IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA

Petitioner,

v. CASE NO. 95,752
5TH DCA NO: 98-38

RONALD RIFE,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

CERTIFICATE OF FONT SIZE

Petitioner certifies that this brief was typed in 12 point Courier, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent, Ronald Rife (Rife), was charged by information with six counts of sexual battery on a minor (age 17) by a person in custodial authority. (R Vol.1, 32-33).[1] After a jury trial, he was found guilty on Counts 1, 2 and 3 of the information. (R 34-36; TR Vol.1, 66-68). The evidence at trial demonstrated that Rife had "custodial authority" over the victim. This was established, in part, through the judicially noticed certified copy of the court order arising from a dependency proceeding which placed the victim in Rife's care and custody. (TT Vol.2, 274-278, 335-336). The notice was admitted into evidence as State's Exhibit 1 and published to the jury without objection. (TT Vol.2 342; TR 48). Additionally, there was testimony by the child-victim that Rife had exercised custodial authority over her. The victim testified that she "couldn't go anywhere, couldn't see anybody or talk to anybody on the phone" without Rife's permission. She further testified that she left Rife because she "was tired of living under those conditions. I couldn't do anything without him knowing what was going on, what was said, stuff like that." (TT Vol.2, 211).

There was also testimony from various officials regarding the

[1](R #) is used to indicate the page number from the State's appeal below. (TR #) is used to indicate the page number of the record from Respondent's direct appeal. (TT # is used to indicate the page number of the trial transcript from Respondent's direct appeal.

situation in which the dependency court had awarded custody of the child-victim to the 49 year-old Rife. Linda Ward, a protective investigator for the Department of Children and Families (DCF), testified regarding the circumstances in which Rife obtained custody of the victim, over the objection of DCF, in a dependency proceeding. (TT Vol.2 269-310). These circumstances included Rife lying about a sexual relationship existing between himself and the victim (TT Vol.2, 273-274, 281, 283, 295) and his averment that he was a protector of the victim, that he would require her to do chores, that he would set down rules to live by, and that he would supervise her (TT Vol.2, 277-278, 281-282). Rife said the victim had no one else and he was there to help her. (TT Vol.2, 278). Ward informed Rife that, if he was having sexual relations with the victim, he would lose custody and could be arrested. (TT Vol.2, 298-299). The child-victim had been the victim of incest from age eleven and required a lot of support. (TT Vol.2, 311).

Linda Penley-Novick, a licensed mental health counselor, testified regarding her interviews of Rife in his successful bid to gain custody of the child-victim. (TT Vol.2, 313). Specifically, she testified that Rife was offended over her concern as to why a 49 year-old male would want to take custody of the teen-age girl who was not his relative and with whom he had no apparent ties. She also testified that Rife repeatedly assured her that he "would never do anything other than be a nurturing part of [the victim’s]

life." (TT Vol.2, 314). Penley-Novick informed Rife that the victim was in no condition to consent to a sexual relationship because she was only age ten to twelve emotionally. Rife was also told that due to the sexual abuse history with her father, while the victim may have been sexually experienced, it did not mean she was good at making judgments of who to be with or when. Penley-Novick further informed Rife that if he were with the child-victim sexually, it would be as a father, not as a lover. Rife indicated to the counselor that he understood and would never do such a thing. (TT Vol.2, 322). While she could not testify that it happened in this case, Penley-Novick testified that, based upon her experience with this victim, she believes the victim would agree to sex in order to have shelter, but does not believe that it constituted true consent. The counselor believed that the victim was neither legally or emotionally developmentally able to consent to sexual relations. (TT Vol.2, 324).

Evidence of custodial authority was also contained in Rife's confession to Officer Reynolds. In his confession, Rife admitted that he "kind of took her under my wing as a daughter and tried to help the girl." (TT Vol.2, 355-356). Rife also admitted in his confession to police that he was the victim's legal guardian at the time he was engaging in sexual relations with her. (TT Vol.2, 363). In his confession Rife stated he would not characterize his relationship with the victim as boyfriend/girlfriend. He stated he

hoped he was an authority figure to the victim and her friends, because that is what his intentions were. (TT Vol.2, 389). Rife understood the court system thought of him as a parent to the victim rather than as a lover. (TT Vol.2, 390). He also told the investigators that he was fully aware that the victim had been sexually abused by her father and did not have a very good home life; he admitted that he had attended the criminal trial of the victim's father. (TT Vol.2, 352, 357-358).

