relied on the broad nature of these provisions to consistently reaffirm personal privacy interests in various settings. See, e.g., In re: T.W., 551 So.2d at 1192.

privacy encompasses "the interest in independence" in making personal decisions); In re T.W., 551 So.2d at 1192 (discussing Florida case law addressing the rights to be let alone and to be free from governmental interference); Id. at 1193 (the right protects all areas of "individual dignity and autonomy.")

Because of the strong and broad nature of Florida's right of privacy, this Court has held that where, as here, the right is subjected to governmental interference, the government bears the heavy burden of "demonstrating that the challenged regulation serves a **compelling state interest**" and that it "accomplishes its goal through use of the **least intrusive means.**" Winfield, 477 So.2d at 547; In re T.W., 551 So.2d at 1192. As this Court explained in In re T.W., the personal autonomy aspects of Florida's right to be let alone and free from governmental intrusion is so strong an interest that few governmental infringements of that right have survived judicial scrutiny. In re T.W., 551 So.2d at 1192 (also noting that the compelling state interest/least restrictive means standard is "a highly stringent" one and listing numerous cases while noting that "no government intrusion in [those] personal decisionmaking cases ... has survived.")

There is also no question that the right "to be let alone" and to be "free from governmental intrusion into [one's] private life" applies to the young man and woman here -- this Court has expressly held so. After outlining that the Florida right to be let alone is broad in scope, In re T.W., 551 So.2d at

1191-93, this Court addressed the question of whether the right extends to "minors":

> We conclude that it does, based on the unambiguous language of the amendment. The right of privacy extends to "[e]very natural person." Minors are natural persons in the eyes of the law and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights."

In re T.W., 551 So.2d at 1193 (citations omitted).[2]

Overlooking the actual interests of the young woman here (a girlfriend of the petitioner), however, the state asserted below that the purpose of Section 800.04, Florida Statutes, is to "protect" young women. Young women have the right, without governmental or parental interference and no matter the consequences, to consent to medical and surgical procedures for themselves and their children. See § 743.065, Fla. Stat.; see also In re T.W., 551 So.2d at 1195. They have the long-established right to consent to adoption of their children. In re T.W., 551 So.2d at 1195; Pugh v. Barwick, 56 So.2d 124 (Fla. 1952); In re Adoption of Brock, 25 So.2d 659 (Fla. 1946). They have the right to decide, without governmental or parental interference, whether to terminate or continue a pregnancy. In

---

[2] See also Parham v. J.R., 442 U.S. 584, 600 (1979) (minors have the same "liberty interests" as adults in various settings involving state action); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.")

re T.W. They can, without parental assistance, waive substantial constitutional protections. State v. S.L.W., 465 So.2d 1231 (Fla. 1985) (fourteen-year-old, without parental assistance, can "waive" rights to assistance of counsel and protections against self-incrimination). The Florida Attorney General has also asserted that such "minors" can be punished as adults under Section 39.02, Florida Statutes, a statute which states that a minor of any age indicted for a crime punishable by death or life imprisonment "shall be tried and handled in every respect as if [he or she] were an adult." See LeCroy v. State, 533 So.2d 750 (Fla. 1988) (addressing the Attorney General's argument that a "minor" can be executed under this statute).

The express recognition of the rights of "minors" to personal decisionmaking in these various instances and the express treatment of "minors" as adults in these various settings cannot be squared with the state's argument that the young women and young men in the cases pending before this Court regarding the issue of consensual sex should be prohibited from entering into the intimate relationship they chose to share with each other. "[T]he selective approach employed by the legislature evidences the limited nature of the ... interest" asserted by the state. In re T.W., 551 So.2d at 1195 (citation omitted). This Court's express holding that the "right of privacy" applies to "minors" such as this young woman, In re T.W., 551 So.2d at 1193, negates much of the state's position.

Applying this Court's precedent, Circuit Judge Lockett,

in his order striking a portion of the statute in State v. Rodriguez (See Appendix B), directly demonstrated the shortcomings of the state's argument.

Under this Court's settled precedent in the area of privacy law, an infringement on the right of privacy will be struck down unless the state meets the heavy burden of establishing both that (a) there exists a compelling state interest, and that (b) the interest is advanced through the least restrictive means available. Winfield; In re T.W., 551 So.2d at 1193 ("The state must prove that the statute furthers a compelling state interest through the least restrictive means.") If, as applied to the circumstances of a given case, the impact of a challenged statute sweeps too broadly, the "least restrictive means" test is not met. That test is not met here. Indeed, not once in the district court did the state try to show that the "interests" it broadly asserted met the "least intrusive means" standard. The governmental intrusion into the privacy rights of this young woman and young man fails under that test.

As to "compelling state interest," the state sweepingly asserted interests in "protecting minors." (State's Brief, Fifth District Court of Appeal, pp. 9-10). The "state interests" (i.e., "protecting minors") asserted here were strikingly akin to the "interests" asserted by the state in T.W. itself. Given the unique facts and circumstances of these cases, these "interests" fail to overcome the rights of young women and young men in their personal relationships, as they failed in T.W.

The district court itself rejected each of the respondent's "state interest" arguments, recognizing that the state's assertions fail under our law. Indeed, although it ultimately upheld the constitutionality of the statute, the district court's opinion speaks volumes about the lack of a "compelling state interest" supporting these prosecutions and the interference with the right of privacy which these prosecutions have engendered. The district court rejected the state's argument:

> ... that we can merely expand the holding in Schmitt v. State, 590 So.2d 404 (Fla. 1991), ... That case involved a father taking explicit photographs of and videotaping his 12-year-old naked daughter. It has been urged that we could uphold the statute by saying that anytime a minor is seduced, sexual exploitation has occurred. This position, however, seems disingenuous.
>
> The statute involved in the cases before us, Section 800.04, is gender neutral and there is no age requirement for the violator of the act. Therefore, if two fifteen-year-olds engage in sex, it is extremely difficult to determine which is the victim and which is the second degree felon. Even if the perpetrator is sixteen (or even twenty) and the 'victim' is a sexually active, mature minor, the question of who 'sexually exploited' whom still may not be readily apparent.

