LAST CASE ON THE COURT'S CALENDAR IS STATE OF FLORIDA VERSUS RIFE. AND BROOKS. MS. PHILLIPS, YOU MAY PROCEED.

NAMES THE COURT. MY NAME IS ANN PHILLIPS, AND I AM HERE ON BEHALF THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE STATE OF FLORIDA IN THESE CASES. WE ARE HERE ON TWO CASES OF GREAT PUBLIC IMPORTANCE OFF FIFTH DISTRICT COURT OF APPEAL. THE ISSUE HAS COME UP SEVERAL TIMES DURING THE YEAR. BOTH CASES INVOLVE A SITUATION WHERE THE TRIAL COURT SENTENCED TO A DOWNWARD DEPARTURE SENTENCE BASED ON THE VICTIM'S CONSENT TO SEXUAL ACTIVITY WITH AN ADULT.

WHAT WELL WILL HERE ON IS OUR STATUTORY CONSTRUCTION QUESTION.

YES, YOUR HONOR.

WOULD YOU AGREE THE LEGISLATURE COULD DECIDE THAT, ALTHOUGH THEY ARE GOING TO PUNISH THESE CRIMES WITH A MAXIMUM POSSIBLE PUNISHMENT AND NOT PROVIDE FOR CONSENT OR PARTICIPATION AS A DEFENSE THAT, THE LEGISLATURE COULD DECIDE TO GIVE THE TRIAL COURT DISCRETION TO DOWNWARDLY DEPART?

YES, THEY COULD, BUT WE DON'T BELIEVE THAT THAT IS THE CASE HERE.

NOW, YOU ARE AWARE OF THE DOCTRINE THAT, WHEN, IN CONSTRUEING THE STATUTE, WE, FIRST, MUST GIVE DEFERENCE TO THE PLAIN MEANING. NOW, IS THERE, IN THE ACTUAL DOWNWARD DEPARTURE, THE MITIGATING CIRCUMSTANCE THAT WE ARE TALKING ABOUT, IS THERE ANY AMBIGUITY IN THE LANGUAGE THAT IS USED? IN OTHER WORDS HOW -- I GUESS WHAT I AM STRUGGLING WITH, HERE, IS UNDERSTANDING YOUR ARGUNIT THAT POLICY SEEMS TO BE THE LEGISLATURE -- ARGUMENT THAT POLICY SEEMS TO BE THAT THE LEGISLATURE DOESN'T WANT TO DEAL WITH THIS, AND THEY HAVE REPEALED THE STATUTE SUBSEQUENTLY, HOW DO WE GET AROUND THAT THE STATUTE, ITSELF, PLAINLY APPLIES TO ANY CRIME THAT IT COULD APPLY TO, AND THAT THERE -- THAT UNLESS YOU SAY THE LEGISLATURE, IN ANOTHER STATUTE, FOUND THAT THE, AS JUDGE GRIFFIN IS SAYING, THAT ALTHOUGH THEY SAID IT IS NOT A DEFENSE, WHAT THEY ARE REALLY SAYING WAS MINOR CANNOT LEGALLY BE A WILLING PARTICIPANT. THAT IS WHAT YOU HAVE TO DO. RIGHT? YOU HAVE TO GO TO THOSE OTHER STATUTES AND SAY THAT THAT LANGUAGE SAYS THEY CANNOT, THAT MINORS CANNOT LEGALLY BE WILLING PARTICIPANTS.

ABSOLUTELY. IT IS THE STATE'S POSITION THAT THIS COURT NEEDS TO RECONCILE THE STATUTE WHICH STATES THAT MINORS -- A MINOR CANNOT CONSENT TO SEX.

WELL, DOES IT REALLY SAY THAT? THAT IS MY PROBLEM. IT SAYS WHAT THE ONE STATUTE SAYS IS, WITHOUT REGARD TO THE WILLINGNESS OR CONSENT OF THE VICTIM. TO ME THAT SAYS THAT IT SEEMS TO IMPLY THAT THEY COULD CONSENT BUT THAT IT IS NOT GOING TO BE CONSIDERED AS A DEFENSE.

IN INTERPRETING THAT STATEMENT, THIS COURT HAS STATED THAT A MINOR DOES NOT HAVE THE MAT YURT AND LACKS THE PERSPECTIVE TO MAKE AN INTELLIGENT CHOICE, AND THEREFORE THEY DON'T HAVE THE ABILITY TO CONSENT, SUCH AS AN ADULT WOULD.