The tape of Rife's interview with the police was played for the jury. (TT Vol.351-392). During his confession, Rife also stated he and his roommate had a three-some with the victim. (TT Vol.2, 363-364). He believed she was a nymphomaniac. (TT Vol.2, 356). Rife told the police, if he was "busted," he was going to take the victim down with him. (TT Vol.2, 365).

During trial, Rife testified that he was hurt and mad when he was giving his statement to the police. (TT Vol.3, 455-456). He and the victim were planning to be married. (TT Vol.3, 453).

The child-victim testified that she moved in with Rife because her mother had turned against her. (TT Vol.1, 193-194). She moved into Rife's house in October of 1996, but had been having sex with him prior to that time. (TT Vol.1, 195-196). From that time through January 1997, the child-victim and Rife had sex almost every night. (TT Vol.1, 196-199). From February until she left, Rife and the victim had sex two to three times per week. (TT

Vol.2, 208-211). She left because she was tired of living under the conditions: she could not do anything or talk to anyone without him knowing, he would not permit her to speak with her male friends, and he got drunk almost every night. (TT 209-211, 234). Prior to her leaving Respondent, the two had plans to marry when the child-victim turned eighteen. (TT Vol.2, 228).

While the child-victim was living with Rife, he was drunk or stoned almost every night. Rife had at least two beers and smoked marijuana every night. She would also smoke marijuana with him. (TT Vol.2, 257-258).

Respondent was aware of that the child-victim had been a victim of incest by her father. (TT Vol.2, 249). She was staying with Rife because she did not have anywhere else to go and she did not want to be in a county facility. (TT Vol.2, 240, 253). The child-victim testified she had sex with Rife after she moved in because she needed to be sure she would have a roof over her head the next day. (TT Vol.2, 255). Respondent had not told her that if she did not have sex with him that she would be kicked out. (TT, Vol.2, 256).

After being convicted, Respondent filed a motion seeking a downward departure sentence. In his motion, Rife listed five mitigating factors in support of his request: 1) that the victim was the initiator of the sexual contact; 2) that he was not dangerous and posed no future threat to society; 3) that this crime

was an isolated incident in that he had no previous history of committing this crime, other than with the named victim for a period of less than six months, 4) that the sexual relationship with the victim began prior to the entry of the court order (appointing Rife as guardian) and, again, was instigated by the victim, and 5) other grounds to be argued at sentencing. (R 37-38). Rife's guidelines scoresheet provided for a state prison sentence range of 297.4 to 495.7 months. (R 39-42). Appellant was adjudicated guilty of the three counts of sexual activity with a minor by a person in custodial authority. (R 43).

At the sentencing hearing, defense counsel again requested a downward departure sentence. Counsel argued that a downward departure sentence was in order because the victim was the initiator of the sexual contact between herself and Rife; that Rife was not dangerous; and that this was an isolated incident in that it involved only one person and continued over a period of time. (R 15-20). Additionally, several of Rife's family members and friends requested the trial court's leniency for Appellant. (R 8-15). At the time of Rife's sentencing, the victim was 18 and had just given birth to a child she claimed was Rife's. (R 5-6).

The state objected to the imposition of a downward departure sentence and requested the trial court sentence Rife within the guidelines. Specifically, the state argued that the victim's consent or initiation was irrelevant since she was a minor. The

State further argued this was not an isolated incident, but involved several instances of sexual battery upon the victim. (R 5-8, 20-22).

The trial court sentenced Rife to concurrent downward departure sentences of eight and one-half years (102 months) imprisonment followed by ten years probation on each count. (R 45-51). The trial court based its downward departure on the minor's consent and willing participation, and the fact that this was an isolated incident committed in an unsophisticated manner for which Rife had shown "some remorse." (R 24-25, 41). The State filed notice that Rife qualified as a sexual predator under Florida Statute section 775.21. (TR 106-107). The trial court found that Rife qualified as a sexual predator (R 29; TR 108-110). Additionally, the court ordered sex offender treatment for Rife. (R 48). As a condition of his probation, the trial court ordered that Rife have no deliberate contact with minors under age 18 without the child's parent or guardian being present. Contact with his own children was permitted so long as the child's other parent or guardian was present. (R 49).

