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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CERTIFICATE OF FONT SIZE

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

SUMMARY OF ARGUMENT

Since the legislature has stated that a minor cannot consent to sexual activity, there is nothing for the courts to consider in defense of a sexual crime against a minor, or in mitigation when sentencing a defendant for engaging in sexual activity with a minor. The State's compelling interest in protecting minors from sexual exploitation precludes the use of "consent" as a mitigator to reduce sentences for defendants who are guilty of such exploitation.

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 suggests that the State's argument confuses cause and effect when it asserts that a minor's consent to sexual activity cannot serve as a mitigating factor in sentencing. Respondent states that the State confuses the sexual act itself with the damage caused by sexual abuse. (Respondent's Merits Brief, pp. 9-10). This is simply not true. The State's position merely preserves this Court's long-standing view that "any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents..." Schmitt v. State, 590 So. 2d 404, 410-411 (Fla. 1991), **cert. denied, 503 U.S. 964 (1992).** See also, Jones v. State, 640 So. 2d **1084,** 1086 (Fla. 1994); B.B. v. State, 659 So. 2d 256 (Fla. 1995); J.A.S. v. State, 705 So. 2d 1381 (Fla. 1998).

In recognizing that "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, this Court has already embraced the rationale which substantiates the State's position. Based upon minors' recognized immaturity and lack of

experience, they may unwittingly "consent" to something that can ruin their lives, jeopardize their health, or cause emotional scars that will never leave them. Id. at 1089 (Kogan, J. concurring). Children do not think the same way as adults. Minors do not have the capacity to make meaningful choices in sexual matters. What may give the appearance of consent may actually be a desperate reaction of a young person who feels there is no other choice. Id. at 1090. Such poor, uniformed choices are quite apparent in this case where a thirteen-year old girl is out on the streets prostituting herself in the wee hours of the morning for twenty dollars. Unlike Respondent suggests, the sexual act itself and the damage caused by sexual abuse cannot be separated from one another.

Respondent relies upon the following language in State v. Rife, 723 So. 2d 541, 543 (Fla. 5th DCA 1999), rev. pending, (Fla.) (Case No. 95,752):

> 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 defense and factors to be considered in mitigation are apples and oranges.

The District Court's analysis begins with an invalid premise. Therefore, the resulting conclusion is flawed. The difficulty with the District Court's logic is that it presupposes a minor's ability to give consent. However, the legislature has specifically stated that a minor cannot consent to sexual activity. Therefore, since

a minor's "consent" does not exist, it cannot be used as either a defense to the crime, i.e., "A", or as a mitigator in sentencing, i.e., "B".

In Schmitt v. State, supra, this Court stated that minor children are legally incapable of consenting to a sexual act in most circumstances. Schmitt v. State, 590 So. 2d at 411, n.10. Later, in B.B. v. Sate, supra, this Court stated, "[i]f our decision [in this case] were based upon whether minors could consent to sexual activity as though they were adults, our decision would be 'no' for the reasons stated in Justice Kogan's concurring opinion in Jones v. State." P.R. v. State, 659 So. 2d at 258.

The inability to utilize consent in mitigation when a defendant is convicted of statutorily prohibited sexual activity with a minor will have a protective effect upon children as well as a deterrent effect on the criminal. If adults are strenuously punished for engaging in sexual activity with minors, then the matter of minors having sexual relations with adults will be greatly diminished. The State's compelling interest in protecting children from sexual exploitation can best be carried out by ruling that a minor's "consent" to statutorily prohibited sexual activity cannot be utilized to mitigate the defendant's 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 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 Reply Brief of Respondent has been furnished by delivery to Rosemarie Farrell, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 5th day of November, 1999.

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