Jones v. State, 18 Fla. L. Weekly at D1376, n.2.

The district court also rejected the state's assertion that there is a "compelling interest" in prohibiting every 14 or 15-year-old, irrespective of maturity, from engaging in sexual relationships because they need tao be "guided" or "nurtured":

> The Florida Supreme Court, in In re

> T.W., held that these considerations are relevant only under the relaxed standard of 'significant state interest' applied by the United States Supreme Court to the United States Constitution. While our supreme court agreed that protecting minors and preserving family unit were 'worthy objectives,' the court held that they were not sufficiently compelling, under our more stringent 'compelling state interest' standard, to override Florida's privacy amendment insofar as a minor's right to an abortion is concerned. In light of this holding, the State's similar argument in the case before us seems already to have been rejected by our supreme court in In re T.W. Specifically, the T.W. court expressly held that the age or maturity of the minor to determine 'the most profound and intimate' question concerning ones' body is immaterial in the constitutional sense under our standard of review. Rodriguez, et al., slip op. at 7-8.

Jones v. State, 18 Fla. L. Weekly at D1376.

Additionally, the Fifth District Court also rejected the state's reliance on a 1977 Alaska Supreme Court decision to support its "compelling interest" assertion:

> The State urges us to follow the opinion of the Supreme Court of Alaska in Anderson v. State, 562 P.2d 351 (Alaska 1977), in which that court acknowledged that the State may exercise control over the sexual conduct of children beyond the scope of its authority to control adults. The State is preaching to the choir. However, we cannot adopt a decision from another state in conflict with the decision of our supreme court. In Anderson, the court never mentioned what state interest standard (compelling or significant) Alaska had adopted.

Jones v. State, 18 Fla. L. Weekly at D1376-77, n.4.

As noted above, Florida's legislative enactments and

judicial decisions establish that "minors," especially mature ones, have the right to personal decisionmaking and must be treated as adults in various settings. In In re T.W., this Court held that the right of privacy extends to "every natural person," including mature "minors" such as this young woman. Id. at 1193. The Court listed examples: (a) that a minor "may consent, without parental approval" to medical procedures "no matter how dire the possible consequences," In re T.W., 551 So.2d at 1195; (b) that a minor's privacy rights encompass decisions as to life support, Id. at 1195, citing In re Guardianship of Barry, 445 So.2d 365 (Fla. 2d DCA 1984); (c) that a minor can engage in adoption procedures without parental consent "even though this decision clearly is fraught with intense emotional and societal consequences," In re T.W., 551 So.2d at 1195; and (d), as the Court ultimately held, that a minor may consent to abortion procedures without parental or state interference. Id.

This Court concluded that "the selective approach employed by the legislature evidences the limited nature of the ... interest(s)" asserted by the state in cases such as T.W. and that of the petitioner here. In re T.W., 551 So.2d at 1195. The inconsistent treatment of the right of privacy in the various legislative enactments discussed in this brief and cited by this Court demonstrates that the state's "compelling interest" argument is highly questionable indeed.

At its core, the state's argument in the lower courts was that it had a "compelling interest" in prohibiting young

women from having sex, irrespective of the young women's obvious maturity. The young women have a substantial privacy right -- they have the right to be "let alone" and to be "free from governmental interference into [their] private lives." In re T.W. That right defeats the state's broad assertions -- the state's interference into the lives of the young women and young men serves no legitimate interest, much less so a "compelling" one.

However the state may choose to characterize its asserted interests, the government's interest in "protecting" a sexually inexperienced and immature nine-year-old is obviously quite different than any "interest" in "protecting" more mature teenagers who are engaged in a romantic relationship. The young women have the privacy right to enter into those personal relationships. In re T.W., 551 So.2d at 1193. The state, however, would punish their boyfriends with a potential 15 years of incarceration because the young women chose to do what the Florida Constitution allows them to do.

There is absolutely no evidence in this case that the young woman has been harmed; she voluntarily wanted to have the personal relationship she entered into with this young man; she did not report the sexual encounter until her mother questioned her absence from school; she made a mature choice to exercise her rights; she does not need those "protections" advanced by the respondent.

Where, as here, a statute intrudes upon the right to

enter private relationships, the state must do more than assert possible justifications for the statute. A reviewing court may not simply accept any proffered rationale advanced by the state as being the actual purpose of the law. In reviewing a statute under the strict scrutiny which In re T.W. requires, a court cannot accept a proffered justification where other statutes adopted by the state make clear that the state itself does not consider the objective to be compelling or where the statute is overbroad and not the least intrusive means as applied to a given case. In re T.W., 551 So.2d at 1194-95.

The state's attempted broad justification for Section 800.04, fail under such examination. None of those "interests" apply in these cases -- there is no evidence that this mature young woman was in any way victimized. Even on its face, moreover, the state's assertions sweep too broadly: Section 800.04, criminalizes sex between peers as well as between a "minor" and an adult. See Jones v. State, 18 Fla. L. Weekly at D1376, n.2. If two fifteen-year-olds engage in sexual relations, each is subject to prosecution under the statute. The statute is thus plainly not designed to prevent sexual victimization of "minors" by adults. If anything, it is designed to prevent "minors" from engaging in any sexual relationship no matter their level of maturity -- a purpose which, under circumstances such as those in these cases, infringes upon the right of privacy embodied in

Article I, Section 23. See In re T.W., 551 So.2d at 1193-95.[3]

Moreover, even accepting the state's proffered rationale, the burden remains with the state to show that it has chosen the least intrusive means of obtaining its objective. In re T.W., 551 So.2d at 1192, 1195-96; Winfield, 447 So.2d at 547. The state has not even tried to meet this burden in these cases -- nor could it given these facts. Criminalizing intimate, close and consensual relationships can by no means be deemed the least intrusive means of preventing sexual victimization of immature minors. This is especially so where there was no coercion or taking advantage of the young woman here, that the young woman is mature, and that the relationship was indisputably consensual. See In re T.W., 551 So.2d at 1195-96 (discussing the propriety of judicial review in cases involving special facts such as those here would more than adequately protect any of the