SO THAT WE WOULD --

SO WHAT PRINCIPLE IS THAT? IN OTHER WORDS WHAT WE WOULD BE SAYING IS THAT, IN THIS

NARROW CIRCUMSTANCE OF SEXUAL ISSUES, THAT A MINOR COULD NEVER, AS A MATTER OF LAW, BE ABLE TO WILLINGLY PARTICIPATE, BECAUSE OF EVERYTHING WE KNOW ABOUT SEXUAL ABUSE OR, AND THE CIRCUMSTANCES THAT WOULD LEAD A MINOR TO BE INVOLVED IN THIS KIND OF SITUATION.

THAT'S CORRECT.

BUT ISN'T THAT AN AWFUL LOT OF JUDICIAL INTERPRETATION ON WHAT SEEMS TO BE TWO PRETTY CLEAR STATUTES?

I DON'T BELIEVE SO. I BELIEVE THAT IT IS VERY CLEAR WHEN YOU LOOK AT THEM TOGETHER, THAT, IF YOU WERE TO READ THE VICTIM'S CONSENT OR WILLING PARTICIPATION AS TO ALLOW MITIGATION, THEN YOU WOULD BE ESSENTIALLY ERODING THE STATUTE THAT PROVIDES THE CONSENT OF A MINOR CANNOT BE CONSIDERED.

SEE, I GUESS I AM HAVING TROUBLE WITH HOW THAT REALLY OCCURS. IF THE PERSON IS CONVICTED OF A CRIME AND THIS STATUTE, OF COURSE, AGAIN, IT IS NOT ON THE BOOKS ANYMORE, BUT IT HAS BEEN USED IN A LIMITED NUMBER OF CASES, SUBJECT TO ABUSE OF DISCRETION STANDARD, HOW IS THAT ERODING THE STATUTE?

BECAUSE, WHEN THE JUDGE IS ALLOWED THE DISCRETION TO DEPART DOWN WARD, AS HE DID -- DOWNWARD, AS HE DID IN BROOKS, TO GIVE CREDIT FOR TIME SERVED, YOU HAVE LIMITED THE PROTECTION THAT THE STATE IS TRYING TO PROVIDE TO MINORS.

THAT IS AN EXECUTIVE DECISION, AS TO WHETHER OR NOT TO GIVE THE JUDGE THAT DISCRETION. YOU AGREE WITH THAT?

YES.

OKAY. SO IF WE CAN'T FIND, WITHIN THE STATUTE, THAT THE LEGISLATURE INTENDED TO REMOVE THAT DISCRETION AS THEY HAVE IN SO MANY OTHER CIRCUMSTANCES, THEN WE REALLY WOULD HAVE TO BE MAKING SOME LEAPS, WOULDN'T WE, AS TO WHAT THE LEGISLATURE PROBABLY WOULD HAVE WANTED TO DO? THAT THEY PROBABLY WOULD NOT HAVE WANTED TO GIVE THE DISCRETION TO JUDGES?

I BELIEVE THAT, WHEN YOU READ THE STATUTES TOGETHER, THAT IF YOU DON'T READ THE MITIGATING PART AS DENYING THE ABILITY TO DEPART ON MINOR'S CONSENT HARKS THAT YOU ARE IGNORING WHAT THE LEGISLATURE HAS PROVIDED, WHEN IT SAYS THE CONSENT OF A MINOR DOES NOT EXIST. IT IS LEGALLY IRRELEVANT.

BUT YOU AGREE IT REALLY DOESN'T SAY THAT, DOES IT?

NO. YOU MUST READ THEM TOGETHER, IN ORDER.

SO IF WE FIND THAT IT IS SUSCEPTIBLE TO TWO DIFFERENT MEANINGS, ARE WE REQUIRED TO, BECAUSE OF THIS BEING A CRIMINAL PROSECUTION, TO APPLY THE PRINCIPLE THAT, IF A STATUTE IS SUSCEPTIBLE TO TWO DIFFERENT INTERPRETATIONS, THAT WE MUST GIVE THE BEN FIT TO THE DEFENDANT?

