IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, Appellant, vs. LEON ROBINSON, Appellee.	)	Case No. SC01-2620

APPELLEE'S ANSWER BRIEF ON THE MERITS

On Appeal from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Appellee was Appellant and Appellant was Appellee in the Fourth District Court of Appeal and Appellee was defendant and Appellant the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol “R” will denote the Record on Appeal, which consists of the relevant documents filed below.

The symbol “T” will denote the Transcript.

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The symbol “ST” will denote Supplemental Transcript on Appeal.

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts. ApIntB. 2-3.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision, below, is not erroneous. Appellee's sexual predator designation was the result of an unconstitutional application of §775.21(c), Fla. Stat. (1998). Pursuant to this law, persons convicted of kidnaping and false imprisonment of minor children, not their own, shall be designated sexual predators and, thereafter, must comply with certain reporting and registration requirements. Inasmuch as the legitimate governmental objective of this statute is to enable the notification of the public of sex offenders' whereabouts, this objective has no rational relationship to Mr. Robinson, in light of the fact that when he "kidnaped" a minor child, it was uncontested that neither he, nor anyone else, sexually exploited the child during the incident in question. Notwithstanding the statute's facial constitutionality under the rational relationship test, its legitimate governmental purpose is not rationally related when applied to Appellee. Additionally, the statute is unconstitutional, in that it requires a sexual predator designation of persons convicted of kidnaping or the false imprisonment of a minor child not their own without affording them the right to rebut the statutory presumption that the crime involved the sexual exploitation, or was motivated by an intent

to sexually exploit, the minor child. In the instant case, the statute failed to permit Appellee to rebut the presumption with the undisputed fact that the kidnaping was neither motivated by nor involved the sexual exploitation of the child. As a result, §775.21(4)(c) is unconstitutional, as it deprived Mr. Robinson of his right to substantive due process of law.

ARGUMENT

THE FOURTH DISTRICT DECISION FINDING THAT THE SEXUAL PREDATOR STATUTE UNCONSTITUTIONAL AS APPLIED TO APPELLEE SHOULD BE AFFIRMED (RESTATED).

STANDING

Appellant's claim that Mr. Robinson has no standing to challenge the constitutionality of §775.21, Fla. Stat. (1998) is without merit (AplntB. 5). Appellant's authority in support of its proposition concern civil litigants' standing to make a claim upon which relief could be granted. Allen v. Wright, 468 U.S. 737 (1984); see Warth v. Seldin, 422 U.S. 490 (1975); see Peregood v. Cosmides, 663 So. 2d 665 (Fla. 5th DCA 1995). However, Appellant's standing to challenge the statute's constitutionality, as applied to him, is pursuant to Art. V, § 4(b), Fla. Const. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773, 774 (Fla. 1996); Thomas v. State, 716 So. 2d 789 (Fla. 4th DCA 1997)[order denying motion to dismiss appeal](Fla. R. App. P. 9.140(b)(1)(C)provides that a defendant may appeal "orders entered after final judgment or finding guilt," and since the sexual predator designation order was entered after defendant was convicted and sentenced, the invocation of this rule is appealable as an order entered after

a "finding of guilt."); Harriel v. State, 710 So. 2d 102, 103 (Fla. 4th DCA 1998).

Appellee's claim that Mr. Robinson lacks standing, because he is currently is serving a term of life imprisonment, is equally frivolous. Appellant maintains that since Mr. Robinson, at this time, cannot be required to comply with the reporting requirements of §775.21(6) and (7), Fla. Stat. (1998), due to his life term of confinement, he cannot seek to challenge law's application to him (AplntB. 5). However, Appellant's complaint overlooks the fact that §775.21(6)(b), Fla. Stat.(1998) requires designated sexual predators to register with the Department of Corrections while "in the custody or control of... the Department of Corrections." Id. This subsection, in turn, provides that the Department of Corrections is to register the inmate/sexual predator with the Florida Department of Law Enforcement during those times that the designated sexual predator is in custody. Id.; §775.21(2)(d), Fla. Stat. (1998).