---

[3] Interestingly, statutes such as Section 800.04, Florida Statutes, codified common law statutory rape laws. These laws existed for one purpose: a young woman's (historically, these laws were not gender-neutral) "virginity" was considered a "thing" of social and economic value owned by either her father or her betrothed. See Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 76 (1952); Simmons v. State, 10 So.2d 436, 438 (Fla. 1942). The common law crime of statutory rape existed to protect this valuable property right. Consent was not a defense to the crime because the property right was not that of the "minor" female. Consequently, at common law, the most severe penalties were imposed only when a man "stole" the virginity of another's betrothed. Otherwise, the man could simply marry the girl and pay the brideprice. Comment, Rape Reform and A Statutory Consent Defense, 74 J. Crim. L. and Criminology 1518 (1983). Such historical rationales for the failure of Section 800.04, to recognize a defense of consent are quite outdated. The rationales advanced by the state in the case of the petitioner fail under T.W. and Article I, Section 23 of our Constitution.

state's asserted "interests."

This, in fact, was the state's alternative argument in the district court in the companion case of State v. Rodriguez, Supreme Court Case Number 81,992, that the portion of the statute (Section 800.04) which Circuit Judge Lockett found unconstitutional as applied to those cases "relating to consent not being a defense to the charge is easily severable from the rest of the statute" and that upholding Judge Lockett's ruling and the constitutional right of privacy there does not require that the entire statute be struck down. The state respondent's alternative argument is the appropriate one. As Judge Lockett held in State v. Rodriguez, it is only portions of the statute which are unconstitutional as applied to these cases. This Court should vindicate the rights of the young women and young men in question in these cases. This Court can do so without invalidating the entire statute.

Notwithstanding its rejection of much of what the state had to say, the district court ultimately affirmed the petitioner's conviction and upheld the state's prohibition on a consent defense. The court asserted its view that "the minor's right to consensual sex is not substantially burdened by requiring a delayed exercise of such right ...". Jones v. State, 18 Fla. L. Weekly at D1376. As the district court itself recognized, such an analysis would not be applied to a 17-year-old, 20-year-old or 55-year-old woman asserting her right of privacy. Id. at D1376 ("[T]he right of privacy precludes the State from restricting an

unmarried adult's right to engage in consensual sex."). Under the facts of this case, the district court's analysis must fail.

Under the Florida Constitution, the district court's analysis is untenable: "[C]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, ... possess constitutional rights." In re T.W., 551 So.2d at 1193 (citations omitted). The young women and young men in these cases either have a right of privacy -- to autonomy in their personal relationships and to the protection of that autonomy against governmental interference -- or they no not. If they do, forcing them to "delay exercise of such right" is a frail constitutional proposition. The proposition on which the district court relied is especially inappropriate in light of the 4½ years incarceration this young man is serving because the young woman voluntarily chose to exercise her rights to personal decisionmaking.

This Court should correct the shortcomings in the district court's holding. The shortcomings of the state's position are demonstrated by the state's own sweeping language -- the state's broad scope shows not only that the state had failed to even try to meet the "least restrictive means" test, it also shows that the test cannot be met in this case and the other cases pending before this Court. Circuit Judge Lockett's reasoned holding in State v. Rodriguez, demonstrates the illusory nature of the "interests" asserted by the state. The facts and circumstances of these cases compellingly establish that the

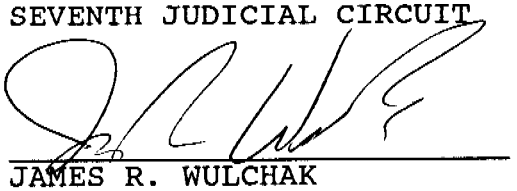
asserted state "interests" are in no way undermined by a ruling that they do not apply to these young women and men. As applied here, Section 800.04, Florida Statutes, is not constitutional. This Court should uphold the right to be "let alone" of young women and young men who are engaged in a consensual, romantic relationship.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court quash the decision of the District Court of Appeal, Fifth District, and either declare Section 800.04, Florida Statutes (1991) unconstitutional and discharge the petitioner, or, in the alternative, at least remand for a new trial wherein the petitoner is permitted to present evidence of and argue consent as a defense.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Joan Fowler, Esquire, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401-2299, and Mr. Quarry Jones, No. 344375, P.O. Box 1360, Jasper, Florida 32052, this 9th day of August, 1993.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

QUARRY JONES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 81,970
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I C E S

Appendix A Decision in Jones v. State, 18 Fla. L. Weekly D1375 (Fla. 5th DCA June 4, 1993)

Appendix B Circuit Court Order State v. Rodriguez/Williams, Cir. Ct. Case Nos. 92-47-CF-JL, 91-1588-CF-JL Sup. Ct. Case No. 81,992

LICENSE SUSPENDED AND CARELESSLY OR NEGLIGENTLY CAUSING THE DEATH OF ANOTHER HUMAN BEING WHERE THERE IS ONLY A SINGLE DEATH.

AFFIRMED in part, REVERSED in part and REMANDED. (SHARP, W., J., and WHITE, A. B., Associate Judge, concur.)

---

[1]§ 316.193(3)(c)3, Fla. Stat. (1991).
[2]§ 316.193(3)(c)2, Fla. Stat. (1991).
[3]§ 316.193(3)(c)1, Fla. Stat. (1991).
[4]§ 322.34(3), Fla. Stat. (1991).
[5]§ 812.014, Fla. Stat. (1991).
[6]Section 775.021(4) provides in pertinent part:

775.021 Rules of construction.—

* * *

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

(b) The intent of the legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principal of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offenses as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021(4), Fla. Stat. (1988).

[7]We have not overlooked the case of *Wright v. State*, 592 So. 2d 1123 (Fla. 3d DCA 1991), *quashed on other grounds*, 600 So. 2d 457 (Fla. 1992). *Wright* held that a defendant who seriously injures four others while driving with a suspended license can only be found guilty of one offense because driving while license suspended is a continuous offense and, thus, a single violation. *Wright*, the holding and reasoning of which were rejected in *Boutwell v. State*, 18 Fla. L. Weekly D796 (Fla. 4th DCA Mar. 24, 1993), has no applicability to the instant case involving the issue of whether a defendant can be convicted of two or more homicide offenses arising from a single death.

