IN THE SUPREME COURT OF THE STATE OF FLORIDA

RYAN LEE CHEEK,

Petitioner,

v. Case No. 83,279

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

Petitioner lacks standing to raise the alleged violations of the child victims' constitutional rights. However, even assuming arguendo that he has standing, there has been no violation of the victim's constitutional right to privacy. The state has a compelling state interest in regulating sexual activity of minors, and the statute is constitutional. The result reached by the Fifth District Court of Appeal in this case and Jones case upon which it relies should be affirmed by this honorable court.

ARGUMENT

EVEN IF PETITIONER HAS STANDING, IT IS NOT UNCONSTITUTIONAL TO HOLD THAT A MINOR CANNOT CONSENT TO SEXUAL INTERCOURSE WITH AN ADULT

Petitioner lacks standing to assert any constitutional right of the child victim. The majority opinion in case of Jones v. State, 619 So. 2d 418 (Fla. 5th DCA 1993), which this decision cited as controlling authority, is erroneously decided in this regard. The state asks this court to adopt the position of Judge Sharp in her concurring opinion in Jones regarding both lack of preservation and lack of standing. The cases cited in the majority opinion are cases where someone whose interests are the **same** as the person whose alleged constitutional rights are being violated asserted that person's rights. In the instant case, it can not be more clear that the interests of Petitioner and the victims are not the same. It is irrelevant that both Petitioner and the victim consented to have sexual intercourse. What is relevant and controlling is that the victim is harmed by Petitioner asserting a right which would preclude her from receiving the protection granted by the legislature. Under such a circumstance, the majority erred by finding that Petitioner had standing to assert the victim's constitutional right of privacy. Rakas v. Illinois, 439 U.S. 128 at 139, 99 S.Ct. 421, 58 L.Ed.2d 387, rehearing denied 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83 (1978); United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); Mansfield v. State, 389 So.2d 292 (Fla. 3d DCA 1980).

The majority opinion of the District Court of Appeal in the Jones case found that Petitioner had standing to raise a constitutional challenge on behalf of the minor who consent to sex, and relied on 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 (1972). The contention that Petitioner is similarly situated to the petitioners in those cases is erroneous. In both Griswold and Eisenstadt, the parties challenging the constitutionality of laws prohibiting the use of contraceptives were persons charged as aiders and abettors for the crime of supplying contraceptives. The court noted the "confidential relationship" which existed between the suppliers and users of contraception. Griswold. There is no analogous relationship here. The Fourth District Court of Appeal has stated in a similar situation:

> there is no special relationship between the perpetrator and the minor victim of the type found in *Griswold*. There is neither a relationship of confidence nor a relationship of advocacy. Remember, of course, that in *Eisenstadt* the very reason Baird openly violated the statute was to challenge its constitutionality. **In the instant case, by no stretch of the imagination can we say that the respondents were engaging in sex with the minor victim so as to challenge the statute.**

State v. Phillips, 575 So.2d 1313, 1314 (Fla. 4th DCA), review denied, 589 So.2d 292 (Fla. 1991). It should be noted that the state was proceeding in Phillips on a petition for writ of common law certiorari which mandated that the state meet the higher standard of showing that the trial court departed from the essential requirements of law. See also Ferris v. Santa Clara

County, 891 F.2d 715, 717 n.3 (9th Cir. 1989); Anderson v. State, 562 P.2d 351 (Alaska 1977). The state asserts that the fact that there is evidence of the victim's consent here does not change the result which was reached by the Fourth District Court of Appeal. Petitioner still does not have the special relationship required by caselaw for the advocacy of the victim's third party interests.

The statute as written has been held by this court to be constitutional. Chesebrough v. State, 255 So.2d 675 (Fla. 1971). Even after the adoption of the privacy amendment, this court has held that the fact that the sexual intercourse was consensual does not invalidate a conviction under §800.04, Fla.Stat. State v. Lanier, 464 So.2d 1192, 1193 (Fla. 1985). More recently, the Second District Court of Appeal has held in ruling on a petition for writ of common law certiorari that not only is consent not a defense under the statute, but also that ignorance, misrepresentation or belief that the child victim was sixteen years or older is not available as a defense by one accused of violating this statute. State v. Sorakrai, 543 So.2d 294 (Fla. 2d DCA 1989).

Although the question of a child's right to consent to intercourse under Article I, §23 is one of first impression in Florida, this court has held under the Federal Constitution that "the right of privacy does not contemplate the privilege of engaging in sexual intercourse at such times and places as the parties may desire and in the presence of others." Chesebrough, 255 So.2d at 679. The state asserts that there is no

constitutional right for minors or others to engage in sexual intercourse under the Florida constitution.