Additionally, this Court retains jurisdiction to review appeals, notwithstanding the fact that the issue may be factually moot, where the question presented is likely to recur. Enterprise Leasing Co. v. Jones, 789 So. 2d 964, 965-6 (Fla. 2001). Although prosecutions under §787.01 (kidnaping) and

§787.02 (false imprisonment) where the victim is a minor child unrelated to the accused may indeed be rare, the fact that no sexual conduct or exploitation occurs during the episode is not outside the realm of probability. See Raines v. State, 805 So. 2d 999 (Fla. 4th DCA 2001). Hence, mootness notwithstanding, this Court retains jurisdiction to review and affirm the decision of the Fourth District on its merits.

Appellant's final contention is that the issue is not yet ripe and, as such, the Fourth District could have disposed of Mr. Robinson's direct appeal from the Circuit Court's sexual predator designation on this ground (AplntB. 6). As previously discussed, Appellee's rights under Rule 9.140(b)(1)(C), as well as the provisions of §775.21(6)(b) are directly oppose this argument. Moreover, §775.21(4)(c), Fla. Stat. (1998) provides that persons convicted of capital and life felonies, under §787.01, Fla. Stat. (kidnaping), are require to be designated sexual predators and comply with the provisions of §775.21(6). Certainly, at the time the legislature enacted the 1998 amendments to §775.21, it was fully cognizant of the fact that capital and life felonies will result in terms of life imprisonment. Joshua v. City of Gainesville, 768 So. 2d 432, 438 (Fla. 2000); State v. McKendry, 614 So. 1158, 1160 (Fla. 1993); §775.082(1) and (3)(a), Fla. Stat. (1998). It also

provided , pursuant to §775.24(1), Fla. Stat. (1998), that Florida courts must impose a sexual predator designation upon those person so qualified, under §775.21(4), unless the statute is held to be unconstitutional, either facially or as applied. Consequently, Appellant has standing to make his claim, i.e., that the sexual predator designation was unconstitutional as applied to him, and such is neither moot nor does not is lack ripeness.

SECTION 775.21 IS NOT "RATIONALLY RELATED" AS APPLIED TO APPELLEE

The Fourth District Court of Appeal, in reversing Mr. Robinson's designation as a sexual predator, held that §775.21, as applied to the facts as elicited in the underlying kidnaping prosecution,[1] was not rationally related and unconstitutional.[2] Robinson v. State, 804 So. 2d 451, 453 (Fla. 4th DCA 2001). Contrary to Appellant's assertion (AplntB. 6), the Fourth District's decision was correct and ought to be affirmed.

The thrust of Appellant's argument is that the Fourth District erred in finding that §775.21 failed the rational

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1Robinson v. State, 757 So. 2d 1267 (Fla. 4th DCA 2000).

[2]United States Const. Amend. 14; Art. I, §2, §9, Fla. Const.

relationship test as applied to Mr. Robinson. It contends that in light of the requirement that all doubts as to the validity of a statute must be construed in favor of its constitutionality, L.B. v. State, 700 So. 2d 370, 373 (Fla. 1997), §775.21 must be construed as being constitutional, because the rational relationship test, upon which the Fourth District's decision rests, requires that a classification, no matter how imperfect it may be, is to be upheld, so long as it bears some rational relationship to a legitimate governmental purpose (AplntB. 8-9). Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 316, 96 S. Ct. 2562, 2568, 49 L. Ed. 2d 520 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 8, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); Metropolis Theatre Co. V. Chicago, 228 U.S. 61, 69-70, 33 S. Ct. 441, 57 L. Ed 730 (1913); See Florida High School Activities Ass'n, Inc. v. Thomas, 434 So. 2d 306, 308 (Fla. 1983). Appellant maintains that the overall legislative scheme, resulting in the classification which caused Mr. Robinson to be designated a sexual predator, despite the fact that he did not engage in any act of sexual misconduct vis-a-vis the girl seated in the carseat of the vehicle he had stolen, is rationally related to the State's

legitimate interest in protecting children against sexual exploitation. This is so, according to Appellant, since non-parental child kidnapers could be perpetrating this crime for the purpose of sexual exploitation of children and due to the supposition that successfully proving child sex crimes is very difficult (AplntB. 9-11).

