IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. DCA CASE NO. 98-2874
CASE NO. 96,400

ROBERT WILLIS BROOKS,

Respondent.
_____\

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

RESPONDENT'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0101907
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: (904) 252-3367

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent makes the following additions to the Petitioner's statement of the case and facts. Some facts are necessarily repeated for continuity.

The Respondent was charged by information with committing a lewd, lascivious, or indecent assault upon a child, a second degree felony. *See* Fla. Stat., Section 800.04 (3) (1997). (R 8)[1] The case proceeded to trial before the Honorable O.H. Eaton, Jr. (R 90) At trial, the State presented evidence that on August 22, 1997, A.H., the child, was likely acting as a prostitute.

In the early morning hours of that Saturday, a car pulled up to where A.H. was sitting and she walked to the driver's window. (R 112) The Respondent offered her twenty dollars in return for sex. (R 112) She agreed and accompanied the Respondent to a house where she was given twenty dollars. (R 112) Inside, the two undressed and began to engage in consensual sexual intercourse. (R 113) A.H. testified, however, that during intercourse, she changed her mind and told the Respondent to get off of her. (R 112-13) She testified that he never ejaculated but that he did eventually let her up. (R 113-114) At the Respondent's request, the prostitute returned the twenty dollars, got dressed, and went to a nearby store where

[1]The record-on-appeal consists of a single volume containing the transcript of documents filed with the Clerk (R 1-89), the transcript of the trial and plea hearing (R 90-169), and the transcript of the sentencing hearing (R 169-182).

she called the police. (R 114-115)

The next day, during the investigation of A.H.'s complaint, the Respondent voluntarily accompanied police to the station where he waived his rights, and gave a taped statement regarding the incident. (R 137) The Respondent told the investigating officer that he had paid A.H. twenty dollars to have sex with him. (R 139-140) When they got to the house, A.H. laid down on the floor and the Respondent laid on top of her. He inserted his penis into her vagina and she kept repeating that he should take it easy because she had just had sex with her boyfriend and was sore. (R 113, 140) Because of what she was saying, the Respondent lost his erection and it could not be revived. (R 141-143) The Respondent demanded his money back from A.H., because he did not get satisfaction. (R 140, 142-143, 146) She got dressed, gave him his twenty dollars back and went across the street to a store where she called the police from a pay phone to say that she had been sexually assaulted. (R 114-115, 142-143)

The taped interview of the defendant was played at trial. The following excerpt begins with the officer advising the defendant that the child called the police.

Q ...she called the police.

A I thought she was calling her brother.

Q She was calling the police. You know how old she was?

A No

Q Did she tell you?

A No.

Q Can-- can you guess how old she was?

A About twenty-three, twenty-four.

Q She's thirteen.

A You kidding me?

Q No.

A Oh shit. Oh man. Holy shit. Oh man. I didn't know. I didn't have no idea. She didn't say how old. She just got outta semi truck with a guy.

(R 146-147)

At the close of the State's case, the defense moved for a judgment of acquittal. The motion was denied. (R 153)

The trial court questioned the State regarding why this case did not settle with a plea agreement instead of being brought to trial. The State informed the court that it was because the State was seeking to have the Respondent sentenced as a violent career criminal. The trial court indicated that it did not believe that it could sentence

the Respondent as a violent career criminal because it could not find that he was a danger to society under the facts presented in this case. (R 155-161) The trial court stated that this was "the most mitigated level seven that I ever heard of" and the assistant state attorney agreed. (R 159)

The Respondent withdrew his earlier tendered plea of not guilty, and entered a plea of nolo contendere as charged. (R 161-162) There was no agreement with the State regarding sentencing. (R 161-167)

On October 8, 1998, the case proceeded to sentencing. (R 169-182) At sentencing, the Respondent's scoresheet reflected a range of 116.4 to 194.0 state prison months. (R 71-73) The trial court adjudicated the Respondent guilty and sentenced him to a downward departure sentence of 408 days imprisonment. (R 64-70) The written reason stated on the Respondent's scoresheet for the departure sentence was that the victim was an initiator, willing participant, aggressor or provoker of the incident. (R 73) Upon the State's objection to the basis for departure, the trial court stated:

> This is the one that the Sentencing Commission considered for this particular statute and recommended to the Legislature, and it is the thing that the Legislature adopted word for word from the Sentencing Commission and that's the reason for imposing the downward departure.