* * *

Criminal law—Sexual activity with minor under sixteen—Defendants charged with sexual activity with minors under age sixteen had standing to raise minors' constitutional rights to privacy—Statute prohibiting sexual activity with minors under age sixteen does not violate constitutional right to privacy—Question certified

QUARRY JONES, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-134. Opinion filed June 4, 1993. Appeal from the Circuit Court for Orange County, Helio Gomez, Senior Judge. James B. Gibson, Public Defender and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee. STATE OF FLORIDA, Appellant, v. ERIK RODRIGUEZ and STEVEN WILLIAMS, Appellees. Case No. 92-1876. Appeal from the Circuit Court for Lake County, Jerry T. Lockett, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, For Appellant. Billy H. Nolas, Public Defender, Ocala, and Julie D. Naylor, Assistant Public Defender, Ocala, for Appellees. David A. Henson of Kirkconnell, Lindsey & Snure, Winter Park, for Amicus FACDL.

(HARRIS, J.) We have for review the companion appeals in the cases of *State v. Erik Rodriguez* and *Steven Williams* (No. 92-1876) in which section 800.04, Florida Statutes (1991) was held unconstitutional and *Quarry Jones v. State*, (No. 92-134), in which the validity of the statute was upheld and Jones was sentenced to four and a half years in prison for violating it.

ISSUE

The issue involved in these companion cases is whether the expansive constitutional right of privacy of minors our supreme court announced in *In re T. W.*, 551 So. 2d 1186 (Fla. 1989), renders unconstitutional that portion of section 800.04, which provides that consent is not a defense to a prosecution for sexual activity with a minor under sixteen.

STANDING

The State urges that the young men involved in these appeals lack standing to assert the young women's rights to privacy even if such rights exist. We reject this argument. The State relies on *State v. Phillips*, 575 So. 2d 1313 (Fla. 4th DCA 1991), *rev. denied*, 589 So. 2d 292 (Fla. 1991). We disagree with the analysis of *Phillips*. We find that the boyfriend who assists the minor child in achieving her constitutional right to engage in sexual activity (if, in fact, she has such a right) has the same standing as the doctor who assists the minor in obtaining her constitutionally protected right to have an abortion. Suppose, for example, the State, while recognizing the minor's right to an abortion, made it a second degree felony for any doctor to perform an abortion on a minor without parental consent. Would the State urge that the doctor could not assert as a defense the minor's right to an abortion? We think not. And even if the State took such a position, we doubt any court would lend it credence.

We hold, therefore, that the young men's position is similar to the appellants' in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and that they have standing to raise the alleged constitutional rights of their sexual partners as a defense to their prosecution.

FACTS

The relevant facts in the *Rodriguez* and *Williams* prosecutions are without dispute. Two young women, ages 14, had consensual sex with young men, ages 19 and 20. Neither of the "victims" wanted to prosecute;[1] the charges were initiated by family members (mother or sister). At least one of the young women desired (intended) to get pregnant and have a child. In the *Jones* prosecution, the defendant was denied the opportunity to raise consent as a defense.

MERITS

Our oath and the law require that we apply the law as determined by the Florida Supreme Court. This obligation is not based on the premise that we agree with the supreme court's opinion. Rather, it is based on the concept of precedent and the relative standing of the courts in the judicial hierarchy. This obligation not only requires us to apply such law in cases with similar facts or issues specifically covered by the supreme court's opinion, but also to give such effect to its opinion on related issues as appears intended by the supreme court. However, particularly because the supreme court must ultimately decide this issue and will have that opportunity to do so through our certification, we are at liberty to consider the possibility that the different policy concerns raised in this case might cause the supreme court to recede from, or at least clarify, the broad rule of law announced in *T. W.*

If this case involved abortion, the decision would be simple. The supreme court has ruled that a minor (of any age if such minor can become pregnant) has the constitutional right to an abortion without the parents' knowledge or consent. But this case does not involve abortion. Instead, the related issue before us is whether a minor under sixteen years of age has a right, protected by Florida's constitutional right of privacy, to engage in consensual sex. While this issue is not identical to the abortion issue before the court in *In re T. W.*, we recognize that although it may be distinguished, it may be a distinction without a difference. That is why we certify the issue to the supreme court.

If the supreme court's opinion is vague, we are free to search for its intent. While the decision in *T. W.* regarding a minor's right to have an abortion is not at all vague, there are different policy concerns raised by the related issue of a minor's right to engage in consensual sex. If the decision in *T. W.* does not apply, it must be because of these differing policy concerns.[2] In that case and in sweeping language, the supreme court mandated that Florida's constitutional right of privacy be construed very broadly and that any constitutional rights of adults must also apply to minors unless the State meets a stringent burden of establishing a *compelling* state interest to restrict such constitutional rights:

The citizens of Florida opted for more protection from govern-

> mental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, free-standing constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

In re T. W., at 1191-92, *quoting Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

* * *

> The next question to be addressed is whether this freedom of choice concerning abortion extends to minors. We conclude that it does, based on the unambiguous language of the amendment: The right of privacy extends to "[e]very natural person." Minors are natural persons in the eyes of the law and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights." . . .
>
> Common sense dictates that a minor's rights are not absolute; in order to overcome these constitutional rights, a statute must survive the stringent test announced in *Winfield*: The state must prove that the statute furthers a compelling state interest through the least intrusive means.

In re T. W., 551 So. 2d at 1193.

The first question, then, is whether adults have a constitutional right to engage in sex without marriage. A few short years ago, the answer would have been different. Fornication was statutorily prohibited in Florida until 1979, when our supreme court ruled the statute unconstitutional. This holding was based on equal protection rather than right of privacy concerns. *Purvis v. State*, 377 So. 2d 674 (Fla. 1979). The legislature then repealed the fornication statute in 1983. Section 798.03, Florida Statutes, repealed by section 17, chapter 83-214. Despite the *Purvis* court's reliance on equal protection, it appears now that the right of privacy precludes the State from restricting an unmarried adult's right to engage in consensual sex.

