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IN THE SUPREME COURT OF THE STATE OF FLORIDA

KEMAR ROCHESTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC12-1932
	)	LT Nos. 4D10-512
STATE OF FLORIDA,	)	08-24049CF 10A
	)	
Respondent.	)	
	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner was Appellant and Respondent was Appellee in the Fourth District Court of Appeal and Petitioner was defendant and Respondent 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.

The symbol "ST" will denote the Supplemental Transcript.

STATEMENT OF THE FACTS

JC testified she was born on May 28, 1999, and was ten years of age, in May, 2008. T. 110. She lived with her mother, Jamailia Charleswell, four siblings, including JH, her mother's boyfriend and the boyfriend's brother in North Lauderdale, Florida. T. 111-2, 143. JC and her mother were both acquainted with Petitioner, Kemar Rochester, after having met him at church. T. 113, 145. Charleswell met Rochester, through her friend, Adisha Huggins. T. 144. Huggins had known Rochester for about eight months, prior to May, 2008. T. 162. While Huggins and Rochester were friends, Rochester was only a church and technical school acquaintance of Charleswell. T. 144-5, 162-3

On May 29, 2008, Rochester had been to the Charleswell home and JC saw him there. T. 113-4. He had arrived after having given one of Charleswell's sons a ride home from the Huggins house. T. 146. Rochester had not previously been to the Charleswell home and his appearance there was unexpected. T. 114, 146. Charleswell heard Rochester's voice outside her front door, and, when Rochester told her that he had given her son a ride from Huggins' house, she thanked him and invited him into her home. T. 147. Rochester entered and after some time asked to view Charleswell's backyard swimming pool. T. 147-8. Thinking nothing of his request, she agreed. T. 147-8. At the time Rochester was looking at her pool, Charleswell's children, JC and JH, were supposed to be cleaning their bedroom. T.

147-8. Rochester was in Charleswell's backyard for about 10 minutes before he reentered the house. T. 148, 160. He appeared to behave normally and Charleswell was unaware that anyone, especially JC and JH, had been with him in the backyard. T. 149, 160-161

JC did not know Rochester well, having been acquainted with him only at church. T. 114. She had had no previous problems with him. T. 114, 145-6. On May 29, JC saw Rochester in the living room and then in the backyard, near the swimming pool. T. 115, 127-8. Only JC and Rochester were in the backyard at the time he lifted her up "halfway," touched her on her clothed buttocks or her clothed genitalia and asked her to keep a secret. T. 115-7, 119, 128, 135. Immediately afterward, JC told only her younger sister, JH, about what had happened in the backyard with Rochester. T. 134. When Rochester left her home, Charleswell was unaware of events in the backyard. T. 149.

JC told JH about the incident with Rochester about two weeks afterward. T. 134, 149-150. Both girls told their mother about it thereafter. T. 150-151. After finding out, Charleswell phoned Huggins. T. 151. Sometime before the call, Rochester had sent Huggins a text message, stating, "'Tell J that I'm sorry and'" "'I'm a fallen brother;'" and that "the devil made him do it and he hope[d] that he could get the help that he need[ed]." T. 154, 164. Charleswell next phoned police and on a later date she met with Sex Crimes Detective Julie Bower. T. 152, 171-2.

Bower spoke to both JC and JH and inspected the backyard where the incident occurred. T. 173. Bower learned that JC referred to her vaginal area as her "too too" or "toon toon." T. 218, 220. The detective claimed that JC pointed to an illustration of a vaginal area and a buttocks in response to her question concerning where Rochester had touched her; and, after JC pointed at her stomach each of three times Bower asked where Rochester had touched her on her own body, she pointed to her vaginal area after Bower asked her a fourth time. T. 213-9.

Bower had arranged for Charleswell to make a controlled telephone call to Rochester. T. 174-5. During the call, Charleswell asked, "The devil came over you? How you get to do something like that like touch her? Touch her private" and "So that's why you touch?" T. 154-5. Rochester answered, "Yeah." T. 155. Rochester admitted he had lifted JC up and said that he had not touched the girl's "bum," but only her privates between her legs. T. 155-6. He denied that he touched anywhere beneath JC's clothing. T. 157. Rochester asked and Charleswell denied that she had contacted police. T. 157. Rochester asked Charleswell to extend his apologies to JC at the end of the call. T. 157.