The analysis in the majority opinion in In re T.W., 551 So.2d 1186, 1193 (Fla. 1989) began with the knowledge that the minor woman had already had intercourse and thus became pregnant. The analysis was focused on her rights to terminate the pregnancy vis a vis the rights of the unborn fetus. No such dichotomy exists here. T.W. did not address the question of T.W.'s right to engage in intercourse with either an adult or a minor. This court merely held that since **pregnant** minors or minor **mothers** are allowed to make life or death decisions for themselves or their child pursuant to §743.065, Fla.Stat. (1987), the choice to have an abortion should not be any different.

This distinction between pregnant minors and other minors is based on holdings by the United States Supreme Court which differentiate between the status of pregnant minors and nonpregnant minors.

> 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. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
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> Moreover, the potentially severe detriment facing a pregnant woman, see Roe v. Wade, 410 U.S. at 153, 35 L.Ed.2d 147, 93 S.Ct. 705, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may

> be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Bellotti v. Baird, 443 U.S. 622 at 642-643, 99 S.Ct. 3035, 61 L.Ed.2d 797, rehearing denied 444 U.S. 887, 100 S.Ct. 185, 62 L.Ed.2d (1979). See also concurring opinion of Justice Blackmun in Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981). Thus, upholding the constitutionality of §800.04, Fla.Stat. (1989) is consistent with T.W., since the application of §800.04 is not to pregnant minors. As stated in Bellotti v. Baird, all that is necessary is that the decision to have intercourse be postponed.

Apart from T.W., the state is aware of only two cases addressing the application of Article I, §23 to matters of personal decision making (as opposed to search and seizure or revelation of information). Those cases, John F. Kennedy Hospital v. Bludworth, 452 So.2d 921 (Fla. 1984), and In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990), addressed the rights of patients to refuse life prolonging medical treatment. The nature of that decision is fundamentally different than that presented here. Those cases involved literally a question of life and death. Respondent submits that a child's decision on sexual activity shares none of the same features of Bludworth, Browning, or T.W., and as such does not implicate the protection of the constitutional provision of the right to privacy.

Alaska, which has a constitutional right of privacy comparable to Florida's[1], rejected a claim similar to that presented here. In Anderson v. State, the defendant was convicted of committing lewd and lascivious acts on a child sixteen years old. Evidence presented to the trial court indicated that the child was not forced or coerced in any way by Anderson, had had similar sexual experiences before, and appeared to enjoy the act. Anderson contended that the statute was unconstitutionally overbroad because, among other things, it infringed on the right of juveniles to control their own sexual development. He further asserted that the statute created, "an impermissible irrebuttable presumption that juveniles under sixteen years of age are incapable of giving valid consent to sexual acts." Id. at 358.

The Alaska Supreme Court, which had two years earlier interpreted the state's constitutional right to privacy so expansively as to protect at home possession of marijuana for personal use[2], found the overbreadth argument inapplicable, and said further:

> [W]e hold that AS 11.15.134(a) is a proper legislative enactment because it does not prohibit conduct which the State may not constitutionally prohibit.
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> In reaching this result, we need not decide whether the right to privacy made explicit in the Alaska Constitution and articulated by

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[1] Article I, §22 of the Alaska Constitution states, "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

[2] Ravin v. Alaska, 537 P.2d 494 (Alaska 1975)

> this court in Ravin v. State, 537 P.2d 494 (Alaska 1975), protects certain sexual practices engaged in by adults in private with other consenting adults. We do note that "citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution."
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> While Respondent is correct in his assertion that juveniles have certain rights to privacy and to express their own autonomy, we have recognized that the State's interest in the well-being of its children "may justify legislation that could not properly be applied to adults." Assuming that juveniles have certain rights to sexual privacy, we nevertheless conclude that the State may exercise control over the sexual conduct of children beyond the scope of its authority to control adults. We conclude further that the State may forbid an adult to have fellatio with a child under 16 regardless of whether the child consents to the act. Therefore consent is not at issue under AS 11.15.134(a), and no presumption of nonconsent is involved. Thus we need not decide whether a presumption of nonconsent would be constitutionally permissible.

Id. at 358, 359 (footnotes omitted). The state asserts that this court should follow Alaska's lead in rebuffing this type of assault on the child sexual battery law, couched in terms of protection of the child's right to privacy.

The United States Court of Appeals for the Ninth Circuit has declined to find that California statutes proscribing certain sexual activities with minors violated any right of privacy which an individual might have under the Fourteenth Amendment. Ferris v. Santa Clara County. Ferris also held that a defendant convicted under state laws proscribing certain sexual activities with minors lacked standing to argue that the state may have impermissibly invaded privacy rights of minor females, since the minor females were third parties not represented in that appeal.