If, then, a sixteen-year-old girl has a right to engage in consensual sex,[3] what compelling state interest can deny this "right" to a fifteen, fourteen or thirteen-year-old girl? The State's only response to this question is one similar to that considered by the United States Supreme Court in *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797, *rehearing denied*, 444 U.S. 887, 100 S.Ct. 185, 62 L.Ed.2d 121 (1979). That is, the State's compelling interest arises from

> . . . the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti, 443 U.S. at 634.[4]

We are impressed with this argument. We agree with the *Bellotti* court that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," (443 U.S. at 635) and that the role of parents in "teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens." 443 U.S. at 638.

The Florida Supreme Court, in *In re T. W.*, held that these considerations are relevant only under the relaxed standard of "significant state interest" applied by the United States Supreme Court to the United States Constitution. While our supreme court agreed that protecting minors and preserving family unity were "worthy objectives," the court held that they were not sufficiently compelling, under our more stringent "compelling state interest" standard, to override Florida's privacy amendment insofar as a minor's right to an abortion is concerned. In light of this holding, the State's similar argument in the case before us seems already to have been rejected by our supreme court in *In re T. W.* Specifically, the *T. W.* court expressly held that the age or maturity of the minor to determine "the most profound and intimate" question concerning one's body is immaterial in the constitutional sense under our standard of review.

We, in good faith, suggest that the differing policy concerns accompanying the issue before us will result in the supreme court's modification of the apparently conflicting broad language in *T. W.*[5] There was a finality and an urgency in the decision facing the minor in *T. W.* To choose abortion, at least for that pregnancy, was a final solution. To delay the decision for any substantial period of time would deny the opportunity to ever make the decision and, for that pregnancy, the result would be equally as final. Further, by subjecting the minor to consultation with (and approval by) her parents and, to a lesser degree, the alternative judicial proceedings, the minor's ability to make this all important, highly personal decision would be compromised. Future events might make either decision (to abort or not abort) wise or folly. But our supreme court held in *T. W.* that, in any event, the young woman should be able to say that it was *her* decision.

In contrast, the decision whether or not to have consensual sex is neither final nor urgent. Parents (and the state) should be permitted to urge (and enforce) restraint in an attempt to ensure that the onset of sexual activity is coupled with the maturity to cope with the consequences. Hopefully this adult and government involvement will reduce the number of young women forced to face the dilemma of choosing between abortion and pregnancy. We recognize that Florida's age of consent, under modern morality, may be too high. But this, in the first analysis, is the legislature's prerogative.

Because we believe that the minor's right to consensual sex is not substantially burdened by requiring a delayed exercise of such right (similar to voting, drinking and driving), we uphold the constitutionality of section 800.04. We, therefore, affirm the conviction in *Jones v. State* and reverse the decisions in *State v. Rodriguez* and *State v. Williams* and remand for further action consistent with this opinion.

Because of the importance of this issue beyond the boundaries of this court and because we may have read less into *In re T. W.* than intended by the supreme court, we certify the issue of these appeals to the Florida Supreme Court as one of exceptional importance. (COBB, J., concurs specially in result, with opinion. SHARP, W., J., concurs specially in result, with opinion.)

---

[1]During the proceedings, the young women sat in the courtroom holding hands with the accused young men.

[2]We do not feel that we can merely expand the holding in *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 112 S.Ct. 1572, 118 L.Ed.2d 216, 60 U.S.L. Weekly 3674 (1992), in which the Florida Supreme Court recognized a "compelling state interest" in protecting minors from "sexual exploitation" under section 827.071, Florida Statutes. That case involved a father taking explicit photographs of and videotaping his 12-year-old naked daughter. It has been urged that we could uphold the statute by saying that anytime a minor is seduced, sexual exploitation has occurred. This position, however, seems disingenuous.

The statute involved in the cases before us, section 800.04, is gender neutral, and there is no age requirement for the violator of the act. Therefore, if two fifteen-year-olds engage in sex, it is extremely difficult to determine which is the victim and which is the second degree felon. Even if the perpetrator is sixteen (or even twenty) and the "victim" is a sexually active, mature minor, the question of who "sexually exploited" whom still may not be readily apparent.

[3]We reach this conclusion because the statute in question only regulates the behavior of persons under sixteen. Therefore, for purposes of section 800.04, persons sixteen and older are adults.

[4]The State urges us to follow the opinion of the Supreme Court of Alaska in *Anderson v. State*, 562 P. 2d 351 (Alaska 1977), in which that court acknowledged that the State may exercise control over the sexual conduct of children beyond the scope of its authority to control adults. The State is preaching to the choir. However, we cannot adopt a decision from another state in conflict with

the decision of our supreme court. In *Anderson*, the court never mentioned what state interest standard (compelling or significant) Alaska had adopted.

[5]The United States Supreme Court in *Bellotti* discussed the role of the family (and state) in restricting certain decisions which can be made by minors:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.
>
> * * *
>
> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting . . . [.]
>
> Yet, an abortion may not be the best choice for the minor. The circumstances in which the issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of the family may be feasible and relevant to the minor's best interest. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.

(COBB, J., concurring specially.) Despite the expansive language employed by the majority opinion in *In re T.W.*, 551 So.2d 1186 (Fla. 1989), I do not believe that the Florida Supreme Court intended to invalidate section 800.04, Florida Statutes. The "compelling state interest" in *T.W.* was the fact that four members of the Florida Supreme Court favored a policy of readily accessible abortions for pregnant minors. There is no such philosophical imperative in regard to the encouragement of sexual activity by minors under the age of 16. Determination of the age of consent is a matter for the legislature, not the courts. It is also my view that the electorate of Florida, in voting for the privacy amendment[1] in 1980, had not the faintest idea it was voting to abolish the crime of statutory rape in this state.

Accordingly, I concur with the majority result and with its conclusion that the defendants in these cases have standing to raise the constitutional issue. I also concur with certification.

---

[1]Art. I, § 23, Fla. Const.

