IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

CASE NO. 96,400
5TH DCA NO: 98-2874

ROBERT WILLIS BROOKS,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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

STATEMENT OF THE CASE AND FACTS

Respondent, Robert Brooks (Brooks), was charged by information with one count of committing a lewd, lascivious or indecent assault upon a child. (R 8). Prior to the conclusion of trial, Brooks entered a plea of no contest to the offense of committing a lewd or lascivious act upon a child. (R 64-65, 163). The facts surrounding this criminal episode included the following:

The victim, A.H., was born on September 14, 1983, and was thirteen years of age at the time Brooks had sexual intercourse with her. (R 109, 110, 121). At trial, before Brooks entered his plea, A.H. testified that during the early morning hours of August 22, 1997, she was sitting on a bench on Thirteenth Street. Brooks was riding around in a car. Brooks stopped and told A.H. that he had twenty dollars and asked her to come have sex with him. During trial, A.H. identified Brooks as the man in the car.

Brooks took the victim to his house where they both undressed and began engaging in sexual intercourse. (R 110-113). During this act, the victim testified that she changed her mind and indicated to Brooks that she wanted him to stop and get off of her. (R 113-114). She began to struggle with Brooks when he would not let her get up. (R 124).

Eventually, Brooks stopped and removed himself from on top of the victim. (R 114). At this time, Brooks kept the twenty dollars; the victim dressed, left the house, and went across the

street to call the police on a pay phone. (R 114). Later that same day, the victim identified Brooks in a photographic line-up as her assailant. (R 115).

During the daylight hours of August 22, 1997, Brooks was approached by Investigator Esoff of the Sanford Police Department and asked if he would come to the Sanford Police Station. (R 129-130). Brooks agreed, and was advised of his constitutional rights once he arrived at the station. (R 130). Brooks indicated that he understood his rights and waived them by signing a Miranda warning card. (R 31, 130-131). Brooks was then questioned by police concerning his contact with the victim in this case. Their conversation was recorded. (R 137-147).

During police questioning, Brooks admitted he offered the victim twenty dollars to have sex with him and that the two did, in fact, have sex. (R 140-142). The primary difference between Brooks' version of the facts and the victim's testimony is that the victim insisted she changed her mind during the act, informed Brooks she wanted him to stop, and struggled with him until he got off of her. (R 113-114). Brooks claimed that the victim never indicated that she wanted him to stop. (R 144).

On the sentencing scoresheet, Brooks scored a total of 183.2 points, resulting in a minimum sentence of 116.4 months and a maximum sentence of 155.2 months. (R 71-73). Brooks was ultimately sentence by the trial court to four hundred and eight

days (408) in the Department of Corrections, with credit for 408 days time served. (R 69-70, 177).

In providing an explanation for its downward departure from the guidelines recommendation, the trial court stated:

> So Mr. Brooks, I'll adjudicate you to be guilty of the offense of a lewd and lascivious act upon a child. And I'm going to depart downward on the guidelines on the basis that the victim was the initiator, willing participant, aggressor or provoker of the incident.

(R 177). The State timely objected to the imposition of this departure sentence. (R 177-180).

The State filed a notice of appeal regarding the imposition of the downward departure sentence. (R 80-81). The Fifth District Court of Appeal (DCA) affirmed Brooks' sentence. In its opinion, the Fifth DCA found that the record supported the trial court's finding that the victim, "a thirteen-year-old girl, a youthful prostitute, willingly participated in the sexual encounter." See State v. Brooks, 24 Fla. L. Weekly D1864, D1865 (Fla. 5th DCA August 6, 1999). (See attached Exhibit A). The Fifth DCA noted that, "[a]lthough the victim ... was young, her actions bespeak a maturity far beyond her years. She was out alone at 4:00 in the morning, appearing much older, and looking for action." Id.

The Fifth DCA certified the following question to this Court:

> May a reasonable mistake as to the age of the victim be considered in mitigation?

Id. The question was certified as a comparison issue to the one certified in State v. Rife, 733 So. 2d 541, 551 (Fla. 5th DCA 1999), review pending, (Fla.)(Case No. 95,752).[1]

On August 30, 1999, this Court entered an order postponing a decision on jurisdiction and setting a briefing schedule. Petitioner's brief on the merits follows.

[1]The Fifth DCA certified the following question in Rife: 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?

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal incorrectly determined that a minor's consent to statutorily prohibited sexual activity may be considered in mitigation of a defendant's sentence. This Court has expressly determined that the State has a compelling interest in protecting minors from sexual exploitation. Minors are a particularly vulnerable class of individuals and are therefore deserving of a high degree of protection. This Court has recognized that minors are unable to make critical choices in an informed, mature manner. Moreover, the legislature has statutorily provided that consent is not a defense to sexual activity with minors. Since a minor's consent is a legally nullity, it cannot serve to mitigate punishment for a sexual crime perpetrated against that minor-child. The legislature has also specifically provided that a defendant's *bona fide* mistake as to a minor's age is not a defense to statutorily prohibited conduct. If this Court were to uphold the decision of the Fifth District Court allowing a minor's consent to sexual activity or a defendant's "reasonable" mistake about the minor's age to mitigate a defendant's sentence, the deterrent effect of the laws prohibiting sexual activity with minors would be severely compromised.