THE RULE OF LYNETTE WOULD GIVE THE -- THE RULE OF LINEITY WOULD GIVE THE BENEFIT TO THE DEFENDANT, BUT THE ATTEMPT OF THE LEGISLATURE IS CLEAR.

THE SPECIFICALLY APPLY TO LEWD AND LASCIVIOUS AND INDECENT ASSAULT ON A MINOR. WE HAVE NIGHT KNOT BEEN SUPPLIED WITH ANY -- WE HAVE NOT BEEN SUPPLIED WITH ANY BACK UP, AND OUR INDEPENDENT RESEARCH HASN'T FOUND ANY SUPPORT, CONSENTING.

NEITHER HAVE I. I WAS INTERESTED IN FINDING THAT OUT BEFORE WE PURSUED THIS, BUT I WAS UNABLE TO FIND, IN OUR RESEARCH, ANYTHING TO SUPPORT THAT STATEMENT.

THE OTHER QUESTION THAT I HAVE IS COULD YOU GIVE ME AN EXAMPLE OF WHERE A VICTIM COULD BE FOUND TO BE A WILLING PARTICIPANT FOR DOWNWARD DEPARTURE? BECAUSE, THEN, I WILL GIVE YOU WHAT I WAS THINKING ABOUT. YOU HAVE RAPE. THE DEFENSE TO RAPE IS THAT THE CONSENT. SO THAT IF THE JURY FOUND THE DEFENDANT GUILTY OF RAPE, THEY WOULD HAVE FOUND THAT THE VICTIM WAS NOT A WILLING PARTICIPANT AND THEN THE JUDGE WOULD BE PRECLUDED FROM DOWNWARDLY DEPARTING BECAUSE OF THAT, SO I WAS TRYING TO THINK WHERE WOULD -- WHERE COULD THERE BE, OTHER THAN IN THIS KIND OF CIRCUMSTANCE, WHERE THEY ARE NOT ALLOWING IT AS A DEFENSE, A FINDING OF SOMEONE BEING A WILLING PARTICIPANT IN A CRIME? COULD YOU GIVE ME SOME OTHER EXAMPLES?

I HAVE SEEN IT SUCCESSFULLY USED IN A CASE OF MANSLAUGHTER, WHERE THE VICTIM AND THE DEFENDANT WERE ENGAGED IN POINTING A GUN AND PULLING THE TRIGGER AT EACH OTHER, PLAYING RUSSIAN ROULETTE, AND THE DEFENDANT WAS CHARGED WITH MANSLAUGHTER FOR KILLING VICTIM, BUT THE TRIAL COURT FOUND THAT, BECAUSE THEY WERE BOTH CHOOSING TO ENGAGE IN THIS CASE, THAT HE WAS A WILLING PART PANT, AND SO IT WAS SUCCESSFULLY USED AS A DOWNWARD DEPARTURE.

SO IT WOULD NEVER BE USED IN ANY SEXUAL CRIME.

CORRECT, PARTICULARLY WHEN A MINOR IS INVOLVED.

IT COULDN'T BE USED IN THE OTHER KIND, BECAUSE, AGAIN, YOU WOULD HAVE THAT THE VERY CONVICTION FOR THE CRIME WOULD SHOW THAT THE -- THAT THEY DIDN'T CONSENT.

ABSOLUTELY. WHEN YOU LOOK AT THE FACTS OF THESE CASES, THEY ARE PARTICULARLY TELLING AS TO WHY THE LEGISLATURE CHOSE TO ACT THE WAY IT DID IN PROTECTING THE VICTIMS MUCH THE VICTIM IN RIFE HAD BEEN SEXUALLY ABUSED FROM THE TIME SHE WAS AGE 11, AND SHE WAS KICKED OUT OF HER HOUSE WHEN SHE FINALLY REPORTED AT AGE 16. MR. RIFE, THE DEFENDANT, A 49-YEAR-OLD MAN, TOOK HER INTO HIS HOME AND BECAME HER GUARDIAN, ACCORDING TO THE STATE. HE ASSURED THE STATE THAT HE WAS NOT INVOLVED IN A SEXUAL RELATIONSHIP WITH HER, AND YET HE WAS PRIOR TO BECOMING HER GUARDIAN, AND THAT SEXUAL RELATIONSHIP CONTINUED, EVEN AFTER HE BECAME HER GUARDIAN. EVEN CORK TO MR. RIFE'S OWN -- EVEN ACCORDING TO MR. RIFE'S OWN ADMISSIONS, HE AND THE VICTIM HAD SEX AT LEAST 80 TIMES. THE COURT BASED THE DEPARTURE ON THE FACT THAT IT WAS AN ISOLATED INCIDENT, CONDUCTED IN AN UNSOPHISTICATED MANNER AND THE DEFENDANT HAD SHOWN REMORSE. THAT IS NOT TRUE. THE VICTIM IN THIS PARTICULAR CASE WAS A VICTIM OF CIRCUMSTANCE MUCH SHE WAS NOT A WILLING PARTICIPANT IN THIS SITUATION. SHE WAS BARTERING WITH THE ONLY THING SHE KNEW TO GIVE.

