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IN THE SUPREME COURT OF FLORIDA

RYAN LEE CHEEK,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

S.CT. CASE NO. 83,279

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On October 7, 1991, an information was filed in Orange County Circuit Court charging Petitioner with ten (10) counts of committing a lewd, lascivious, or indecent act upon a child. (R138-141) All the charges involved the same fourteen (14) year old consenting victim, S T

Petitioner filed a written motion to dismiss the charges on the grounds that Section 800.04(3), Florida Statutes, was unconstitutional as it applied to him. (R188-190) Following a hearing, the motion was denied. (Rll-74)

On September 10, 1992, Petitioner agreed to plead no contest to an amended information charging a single count of lewd and lascivious assault and one count of grand theft of a motor vehicle. (R2,210) Petitioner specifically reserved his right to appeal the denial of his earlier motion to dismiss on constitutional grounds. (R4) At sentencing, the court withheld

adjudication and placed Petitioner on probation. (R222-227)

Timely notice of appeal was filed, Petitioner was adjudged insolvent and the Office of the Public Defender was appointed for appeal. (R229,240)

On appeal the Fifth District Court affirmed. Cheek v. State, 630 So. 2d 231 (Fla. 5th DCA 1994). The affirmance was expressly based on the District Court's prior opinion addressing the identical issue, Jones v. State, 619 So.2d 418 (Fla. 5th DCA 1993).

Timely notice to invoke discretionary review was filed. This Court accepted jurisdiction and dispensed with oral argument in an order dated May 3, 1994. This brief follows.

SUMMARY OF ARGUMENT

Section 800.04, Florida Statutes, is unconstitutional because it prohibits a defendant who has sexual relations with a consenting citizen under the age of 16 years from presenting a defense of consent, a defense which would be available were he charged with sexual battery, an offense of the same degree. Petitioner had standing to challenge the constitutionality of the statute because of his relationship with the named victim and the fact that the named victim and others similarly situated are not subject to prosecution under Section 800.04 and thus otherwise have no avenue for asserting their right to privacy and decision-making regarding their bodies. The requirement that a child be 16 years of age or older in order to consent to sexual relations is arbitrary and the statute is an invalid attempt to regulate morals.

ARGUMENT

SECTION 800.04, FLORIDA STATUTES, IS UNCONSTITUTIONALLY VIOLATIVE OF THE RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF LAW.

The District court affirmed Petitioner's conviction relying on its decision in Jones v. State, 619 So. 2d 418 (Fla. 5th DCA 1993). Jones is currently pending review in this Court. Jones v. State, Florida supreme Court Case number 81,970. Mr. Cheek relies on the petitioner's argument in Jones, as well as the following:

Petitioner was charged under Section 800.04(3), Florida Statutes, with committing a lewd, lascivious or indecent act upon a child by "commit[ting] an act defined as sexual battery upon . . . a child under the age of sixteen years, without committing the crime of sexual battery . . . " (R210) Section 800.04 provides that neither the victim's lack of chastity nor the victim's consent is a defense to the charge if the person with whom a defendant engaged in sexual relations is under 16 years of age.

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 private life except as otherwise provided herein. . . .

This Court has held that the right of privacy, which is implicated in the decision "whether, when, and how one's body is to become the vehicle for another human being's creation," and

includes the freedom to make the choice to end a pregnancy, is fundamental, and extends to minors. In Re T. W., 551 So. 2d 1186, at 1192 (Fla. 1989), quoting L. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). If a minor has the constitutional right to consent to an abortion without parental consent, a fortiori, she has the right to knowingly and voluntarily consent to engage in sexual conduct.

In Jones v. State, 619 So. 2d 418 (Fla. 5th DCA 1993), the Court held that an adult sexual partner has standing to raise the constitutional rights that could otherwise not be alleged by a consenting minor child, rejecting State v. Phillips, 575 So. 2d 1313 (Fla. 4th DCA 1991), rev. denied, 489 So. 2d 292 (Fla. 1991). The concept of "vicarious standing" has been applied specifically in the right of privacy area to permit a party to assert the constitutional rights of another. Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). The rule against allowing the assertion third party rights has been relaxed either where there existed a special relationship between the party and a non-litigant or where enforcement of the challenged restriction would adversely affect the rights of individuals who are not parties to the lawsuit but have no effective avenue of preserving their rights themselves. State v. Saiez, 489 So. 2d 1125 (Fla. 1986); Higdon v. Metropolitan Dade County, 446 So. 2d 203 (Fla. 3d DCA 1984); State v. Long, 544 So. 2d 219 (Fla. 2d DCA 1989).