ARGUMENT

IN LIGHT OF THE STATE'S COMPELLING INTEREST IN PROTECTING MINORS FROM SEXUAL EXPLOITATION, NEITHER A MINOR'S CONSENT NOR A DEFENDANT'S MISTAKE AS TO THE MINOR'S AGE SHOULD BE CONSIDERED A MITIGATING FACTOR WHERE THE DEFENDANT WAS CONVICTED OF SEXUAL ACTIVITY WITH A MINOR.

Respondent, Robert Brooks (Brooks), was convicted of one count of committing a lewd and lascivious act upon a child. The child-victim, A.H., was thirteen years of age at the time Brooks had sex with her. Brooks admitted to having sex with the child-victim for twenty dollars at about 4:00 in the morning. The main difference between the victim's version of the events and Brooks' is that the victim testified she withdrew her consent to the sexual act by telling Brooks to stop and get off of her, while Brooks claimed the child-victim never withdrew her consent. Brooks maintained that the sexual act was never completed, because he was unable to maintain an erection.

The trial court sentenced Brooks to a downward departure sentence based upon the victim's consent to the sexual act. The Fifth District Court of Appeal (DCA) found that consent could properly be considered a mitigating factor in sexual activity with a minor. The District Court certified the following question:

> May a reasonable mistake as to the age of the victim be considered in mitigation?

State v. Brooks, 24 Fla. L. Weekly D1864, D1865 (Fla. 5th DCA

August 6, 1999). The trial court, however, never used Brooks' mistake as a grounds for departure. The appellate court began from the premise that a minor's consent was properly considered in mitigation of a defendant's sentence. The court then, in discussing whether the trial court abused its discretion in entering a departure sentence in this case, noted that Brooks reasonably believed A.H. to be older than she actually was. The core issue in Brooks, however, concerns the district court's initial assumption - that a minor-victim's consent to a sexual crime may be considered in mitigation by a trial judge. The main issue in the instant case, is therefore, whether the trial court erred in considering the minor-victim's "consent" in mitigation of Brooks' sentence.

Petitioner asserts that, in light of the legislature's policy of protecting minors, their consent or willing participation in a sexual act should not be considered a mitigating factor in sentencing. Neither should a defendant's "reasonable" mistake as to the minor-victim's age be allowed to provide mitigation where a minor is the victim of a sexual act. Petitioner's position that "consent" and "mistake" never apply as mitigators is borne out by the legislature's specific delineation that neither a minor's consent nor a defendant's mistake as to age constitute a defense to sexual crimes involving a minor. See §§ 794.011, 794.021 & 800.04, Fla. Stat. (1997). The State's intervention in the sexual activity

of a minor is designed to prevent harm to the child, of which the child, owing to his or her legally recognized immaturity, may be wholly unaware. To allow the minor's "consent" to mitigate the punishment of the defendant would eviscerate the protection afforded minors from the sexual exploitation of adults.

As Justice Frankfurter aptly 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 a child-victim's consent or willing participation to mitigate punishment for a criminal sexual act perpetrated against a minor child.

As this Court recognized 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 holdings emphasize the primacy of child protection policies implicit in the law.

It would, therefore, be antithetical to find that the same innate naïveté 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 for mitigation. 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. Since the legislature does not recognize a minor's "consent" to sexual activity, a trial court may not utilize a non-existent factor to mitigate the defendant's punishment. The legislature has repeatedly stated its intention that departure sentences are to be 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.

In light of the State's protective policies, Petitioner 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 countenanced, it would erode the protection provided by the laws designed to prevent the sexual exploitation of a child. Even though the sexual act would be still be criminalized, with a potentially infinite downward departure permitted, the punishment of that crime would be eradicated. With the threat of punishment diminished, the deterrent effect on adults engaging in sexual relations with minors would likewise be eroded. This surely was not the legislature's intent when enacting the mitigator of "willing participation." Since the Fifth DCA's decision below uncritically transfers the application of this mitigator to minor-victims, despite the well-recognized duty of the State's toward children, it must be reversed.

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 are 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 uniquely vulnerable, unable to make critical, informed and mature decisions, and lack the experience, perspective and judgment to avoid poor choices, how then are they able to give consent to, or willingly participate 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 Jones, Justice Kogan stated he feared "an uncritical acceptance of the notion that youths 'consenting' to sexual activity w[ould] merely create a convenient smoke screen for a predatory exploitation of children and young adolescents." Id. A determination that minor-children, who lack the experience and perspective to avoid injurious choices, can give true consent to a sexual act, despite the exploitative effect upon them, is counter-intuitive. It would be contradictory for this Court to find, on the one hand, that children lack the decision-making skills of an adult, and then give the same weight to a child's "consent" to sexual activity that is given to a comparable choice made by an adult.

