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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 REPLY BRIEF ON THE MERITS

On Discretionary Review from the Fourth District Court of Appeal

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida

IAN SELDIN
Assistant Public Defender
Attorney for Kemar Rochester
Criminal Justice Building
6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600
ISeldin@pd15.state.fl.us
Appeals@pd15.org
Florida Bar No. 604038

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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.

The symbol "RBJ" will denote Respondent's Brief on Jurisdiction.

The symbol "InB" will denote Petitioner's Initial Brief.

The symbol "AnsB" will denote Respondents' Answer Brief.

STATEMENT OF THE FACTS

Petitioner acknowledges Respondent's acceptance of his Statement of the Case and Facts. AnsB. 2-3. Rochester will rely on the Statement of the Facts and Statement of the Case advanced in his Initial Brief. InB. 1-9.

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 § 775.082(3)(a)4a(II), Fla. Stat. 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)4aII, 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.

Respondent complains that this Court is without jurisdiction to decide the merits of the case at bar (AnsB. 5-7). Its argument, however, is without merit, as it is merely a reiteration of the same contentions it advanced in its Brief on Jurisdiction (RBJ. 6-8). This Court accepted jurisdiction to review the decision of the Fourth District Court of Appeal, in Rochester v. State, 95 So. 3d 407 (Fla. 4th DCA 2012), as it conflicts with the decision of the Second District Court of Appeal, in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010). In its amended order, of April 17, 2013, the panel unanimously granted jurisdiction to review the Rochester decision. There are no substantive differences between the claims made by Respondent in opposing this Court's initial jurisdiction consideration and those now it promulgates in its Answer Brief. This Court should, again, reject now what it had rejected before.

Rochester's argument on the merits does not ignore, as Respondent contends, the principles of statutory construction which provides that a more specific statutory sentencing scheme controls over general statutory provisions; nor does he dismiss the notion that the last statement of legislative intent controls over earlier expressions of legislative intent (AnsB. 7-10). What Petitioner maintains is that to the extent that sections 775.082(3)(a)4 and 800.04(5)(b), Florida Statutes (2008), are more contemporary and more specific statements than the general provisions of section 775.082, Florida Statutes (2008), the language utilized for this child molestation sentencing scheme, unlike the language used by the Legislature in other statutory sentencing schemes which have been held to prohibit downward departure sentencing considerations, creates a minimum term of imprisonment of 25 years for a 30-year, first degree felony, sections 775.082(3)(a), Florida Statute (2008), but it does not forbid a trial court from granting a motion for downward departure from the 25 year minimum term (InB. 13-24).

Respondent insists that this Court's decision, in McKendry v. State, 641 So. 2d 45 (Fla. 1994), control the merits of this case (AnsB. 7-10). However, unlike the wording in section 775.082(3)(a)4, the McKendry Court reviewed a sentencing statute which included specific mandatory language, providing that any

person convicted of having possessed a short-barreled shotgun, "shall be sentenced to a mandatory minimum term of imprisonment of 5 years." See § 790.221(2), Fla. Stat. (1989). Id at 46. Respondent also contends that the decision by the Fourth District Court of Appeal, in State v. Scriber, 991 So. 2d 969 (Fla. 4th DCA 2008), is contrary to Rochester's argument at bar (AnsB. 9). However, Scriber concerned a statute that specifically prohibited the withholding of an adjudication of guilt and the Fourth District reversed a felony prosecution disposition that withheld guilt adjudication in contravention of the specific statutory prohibition against such a disposition. Id, at 940. As stated, the language used by the Legislature, creating the 25 year minimum term of imprisonment for violations of section 800.04(5)(b), is the last word on sentencing and more specific that the general sentencing provisions applicable for felonies of the first degree; but by the same token, unlike the mandatory language discussed in McKendry, supra, and the adjudication withholding prohibition opined on in Scriber, supra, section 775.082(3)(a)4 contains no other mandatory or limiting language and it is silent on whether a trial court can consider downward departure from the 25 year sentencing floor established by the Legislature (InB. 23-4).

