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

REPLY BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANN M. PHILLIPS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0978698
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

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SUMMARY OF ARGUMENT

The State has an obligation and a compelling interest in protecting minors from sexual exploitation. Courts have recognized that minors are unable to make critical choices in an informed, mature manner. For this reason, a minor's "consent" to sexual activity, which is inadequate to negate the crime, is also insufficient to mitigate the defendant's sentence. The legislature has deemed a minor's consent to sexual activity irrelevant. If this policy were disregarded in sentencing a defendant, it would severely undermine the deterrent effect of the laws prohibiting sexual activity with minors.

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, in his brief, agrees with Petitioner that the State has a strong interest in preventing the sexual exploitation of minors. Rife, however, asserts that this interest of the State is not hampered when a trial judge is allowed to enter a downward departure sentence based upon a minor's consent to a sexual act. (Respondent's Merits Brief, p.3). Petitioner emphatically disagrees.

As stated in Petitioner's Merits Brief, the State recognizes that children are a particularly vulnerable class, unable to make critical decisions in an informed, mature manner. Bellotti v. Baird, 443 U.S. 622, 634 (1979); Jones v. State, 640 So. 2d 1084 (Fla. 1994). Therefore, the State has an obligation, as well as a compelling interest, to protect children from sexual activity before their minds and bodies have matured to make it appropriate, safe, and healthy for them. Jones, 640 So. 2d at 1087. See also, Schmitt v. State, 590 So. 2d 404, 410-411 (Fla. 1991), cert. denied, 503 U.S. 964 (1992); State v. Sorakrai, 543 So. 2d 294 (Fla. 2d DCA 1989). It is based upon this premise that the

legislature has declined to allow consent to be a defense to sexual crimes involving a minor. See § 794.011, Fla. Stat. (1997), § 800.04, Fla. Stat. (1997). The State's intervention in the sexual activity of minors is designed to prevent harm to the child, of which the child, owing to his or her legally recognized immaturity, may be wholly unaware.

How can it be that a minor's "consent," which has been found to be so invalid and uninformed that it cannot constitute a defense to the commission of a sexual act, suddenly be transformed to be sufficiently knowing and voluntary so as to constitute a clear and convincing mitigating factor at sentencing? See State v. Mischler, 488 So. 2d 523, 524 (Fla. 1986)(departures from sentencing guidelines should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence). It is antithetical to find that the innate naivete' of children, which prevents them from being able to consent to a sexual act in a manner sufficient to negate the crime, is nevertheless a reasonable justification to mitigate the sentence for the same sex crime. If a minor's "consent" is legally insufficient to be a defense to sexual acts, then that same "consent" is likewise inadequate to constitute a mitigating factor in sentencing. The legislature has repeatedly stated its intention that departure sentences are discouraged absent circumstances which reasonably justify departure. §§ 921.0016(2), 921.0026, Fla. Stat. (1997). By

negating consent of minors as a defense to sex crimes, the legislature has determined it to be legally irrelevant. This Court should hold that this general reason for departure cannot apply to this particular offense.

The Fifth DCA has previously noted how difficult it would be to define "consent" when the "consenting" party is a child.

> It should by now be clear through experience, as recognized in Jones, that there is no constitutionally protected right to the defense of consent when *any person* commits a lewd act on a minor. The difficulty of defining exactly what "consent" consists of when the "consenting" party is a child, what might be deemed the communication of "consent" by a minor, how a minor would be expected (or required) to communicate lack of consent and determining the earliest age at which "consent" would be valid are just some of the obvious reasons why the legislature has determined this defense cannot apply in such cases. [emphasis in original]

State v. Raleigh, 686 So. 2d 621, 623 (Fla. 5th DCA 1996). In her dissenting opinion in Rife, Judge Griffin again noted the difficulty in determining what exactly constitutes "willing participation" on the part of a minor. State v. Rife, 24 Fla. L. Weekly D746, D748-749 (Fla. 5th DCA March 19, 1999)(Griffin, J., dissenting). Additionally, Judge Griffin stated, if "willing participant" was a valid ground for departure, so, too, were the other categories listed in subsection (4)(f): initiator, aggressor

and provoker. The notion that a minor could "provoke" an adult into conducting a sex act with the minor is at a complete variance with the legislative intent to protect children from the exploitation of adults. Id. This kind of harm is exactly the type of behavior the legislature was trying to prevent.