Rochester met Bower at her office after the control call; she Mirandized him and he agreed to speak without a lawyer. T. 175, 179-184. Rochester said he was 29 years of age and he knew the reason for the interrogation. T. 178-9. He was unemployed, although

attending trade school. He said he was a Pentecostal Christian, and since he was "saved" in 1997, his life's goal was to become a pastor. T. 184. He currently resided with his mother until he could find employment. T. 185. He lost his last job, as a telemarketer, as he found that forcing people to buy vacation packages conflicted with his Christian principles. T. 185. Rochester told Bower that he had met Charleswell and her children at "World Ministry, International," a Pentecostal church. T. 186, 189-7. Since then, he had changed churches to the "Holy Temple Holiness Church of Deliverance." T. 186-7. He changed his congregation after the incident with JC, because "the Lord, he instructed me that that wasn't my church, and the pastor called me and confirmed that the Lord says that I don't belong at that church" and that he was not "blending" with the plan that God had for him at his initial church. T. 187. His new congregation's pastor "prophesied" to Rochester that he belonged at his new church and Rochester had regularly attended services there for two week prior to the interrogation. T. 187-8. He denied that he changed congregations because of any bad feelings about JC; rather, it was because he believed his purpose in life was to be a minister and that he was fighting against the devil within himself. T. 188.

About the events of May 29, 2008, he explained that his hand "maybe had touched there unnoticing" and that he "might have" touched her clothed vagina and maybe "the devil kind of got into [his] spirit

or something and made [him] do it." T. 193. Rochester told Bower that he had texted Huggins after he had been accused of having inappropriately touched JC. He denied that he had touched the girl knowingly or that he thought "anything about it." T. 193. Rochester was determined to take responsibility for his actions. T. 195. He told Bower that he did so when he had found out from Huggins, about a week after the incident, that Charleswell had reported the incident to police. T. 195. He next consulted with his pastor about the incident and, afterward, texted Huggins, stating that he was a "fallen brother and if this happened, it was a demonic attack." T. 195.

Rochester told Bower he had been orphaned and that his birth mother had carried him to term, knowing that she could die if she did, and had died four months after he was born. T. 206. He reported that he was without a girlfriend and had abstained from sex out of wedlock, as well as from masturbating, for the preceding 10 years out of religious conviction. T. 196. Rochester agreed with Bower that abstaining from sex in the prime of life can make a person go crazy. T. 197. Rochester was uncertain that he had touched JC because he had been without sexual relations for 10 years. T. 197. While he acknowledged that, at times, he wanted to have sex and thought about getting married, although he needed to control his hormone induced emotions. T. 198-9. He "honestly" agreed that he had touched JC "like in between her legs," atop her clothing; that

he had told her not to tell anyone about it; although denied that he had become sexually aroused. T. 199-201. While he did not understand why he had touched JC, he could only explain that his spirit had been attacked and he was weak. T. 200-201. He was weak, he explained, because he had low self-esteem, since he was overweight. T. 200-201. He told Bower that women did not want to be with fat men, although he hoped to lose weight and have girlfriend. T. 200-202.

Rochester told Bower that he apologized directly to Charleswell for the incident and promised that it would not happen again. T. 204-5. Since the incident, he prayed with and was counseled by the pastor of his new church, who believed in deliverance, and Rochester felt less depressed, closer to God and that he needed to fight the devil. T. 205.

STATEMENT OF THE CASE

Petitioner, Kemar Rochester, was charged by way of an information, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. R. 2-5, 55-6. The information alleged that he committed a single count of lewd or lascivious molestation by touching JC on her genital area "and/or" on her buttocks, in violation of Section 804.04(5)(b), Florida Statute (2008). R. 55-6. At the close of evidence, the jury returned a verdict finding Rochester guilty as charged. T. 248-9; R. 74.

Prior to sentencing, Rochester filed a motion for a downward departure sentence, pursuant to Section 921.0026(2)(j), Florida Statute (2008), upon the ground that the crime was committed in an unsophisticated manner; it was an isolated incident; and that he had shown remorse for his crime. T. 77-8. According to the Criminal Punishment Code scoresheet, prepared by the prosecutor, Rochester had no prior criminal convictions and the instant crime was his first offense. R. 99-100. After the parties presented a legal argument concerning an alternative sentencing issue, Rochester argued that the trial court should not impose the statutory minimum sentence of 25 years imprisonment, because such a severe disposition was fundamentally unfair and that the trial court was within its discretion to impose a sentence that it deemed to be fair. T. 285. The State contended that the 25 year minimum term of imprisonment

was required, per § 775.082(3)(a)(4), Florida Statute (2005). The trial court agreed and denied Rochester's motion for a downward departure sentence. T. 285-6; R. 77-8. The trial judge did note that he agreed with Rochester that 25 years was excessive for the crime he committed, based on the facts adduced at trial, although he was without any discretion or authority to impose anything less than 25 years imprisonment. T. 286. The trial court adjudicated Rochester guilty and sentenced him to the minimum term of 25 years, although, again, with the caveat that if it had had the authority it would have considered a more lenient sentence, as 25 years imprisonment was excessive. T. 286-7.