In Eisenstadt V. Baird, supra, the statute controlling the sale of condoms to unmarried persons was found to be invalid in large part because it "was, in reality, merely an attempt to regulate morals, not a health measure." Stall v. State, 570 So.2d 257 (Fla. 1990). Likewise, Section 800.04(3), Florida Statutes, is an effort to legislate morality, and in a highly random manner. Had it been alleged that the named victim in this case did not consent to sexual intercourse, Appellant could be found guilty of sexual battery on a person 12 years of age or older, a second-degree felony punishable by up to 15 years in prison. Sections 794.011(5) and 775.082(3)(c), Florida Statutes (1991). Mr. Cheek, however, would have been permitted to present his defense of consent. Lewd assault on a child would not constitute a lesser included offense. See, e. g., Wallis v. State, 548 So. 2d 808, at 810 (Fla. 5th DCA 1989); and Furlow v. State, 529 So. 2d 804 (Fla. 1st DCA 1988). Where a person older than 12 years of age but younger than 16 years of age consents to sexual intercourse, the punishment for his or her partner is the same as though the partner had ravished the minor against his or her will, i. e., it is a second-degree felony. Section 800.04, Florida Statutes (1991).

In Jones, the District Court found that the Legislature has the right to restrict a fourteen-year-old person's right to engage in consensual sex, but Petitioner maintains that there is no rational basis for arbitrarily setting the "age of consent" at 16 years, particularly where, until 1984, Section 800.04 did not

apply unless the alleged victim was under the age of 14. See, e.g., Section 800.04, Florida Statutes (1983); Chapter 84-86, Laws of Florida. In speaking of a Florida citizen's right to privacy in his communications, this Court wrote:

> . . . Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over "majoritarian sentiment" and thus cannot be universally defined by consensus. (Footnote omitted.)

Shaktman v. State, 553 So. 2d 148, at 151 (Fla. 1989). Neither, Petitioner would submit, should the parameters of one's exercise of privacy regarding his or her body be defined by randomly picking a number.

Because of the relationship between Petitioner and the named victim in this case, and the fact that their engaging in sexual intercourse was with her consent, Petitioner has standing to assert the named victim's right to privacy and to govern her own actions and body. Because Section 800.04, Florida Statutes, prohibits a defendant's assertion of a defense of consent to a criminal charge, especially where consent was given, and because there is no rational basis for denying a 15-year-old the right to consent to sexual relations, the statute is unconstitutional. Petitioner's conviction for violation of Section 800.04(3) should be reversed.

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

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
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COUNSEL FOR PETITIONER

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 to Ryan Lee Cheek, 1025 B. Tree Lane, Titusville, Florida 32780, this 24th day of May, 1994.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RYAN LEE CHEEK, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 83,279

A P P E N D I X

Cheek v. State, 630 So. 2d 231 (Fla. 5th DCA 1994)

1

Ryan Lee CHEEK, Appellant,

v.

STATE of Florida, Appellee.

No. 92–3117.

District Court of Appeal of Florida, Fifth District.

Jan. 28, 1994.

Appeal from the Circuit Court for Brevard County; Martin Budnick, Judge.

James B. Gibson, Public Defender, and Daniel J. Schafer, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Anthony J. Golden, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

AFFIRMED.

See Jones v. State, 619 So.2d 418 (Fla. 5th DCA 1993).

HARRIS, C.J., and DAUKSCH and GOSHORN, JJ., concur.

2

James Thomas WHICHARD, Appellant,

v.

STATE of Florida, Appellee.

No. 93–654.

District Court of Appeal of Florida, Fifth District.

Jan. 28, 1994.

Appeal from the Circuit Court for Orange County; James C. Hauser, Judge.

James B. Gibson, Public Defender, and Susan A. Fagan, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

COBB, Judge.

In this appeal the appellant correctly points out, and the state readily concedes, that 42 months total incarceration in the Orange County Jail represents an improper upward departure from the recommended and permitted range of "any nonstate prison sanction" in regard to the six cases in which he pled no contest. Accordingly, the sentences are vacated and remanded for resentencing within the parameters of *Singleton v. State,* 554 So.2d 1162 (Fla.1990); § 922.051, Fla.Stat. (1991); § 921.001(5)(6), Fla.Stat. (1991); Fla.R.Crim.P. 3.701(d).

REVERSED AND REMANDED.

PETERSON and DIAMANTIS, JJ., concur.

3

Arthur COOPER, Jr., Appellant,

v.

STATE **of Florida,** Appellee.

No. 924022.

District Court of Appeal of Florida, First District.

Feb. 1, 1994.

An appeal from the Circuit Court for Bay County; Judge N. Russell Bower.

Arthur Cooper, Jr., pro se.

No appearance for appellee.