(SHARP, W., J., concurring specially.) Since the majority opinion finds the defendants have standing to raise the underage persons' claimed constitutional privacy rights, I concur that the issue of whether *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) invalidates prosecutions of persons pursuant to section 800.04, should be certified to the Florida Supreme Court as a question of great public importance.[1] However, I disagree with the majority opinion that these defendants have standing to raise the underage minors' claimed constitutional rights to have sex. I would prefer to dispose of the Williams and Rodriguez cases by holding they lack such standing,[2] and in the Jones case, that this constitutional issue was not timely raised or presented to the trial judge.[3]

In re T.W., contains broad language which gives some credence to the appellants' positions that since pregnant minors cannot be prohibited from consenting to have an abortion, it follows they cannot be legally prohibited from consenting to have sex. The court said in *T.W.*, that the right to procreate, and by implication, the right to have sex for fun, falls within Florida's constitutional right of privacy protection, Article I, section 23, as a "fundamental right." It also said such fundamental rights extend to minors as well as to adults.

In order to be able to constitutionally impinge by statute on the free exercise of such a fundamental right, the court said in *T.W.*, that the state must show it has a "compelling state interest" and that such interest is furthered by the challenged statute. It found no compelling state interest in the statute's requirement that a minor obtain parental or court-substituted consent prior to having an abortion. This was partially because the court found the minor's health and well being were not furthered by the statute. Compliance with the statute could have prevented a minor from having an abortion early in the pregnancy when such procedure was least risky for the minor's health, and far less risky than giving birth.

Further, the court said in *T.W.*, that the Legislature had taken inconsistent positions on the issue of requiring parental consent for decisions a pregnant minor was allowed to make for her own medical care while pregnant and that of her child, after its birth. In those contexts, which could be serious and life-threatening, the minor was empowered to make decisions regarding medical treatment without her parent's consent. The court concluded, based in such inconsistency, "[t]he selective approach employed by the Legislature [regarding requiring parental consent] evidences the limited nature of the...interest being furthered by these provisions." *T.W.* at 1195, citing *Ivey v. Bacardi Imports Co., Inc.*, 541 So. 2d 1129, 1139 (Fla. 1989).

In contrast, Florida has long adhered to a policy of protecting minors from sexual exploitation and abuse. The roots of this policy can be found in an early English statute making it a felony to have "carnal knowledge" of a woman child under ten years of age. The statute was old enough to be accepted in the United States as part of the common law. Wharton's *Criminal Law* Vol. II § 291 (4th ed. 1978). Such laws, known as "statutory rape," exist in every state. Although the ages of the protected child may vary, from state to state, and for the degree of crime within a state, all have in common the fact that the consent of the underage child is not relevant as a defense.

In Florida, the first statutory rape law dates back to 1892 (section 2598):

> Whoever ravishes and carnally knows a female of the age of 10 years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of 10 years, shall be punished by death....

A version of this statute was in effect in Florida until the sexual battery statute was passed in 1975.[4] Section 794.011 makes it a felony of varying degrees of seriousness to commit a sexual battery on a person under the age of twelve, for which consent is no defense. Section 794.05 similarly obviates consent as a defense if the child is under eighteen, unmarried, and previously was chaste.

In 1943, the Legislature broadened its policy of protecting minors by passing section 800.04, the statute involved in these cases. It prohibits a variety of lewd and lascivious conduct with a child under the age of sixteen, or in the child's presence, including actual sexual intercourse, as occurred in these cases. Violations of section 800.04 are second degree felonies rather than possibly first degree or life felonies pursuant to section 794.011. Section 800.04 also provides that the child's lack of chastity and the child's consent are not defenses to charges brought under section 800.04. Since all of the children involved in these cases are over the age of twelve, apparently were not previously chaste, and they consented to the sexual intercourse, charges had to be brought under section 800.04 rather than section 794.05 or 794.011.

Also demonstrating Florida's policy of expanded protection of minors from harmful explicit sexual conduct are other statutes which deal with a variety of subjects. *See, e.g.*, section 847.013 (exposing minors to obscene motion pictures and shows); section 847.0133 (protection of minors; prohibition of certain acts in connection with obscenity; penalty); section 847.0145 (selling or buying minors to engage in sexually explicit conduct for the purpose of visually depicting it). Such statutes illustrate a well-established, consistent policy in Florida to increase the protection of its children from premature sexual activity and exploitation. The mechanism chosen by the Legislature to enforce this policy is to make it a crime to engage in the prohibited sexual conduct with a child without regard to the child's or even the child's parents' consent. The basic assumption behind such laws is that consent by the child counts for nothing because the child or un-

derage person must be protected from his or her own lack of wisdom and good judgment.

I agree with Judge Harris that the State of Florida has a compelling interest in protecting its children from sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe and healthy for them. *See New York v. Ferber*, 458 U. S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Ferris v. Santa Clara County*, 891 F.2d 715 (9th Cir. 1989), *cert. denied*, 498 U.S. 850, 111 S.Ct. 141, 112 L.Ed.2d 107 (1990); *Ravin v. State*, 537 P.2d 494 (Alaska 1975). This compelling state interest has been long adhered to in Florida, and has been consistently broadened in scope. Section 800.04 and other Florida statutes evidence no inconsistent or limited loyalty to the social policy of protecting children from sexual activity and abuse.

Thus, in my view, the defendants in these cases have failed to demonstrate any constitutional invalidity with section 800.04 on its face or as applied. Accordingly, I agree the *Jones* case should be affirmed and the *Rodriguez* and *Williams* cases should be reversed.

---

[1]Fla. R. App. P. 9.030(a)(2)(B)(i).

[2]*See State v. Phillips*, 575 So. 2d 1313 (Fla. 4th DCA), *rev. denied*, 589 So. 2d 292 (Fla. 1991); *Ferris v. Santa Clara County*, 891 F.2d 715 (9th Cir. 1989), *cert. denied*, 498 U.S. 850, 111 S.Ct. 141, 112 L.Ed.2d 107 (1990).

[3]Constitutional questions may, or may not be, fundamental error. If not fundamental error, they must be objected to or they are waived. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

[4]Chapter 794, Florida Statutes (1975).