The State filed a timely notice of appeal in the Fifth District Court of Appeal. (R 53). The District Court *sua sponte* considered the case *en banc*. In a 5-4 decision, the Fifth District Court affirmed the imposition of a departure sentence in this case. The majority found that, even though consent of a minor was not a

defense to the crime of sexual battery by a person in custodial or familial authority that it could be considered as a mitigating factor. State v. Rife, 24 Fla. L. Weekly D746, D747 (Fla. 5th DCA March 19, 1999. (See attached Exhibit A).

On May 28, 1999, the Fifth DCA granted, *en banc*, the state's Motion to Certify and certified the following question to this Court:

> Although willingness or consent of the minor is not a defense to sexual battery of a minor, may it be considered by the court as a mitigating factor in sentencing? Should the mitigation also apply where the defendant was convicted of being in a position of custodial or familial authority with the victim?

(See attached Exhibit B). On June 9, 1999, this Court entered an order postponing a decision on jurisdiction and setting a briefing schedule. Petitioner's brief on the merits follows.

SUMMARY OF ARGUMENT

The State has a compelling interest in protecting minors from sexual exploitation. The deterrent effect of the laws prohibiting sexual activity with minors would be compromised if willing participation or consent were to be allowed as a mitigating factor in sentencing. Minors are a particularly vulnerable class of individuals. Courts have recognized that minors are unable to make critical choices in an informed, mature manner. For this reason, a minor cannot give true consent to sexual activity.

Even if consent may be a suitable mitigator in some circumstances involving sexual activity with a minor, it is never appropriate where the defendant has been found to be in a position of familial or custodial authority over the child-victim. Based upon their position of familial or custodial authority with the victim, the defendant is in a position to exercise their influence over the victim. Under these circumstances, a minor cannot be found to be a willing participant in sexual acts with the person who is supposed to be their guardian.

Even if this Court finds that consent or willing participation may be a mitigator in any circumstance involving sexual activity with a minor, the trial court abused its discretion in finding the mitigator applied in this instance. Because the minor-victim in this case had been the victim of incest from the age of eleven at the hands of her father and had been kicked out her family home for

reporting the abuse, she was in a vulnerable position. The defendant, a 49 year-old male, took advantage of the victim's position in engaging in an ongoing sexual relationship while supposedly acting as her court-appointed guardian.

ARGUMENT

IN LIGHT OF THE STATE'S COMPELLING INTEREST IN PROTECTING MINORS FROM SEXUAL EXPLOITATION, CONSENT SHOULD NOT BE CONSIDERED A MITIGATING FACTOR IN SEXUAL BATTERY OF A MINOR. IN ANY EVENT, IT SHOULD NOT BE CONSIDERED A MITIGATING FACTOR WHEN THE DEFENDANT WAS CONVICTED OF SEXUAL BATTERY WHILE IN A POSITION OF FAMILIAL OR CUSTODIAL AUTHORITY.

Respondent, Ronald Rife (Rife), was convicted of three counts of sexual battery on a minor by a person in custodial authority. The child-victim moved in with Rife because she had no other place to reside. Her own mother kicked her out of the family home after the victim accused her father of incest beginning at the time she was approximately eleven years of age.[2] The sexual relationship began before, and continued after, the child-victim moved in with Rife. Respondent admits to having sex with the child-victim numerous times. Several months after the victim moved in with Rife, he was made her legal guardian.

The trial court sentenced Rife to a downward departure sentence based upon the victim's consent to the sexual relationship. The Fifth District Court of Appeal (DCA) found that consent could properly be considered a mitigating factor in sexual battery by a person in familial or custodial authority. The court

[2]The victim eventually testified at trial against her father. The mother testified in the father's behalf. The father was ultimately convicted. (TT Vol.2, 248-249).

further found that the trial court had not abused its discretion in applying the mitigator in this case. The District Court certified the following question:

> Although willingness or consent of the minor is not a defense to sexual battery of a minor, may it be considered by the court as a mitigating factor in sentencing? Should the mitigation also apply where the defendant was convicted of being in a position of custodial or familial authority with the victim?