Rochester timely appealed his sentence to the Fourth District Court of Appeal. R. 114. Before the District Court, Rochester argued that the trial court erred, because, contrary to its belief, it had the discretion to consider imposition of a downward departure sentence. Rochester argued to the District Court that § 775.082(3)(a)(4) provided that the imposition of a twenty-five year term was couched in permissive language, inasmuch as a trial court "may" impose such a sentence, and, as such, the permissiveness provided a trial court with the discretion to entertain and rule on the merits of a motion for a downward sentence departure. The Fourth District Court of Appeal affirmed the trial court's imposition of the 25 year term of imprisonment. Rochester v. State, 95 So. 3d 407 (Fla. 4th DCA 2012).

In so doing, the District Court employed two statutory construction rules providing that; (1) a "specific statute 'covering a particular subject matter is controlling over the same and other subjects in general terms,'" and, (2) a subsequently enacted statute which conflicts with an earlier version of the same statue prevails over the earlier version. Id. at 409. It concluded that the legislature's use of "may" in Section 775.082(3), Florida Statute (2005), limited a trial court's discretion to impose one of two alternative sentences, only; a minimum mandatory 25 year term of imprisonment or life imprisonment. Id. at 410. The Fourth District recognized and certified conflict with the Second District's decision in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010). Id. at 410-411.

This Court accepted jurisdiction upon Rochester's claim that the decision of the Fourth District Court of Appeal was in express and direct conflict with the decision of the Second District Court of Appeal in Montgomery. Id.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in holding that a trial court is without discretion to impose a downward departure sentence less than the 25 year minimum term provided by Section 775.082(3)(a)4.a.(II), Florida Statute. This statute does not prohibit a downward departure sentence. Any ambiguities with regard to the meaning of the statute, in terms of whether it would permit a imposition of a downward departure sentence, must be construed in a light most favorable to a criminal defendant.

ARGUMENT

THE FOURTH DISTRICT DECISION FINDING THAT § 775.082(3)(a)4.a.(II), Fla. Stat. (2005), DOES NOT PROVIDE A TRIAL COURT WITH DISCRETION TO CONSIDER A DEFENDANT'S MOTION FOR A DOWNWARD DEPARTURE SENTENCE SHOULD BE REVERSED, IN THAT THE STATUTE, INTERPRETED IN A LIGHT MOST FAVORABLE TO A CRIMINAL DEFENDANT, DOES NOT PROHIBIT A TRIAL COURT FROM IMPOSING A DOWNWARD DEPARTURE SENTENCE FROM THE STATUTORY MINIMUM OF 25 YEARS IMPRISONMENT.

Rochester was convicted of lewd or lascivious molestation, in violation of Section 800.04(b), Florida Statute. This statute provides, in pertinent part, that,

> A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person... or forces or entices a person... to so touch the perpetrator, commits lewd or lascivious molestation.
>
> An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a life felony, punishable as provided in § 775.082(3)(a)4.

He was sentenced pursuant to Section 775.082(3)(a)4.a., which provides, in pertinent part that,

> A person who has been convicted of any other designated felony [other than a capital felony] may be punished as follows:
>
> *****
>
> Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005, which is a violation of Section 800.04(5)(b), by:

> (I) A term of imprisonment for life; or
>
> (II) A split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life.

At sentencing, Rochester moved the trial court to depart downward from the minimum term of 25 years imprisonment (R. 77-8) pursuant to Section 921.0026(3). The trial court was inclined to do so but the trial court was under the belief that it was prohibited from doing so by the sentencing statute (T. 286-7). The issue of whether legal grounds exist to depart from a statutory presumptive sentence is a question of law. See Kezal v. State, 42 So. 3d 252, 253 (Fla. 2d DCA 2010). The issue of whether Section 775.082(3)(a)4, Florida Statute prohibits a court from imposing a downward departure sentence from the 25 year minimum term is a question of statutory construction and this Court's standard of review is de novo. Anderson v. State, 87 So. 3d 774, 777 (Fla. 2012).