The Fifth DCA was correct when it held in Smith v. State, 668 So. 2d 639, 644 (Fla. 5th DCA 1996), that it would be "inconceivable that the key feature of this criminal statute, i.e. irrelevancy of the child's consent to sex, would nevertheless be a basis to disregard the statutorily prescribed penalty for its commission." See also, State v. Scaife, 676 So. 2d 1035 (Fla. 5th DCA 1996)(fact that defendant and minor-victim were involved in dating situation and were, by inference, engaged in a consensual sexual relationship is of no consequence and did not support a downward departure sentence). The Second DCA cited to Smith and Scaife in deciding State v. Whiting, 711 So. 2d 1212 (Fla. 2d DCA 1998) and State v. Harrell, 691 So. 2d 46 (Fla. 2d DCA 1997). Whiting involved a defendant in custodial or familial authority over his victim. The court found that "[t]o consider consent as a mitigating factor in this instance would be particularly egregious, since illicit sexual activity with a child over whom one has an official position of authority is a crime, regardless of 'the willingness or consent' of the child." State v. Whiting, 711 So. 2d at 1214. See also, State v. Hoffman, 24 Fla. L. Weekly D1667

(Fla. 2d DCA July 14, 1999)(consent to sexual activity given by an eleven-year old can never serve to mitigate a sentence). These decisions accurately reflect the legislature's intention to protect minors from the poor choices they may make based upon their youth and inexperience. Allowing a downward departure sentence based upon a minor's supposed "consent" would amount to rewarding the defendant for exploiting a vulnerable victim.

Judge Harris, in the majority opinion of Rife, attempts to distinguish another decision of the Fifth DCA, State v. Johns, 576 So. 2d 1332 (Fla. 5th DCA 1991). Johns involved a police officer defendant who engaged in sexual relations with a 15-year old prostitute. The trial court entered a downward departure sentence finding that the young girl was a willing participant in the sexual activity. The Fifth DCA reversed finding that, "given the officer's position of truest and authority in the community, the victim's drug addiction and her age of 14 years at the time the crime was committed, the fact that the victim was a prostitute ad and charged the defendant for sex cannot be used as a basis to mitigate his sentence. Id. at 1336. Harris states that Rife can be distinguished from Johns because the prostitute/victim in Johns engaged in sexual relations with the officer as a recognized "cost of doing business" rather than actually "consenting" to the act as Harris believes the minor-victim did in the instant case. State v. Rife, 24 Fla. L. Weekly at D747. This is a hollow distinction.

In Rife, Judge Harris asks the question, "[w]ouldn't it have been different had the same fifteen-year-old girl had a sexual relationship with an older neighbor after he had taken her to dinner and a movie?" State v. Rife, 24 Fla. L. Weekly at D747. The State asserts that there would not be any difference. It is no less egregious for an adult to "buy" a minor's consent with dinner and a movie than an actual cash payment. The principle which is being violated is the same in both cases - an adult is taking advantage of his capacity as an older, wiser and, perhaps, more authoritative person, to gain the minor's consent. This is the precisely the type of behavior that the legislature desires to prohibit.[1]

Additionally, as Judge Thompson stated in his opinion in State v. Brooks, 24 Fla. L. Weekly D1864 (Fla. 5th DCA August 6, 1999) (Thompson, J., concurring in part and dissenting in part), rev. pending (Case No. 96,400)[2], reasoning such as that advocated by Judge Harris causes sentencing to become "based upon a balancing of comparable morality and/or worth of the victim and the defendant."