Petitioner first contends that, based upon the legislature's policy of protecting minors, consent or willing participation in a sexual act by a minor should not be considered a mitigating factor in sentencing. Alternatively, Petitioner contends that even if consent or willing participation may be considered a mitigator in some circumstances where a minor is the victim of a sexual act, it should never be applied as a mitigator in cases where the defendant is found to be in a position of familial or custodial authority over the victim. Finally, even if consent may properly be considered as a mitigator in any circumstance where a minor is the victim of a sexual act, the trial court abused its discretion in finding the mitigator applied in the instant case.

A. *Consent Should Not be a Mitigating Factor when Sentencing a Defendant for Sexual Activity with a Minor.*

As Justice Frankfurter appropriately put it: "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination

of a State's duty towards children." May v. Anderson, 345 U.S. 528, 536 (1953) (concurring opinion). Based upon this reasoning, the State contends the legislature never intended for the mitigating factor of consent or willing participation to apply to criminal acts of a sexual nature where the victim is a minor child.

As this Court noted in Jones v. State, 640 So. 2d 1084, 1085 (Fla. 1994), and again in J.A.S. v. State, 705 So. 2d 1381, 1385 (Fla. 1998), the legislature, "[a]s evidenced by the number and breadth of the statutes concerning minors and sexual exploitation, ... has established an unquestionably strong policy interest in protecting minors from harmful sexual conduct." Additionally, the State has an "obligation and a compelling interest in protecting children from 'sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them.'" Jones, 640 So. 2d at 1987, quoting Jones v. State, 619 So. 2d 418, 424 (Fla. 5th DCA 1993) (Sharp, J., concurring specially). These opinions emphasize the primacy of child protection policies implicit in the law.

In light of these policies, the State submits that the legislature, in enacting section 921.0016(4)(f), did not intend for that downward departure ground to apply to sexual offenses where minors are the victims. To permit consent of a minor child as a mitigator allows for the possibility of a potentially infinite downward departure. If this is permitted, it erodes the protection

provided by the law which is designed to prevent the sexual exploitation of a child. Even though the sexual act may be still be criminalized, with a potentially infinite downward departure permitted, the punishment of that crime is erased. With the threat of punishment abated, the deterrent effect on adults engaging in sexual relations with minors is likewise eroded. This surely was not the intent when enacting the mitigator of willing participation.

The United States Supreme Court has recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: 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 v. Baird, 443 U.S. 622, 634 (1979). The Supreme Court has also held "that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition 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." Id. at 635.

Given that minors are peculiarly vulnerable, unable to make critical, informed and mature decisions, and lack the experience,

perspective and judgment to avoid poor choices, how then can they be said to be able to give consent or be a willing participant in a sexual act? Allowing for consent to mitigate the sentence of a defendant guilty of engaging in sexual acts with a minor provides the precise "smoke screen" Justice Kogan wrote about in Jones v. State, 640 So. 2d at 1088. In his opinion, Justice Kogan stated he feared "an uncritical acceptance of the notion that youths 'consenting' to sexual activity will merely create a convenient smoke screen for a predatory exploitation of children and young adolescents." Id. A determination that minor-children, who have been recognized to lack the experience and perspective to avoid injurious choices, can give true consent to a sexual act, despite the exploitative effect them, is counter-intuitive.

The sentencing hearing of a defendant convicted of sexual activity with a minor can then be turned into a "mini-trial" of the child-victim to determine if he or she was "unwilling" enough to prevent the application of the mitigator in that case. Clearly, allowing for the consent or willing participation of a minor child in sexual activity to act as a mitigator at all would create a slippery slope of an unthinkable magnitude. The statutory protections afforded children have been set in place by the legislature to prevent the sexual exploitation of children. That protection should be applied consistently, through the sentencing phase of the defendant.

B. Consent Should Never be a Mitigating Factor when Sentencing a Defendant for Sexual Activity with a Minor by a Person in Familial or Custodial Authority.

The State's obligation to protect children is magnified when a child's parent or guardian has failed to provide such protection. Allowing a departure sentence for sexual activity committed by a person in custodial or familial authority of a victim destroys the protective shelter the laws have been designed to ensure. Therefore, when a defendant is convicted of sexual activity with a minor of whom he or she is in a position of familial or custodial authority, consent should never be allowed as a mitigating factor in sentencing.