Petitioner agrees with Respondent that sections 775.082(3)(a)4 and 800.04(5)(b) established a minimum sentence to be imposed against adults who molest children under 12 years of age (AnsB. 11). However, the minimum sentence is not absolute, because there is no language making the minimum a mandatory one. Montgomery v. State, supra. Respondent, in an effort to bolster its argument, cites to the preamble of Chapter 2005-28, sections 4-5, Laws of Florida (AnsB. 11). However, as this Court has noted, uncodified, preamble language is not a factor to consider in the process of divining legislative intent. Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184, 1188 (Fla. 1992); Dorsey v. State, 402 So. 2d 1178, 1180 (Fla. 1981). Where, however, ambiguity exists with regard to the meaning of statutory language or its application, the use of extrinsic sources of information is a consideration secondary to the plain meaning of the law, as codified. Id. Moreover, while, with regard to criminal laws, the principle of lenity may be a statutory construction tool of last resort to be applied only when other means of statutory construction fails to resolve a statutory ambiguity, Paul v. State, 38 Fla. L. Weekly S228 (April 11, 2013), lenity is also a statutory directive, enacted by the legislature, see § 775.021(1), Fla. Stat. (2008) and requires that "'[a]ny ambiguity or situations in which statutory

language is susceptible to differing constructions must be resolved in favor of the person charged with an offense.'" Kasischke v. State, 991 So. 2d 803, 814 (Fla.2008). The statutory construction methods employed by the Fourth District and Respondent at bar, McKendry v. State, supra, fail to resolve the issue of whether the 25 year minimum term for violations of section 800.04(5)(b) "may" be imposed, section 775.082(3)(a)4, or whether it permits or prohibits judicial consideration of a downward departure sentence under section 921.0026(2), Florida Statutes (2008). Lenity, as a legislative directive within the realm of Florida criminal law, considers the language of the statute itself in order to resolve its meaning and does not employ extrinsic information, such as preamble pontifications; to this extent, lenity, as a means to establish the meaning of a law, trumps the application of uncodified language within the preamble of a legislative bill. Kasischke v. State, supra at 814; Silva v. Southwest Florida Blood Bank, Inc., supra at 1188; Dorsey v. State, supra at 1180.

While the law of lenity, in its application to establish the meaning of a statute, will not be followed when doing so would culminate in an absurd result, State v. Iacovone, 660 So. 2d 1371, 1373 (Fla.1995), maintaining a trial court's discretion to depart downward from the 25 year minimum sentence under rare

and unique circumstances, contrary to Respondent's contentions, is far from absurd (AnsB. 14-5). This issue at bar does not concern, as Respondent characterizes it, a get-out-of-jail card for adult child molesters that countermands the 25 year minimum sentence (AnsB. 14-5). The Legislature likely had good cause in establishing a sentencing floor of 25 years imprisonment for those convicted of violating section 800.04(5)(b). However, the fact that there is no additional language of a mandatory nature reflects that the Legislature, indeed, had the foresight to envision rare and unique circumstances where the imposition of the 25 year minimum term would be unjust. As previously argued, (InB. 24-8), the Legislature, in enacting section 800.04(5)(b), sought to prohibit a vastly wide range of behaviors by adults aimed at children under 12 years that included lewd or lascivious touching even atop a fully clothed child. The breadth of this law often make it both difficult to prove its violation and nearly impossible to defend against such a charge. See § 921.0026(2)(j), Fla. Stat. (2008). Moreover, when the nature, background, character or relationships of one convicted of having violated section 800.04(5)(b) are unique or rare, due process necessitates that these factors be considered before a trial would impose the 25 year mandatory sentence unfair. See §§ 921.0026(c), (d), (g) and (l), Fla. Stat. (2008). What is

absurd, however, is the imposition of the 25 year minimum term blindly, across the board, without providing a trial judge with any discretion to consider rare and unique circumstances.