The Fourth District Court of Appeal affirmed Rochester's sentence of 25 years imprisonment, holding that it was the legislature's intent when enacting § 775.082(3)(a)4.a.(II), Florida Statute (2005), to obviate any judicial discretion with regard to imposing a downward departure sentence for persons convicted of having violated committing lewd or lascivious molestation of a child

under 12 years of age by a person 18 years of age or older, pursuant to Section 800.04(5)(b), Florida Statute (2008). Rochester v. State, 95 So. 3d 407 (Fla. 4th DCA 2012). The Fourth District reasoned that the plain language of the statute provides that a trial court "may" impose either a 25 year term of imprisonment or life imprisonment and that lenity considerations were inapplicable, because there was no ambiguity with regard to the statute's meaning. Id. at 411. Although the Fourth District maintained that the plain meaning of Section 775.082(3)(a)4.a.II, Florida Statute, was obvious and that no statutory construction rules needed to be utilized, id. at 409, it nevertheless applied statutory construction tools. Id. at 409-410.

First, it considered the rule concerning a specific statute controlling over general statutes, citing Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959). Second, it considered the rule providing that a statute enacted later in time prevailed over an older statutory enactment where there was an apparent conflict between the two versions, citing McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994). Applying these two rules, the Fourth District concluded that the more specific provisions of sub-subsection (3)(a)4.a.(II) of §775.082, prevailed over the more general provisions of this section and that the legislature's enactment of a minimum term of 25 years was more restrictive than its prior sentencing laws for violations of the same offense, as evinced in Ch. 2005-28, §§ 4 and 5, Laws of Fla.

Rochester v. State, supra at 409-410. Finally, it concluded that the term "may," as used to apply to all provisions of subsection (3) of Section 775.082, was not permissive when it came to sub-subsection (3)(a)4.a.(II) and provided limited discretion for a trial court to impose either no less than 25 years imprisonment, another term of years not less than 25 years imprisonment, or life imprisonment. Id. 410-411. The Fourth District's analysis was wrong.

That Ch. 2005-28, §§ 4 and 5, Laws of Fla., was the legislature's last word on sentencing discretion for violations of Section 800.04(5)(b), that were pertinent to Rochester, is not a relevant consideration. Likewise, the more specific provisions of sub-subsection (3)(a)4.a.(II) over the more general provisions of Section 775.082(3)(a), Florida Statute (2005), do not directly address the issue at hand. Rochester acknowledges that the 2005 Florida Legislative session changed the sentencing parameters for violations of §800.04(5)(b) and raised its status from a first degree felony to a life felony. However, the Fourth District did not address while the Legislature enacted a harsher and more limited sentencing range for adults who molest children under the age 12, it did not prohibit a trial court, in its discretion, from departing downward from the 25 year minimum sentence when a recognized ground for departure is sufficiently proven. See State v. Henderson, 108 So. 3d 1137, 1140 (Fla. 5th DCA 2013)("The trial court can impose a downward departure sentence" per Section 921.0026(2), Florida

Statute (2008), "so long as the reason given is supported by competent, substantial evidence and is not otherwise prohibited"); State v. McKinley, 109 So. 3d 301, 303 (Fla. 4th DCA 2013); Spaulding v. State, 93 So. 3d 473, 474 (Fla. 2d DCA 2012); State v. Adkison, 56 So. 3d 880, 882 (Fla. 1st DCA 2011); State v. Ford, 48 So. 3d 948, 949 (Fla. 3d DCA 2010).

Standing alone, Section 775.082(3)(a)4.a.(II) provides that a trial court may sentence persons convicted of violating Section 800.04(5)(b) with a term of 25 years, coupled with lifetime probation or community control, or life imprisonment. In Montgomery v. State, 36 So. 2d 188 (Fla. 2d DCA 2010), the Second District held that the requirement that a 25-year sentence be imposed under this statutory scheme, Ch. 2005-28, §§ 4 and 5, Laws of Fla., did not create a minimum mandatory sentence or a minimum mandatory term of imprisonment. Id. at 188-9. Specific language, the court held, was absent from sub-subsection (3)(a)4.a.(II) that would otherwise create a minimum mandatory term. Id. at 188. Petitioner at bar agrees with the Second District's analysis; restrictive language which exists in other statutes, held to provide for minimum mandatory terms of imprisonment, does not appear in sub-subsection (3)(a)4.a.(II); and while convictions for violations of § 800.04(5)(b) require a minimum sentence, imposition of 25 years imprisonment is not necessarily mandatory. Id. at 189. The Montgomery court arrived at this