When occupying a position of familial or custodial authority with a minor-child, a person is in a special position of trust and care of that child. The State can envision no circumstance which would engender a situation where a minor could be an initiator, willing participant, aggressor or provoker of sexual activity with a person who has familial or custodial authority over them. For any person in a position of familial or custodial authority of a minor-child to engage in sexual conduct with that minor is a staggering misuse of that position.

It is because of the position the person in familial or custodial authority holds over the minor-child that they are in a role which allows them to exercise influence over the minor. If a child "willingly participates" in sexual activity with a person in

familial or custodial authority over them, it can hardly constitute the type of voluntary participation the legislature intended when enacting section 921.0016(4)(f) as a mitigating factor.

Additionally, it is difficult in this application to determine what could constitute "willing participation." Is not saying "no" enough? If the minor-child believes himself or herself to be in "love," is that sufficient? If the child-victim has resigned herself to her lot in life, perhaps as the victim of incest, is that consent? What if the child-victim believes he or she should provide for the needs of her caretaker so that they will provide for the minor's needs? When can a minor truly make a decision to have consensual sex with a person in familial or custodial authority over them? The State believes that this can never occur.

Given the legislature's and this Court's recognition of the protection afforded minor children from sexual exploitation by adults, it is inconceivable that any adult in custodial or familial authority of a minor is deserving of sentencing mitigation because of consent from the minor they were entrusted to care for. When in a position of custodial or familial authority over a minor-child, part of the adult's job is to protect the child from sexual abuse and sexual exploitation. To allow for mitigation because the adult used his or her status with the child to garner "willing participation," eviscerates the laws and public policy protecting minors. Consent or willing participation should never be

considered as a mitigating factor when sentencing a defendant for sexual activity with a minor over whom he has familial or custodial authority.

C. Even if Consent of a Minor may Properly be Considered a Mitigating Factor, the Trial Court Abused its Discretion in Applying it in the Instant Case.

As this Court noted in Jones, supra, "sexual activity with a child opens the door to sexual exploitation, physical harm, and sometimes psychological damage, regardless of the child's maturity or lack of chastity." Jones v. State, 640 So. 2d at 1086. Respondent's sexual activity with the minor-victim in the instant case capitalized upon her exploitation at the hands of her father as well as the psychological damage that went along with the incest. The departure reasons given by the trial court are not supported by the record.

The defendant was 49 years old when he began his sexual relationship with the victim, who was 16 at the time. The victim first came by Rife's home after she had been kicked out of her own home by her mother. The child-victim's mother had kicked her out once the child reported her father had been sexually abusing her since she was approximately 11 years old. Rife and the child-victim had sexual relations before she moved in, and the sexual relations continued after she moved in. During the first several months of the relationship, the child-victim testified she had sex with Rife almost every night and that it dwindled down to two or

three times per week after he gained custodial authority of her. Rife did not dispute these figures. Respondent would smoke marijuana with the child-victim.

The child-victim testified that Rife had proposed to her and that they were to be married when she turned 18. Eventually, she testified, she could no longer tolerate his domineering behavior and she moved out. The victim testified that she "couldn’t go anywhere, couldn’t see anybody or talk to anybody on the phone" without Rife’s permission. She further testified that she left Rife because she "was tired of living under those conditions. I couldn’t do anything without him knowing what was going on, what was said, stuff like that." (TT Vol.2, 211).

Linda Ward, a protective investigator for the Department of Children and Families (DCF), testified regarding the circumstances in which Rife obtained custody of the victim, over the objection of DCF, in a dependency proceeding. (TT Vol.2 269-310). These circumstances included Rife lying about a sexual relationship existing between himself and the victim (TT Vol.2, 273-274, 281, 283, 295) and his averment that he was a protector of the victim, that he would require her to do chores, have rules set down to live by, and that he would supervise her (TT Vol.2, 277-278, 281-282).