(R 177)

The trial court agreed with the State that consent or participation was not a defense to the charge. (R 178) However the court stated that it was a possible mitigator for sentencing. (R 178) The State filed timely notice of appeal, and the Office of the Public Defender was appointed to represent the Respondent in the appeal. (R 80-81, 89)

The Fifth District Court of Appeal issued its opinion affirming the trial court's downward departure sentence, on August 6, 1999. *See* ***State v. Brooks***, 24 Fla. L. Weekly D1864 (Fla. 5th DCA August 6, 1999). (See Appendix A.) The Court held that the record fully supported the trial judge's finding that the thirteen-year-old prostitute had willingly participated in the sexual encounter, and that the court had not abused its discretion in considering record evidence that the defendant had reasonably believed that his paid companion was of the age of consent, in determining whether to give weight, and how much weight to give the victim's voluntary participation when crafting an appropriate sentence. ***State v. Brooks.***

The State invoked the discretionary jurisdiction of the Florida Supreme Court to review the following question certified by the Fifth District Court of Appeal as a comparison issue to ***State v. Rife***, 733 So.2d 541 (Fla. 5th DCA 1999), currently pending review by the Florida Supreme Court: "May a reasonable mistake as to the

age of the victim be considered in mitigation?" ***State v. Brooks.*** This brief on the merits of that appeal answers the initial merit brief of the State.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in imposing a downward departure sentence. The Petitioner argues that because consent and mistake as to age of the partner have been determined not to be defenses to the crime of sexual activity with a minor, that the legislature must also have intended that these factors could not be considerations in mitigation of sentence. The State makes this argument, notwithstanding the plain language of Section 921.0016 (4)(f) (1993), and the fact that others among the statutory mitigators at sentencing, are not available as defenses to crimes.

The trial court properly departed because while a victim's "willing participation" is not a defense to a crime under Section 800.04(3), Florida Statutes, a trial court may still consider this factor in determining whether a downward departure sentence is warranted. Here, the record firmly supports the presence of this mitigating factor and the trial court did not abuse its discretion in its sentencing of the Respondent. Furthermore, careful consideration of both sides of the public policy arguments concerning what best protects children, should convince this Honorable Court that a sentencing court must retain the ability to consider the active role of the child in her own demise in fashioning an appropriate sentence of the adult defendant.

ARGUMENT

. THE TRIAL JUDGE'S DISCRETION TO DOWNWARDLY DEPART IN SENTENCING AN ADULT FOR SEXUAL CONDUCT WITH A MINOR BASED UPON THE MINOR'S INITIATION OR WILLING PARTICIPATION IS CONSISTENT WITH THE INTENT OF THE LAW, AND PUBLIC POLICY.

The trial court correctly imposed a downward departure sentence based upon valid reasons. A court may impose a departure sentence upon factors which are reasonably justified and are established by a preponderance of the evidence. ***State v. Chandler***, 668 So.2d 1087, 1088 (Fla. 1st DCA 1996); Fla. Stat., Section 921.001(6) (1997). The task of an appellate court is only to review these factors and to determine whether the trial court abused its discretion. ***Id***. In the instant case, the Fifth District Court of Appeal correctly found that (1) the record fully supported the trial court finding that the youthful prostitute had willingly participated in the consensual encounter, and (2) the trial court did not abuse its discretion is determining whether to give weight, and how much weight to give to this consent, based upon the facts in evidence before it. ***State v. Brooks***.