What is also absurd is Respondent's contention that all adults convicted of molesting a child, under 12 years of age, would be able to avoid the 25 year minimum term by making a downward departure claim (AnsB. 14-5). On the contrary, massive numbers of downward departure sentences are not apt to happen. In order to qualify of a downward departure sentence, one would, first, need to present evidence of his or her qualifications for a downward departure. See Hunter v. State, 65 So. 2d 1123, 1124 (Fla. 4th DCA 2011), receded from on other grounds State v. Chubbuck, 83 So. 3d 918 (Fla. 4th DCA 2012). Second, not every ground for departure available under section 921.0026(2) would apply to this crime. Third, even if competent, substantial evidence would be elicited at sentencing to establish an applicable ground for departure, the ultimate decision to depart remains solely within a trial judge's unrestrained discretion. See Perez v. State, 107 So. 3d 537, 538 (Fla. 4th DCA 2013). Lastly, while the State can appeal from a sentencing order granting a downward departure sentence, State v. Washington, 84 So. 3d 1265, 1266 (Fla. 4th DCA 2012), a defendant cannot, generally, appeal its denial, so long as the denial meets

fundamental, procedural due process requirements. See Marshall v. State, 978 So. 2d 279 (Fla. 4th DCA 2008); cf. Santisteban v. State, 72 So. 3d 187, 196-8 (Fla. 4th DCA 2011).

Respondent's complaint that Rochester elicited no evidence to prove that he qualified for a departure sentences, on the ground that his crime was committed in an unsophisticated manner, and was an isolated incident for which he had expressed remorse, is entirely without merit (AnsB. 12-3). First, the entire argument is one which places the cart before the horse. The trial court never provided Appellant an opportunity to consider evidence in support of departure, as it erroneous believed that it was without the authority to consider a downward departure upon convictions under section 800.04(5)(b) (T. 286-7). Second, the evidence considered by the trial court, causing it to be inclined to downward depart from the minimum term at bar, was established by the trial evidence, itself; all of which was elicited by the State, below (T. 154-7, 175-209). Had the trial court ruled on the merits of Petitioner's downward departure motion, the trial evidence would have been legally sufficient to support mitigating Rochester's sentence below the minimum term, pursuant to section 921.0026(2)(j), Florida Statutes; there would have been no need to duplicate the trial evidence, especially since it was all elicited by the State

without objection. Hines v. State, 817 So. 2d 964, 965 (Fla. 2d DCA 2002).

Respondent also contends that the evidence offered to show that Rochester's incident with JC was isolated was insufficient, because it was premised no evidence, other than Petitioner's Criminal Punishment Code scoresheet reflecting that he had no prior criminal convictions (AnsB. 12). Yet, Respondent's argument overlooks the fact that the content of the scoresheet itself reflects that it was compiled and completed by the prosecutor and accepted by the trial judge (R. 99-100). Consequently, the scoresheet content was admissible as a statement by a party opponent as competent, substantial evidence that Rochester had no prior criminal convictions. See § 90.803(18), Fla. Stat. (2008). The alleged statement by Petitioner that he had "done this before" was not an admission and it was not in evidence at trial or at the sentencing hearing (AnsB. 12). It was a representation made by the prosecutor, prior to trial, with regard to an evidentiary issue considered within the contents of a motion in limine. It was not evidence and it did not rebut Appellant's downward departure argument, that his touching of JC was isolated; rather, it was nothing more than lawyer-talk. State v. Williams, 963 So. 2d 281, 282-3 (Fla. 4th DCA 2007). The "tipsey coachmen," or "right for the

wrong reason" procedural default devise is inapplicable at bar (AnsB. 13). Respondent's right-for-the-wrong-reason claim is not based on properly admitted evidence (T. 8); and it ignores evidence which was elicited by the State and properly admitted (T. 154-7, 175-209; R. 99-100).

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)4a(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, Petitioner respectfully requests this Court disapprove and reverse the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

CAREY HAUGHWOUT

Public Defender
15th Judicial Circuit of Florida

s/ Ian Seldin
IAN SELDIN
Assistant Public Defender
Attorney for Kemar Rochester
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600
ISeldin@pd15.state.fl.us
Appeals@pd15.org
Florida Bar No. 604038

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 18th day of June, 2013.

s/ Ian Seldin
IAN SELDIN
Counsel for Appellant

CERTIFICATE OF FONT SIZE

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

s/ Ian Seldin
IAN SELDIN
Counsel for Appellant