Firstly, Appellee is not challenging the overall constitutional validity of §775.21. Rather, his claim is that the law is unconstitutional as applied to him. As such, Appellant's contention that the designation of kidnapers of minor children not their own is rationally related to a legitimate governmental purpose, notwithstanding the fact that exceptional, individual circumstances are included or excluded, is not germane to the issue. All authority cited by Appellant in support of its rational relationship argument concerns attacks of the facial, not the "as applied" constitutionality of certain laws. Heller v. Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); Massachusetts Board of Retirement v. Murgia, supra; Village of Belle Terre v. Boraas, supra; Metropolis Theatre Co. v. Chicago, supra; State v. C.H., 421 So.

2d 62 (Fla. 4th DCA 1982); People v. Fuller, 324 Ill. App. 3d 728, 756 N.E. 2d 255, 258 Ill. Dec. 273 (1st Dist. 2001).

Facial attacks on the constitutionality of a classification, based on the rational relationship test, come under a different analysis than do as-applied constitutional challenges. Britell v. United States, 150 F. Supp. 2d 211 (D. Mass. 2001). A legislative act, while maintaining its facial constitutionality under the rational relationship test, may still be found not to be rationally related to a legitimate governmental purpose or interest, as-applied to the challenging party Id. at 220. Although a court is obliged to defer to the legislature's decision and uphold the validity of laws which affect non-suspect classifications, notwithstanding the possibility that such a law may operate unconstitutionally under some conceivable circumstances, when facially challenged, C.f. Janklow v. Planned Parenthood, 517 U.S. 1174, 1175, 116 S. Ct. 1582, 1583, 134 L. Ed. 2d 679 (1996)(Memorandum), in the case of an "as-applied challenge, the bar is necessarily lower" and all the challenging party "must do is show that the challenged provisions operate unconstitutionally as applied to" that party's situation. Id.; Britell v. United State, supra at 222.

The Fourth District's decision, that §775.21 is not rationally related as applied to Mr. Robinson, is in keeping with the lesser standard of constitutional review. Janklow v. Planned Parenthood; supra; Britell v. United State, supra. The analysis utilized by the Fourth District considered the legislative goal in providing a sexual predator designation upon persons who kidnap minor children not their own and the fact that although Appellee committed such a kidnaping, in his specific case, the evidence showed, as well as conceded by all parties, Mr. Robinson did not sexually exploit the child. Robinson v. State, 804 So. 2d at 453. The goal, as delineated by the District Court, was to provide the community with relevant information about sex offenders. Id. However, the governmental objective would not be accomplished by designating Appellant a sexual predator, because he had not committed an illicit sexual act when he kidnaped another's minor child. Id.

The Fourth District's analysis mirrored that of the Britell court. In Britell, the insured, who were beneficiaries of a Federal government health insurance program, subject to Congressional regulation, under the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"), sought coverage

for costs associated with the abortion of her confirmed anencephalic fetus. Pursuant to the challenged regulation, a result of the "Hyde Amendment," coverage of medically necessary services and supplies associated with maternity care are barred with regard to abortions, except where the life of the mother would be endangered if the fetus were carried to term. Under the regulation, abortions performed for suspected or confirmed fetal abnormality, including anecephaly, was not within the exception and coverage was not authorized by CHAMPUS. Id. at 215.

The Britell court recognized that the CHAMPUS regulations, as enacted under the Hyde Amendment, which barred the funding of abortions, except in the case where a mother's life was endangered, was facially constitutional under the rational relationship test. Id. at 216-7. Citing Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), it pointed out that the Supreme Court found that the restrictions, encouraging childbirth, except in the most urgent circumstances, was, on its face, rationally related to a legitimate governmental objection of protecting potential life. Id. at 325; Britell v. United States, at 217. However, as applied to

the insured, the CHAMPUS regulations were not rationally related to the objective of encouraging childbirth in an effort to protect potential life. This was because anencephaly is uniformly fatal to a fetus. Even if carried to term, such a child would be stillborn or have, at most, a finite life expectancy of no more than a month, since as such a child is born without a brain. The Britell court found that no remedial medical care is available to prolong the life of such a child, as opposed to a child born with a defective organ, who may potentially qualify for a transplant. Consequently, without life or potential life to be protected, the regulations were not rationally related as applied to the insured's situation, notwithstanding the facial constitutionality of the same provision. Id. at 224; see also Karlin v. Foust, 188 F. 3d 446, 489 n.16 (7th Cir 1999).