The trial court imposed a downward departure sentence stating the following reason for mitigation: that the victim was an initiator, willing participant, aggressor or provoker of the incident. Section 921.0016 (4)(f), Florida Statutes (1997)

authorized this as a valid reason for departure. The Petitioner contends, as it did below, that this reason for departure is invalid in the context of the instant case because the legislature has provided that the victim's consent is not a valid defense to Section 800.04(3).[2] The State concludes that the victim's consent cannot therefore be considered by a sentencing court as a valid reason for mitigating a sentence. The State is incorrect.

Citing to Justice Frankfurter's concurring opinion in ***May v. Anderson***, 345 U.S. 528, 536 (1953), the Petitioner cautions that legal theories and language in other cases must be applied to situations involving children with considered care. Yet, the State is guilty of that very fallacious reasoning and uncritical application of legal theories that it cautions against in its argument that a factor cannot mitigate sentence unless it can be used as a defense, and that furthermore, a factor which cannot be used as a defense is a "legal nullity"-- indeed, it is not even a fact. The State's suggestion that taking account of the child's role in the incident somehow abandons the State's policy of protection of children is without logical, analytical or

[2]The State was careful to charge the crime as subsection (3) as opposed to subsection (4), the latter which provides that the lewd and lascivious act must be "knowingly" committed on a child. This latter subsection may have afforded a defense based upon the facts of this case. *See* Fla. Stat., Section 800.04 (4) (1997).

documentary basis. Its treatment of crime and punishment, as well as its treatment of victimization and its consequences, confuse cause and effect. In ***State v. Rife***, the Fifth District Court of Appeal addressed this brand of reasoning:

> We find that a logic which holds that because consent may not be a defense, it cannot be a mitigator does not compute. A does not equal B nor is something true of A necessarily true of B. Defenses to a criminal charge and factors to be considered in mitigation are apples and oranges. Indeed, if consent were a defense to this criminal charge, there would be no need to mitigate in this instance. Although remorse is never a defense to a criminal charge, the legislature has made it a mitigating factor to be considered by the judge. Likewise, the legislature has made the willing participation of the victim a mitigating factor. And the legislature did not limit the applicability of this factor, as does the dissent, to only those victims "of age."

24 Fla. L. Weekly at D747. The State's argument confuses the sexual act itself, with the damage caused by sexual abuse which, as pointed out in Judge Thompson's dissenting opinion, likely predated this incident.[3] ***State v. Brooks.***

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[3]"According to several studies, girl-children who have been sexually abused or raped are much more likely to become prostitutes than girl-children who have not been subjected to such manhandling. In one study 65 percent of adolescent prostitutes were forced into sexual activities as children; 57 percent had been raped, and one-third of those had been raped more than once. (FN omitted) These studies also suggest that girl-children who have been rewarded for entering into sexual relations with their fathers, brothers, uncles, neighbors, and so on are even more prone than girl-children who have been forced into such relations to enter the life of prostitution. (FN omitted)" ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 52-53 (1984).

More than a third of all women are victims of child sexual abuse. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED, DISCOURSES ON LIFE AND LAW 184 (1987).

A.H., the thirteen-year-old prostitute who "hooked" the Respondent in the case *sub judice,* lived in a house in Sanford with her mom, her brother and her sister. (R 110) Her single-parent mother was employed as the custodian at an elementary school and probably worked nights. (R 108) This might explain how her thirteen-year-old daughter could be street-walking, "turning tricks" between 4 and 5 a.m. on a Saturday morning, *even if it does not explain why.* There is no record support for the notion that the child's prostitution was for any reason except profit. When the Respondent demanded his money back from A.H. because he did not get satisfaction the prostitute said, "You gonna take your twenty dollars back?" (R 146) She then got dressed, gave him his twenty dollars back and went across the street to a store where she called the police from a pay phone to say that she had been sexually assaulted. (R 114-115, 142-143)

After the State rested its case, the trial court stated that this was "the most mitigated level seven that I ever heard of" and the assistant state attorney agreed. (R 159) Neither force nor seduction (by the defendant) were in issue: the girl had prostituted herself. The defendant went as requested to the police department, waived counsel, and gave a taped statement, in which he spoke freely and completely about the incident. The transcript of the dialogue reflects that the defendant was clueless regarding the "woman's" actual age, and horrified upon

learning of it. The defendant pled no-contest without agreement as to sentence.