conclusion by applying the rules of lenity. § 775.021 (1), Fla. Stat. (2008). Lenity must be applied, due to an apparent ambiguity within the context of (1) the overall provisions of Section 775.082, Florida Statute; (2) the limiting provisions of sub-subsection (3)(a)4.a.(II); (3) the lack of any restrictive sentencing language within context of Section 800.04(5)(b), Florida Statute; (4) and the lack of any language within the above cited statutory provisions which would proscribe the use of the Criminal Punishment Code as the means to determine imposition of a appropriate sentencing term.

Moreover, the general sentencing statute, Section 775.082, is to be read in pari materia with the Criminal Punishment Code, § 921.0002, et seq., Fla. Stat. (2008), since both statutory provisions concern criminal sentencing and the computation of appropriate sentences. See Butler v. State, 838 So. 2d 554, 556 (Fla. 2003). While Section 775.082(3)(a)4 provides for the 25 year minimum term for violations of § 800.04(5)(b), there is no prohibition within the context of this sentencing statute for a trial court to consider the linked provision of the Criminal Punishment Code when imposing a sentence under this law. The Criminal Punishment Code provides for downward departure sentences when certain factual criteria are proven and when a trial court exercises its discretion to downwardly depart. See §§ 921.002(3) and 921.0026, Fla. Stat. (2008). Convictions for crimes categorized as life felonies, like lewd or

lascivious molestation, under Section 800.04(5)(b), are subject to sentencing under the Criminal Punishment Code. The only felonies excluded are capital crimes. See § 921.0021, Fla. Stat. (2008). In fact, the Criminal Punishment Code, to the extent that it provides for a minimum permissible sentence based on, inter alia, a defendant's current and prior convictions, establishes minimum sentencing terms which generally limit a trial judge's sentencing discretion. See Section 921.002(1)(c), Fla. Stat. (2008). In fact, under the Criminal Punishment Code, a trial court may mitigate "any felony sentence, except any capital felony, committed on or after October 1, 1998," where there is proof of certain recognized circumstances. See Section 921.0026, Fla. Stat.

In State v. VanBebber, 848 So. 2d 1046 (Fla. 2003), this Court held that downward departure sentences, under the mitigating circumstance provisions of the Criminal Punishment Code, Section 921.0026, are to be considered by a sentencing court for "any felony, except [a] capital felony." Id. at 1049. This Court emphasized that the "any" non-capital "felony" application of downward departure sentencing meant just how it read; that it applied to "any felony" expect convictions for capital offenses. Id. Crimes for which downward departure consideration was required under the Criminal Sentencing Code included sentences for convictions of DUI manslaughter. Id. If a defendant provided competent, substantial

proof that his DUI manslaughter was committed in an unsophisticated manner and was an isolated incident for which the defendant showed remorse, a trial court had the legal authority to exercise its discretion and impose a sentence below the minimum term established by the Code scoresheet. Id.; § 921.0026(2)(j), Fla. Stat. (1998). Under VanBebber and Montgomery, a trial judge has the lawful discretion to consider a sentence that is a downward departure from the Section 775.082(3)(a)4, 25 year minimum term for violations of Section 800.04(5)(b). Id.

The Fourth District's Rochester, supra, opinion is the only Florida legal authority which specifically holds that a trial court cannot downwardly depart from the 25 year minimum term for a violation of §800.04(5)(b). However, other case law concerning whether a court can depart downward from minimum mandatory sentencing schemes concerning other types of crimes provides guidance for the issue at bar. Comparing the drafting language of ostensibly similar statutory provisions is a proper method to divine legislative intent. See Reynolds v. State, 842 So. 2d 46 (Fla. 2002); Gaudet v. Florida Bd. of Professional Engineers, 900 So. 2d 574, 580 (Fla. 4th DCA 2004).

In Kelley v. State, 821 So. 2d 1255 (Fla. 4th DCA 2002), the Fourth District considered whether a trial court had the authority to impose a downward departure sentence on a defendant's conviction for cocaine trafficking. It found that since the drug trafficking

statute, Section 893.135, Florida Statute (2000), included a "'proscription against suspending, deferring or withholding the mandatory penalty,'" such "'reflect[ed] a legislative intent to strengthen the punishment for large scale drug trafficking.'" Id. at 1257, quoting Hill v. State, 624 So. 2d 826 (Fla. 2d DCA 1993).