AREN'T YOU TALKING ABOUT AN ABUSE OF DISCRETION IN A PARTICULAR CASE THOUGH, THAT IS THAT YOU ARE SAYING THESE EGREGIOUS FACTS THAT THE JUDGE SHOULDN'T HAVE EXERCISED HIS DISCRETION IN THE WAY THAT HE DID? I MEAN, ISN'T THAT WHAT YOU ARE DOING NOW, AS OPPOSED TO THE INTERPRETATION OF WHETHER OR NOT HE HAD HAD THE DISCRETION TO BEGIN WITH?

WE BELIEVE THEY DID ABUSE THEIR DISCRETION BUT WE, ALSO, BELIEVE THAT IT NEVER SHOULD HAVE BEEN ALLOWED IN THE FIRST PLACE.

REALLY WE ARE NOT UP HERE TO REVIEW EACH TIME A JUDGE EXERCISES A DISCRETION AND CATCH THE ERROR, YOU KNOW, IN DOING THAT. WE ARE CONCERNED WITH THE ISSUE OF LAW. WHETHER OR NOT THE DISCRETION IS THERE TO BEGIN WITH. I DON'T KNOW THAT IT HELPS VERY

MUCH TO SAY THE JUDGE MADE A TERRIBLE MISTAKE HERE. INSOFAR AS INFORMING US ABOUT WHETHER THE DISCRETION IS THERE TO BEGIN WITH, BECAUSE THAT INVITES US, THEN, TO THINK OF HYPOTHETICALS THAT WOULD BE THE OTHER WAY AROUND, THAT YOU HAD THE, ASSUMING THAT A 17-YEAR-OLD THAT WAS DAY SHORT OF HIS 18th BIRTHDAY, BEING A MINOR, ENTITLED TO THE BENEFIT OF THIS NO CONSENT SITUATION, SEDUCING A 19-YEAR-OLD WHO WAS JUST A DAY PAST BEING 19. BUT CLEARLY BEING THE AGGRESSOR IN EVERYTHING. AND THEN THE 19-YEAR-OLD BEING PROSECUTED FOR STATUTORY VIOLATION, BECAUSE THE 17-YEAR-OLD COULDN'T GIVE THE CONSENT. YOU KNOW, IN THAT, THAT WOULD BE A FAR DIFFERENT SCENARIO THAN THE SCENARIO THAT YOU DESCRIBED HERE, BASED ON THE REALM OF HYPOTHETICALS, WOULD SEEM TO MAKE A VERY SYMPATHETIC DEFENDANT, WHO ENDS UP GETTING PROSECUTED FOR SOMETHING LIKE THAT, AND WHERE, PERHAPS, THE VERY PURPOSE OF THAT STATUTE WOULD BE INVOKED. WOULDN'T YOU AGREE? THAT THERE ARE SCENARIOS WHERE IT WOULD APPEAR THAT THERE SHOULD BE SOMETHING SHOWN IN MITIGATION, IF YOU HAVE GOT THAT KIND OF A HYPOTHETICAL, THAT KIND OF A FACTUAL SITUATION.

IT IS THE STATE'S POSITION WHEN THE VICTIM IS A MINOR, THEN THE LEGISLATURE HAS SET OUT THE AGE OF CONSENT.