In her dissenting opinion in ***State v. Rife***, Judge Griffin was concerned about the difficulty in determining just what would constitute "willing participation" in a sexual act with an adult in a position of familial or custodial authority on the part of a dependant minor-child victim. Although the Petitioner relies upon the "slippery slope" reasoning of Judge Griffin's dissent in ***Rife***, that case is distinguishable from the instant case in several ways. The seventeen-year old dependant victim in ***Rife***, had the maturity level of a ten or eleven-year-old, and was in love with her adult guardian. Although the victim in ***Rife***, was more vulnerable by virtue of her inferior mental age, her infatuation, and her dependancy upon her sexual partner, the Fifth District still felt that the factual basis for mitigation based upon consent supported the trial court's downward departure. ***State v. Rife***. In the instant case, the thirteen-year-old child-prostitute approached the Respondent, and they made a bargain to exchange sex for money. The trial court and appellate courts both found that A.H. was mature beyond her years, and she and her bystander client had not previously known each other. The record also reflects as the Fifth District Court observed, that by intentionally committing the crime of purchasing the services of a prostitute, the Respondent had unknowingly committed the greater offense of a lewd and lascivious act on a child. ***State v. Brooks***. To the extent that Judge

Griffin's dissent in ***Rife*** can be applied to the case *sub judice*, the Respondent respectfully suggests that it is possible to recognize the fact of consent when one sees it, and it is present in ***State v. Brooks***.

The instant case is also distinguishable from the case of the drug-addicted child who sold sex to a police officer in ***State v. Johns***, 576 So.2d 1332 (Fla. 5th DCA 1991). *See also* ***State v. Whiting***, 711 So.2d 1212 (Fla. 2d DCA 1998). Nor was the instant case comparable to the thirteen-year-old who engaged in sex with two other minor friends before having consensual sex with one of the friend's adult brother, upon whom she had a crush. *See* ***State v. Smith***, 668 So.2d 639 (Fla. 5th DCA 1996). Furthermore, in the past year in both ***Rife*** and ***Brooks*** the Fifth District Court of Appeal has formally receded from its previous holding that because consent was irrelevant as a defense to sexual activity with a minor, it could not furnish a basis for downward sentencing departure. *See* ***State v. Smith; State v. Scaife***, 676 So.2d 1035 (Fla. 5th DCA 1996) *and also* ***State v. Harrell***, 691 So.2d 46 (Fla. 2d DCA 1997).

The State's argument that a court's discretion to downwardly depart in sentencing a defendant for sexual battery of a minor based upon facts before him which show that the minor initiated or provoked the incident, is contrary to public policy which seeks to protect children, is terribly misguided. To approach child

protection by carrying out a crusade to incarcerate all of the world's would-be "johns," is like attempting to fish by extracting all of the water from the sea.

The child from the middle-class home that is street-walking at 5:00 a.m. on a Saturday, "passing" as an adult, allowing men to take turns with her for twenty dollars each, will not be protected by slamming the prison gate on her individual clients. Harsher sanctions upon defendants such as the Respondent in the case *sub judice* who the record reflects *unwittingly* engaged in sex with a minor, will not give back children such as this victim, her childhood or her self-respect. It will not cure the life-disfiguring, sexually transmitted diseases she will contract and spread, the unwanted pregnancies and children she will produce. The Respondent does not attempt to argue that the child prostitute in the instant case is not a victim. Instead the Respondent argues that the self-victimization *initiated* and *provoked* by this child is in no way assuaged by the stiff punishment meted out to the adult who had sex with her. On the facts in this case, a non-mitigated sentence would send a message to this child that no matter what you do or say, there is no possibility that you will have to take any responsibility for what happens.