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[1]The legislature has also specifically stated that where a psychotherapist is engaging in sexual misconduct with a client or former client, the giving of consent by the client shall not be a defense to the crime. § 491.0012, Fla. Stat. (1997). This statute reflects the ongoing policy of the legislature to prohibit the exploitation of a vulnerable class by those in a superior position.

[2]In Brooks, the Fifth DCA certified a companion issue to the one certified in the instant case. Brooks is currently pending review in this Court.

Id. at D1865. Judge Thompson finds that "[r]ather then focusing on the protection of children, the sentencing court focuses upon whether the defendant has been punished enough and whether the child is so bad and of such low moral character that the defendant need not be punished anymore." Id.

It is certainly not Petitioner's contention that trial judges are "stupid people." (Respondent's Merits Brief, p.5). Neither is Petitioner suggesting that judges will impose a departure sentence "all of the time." (Respondent's Merits Brief, p.3). Petitioner acknowledges that trial judges are in a position to assess the credibility and demeanor of witnesses, and are intelligent enough to discern when a departure sentence is appropriate. Additionally, Petitioner is not suggesting that no mitigating factor could ever apply in a case involving sexual activity with a minor. A trial court would still be free to utilize other mitigating factors. The court should refrain from imposing a departure sentence based upon a minor's "consent" because, in view of the primacy of child protection policies, the legislature never intended for judges to apply this particular mitigator, section 921.0016(4)(f), to cases involving sexual acts committed upon a minor. Instead, subsection (4)(f) was intended to apply to all other cases where consent has not be statutorily prohibited as a defense. Contrary to Judge Harris' statement that defenses to criminal charges and factors to

be considered in mitigation are apples and oranges,[3] the reasoning espoused by Petitioner adheres to the doctrine of *ejusdem generis* and provides for the consistent application of legislative intent.

Legal theories and their phrasing in other cases can readily lead to fallacious reasoning if uncritically transferred to the determination of a State's duty towards children. May v. Anderson, 345 U.S. 528, 536 (1953)(Justice Frankfurter's concurring opinion). The mitigating factor of the victim being an initiator, willing participant, aggressor or provoker of an incident has its place in the law - where the legislature has not statutorily determined that consent to be immaterial. The legislature has, however, placed a high value on the protection of minors, and has chosen to treat them differently regarding sex crimes. Sentencing mitigation involving "consent" should not be applied in cases involving sexual activity with a minor.

The rationale behind prohibiting a minor's consent from mitigating a defendant's sentence for sexual activity with a minor is amplified when dealing with a situation where the defendant is in a position of familial or custodial authority over the victim. The sexual exploitation of a child by someone who is in a position of familial or custodial authority involves a level of abhorrence of the highest magnitude. The State can conceive of no situation which would ever justify a family figure or custodian's sexual

[3]State v. Rife, 24 Fla. L. Weekly at D747.

exploitation of a minor under their supervision. Certainly, it cannot be said that a defendant in this situation who, while in a position of trust with the child, somehow convinces a child to "consent" or willingly participate, could ever be deserving of sentence mitigation for abusing their capacity to engage in sexual activity with their ward.

Moreover, the trial court in the instant case abused its discretion in finding any valid reason for departure, including that the minor-victim in the instant case was a "willing participant." Due the minor's unfortunate history she was an easy target for sexual exploitation by an adult. Plights such as those suffered by Rife's minor-victim are the very reason the legislature never intended the mitigator of "consent" to apply to minors who are the victims of statutorily prohibited sexual activity. By holding that this general reason for departure is inapplicable to sex crimes committed against minors, this Court would recognize the overarching policy in Florida to protect children from sexual exploitation.

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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BELLE B. SCHUMANN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #397024
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANN M. PHILLIPS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #978698
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply 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 September, 1999.

Ann M. Phillips
Of Counsel