The Fourth District's decision, holding that §775.21 was unconstitutional as applied to Mr. Robinson followed the prevailing analysis. Although the State has a legitimate objective in informing the citizens of Florida of the whereabouts of sex offenders, this objective has no merit when applied to Appellee. Mr. Robinson participated in the

carjacking of a motor vehicle, knowing that it was occupied by a minor child, and did nothing more to that child than to remove her, carseat and all, from the vehicle, after fleeing from the location of the taking, and left her unharmed (ST. 329-332, 393-6, 338, 415). This Court should affirm the decision of the Fourth District Court of Appeal.[3]

SECTION 775.21(4)(c) PROVIDES FOR AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION, VIOLATING APPELLEE'S RIGHT TO DUE PROCESS OF LAW

Mr. Robinson's designation as a sexual predator, based upon his kidnaping conviction, pursuant to §775.21(4)(c), Fla. Stat., is unconstitutional, as this statute establishes an irrebuttable or conclusive presumption, violating Appellee's right to substantive due process of law.[4] [5] Section 775.21(4)(c), Fla.

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[3]Upon this Court's affirmance of the Fourth District's decision, no further judicial action will be required. The District Court's mandate in the instant case was not stayed and the trial court has, heretofore, vacated its designation of Appellee as a sexual predator (SR3.).

[4]U.S. Const. Amend. 14; Art. I, §9, Fla. Const.

[5]Inasmuch as §775.21, Fla. Stat. is a statutory scheme designed to regulate otherwise lawful and constitutionally protected behavior, i.e., the whereabouts of persons designated to be sexual predators, it has a direct bearing on the liberty interests of those so regulated and, as such, must comport with the principles of due process. See Heller v. Abess, 184 So. 2d

Stat. (1998)(effective October 1, 1998, Laws of Fla. Ch. 98–81, §3), provided, that a person who was convicted of committing an enumerated crime, inter alia a capital, life or first degree felony pursuant to §787.01, Fla. Stat., where the victim is a minor child and the defendant is not the child's parent, "shall be designated as a 'sexual predator.'" Other than kidnapping, §787.01, Fla. Stat. and false imprisonment, §787.02, Fla. Stat., where the victim is a minor child and the defendant is not that child's parent, all other enumerated crimes which require a sexual predator designation upon conviction are either patently sexual in nature or provide for sexually exploitative acts as alternative elements of proof. They include convictions for violations of various provisions of the following Florida Statutes: Chapter 794, Fla. Stat., Sexual Battery; Chapter 796, Fla. Stat., Prostitution; Chapter 800, Fla. Stat., Lewdness; Indecent Exposure; Chapter 825, Fla. Stat, Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Persons; Chapter

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122 (Fla. 1938); see also Aspen-Tarpon Springs Ltd. Partnership v. Stuart, 635 So. 2d 61 (Fla. 1st DCA 1994); see also Tomlinson v. Department of Health and Rehabilitative Services, 558 So.2d 62, 66 (Fla. 2d DCA 1990) (regulations cannot be enforced by means of conclusive presumptions of proof).

827, Fla. Stat., Abuse of Children; Chapter 847, Fla. Stat., Obscene Literature; Profanity.

The legislature's intent in enacting §775.21, Fla. Stat. (1997), was upon its recognition that repeat sex offender and sex offenders who prey on children are sexual predators who are extremely threatening to the safety of the public. Collie v. State, 710 So. 2d 1000, 1009 (Fla. 2d DCA 1998); §775.21(3)(a), Fla. Stat. The legislature found that sex offenders are likely to use physical violence and repeat their crimes and that they are recidivist to an extent far more than actually reported, causing an exorbitant and incalculable cost to society. Id. It went on to find that the high level of threat posed and the long-term suffering caused by sexual predators justified the legislature in implementing a strategy to protect the interests of the public, especially children, from predatory sexual activity. Collie v. State, supra at 1009; §775.21(3)(b) and (c), Fla. Stat. The legislature's objective in enacting §775.21 and its amendments appear to be rational related to a legitimate governmental interest and, to this extent, the statute is facially constitutional. Appellate courts in this state have recognized the facial constitutionality of the law and that

sexual predator designation or classification is rationally related to the recognized purpose of protecting the public and specifically children from predatory sexual activity. See Payne v. State, 73 So. 2d 129 (Fla. 2d DCA 2000); see Fletcher v. State, 699 So. 2d 346 (Fla. 5th DCA 1997).