* * *

Landlord-tenant—Default—By providing proper notice to tenant of default, landlord was entitled to termination of lease upon tenant's failure to timely cure default under terms of lease—Where lease was properly terminated, trial court lacked authority to reinstate lease upon tenant's payment of past due rent—Tenant did not become holdover month-to-month tenant entitled to statutory notice requirements for filing of suit to terminate month-to-month tenancy when it was permitted to remain in possession for some months before eviction suit was filed—If proper termination notice is given under terms of written lease and eviction proceedings are filed under said lease, no additional notice need be given where tenant refuses to vacate premises until ordered by court to do so

WENBOY LIMITED PARTNERSHIP, Appellants, v. ROCKLEDGE BAR-B-Q, INC., a Florida Corporation, JESSE L. KELLER and JAN KELLER, his wife, and FAT BOY'S BAR-B-Q, INC., a Florida Corporation, Appellees. 5th District. Case No. 92-2728. Opinion filed June 4, 1993. Appeal from the Circuit Court for Brevard County, Frank Pound, Judge. James R. Dressler, Cocoa Beach, for Appellants. Raymonda A. Chakhtoura, of Benjamin Y. Saxon, P.A., Melbourne, for Appellees.

(HARRIS, J.) Wenboy Limited Partnership (Wenboy) timely appeals from a final judgment permitting reinstatement of a lease with Rockledge Bar-B-Q, Inc. (Rockledge).

Wenboy, a West Virginia corporation, owned certain real property located in Brevard County and leased the property to Rockledge for operation of a Fat Boy's Bar-B-Q restaurant. The lease was to terminate on December 31, 2007, provided Rockledge, among other conditions, paid the monthly rent plus any taxes levied on the premises. The lease contained the following provisions:

4. HOLDING OVER.

In the event that Lessee remains in possession of the Premises after the expiration or termination of this Lease, Lessee will be deemed to be occupying the Premises as a Tenant from month-to-month, subject to all the conditions, provisions and obligations imposed upon the Lessee in this Lease.

* * *

18. DEFAULT BY LESSEE.

If: (i) the Lessee defaults in the performance of any of the provisions, covenants or conditions of this Lease and such default continues for ten (10) days after the Lessee is notified in writing by Lessor to cure such default (or if such default is of a nature that it cannot be cured within such ten (10) day period and continues for longer than the period reasonably required to cure it), or

* * *

(v) if this Lease is terminated by operation of law, then in any such event Lessor may immediately, or any time thereafter, without prior written or other notice or demand upon the Lessee except as specifically otherwise provided in the Lease, re-enter and take possession of the Premises (by action of forcible entry and detainer or otherwise) and, thereafter Lessor may either:

(a) declare this Lease terminated, in which event Lessor may thereafter possess and enjoy the Premises as though this Lease had never been made, without prejudice, however, to any and all rights of action which the Lessor may have against the Lessee at the time of such termination for Rent, damages or breach of covenant previously accruing or occurring, . . .

Rockledge defaulted by failing to pay rent and Wenboy served the appropriate written notification of the default and notified Rockledge to cure the default by paying the amount of $19,548.96 within ten days or Wenboy would pursue all available remedies, including filing an action for eviction. Upon Rockledge's failure to cure the default, Wenboy again served written notification declaring the lease terminated, demanding possession of the premises within ten days, and requiring double rent for each day Rockledge continued to occupy the premises. Rockledge failed to respond and refused to vacate the premises.

Wenboy filed an eviction action seeking a judgment for possession under Count I; damages for past due rentals, sales tax and real property tax under Count II; damages pursuant to the guaranty agreement under Count III; and summary proceedings pursuant to Section 51.011. In response, Rockledge filed a motion to dismiss in which it alleged that the court lacked personal and subject matter jurisdiction and that Wenboy had failed to allege performance of certain conditions precedent. A hearing on the motion to dismiss was conducted but no immediate ruling was made and no transcript of the hearing is available. Following the hearing, Rockledge filed an untimely answer admitting only the execution of the lease and filed affirmative defenses alleging that Wenboy had wrongfully terminated the lease, had waived its right to bring such an action, had failed to allege compliance with conditions precedent under the lease and Florida law, was not entitled to double rent, that the court lacked jurisdiction, and that Rockledge was entitled to set off debts owed by Wenboy's general partner to Rockledge subject to pending litigation in another case.[1]

Rockledge thereafter deposited funds to cover the rents due up to the time of the deposit into the court's registry and Wenboy moved the court to disburse the funds, alleging that they constituted minimum rentals that Wenboy was entitled to regardless of any other matters set forth in the pleadings. The court granted Wenboy's motion, finding that it was entitled to past due rents in any event under the terms of the lease. When the eviction count came before the court, the trial court entered the following order styled "Final Judgment for Possession and Allowing Reinstatement":

Defendant, ROCKLEDGE BAR-B-Q, INC., filed no defenses of law or fact pursuant to Section 51.011(1), Florida Statutes, but did file a Motion to Dismiss which the court heard. Based upon argument of counsel, it is thereupon

ORDERED AND ADJUDGED:

(1) Defendant's Motion to Dismiss is denied.

(2) The factual allegations set forth in paragraphs 1 through 8 of Count I of the Complaint are taken as true as a result of the default of Defendant, ROCKLEDGE BAR-B-Q, INC. Plaintiff, WENBOY LIMITED PARTNERSHIP, shall recover from Defendant, ROCKLEDGE BAR-B-Q, INC., possession of the following described property...

(3) Defendant, ROCKLEDGE BAR-B-Q, INC., is allowed until 5:00 o'clock p.m. Monday, August 10, 1992 to pay all past-

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

ERIK RODRIGUEZ,

Defendant.

_____/

CASE NO. 92-47-CF-JL

STATE OF FLORIDA

vs.

STEVEN WILLIAMS,

Defendant.

_____/

CASE NO. 91-1588-CF-JL

ORDER

The issue of law presented in the above-referenced cases is identical and they are consolidated for decision.

I. FACTS

A. RODRIGUEZ

This defendant, age 19, is charged with violation of Florida Statute 800.04(3)[1], a second degree felony punishable by (15) fifteen years in state prison.