In State v. Vanderhoff, 14 So. 3d 1185 (Fla. 5th DCA 2009), the Fifth District reversed a downward departure sentence on a defendant convicted pursuant to the 10/20/life statute, Section 775.087(2), Florida Statute (2008), for discharging a firearm during the commission of a felony offense. It ruled that a departure sentence was inappropriate for convictions under this statute, because (1) the language of Section 775.087(2)(c), Florida Statute (2008), provided that where the Criminal Punishment Code sentencing score exceeded the minimum mandatory term, the sentence pursuant the sentencing score must be imposed; and (2), because the language of Section 775.087(2)(d), provided that it was the intent of the legislature that persons convicted of possessing, displaying or discharging firearms during the commission of a felony be punished to the fullest extent of the law. Id. 1188-9.

In State v. Garcia, 923 So. 2d 1186 (Fla. 3d DCA 2006), the Third District reversed a downward departure sentence imposed on a defendant who was proven to qualify for Prison Releasee Reoffender, mandatory minimum sanctions. See Section 775.082(9)(a), Fla. Stat.

(2006). Likewise, in Dixon v. State, 888 So. 2d 141 (Fla. 1st DCA 2004), the First District affirmed a trial court's imposition of a Prison Releasee Reoffender minimum mandatory term against a defendant's argument that he otherwise qualified for a downward departure sentence. Both decisions held that a trial court was without legal authority to impose a downward departure sentence for a defendant where the State proved by a preponderance of the evidence he or she qualified for such enhanced, recidivist sentencing sanctions. State v. Garcia, supra at 1188-9; Dixon v. State, supra at 142. The authority under which the Third and First Districts reached this conclusion was this Court's decision in State v. Cotton, 769 So. 2d 345 (Fla. 2000). In Cotton, this Court cited to specific statutory language within Section 775.082(8)(a), Fla. Stat. (1999)(currently contained in Section 775.082(9)(a), Florida Statute (2008)), pointing out that the Legislature provided the Office of the State Attorney the exclusive discretion whether to seek a Prison Releasee Reoffender sanction. Id. at 348. It recognized that if the State can successfully prove that the defendant meets the statutory criteria, the minimum mandatory term must be impose. Id. The Cotton court also cited to the statute's provisions expressing that, "It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in

this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender." Id.

At bar, neither the provisions of Sections 800.04(5)(a) and (b), defining the crime of lewd or lascivious molestation of a person under 12 years of age by a person 18 years of age or older, nor Section 775.082(3)(a)4, contain any language that would reflect a legislative intent which could be construed as a prohibition against the imposition of a downward departure sentence from the 25 year minimum term. Section 800.04(5)(b) merely provides that the crime is a life felony, punishable as provided pursuant to Section 775.082(3)(a)(4), Florida Statute (2005). Section 775.082(3)(a)4 provides a specific minimum term for conviction of this type of lewd or lascivious molestation; however, there is no specific legislative proscription or other language inferring a legislative proscription against a trial court exercising its discretion to depart downward from the minimum mandatory term where the defendant provides sufficient proof of his or her factual qualifications for a departure. Cf. State v. Vanderhoff, supra; c.f. State v. Garcia, supra; Dixon v. State, supra; Kelley v. State, supra.

The Criminal Punishment Code applies to sentences imposed pursuant to Section 775.082(3)(a)4, and a trial court may depart downward from the minimum mandatory term, because the Legislature

made imposition of sentences under Section 775.082(3), Florida Statute (2008), permissive. Subsection (3) of Section 775.082 states that, "A person who has been convicted of any other [non-capital] designated felony may be punished as follows." Sub-subparagraph (a)4.a states that, "Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005 [and before July 1, 2008], which is a violation of Section 800.04(5)(b), by: (I) A term of imprisonment for life; or (II) A split sentence that is a term of not less than 25 years' imprisonment followed by probation or community control for the remainder of the person's natural life" [citations omitted]. As discussed above, this permissive language can be contrasted to similar, but non-discretionary language used within the "10-20-Life" statute for firearm use during the commission of a felony. See § 775.087, Fla. Stat. (2008). Unlike the permissive "may" used within Section 775.082(3)(a)4, the 10-20-Life law provides that upon the conviction of an enumerated felony where a firearm was carried, discharged or discharged and caused death or great bodily harm, the person convicted "shall be sentenced to a minimum term of imprisonment of 10 years" for actual possession of a firearm; "shall be sentenced to a minimum term of imprisonment of 20 years" for discharging of a firearm; and "shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term