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she testified that Rife was offended over her concern as to why a 49 year-old male would want to take custody of the teen-age girl who was not his relative and with whom he had no apparent ties. She also testified that Rife repeatedly assured her that he "would never do anything other than be a nurturing part of [the victim's] life." (TT Vol.2, 314). Penley-Novick testified that she informed Rife that the victim was in no condition to consent to a sexual relationship because she was only age ten to twelve emotionally, and due to her circumstances, while she may have been sexually experienced, it did not mean she was good at making judgments of who to be with or when. She further informed Rife that if he were with the child-victim sexually, it would be as a father, not as a lover. Rife indicated to her that he understood and would never do such a thing. (TT Vol.2, 322). While she could not testify that it happened in this case, Penley-Novick testified that, based upon her experience with this victim, she believes the victim would agree to sex in order to have shelter, but does not believe that it constituted true consent. (TT Vol.2, 324).

In Rife's confession, he admitted that he "kind of took her under my wing as a daughter and tried to help the girl." (TT Vol.2, 355-356). Rife also admitted in his confession to police that he was the victim's legal guardian at the time he was engaging in sexual relations with her. (TT Vol.2, 363). In his confession Rife stated he would not characterized his relationship with the

victim as boyfriend/girlfriend. He stated he hoped he was an authority figure to the victim and her friends, because that is what his intentions were. (TT Vol.2, 389). Rife understood the court system thought of him as a parent to the victim rather than as a lover. (TT Vol.2, 390). He also told the investigators that he was fully aware that the victim had been sexually abused by her father and did not have a very good home life; he admitted that he had attended her father's criminal case. (TT Vol.2, 352, 357-358).

The child-victim moved in with the 49 year-old Respondent who was engaging in sexual relations with her. This was precipitated by the child-victim's mother kicking her out of the family home after reporting that her father had been sexually abusing her from an early age. It is not surprising that she would consent to this arrangement with Rife in order to keep a roof over her head - this was the only type of home life she knew. Such actions do not make her participation in this event "willing." Instead, sex appears to the child-victim to be a requirement for maintaining the necessities of life. This was clearly a case of a 49 year-old man taking advantage of a minor-child with whom he had been placed in a position of authority and trust.

Additionally, there exists insufficient record support for the trial court's finding that this was an isolated incident, committed in an unsophisticated manner, for which the defendant has shown remorse. Rife lied to DCF and the mental health counselor about

his sexual relationship with the child-victim, even after he was informed about her precarious mental state. This allowed Rife to gain custody of the victim, and thus the continuation of the sexual relationship. This shows the crime was not committed in an unsophisticated manner. Moreover, as noted by Judge Thompson in his dissent, even if a court were to assume that Rife intended to marry the child-victim when she became 18, this supports the conclusion that Rife's misrepresentations were part of a sophisticated plan.

Neither was this crime isolated. According to his own testimony, Rife had sex with the minor-victim at least 110 times. (TT Vol.2, 373, 382). Rife committed multiple acts with a single victim over a period of approximately six months. This does not constitute an isolated incident.

Additionally, Rife did not show remorse for his actions. He blamed the minor-victim for initiating the sexual activity as well as for suggesting the guardianship. It was his belief that the minor-victim was the responsible party. At no time did he apologize for his behavior. Rife did not demonstrate remorse. Since a failure to demonstrate even one of the three requirements of section 921.0016(4)(j) bars the application of that ground as a mitigator, the trial court erred in finding this subsection applied in the instant case.

The victim was unable to be a willing participant in sexual

activity because of her troubled sexual history with older men. Rife abuse his position of authority over the child-victim in participating in a sexual relationship with her. The relationship existed for a period of several months, during which time Rife went out of his way to assure the relationship was hidden from those who would seek to protect the child-victim. He has shown no remorse for his actions.

This type of predatory behavior is precisely the type that the legislature has designed laws to prevent. Respondent had violated one of the most important responsibilities in society - protecting and nurturing a child. The trial court abused its discretion in sentencing Rife to a downward departure sentence.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable Court reverse the ruling of the Fifth District Court of Appeal and find that consent may never be a mitigating factor in sexual activity with a minor; to, alternatively, find that consent may never be a mitigating factor in sexual activity with a minor by a person in familial or custodial authority or, finally, if consent is a proper factor to be considered, find that the trial court abused its discretion in applying the mitigator in the instant case. The case should be remanded for a guidelines sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by delivery to Kenneth W. Witts, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this _____ day of July, 1999.

Ann M. Phillips
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