Id. at n.3. Ferris, like Anderson, found that even if there existed some constitutional right to engage in consensual sexual activities with females, the state may regulate that activity as it pertains to minors. Id. at 717. This holding relied in part on the United States Supreme Court's holding that

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." (citation omitted)

New York v. Ferber, 458 U.S. 747, 756-757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Ferber also held that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Id. at 757.

Furthermore, the State of Florida certainly has a compelling state interest which when balanced against a minor's right to privacy (in this case the right to consent to sexual intercourse) must prevail. Since common law it has been a crime to participate in sexual intercourse with a child. This common law was codified in 1943 in Florida by §800.04, Fla.Stat. Florida law also holds that the well-being of children is a subject within the state's constitutional powers to regulate. Griffin v. State, 396 So.2d 152, 155 (Fla. 1981). Griffin noted that the legislature may exercise its constitutional power to regulate for the well-being of children, and that the legislature has a great deal of discretion in determining what measures are necessary for the public's protection, and a reviewing court may not substitute its judgment for that of the legislature. Id. This legislative prerogative is based in part on the principle that a minor is not possessed of the full capacity necessary for

individual choice which may have potentially serious consequences. Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, rehearing denied 391 U.S. 971, 88 S.Ct. 2029, 20 L.Ed.2d 887 (1968); Bellotti v. Baird. In addition, this court has recently held:

> **the Court must be mindful that sexual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy that normally shields the home. The state unquestionably has a very compelling interest in preventing such conduct.**
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> * * *
>
> By the same token, it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, **whether or not the child consents** and whether or not that conduct originates from a parent.* As noted earlier, society has a compelling interest in intervening to stop such misconduct.
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> *Obviously, minor children are legally incapable of consenting to a sexual act in most circumstances. *See, e.g.*, Fla.Stat. §§ 794.041 & 794.05 (1989). One exception is for a minor who is lawfully married. Fla.Stat. § 743.01 (1989).

Schmitt v. State, 590 So.2d 404, at 410-411 (Fla. 1991), cert. denied ___ U.S. ___, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992). It can not be questioned that the state has a compelling interest in preventing children from being subject to sexual advances by adults. In the preamble to Ch. 84-86, Laws of Florida[3], the Florida Legislature enunciated the compelling interest underlying its statutory scheme as to sexual crimes against minors:

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[3] This amendment added the language to §800.04 that consent is not a defense.

> WHEREAS, the intent of the Legislature was and remains to prohibit lewd and lascivious acts upon children, including sexual intercourse and other acts defined as sexual battery, without regard either to the victim's consent or of the victim's prior chastity.

Id. What Petitioners needed to show below in order to properly prevail on their motion was that the state had a less intrusive means by which to achieve this state interest. Shaktman v. State, 553 So.2d 148, 151-152 (Fla. 1989); Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985); T.W.. Petitioners did not even attempt to make such a showing.

It is a general rule of statutory construction that statutes will not be interpreted in a manner which would result in an absurdity. Carawan v. State, 515 So.2d 161 (Fla. 1987). The rules of statutory construction apply to questions of constitutional construction. State ex rel McKay v. Keller, 140 Fla. 346, 191 So. 542 (Fla. 1939). The state submits that Article I, §23 can not be construed as granting children under the age of sixteen a constitutional right to consent to sexual intercourse without resulting in an absurdity, as the right would clearly apply also to ten, five, or three year old children. Such an interpretation can not stand. If the trial court's ruling were taken to its logical extensions, then criminal defendants would suddenly have the ability to argue that children consented to being photographed for kiddie porn materials, that children consented to otherwise illegal sexual acts, and the purchase of alcohol, tobacco, firearms and lottery tickets. The statutes which prohibit using the defense of a child's consent

for criminal defendants charged with procuring children to commit illegal acts were designed to avoid this very problem. The United States Supreme Court has consistently held that the constitutional rights of minors may be burdened to further a state interest. See e.g., New York v. Ferber; Ginsberg v. New York. The value of a child reaching the age of majority is that the child has reached the age of capacity to make such important decisions.

In summary, Petitioner lacks standing to raise the alleged violations of the child victim's constitutional rights. However, even assuming arguendo that he has have standing, there has been no violation of the victim's constitutional right to privacy. The state has a compelling state interest in regulating sexual activity of minors, and the statute is constitutional.

CONCLUSION

Wherefore, based on the foregoing argument and authorities, Respondent respectfully requests that this Honorable Court approve the result reached by the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by delivery via the basket at the District Court of Appeal to: Assistant Public Defender Daniel Schafer, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 26th day of May, 1994.

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