of imprisonment of life in prison" for discharging of a firearm and causing death or great bodily harm. See § 775.087(2)(a)1, 2 and 3, Fla. Stat. (2008). Additional provisions of the 10-20-Life law make it clear that sentences imposed under it are not subject to suspension, deferment or the withholding of adjudication of guilty and that the minimum mandatory term must be impose, even where it exceeds the statutory maximum term of punishment for the offense under sentence. Cf. Mendenhall v. State, 48 So. 3d 740 (Fla. 2010); see § 775.087(2)(b) and (c), Fla. Stat. (2008).

The absence of mandatory language and specific restrictive provisions and the presence of permissive language within Section 775.082(3)(a)4, with regard to the imposition of the minimum terms for convictions under Section 800.04(5)(b), illustrates that the legislature left trial court's with the discretion to impose sentences which depart downward from minimum term.

The lack of any language in Section 775.082(3)(a)4 that prohibits downward departure sentences and the legislature's omission of any terminology which specifically removes all trial judge discretion in sentencing persons convicted of having violated Section 800.04(5)(b), leads to the conclusion that downward departure sentences for the crime of lewd or lascivious molestation of a child under 12 years of age by a person 18 years of age or older are not contrary to the intent of the Florida Legislature. State

v. Cotton, supra; State v. Vanderhoff, supra; State v. Garcia, supra; Dixon v. State, 888 So. 2d 141 (Fla. 1st DCA 2004); Kelley v. State, supra. To the extent that the context of Section 775.082(3)(a)4, may be ambiguous as to whether downward departure sentences for Section 800.04(5)(b) violations are lawful, lenity must be applied and the meaning of these statutes must be construed most favorable to Petitioner's position. State v. VanBebber, supra at 1049; Montgomery v. State, supra at 189; see Section 775.021(a), Florida Statute.

At bar, the trial judge believed a downward departure sentence was not authorized under Section 775.082(3)(a)4; although he would have considered Rochester's motion to depart if the authority existed, because he deemed that 25 years imprisonment for what Rochester had done to JC was too severe (T. 285-7). See Washington v. State, 82 So. 3d 828 (Fla. 4th DCA 2011); see Williams v. State, 889 So. 2d 969, 970 (Fla. 4th DCA 2004); see Ellis v. State, 816 So. 2d 759, 760 (Fla. 4th DCA 2002). However, as discussed above, the trial court had the authority to impose a downward departure sentence for Rochester and its failure to consider doing so was error.

As a matter of policy, there should be no legal bar against a trial court's consideration of a downward departure sentence for a lewd or lascivious molestation conviction pursuant to Section 800.04(5)(b), Florida Statute. This policy consideration is

grounded upon the nature and the elements of proof for this offense. Proof sufficient to sustain a conviction for a Section 800.04(5)(b) violation includes an intentional, lewd or lascivious touching of breasts or chest; genitals; genital area or the buttocks. Id. A conviction will be sustained even when it is proven that the touching was atop clothing covering these body parts. Id. A pat or rub by an adult on the buttocks of a child under 12 years of age may or may not be sufficient to even prove a violation of Section 800.04(5)(b); it all depends on the eye of the beholder, whether it was brief or lingering, as well on the trier of fact. See, e.g., Farinacci v. State, 29 So. 3d 1212 (Fla. 4th DCA 2010); see Foreman v. State, 965 So. 2d 1171, 1174 (Fla. 2d DCA 2007); see M.L.C. v. State, 875 So. 2d 810, 811 (Fla. 2d DCA 2004). The touching of a young child's crotch or buttocks, under the statute, will result in either life imprisonment or a minimum term of 25 years incarceration. See § 775.082(3)(a)4, Fla. Stat. Under the vast majority of circumstances such a sentence is warranted, because proof that the touching, even over the child's clothing, was lewd or lascivious typically entails evidence of a salacious nature or proof that the accused had previously committed similar acts. See Foreman v. State, supra; c.f. M.L.C. v. State, supra at 811.