Public policy rightfully places a very high priority upon the protection of children. Society's promise to protect the child-victim in the instant case had already been broken by the time we meet her in this record. The Respondent argues that to

tell this child that she can be protected from her own self-destructive behavior is to perpetrate another dangerous, false promise.

The public policy which exacts strict criminal liability for sexual battery of a child without regard to knowledge or intent is a potent tool, which sends a powerful message. There is no defense to this crime, except not to have done it, and unfortunately even this is often not enough to result in acquittal, so stigmatic is the accusation itself. Children who can process information, know this. Without an ability on the part of a sentencing judge to apply a statutory mitigator such as that of provocation by the victim to the facts before him or her, perversion of the public policy of protection can be just another milestone in the contest among misguided juveniles to become "as bad as I wanna be." [4]

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[4]Decriminalization [of prostitution] will not help these girls achieve autonomy unless it is accompanied by extralegal remedies in the form of needed social services and by laws that prohibit the exploitation of minors, The former remedies will increase the adolescent's general ability to understand both the nature and consequences of prostitution and its alternatives...[U]less sexually abused adolescents are given emotional support and psychological help, they will remain convinced that they are tainted... TONG, *supra*. 60.

Catharine MacKinnon describes a woman who was a child-victim of incest, who now lives in a community saturated with pornography, and who relives the incest every time she walks by pornography she cannot avoid. MacKinnon concludes the case summary by asking what it means when although one-half to one-third of all women are victims of sexual abuse at sometimes in their lives, "targeted survivors must live in a society in which the rehearsal and celebration and ritual reenactment of our victimization is enjoyed, is an entertainment industry, is arguably a constitutional right?" MACKINNON, *supra*. 184. Respondent's counsel submits that the issue of where children get their images and ideas of themselves, and how best society can protect them will not best be served by denying that they have consented to sex, or by segregating the causes from the consequences of abuse initiated by their own ill-conceived decisions.

The child in the instant case duped the Respondent twice. She "passed" as a woman, and then when he was still so naive as to ask for his money back when she didn't keep her bargain, she really showed him. She called the police.

The Respondent submits that no moral imperative regarding the protection of children is necessarily satisfied by the needless ruination of a man's life over a bad mistake of fact. Rather, based upon the facts of the instant case if and when this child ever does mature and become whole, she will have one fewer ugly memory to surmount, because the sentencing judge used his discretion to fashion an appropriate sentence. Arguably, this consideration of cause and consequence, within the context of the self-victimization depicted by the instant record can be the beginning of understanding and maturity for the troubled child.

Under the facts of the instant case, the trial judge did not abuse his discretion in downwardly departing. The trial judge in this case was in a position to see the victim, judge her appearance and maturity, and weigh the credibility of the evidence placed before the court. After doing so here, the trial judge found that this was the "most mitigated" level seven felony that he had ever seen, *and the State agreed.* Here, the trial court did not abuse his discretion in considering record evidence that the Respondent had reasonably believed that his paid companion was of the age of consent, in determining whether to give weight, and how much weight to give the

victim's voluntary participation when crafting an appropriate sentence. The judge determined that the victim was an initiator, willing participant, aggressor and provoker of the offense.

With regards to sentencing, a court is free to believe such witnesses and such testimony, or portion thereof, that it finds credible. ***State v. Rife.*** Consequently, the record supports the court's reason for departure by a preponderance of the evidence and there is no showing that the trial judge abused his discretion. The Respondent repectfully requests that this Court affirm the holding of the Fifth District Court of Appeal.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court affirm the decision of the Fifth Distric Court of Appeal, upholding the trial court's downward departure sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0101907
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 hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to Robert Willis Brooks, this 18th day of October, 1999.

_____
ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

ROSEMARIE FARRELL
Assistant Public Defender

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APPENDIX