It is stipulated and agreed between counsel that the alleged victim, L.G., date of birth: October 22, 1977, consented without any reservation to sexual intercourse with the defendant and believes she is pregnant, a result which she desires. Furthermore, the victim has no interest in having this case

[1]Information orally amended as to sub-section at oral argument with consent of defendant and permission of the court.

prosecuted and, in fact, vehemently desires that it be dismissed. The complainant is identified as the victim's sister. Parenthetically, the court has noted the victim and the defendant sitting together, holding hands, on numerous occasions both in the lobby and in the courtroom.

B. WILLIAMS

This defendant is likewise charged with violation of Florida Statute 800.04(3)[2] and likewise faces a maximum penalty of fifteen (15) years in state prison if convicted.

It is stipulated and agreed between counsel that the alleged victim, W.O., date of birth: July 16, 1976, consented without any reservation to sexual intercourse with the defendant and has no interest in having this case prosecuted. The complainant herein appears to be the victim's mother.

II. ISSUE

Is Florida Statute 800.04(3) unconstitutional in light of Article I, Section 23 of the Declaration of Rights of the Constitution of the State of Florida and In Re T.W., A Minor, 551 So.2d 1186 (Fla. 1989)?

III. HOLDING

A. STANDING

The State argues that neither of these defendants has standing to challenge the constitutionality of Florida Statute

[2]Sub-section also amended orally in court with agreement of counsel and consent of court.

800.04 on the asserted ground of the right of sexual privacy of the minor victim, citing State v. Phillips, 575 So.2d 1313 (4th DCA 1991). A careful reading of that decision establishes the contrary and grants standing to these defendants on these facts.

Individuals may be vested with the authority to assert constitutional rights of others in situations involving a special relationship between the parties. See Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) and Eisenstadt v Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). In Phillips the court found no standing because it was the victim herself who reported the sexual battery and testified against the defendant at a bond hearing. The court similarly held that the impact of such litigation on third party interests would not be vindicated in a criminal prosecution where the minor victim was maintaining a lack of consent. The facts of the instant cases are diametrically opposed to those in Phillips and, as a matter of reverse logic, establish standing. If these defendants and those of like stature have no standing in these cases no one can ever have. A criminal statute not subject to constitutional attack is a legal abomination.[3]

B. UNCONSTITUTIONALITY OF STATUTE

This court is inescapably compelled to rule that Florida Statute 800.04(3), as applied to these defendants, is unconstitutional in violation of Article I, Section 23 of the

[3]We cannot suppose the Attorney General will mount an attack on a criminal statute of this nature. See T.W., p.1190.

Florida Constitution as interpreted by the Florida Supreme Court in In Re T.W., A Minor. The doctrine of stare decisis permits no other result.[4]

In simplest terms, the compelling force of logic is as follows:

a. Article I, section 23 of the Florida Constitution provides that every natural person has the right to be let alone and free from governmental intrusion into his or her private life.

b. In Re T.W., A Minor, at page 1191 makes explicitly clear that this constitutional right of privacy is fundamental, stating:

> "Pursuant to this principle, the United States Supreme Court has recognized a privacy right that shields an individual's autonomy in deciding matters concerning marriage, procreation, contraception, family relationships, and child-rearing and education. Roe, 410 U.S. at 152-53".
>
> emphasis added

c. The standard of review for evaluating the lawfulness of a governmental intrusion into one's private life is, according to the Florida Supreme Court in T.W., one of "compelling state interest".

d. One of the state's arguments in T.W. was that it had a compelling state interest in regulating the decision of a minor concerning abortion due to the tender years of the decision-maker and her perceived immaturity to intelligently consent to such a procedure.[5] This position was specifically rejected by the

[4]This doctrine, simply put, requires lower courts to follow the law announced by superior courts. Thus, we have a rule of law and not of men. This opinion in no way contains the personal opinion of this court, thus avoiding the pitfalls indicated in footnote 3 of T.W., p. 1190.

[5]It was, in fact, the lack of procedural due process in the state's judicial bypass statute dealing with the maturity of a minor to consent to abortion which caused this court to rule it unconstitutional.

Florida Supreme Court in T.W., wherein it states:

> "Florida's privacy protection is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime...".

T.W. at p. 1192.

A complete discussion of the broad application of this right to privacy to minors is found in the T.W. opinion at pages 1193 through 1194. Thereafter, the Court states:

> "We fail to see the qualitative difference in terms of impact on the well-being of the minor between allowing the life of an existing child to come to an end and terminating a pregnancy...".[6]

T.W. at 1195.

e. Extending this reasoning to the case at hand, defendants argue that if a minor is sufficiently mature, as a matter of law, such that the right to privacy compels the law to accept her consent alone to an abortion, surely she may consent, as a matter of law and privacy, to the act which led to the necessity for the abortion, i.e. sexual intercourse. In other words, if this constitutional right to privacy extends to the decision of a minor to have an abortion it must extend to the decision to engage in sexual intercourse.

f. If such be the case, consent must be a defense to the crime of "statutory rape",[7] the reason being that "statutory rape" statutes were enacted originally based upon the presumption that victims of less than a certain age were legally incapable

[6]The difference between terminating a pregnancy and the act of sexual intercourse is even less.

[7]Admittedly, this language is outdated and archaic but is often found in the common vernacular.

of giving their consent to sexual intercourse.

g. If consent is a constitutional defense to "statutory rape" then Florida Statute 800.04(3) must be unconstitutional in providing that such is not the case.

IV. CONCLUSION

For the reasons stated above this court feels that it has no alternative but to rule Florida Statute 800.04(3) unconstitutional as applied to these defendants and to grant defendants' Motions To Dismiss filed herein. The court would urge the Florida Supreme Court to re-examine the broad language of the T.W. decision in light of the issue presented herein so as to provide guidance to the trial judges of this state as related issues inevitably arise in the future.[8]

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida, this 21st day of July, 1992.

Jerry T. Lockett

JERRY T. LOCKETT, Circuit Judge

[8]Alternatively, the court chooses to treat defendants' motions as "Motions to allow Presentation of a Consent Defense" and grants same.