However, at bar, the competent, substantial evidence elicited by the State proved that Rochester lifted JC up into the air and

touched her clothed crotch, covering her genital area, for a handful of seconds (T. 115-9, 128, 135). The circumstances surrounding his act, proven by the State, were that Rochester had no criminal convictions (R. 99-100); his encounter with JC was merely happenstance (T. 148-9, 160, 189-194), in that there was no proof that he planned the meeting or was stalking the girl (T. 114, 145-6); there was no trial evidence indicating that he had committed similar acts against JC or any other child; and, based on his text messages to Huggins and the content of his confession to Bower (T. 157, 204-5), he was remorseful. These facts provided the proof necessary for the trial court to consider exercising its discretion to sentence Rochester to term less harsh than 25 years imprisonment, on the ground that his crime was committed in an unsophisticated manner and it was an isolated incident for which Rochester had shown remorse. State v. VanBebber, supra; see State v. Strawser, 921 So. 2d 705 (Fla. 4th DCA 2006); Section 921.0026(2)(j).

At bar, Rochester's admission to Huggins and his confession to Bower was the most damning trial evidence against him, providing the proof that he had touched JC in a lewd or lascivious manner and not merely innocent or accidental touch resulting from mishandling the girl when he lifted her up (T. 164, 204-5). However, on occasion, the evidence offered to prove a violation of § 800.04(5)(b) is fleeting and factually ambiguous. It cannot be said that every time

an adult touches a child on his or her clothed buttocks, chest or crotch a lewd or lascivious act is committed. Yet, the proof of one's intent when touching a child, as to whether it was lewd or lascivious, is a jury question. Rosen v. State, 940 So. 2d 1155, 1159-1160 (Fla. 5th DCA 2006); Egal v. State, 469 So. 2d 196, 199 (Fla. 2d DCA 1985). Where the state were to merely prove that an adult touched a child's clothed buttock, for instance, the proof of a lewd or lascivious molestation, as a matter of law, is generally sufficient. Id. Where the adult were to be convicted on such evidence, a jury's finding of fact is not an appealable issue. See Tibbs v. State, 397 So. 2d 1120, 1123, 1125 (Fla. 1981). Nevertheless, the trial judge presiding over such a case ought to have the discretion not to impose the minimum term of 25 years imprisonment where the proof, although legally sufficient, is narrow and where a valid reason for a downward departure sentence exist and is proven. State v. VanBebber, supra; § 921.0026(j), Fla. Stat. (2008).

Alternatively, where the State sufficiently proves that an adult touched a child under 12 years of age in a manner that was undisputedly lewd or lascivious, not fleeting and had done so repeatedly, a trial court should also have the discretion to downwardly depart from the 25 year minimum term where the accused proves that his or her mental capacity to appreciate the criminal nature of his or her conduct was substantially impaired, Section

921.0026(c), Fla. Stat. (2008); or where the defendant requires specialized treatment for a mental disorder and is amenable to such treatment, Section 921.0026(d), Fla. Stat. (2008); or where the defendant acted under extreme duress or under the domination of another person. See § 921.0026(g), Fla. Stat. (2008). As a matter of due process of law, with regard to Section 775.082(3)(a)4.a.(II), there is no clear legislative intent that a downward departure from the minimum sentence is prohibited by legislative fiat. Hence, a trial court should have the discretion to consider a more lenient sentence were a valid departure reason is sufficiently proven. Little v. State, 38 Fla. L. Weekly D790 (Fla. 2d DCA April 10, 2013),(Northcutt, J., concurring) ("lenity, the foundation of which is the due process requirement that 'criminal statutes must say with some precision exactly what is prohibited'"); Borjas v. State, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001)("[l]enity applies 'not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose'").

At bar, the Legislature provided that a trial court "may" impose a minimum term for violations of Section 800.04(5)(b), pursuant to Section 775.082(3)(a)4.a.(II), Florida Statute. The statutory language chosen by the legislature left open the authority for a trial court to employ its discretion to impose a downward departure sentence. The statutory language does not include any mandatory or

other restrictive provisions against a departure from the minimum 25 year term. This Court should disapprove the Fourth District's opinion in Rochester, supra, and approve the Second District's decision in Montgomery, in that Section 775.082(3)(a)4, while providing for a minimum sentence, did not create a "minimum mandatory" sentence.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that this Appellant's Initial Brief on the Merits has been electronically filed with the Court and a copy of it has been served to Richard Valuntas, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, FL 33401, by email at CrimAppWPB@MyFloridaLegal.com this 13th day of May, 2013.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point "Courier New" type.

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