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 that exists in determining what exactly constitutes "willing participation" on the part of a minor-victim. State v. Rife, 733 So. 2d 541, 545 (Fla. 5th DCA 1999)(Griffin, J., dissenting), review pending, (Fla.) (Case No. 95,752). 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 complete variance with the legislative intent of protecting children from the sexual exploitation of adults. Id.

The Fifth DCA was correct when it held in State v. Smith, 668 So. 2d 639, 644 (Fla. 5th DCA 1996), receded from, State v. Rife, 733 So. 2d 541 (Fla. 5th DCA 1999), review pending, (Fla.) (Case No. 95,752), 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 district 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 D2037 (Fla. 2d DCA September 3, 1999)(consent to sexual activity given by an eleven-year-old can never serve to mitigate a sentence). These decisions accurately reflect the legislative intent of protecting minors from the poor

choices they may make based upon their youth and inexperience. Allowing a downward departure sentence to be based upon a minor's supposed consent would amount to rewarding the defendant for exploiting a vulnerable victim.

Also, if this Court were to permit a minor's consent to sexual activity to mitigate a defendant's sentence, then the sentencing hearing of that defendant could 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. See State v. Rife, 733 So. 2d at 547, (Griffin, J., dissenting opinion). Sentencing would then constitute a "balancing of the comparable morality and/or worth of the victim and the defendant," rather than focusing on the protection of children. See State v. Brooks, 24 Fla. L. Weekly at D1865, (Thompson, J., dissenting opinion).

Clearly, allowing for the consent or willing participation of a minor child in sexual activity to act as a mitigator 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 throughout the judicial process, including the sentencing phase.

Brooks' sexual activity with the minor-victim in the instant case capitalized upon her vulnerability. The victim was a

thirteen-year-old prostitute, out at 4:00 in the morning. This child-prostitute acceded to perform a sexual act with Brooks, age 53, for twenty dollars. These facts, rather than "bespeaking a maturity far beyond her years" as suggested by Judge Harris, instead demonstrate that A.H. was far too young to understand the far-reaching implications of her "choices." State v. Brooks, 24 Fla. L. Weekly at D1865. More likely, the truth is akin to Judge Thompson's supposition that there must have been severe family dysfunction or other powerful circumstances that made prostitution an acceptable lifestyle for this thirteen-year-old. Id. To now allow Brooks to escape severe punishment for having sex with a minor, because she was too young to realize the impact of her decision or because nature matured A.H. more quickly than other teen-agers, would only serve to further exploit A.H. - this time at the hands of the judicial system itself. Brooks' belief as to A.H.'s age should not be the focus of the judicial system; the effect of sexual exploitation upon the child-victim should instead be the focus.

Moreover, like consent, mistake as to age has been statutorily prohibited as a defense to sexual crimes involving a minor-victim. Section 794.021 provides that, where the criminality of conduct is dependant upon the victim being a specified age, ignorance of the age is no defense. The legislature even went so far as to provide that neither the victim's misrepresentation nor the defendant's

bona fide belief that the victim is over the specified age changes the fact that mistake is not a defense. § 794.021, Fla. Stat. (1997). As with "consent," where the legislature negates a potential defense such as a defendant's *bona fide* mistake, making it a non-issue, there is nothing for the trial court to rely upon to support mitigation. A legal nullity cannot support mitigation.

In advancing the proposition that a minor's "consent" and a defendant's mistake as to the minor's age are not proper mitigators, Petitioner is not suggesting that there are no mitigating factors which could ever apply in a case involving sexual activity with a minor. The courts should merely refrain from imposing a departure sentence based upon a minor's "consent" because, in light of the primacy of child protection policies, the legislature never intended for judges to apply section 921.0016(4)(f) to cases involving sexual acts committed upon a minor. Instead, this subsection was intended to apply to all other cases where consent has not been statutorily prohibited as a defense. Similarly, a minor-victim should not be punished, or viewed as more culpable, merely because the minor looks older than his or her chronological years. When addressing crimes committed against minors, the ultimate goal is the child's protection. The reasoning espoused by Petitioner adheres to the doctrine of *ejusdem generis* and provides for the consistent application of legislative intent.

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 is deserving of sentencing mitigation because of "consent" from the minor-victim. Plights such as those suffered by Brooks' 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 a minor's "consent, as well as defendant's mistake as to the minor-victim's age, are inapplicable to mitigate punishment for 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 a minor-victim's consent may never be a mitigating factor in sexual activity with a minor; neither should a defendant's mistake as to a minor victim's age be a mitigating factor. 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 James Gibson, Office of the Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this _____ day of September, 1999.

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