Yet, as previously stated, not all of the enumerated crimes, which, upon conviction, trigger a sexual predator designation, are patently sexual in nature. While §787.01(3), Fla. Stat. (1998) provides for sentencing enhancement if a kidnaping of a child is perpetrated along with certain other substantive sexual offenses,[6] Mr. Robinson was charged under §787.01(1), which fails to include any sort of sexual crime as an element for prima facie proof of its commission. While Appellee's kidnaping conviction was sufficiently proven, Robinson v. State, 757 So. 2d 1267 (Fla. 4th DCA 2000), neither the underlying facts nor the elements proven warrant the conclusion that he committed a sexually exploitative offense or that he had intended to do so.

[6]These separate offenses, if committed during the perpetration of a kidnaping of a child under 13 years of age, enhance the penalty from a first degree felony punishable by a term of imprisonment not exceeding life to a life felony. They are aggravated child abuse, sexual battery, lewd or lascivious conduct or lewd or lascivious exhibition and child prostitution. §787.01(3)(a), Fla. Stat.

However, §775.21(4)(c) mandates that a trial court designate as a sexual predator any person convicted under 787.01(1), notwithstanding the elements of the offense or the proof adduced in support of the conviction. The statutory language, "upon conviction, an offender shall be designated as a sexual predator," creates an irrebuttable or conclusive presumption as the sole quantum of proof for the judicial act to be invoked.

A legal presumption allows a known fact or set of facts to suffice as proof to establish the truth of an unknown fact. Charles W. Ehrhardt, Florida Evidence §§ 301.1 (2001 ed.). In Florida, the only type of permissible legal presumptions are those which are subject to rebuttal. Goldstein v. Maloney, 62 Fla. 198, 203, 57 So. 342, 344 (1911). The laws in this state disfavor conclusive or unrebuttable presumptions. See Gurrell v. Starr, 640 So. 2d 228, 230 (Fla. 5th DCA 1994). Those that do not provide for a rebuttal of the presumed fact can violate an individual's right to due process of law. See Vlandis v. Kline, 412 So. 2d 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973)(United State Supreme Court held invalid irrebuttable presumptions that certain married and unmarried students in the Connecticut university system were out-of-state students, notwithstanding

that they subsequently became bonafide, permanent Connecticut residents, for purposes of tuition rates were violations of substantive due process of law).

In order for a legal or statutory presumption to be constitutional, it must, "First... be a rational connection between the fact proved and the ultimate fact presumed," and "Second, there must be a right to rebut in fair manner. Id.; Straughn v. K&K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976). In other words, there must be a rational relationship between the face proved and the fact presumed, coupled with the right to rebut the ultimate presumption. Parikh v. Cunningham, 493 So. 2d 999, 1001 (Fla. 1986).

In the present case, there is a facial, rational relationship between the proven fact, that Appellee kidnaped a minor child not his own, and the presumed fact, that non-parental adults kidnapers commit such crimes to sexually exploit minor children. Parikh v. Cunningham, supra. However, the constitutionality of this presumption fails, because no where in the enabling statute is there a provisions which permits one convicted of a non-parental, minor child kidnaping to offer any evidence to rebut the presumption that his crime either entailed

sexual conduct or was motivated by an intent to engage in sexual conduct. The facts of the present case are indisputable. At the sexual predator designation hearing, Mr. Robinson did rebut the presumption that he either sexually exploited or intended to sexually exploit the minor child victim of the kidnaping. In fact, the State conceded that there was no evidence of sexual conduct on Appellant's part. The trial court's inability to consider the uncontested rebuttal evidence, due to the statutory proscription against the judicial consideration of such evidence, denied Appellee of this rights to substantive due process. Hence, in addition to the statute's constitutional infirmity as applied to Mr. Robinson's unique set of facts, this Court should affirm the Fourth District's decision on the alternative ground that §775.21 is unconstitutional as it fails to permit a potential designee to rebut the presumption that a conviction on an enumerated offense, in and of itself, is the sole qualifying factor upon which to be designated a sexual predator.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this Court affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to James J. Carney, Assistant Attorney General, 1515 North Flagler Drive, 9th floor, West Palm Beach, FL 33401-3432 this 15th day of March, 2002.

IAN SELDIN
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this 15th day of March, 2002.

_____

IAN SELDIN
Counsel for Appellee