SO IS THE HYPOTHETICAL THAT I GAVE YOU, YOU WOULD SEE SAY, NO, THAT 19-YEAR-OLD WOMAN WHO HAS BEEN SEDUCEED BY THE 17-YEAR-OLD MINOR SHOULD RECEIVE NO SYMPATHY IN THAT SITUATION, COMPARED TO THE 19-YEAR-OLD MALE, MATURE, WHATEVER, THAT TAKES ADVANTAGE OF A CLEARLY MINOR WOMAN IN THE SITUATION, THAT BOTH OF THOSE SHOULD BE TREATED EXACTLY THE SAME, EVEN THOUGH THOSE FACTS ARE STARTLINGLY DIFFERENT.

IF THE DEFENDANT IS IN A POSITION OF FAMILIAL CUSTODIAL AUTHORITY OVER THAT VICTIM, THEN ABSOLUTELY THEY DESERVE NO CONSIDERATION AS TO CONSENT. THE STATE'S POSITION IS THAT, UNDER NO CIRCUMSTANCE CAN SOMEONE THAT IS IN A POSITION OF FAMILIAL OR CUSTODIAL AUTHORITY GAIN THE CONSENT OF THAT VICTIM TO SUBMIT TO THE SEXUAL ACTIVITY.

SO AS I UNDERSTAND THIS, WE HAVE A COUPLE OF QUESTIONS THAT HAS PRESENTED HIM HERE, AND ONE IS WHETHER OR NOT YOU CAN USE THE CONSENT OF WILLINGNESS AND THOSE KINDS OF THINGS, AS A MITIGATING FACTOR IN THESE SEXUAL CASES, AND THE SECOND IS, EVEN IF YOU ASSUME THAT YOU CAN, CAN YOU USE THEM IN SITUATIONS INVOLVING FAMILIAL AND CUSTODIAL SITUATIONS, IS THAT CORRECT?

YES, YOUR HONOR.

DO YOU SEE ANY DIFFERENCE IN THOSE TWO, IN THOSE SITUATIONS? A SOMEONE WHO -- SHOULD SOMEONE, OR IS IT POSSIBLE, EVEN, GIVEN THE INTERPRETATION OF WHATEVER INTERPRETATION WE GIVE THE STATUTE AND THE STATUTE DEFINING THE CRIMES, IS THERE ANY ROOM FOR MAKING A DIFFERENT INTERPRETATION FOR A CUSTODIAL FAMILIAL SITUATION, VERSUS BETWEEN STRANGERS?

ABSOLUTELY. I BELIEVE THERE IS A HEIGHTENED DUTY, WHEN YOU HAVE AN ADULT THAT ISN'T IS IN A FAMILIAL CUSTODIAL POSITION OVER THE VICTIM. THEY HAVE TAKEN IT UPON THEMSELVES TO PROTECT AND TEACH THAT PERSON THAT YOUNG MINOR PERSON, AND IF THEY, THEN, ABUSE THAT TRUST, AND THEY ARE PLACED IN APHID YOU SHALL YEAR RELATIONSHIP,ES -- IN A FIDUCIARY RELATIONSHIP, ESSENTIALLY, AND THEY USE THAT TO GARNER QUOTE/UNQUOTE CONSENT TO HAVE A SEXUAL RELATIONSHIP, I THINK THERE IS A DIFFERENCE THERE.

AND WHERE DO WE FIND THE AUTHORITY TO MAKE THE DIFFERENCE, TO SAY THAT THERE IS SUCH A DIFFERENCE?

IN THE LEGISLATURE'S TREATMENT OF THE CRIME, AND IN THE HISTORY OF THE STATUTE. IF YOU READ IT, WHEN IT SAYS THAT, WHEN YOU LOOK AT THE STATUTE, THE AGE OF CONSENT MOVES UP TO 18, WHEN YOU ARE TALKING A FAMILIAL OR CUSS TOLDIAL AUTHORITY, RATHER THAN 16, FOR ALLUDE AND LASCIVIOUS ACT, BECAUSE THEY ARE PROVIDING AN ADDITIONAL PROTECTION FOR MINORS THAT ARE UNDER THE CARE OF A FAMILIAL CUSTODIAL AUTHORITY OF SOMEONE.

LET ME MAKE SURE I UNDERSTAND THIS AGAIN. IF THEY ARE NOT, IF THE PERSON IS NOT IN A POSITION OF FAMILIAL OR CUSS TOLDIAL -- CUSTODIAL AUTHORITY, THEN SUBSECTION 8, WHICH TALKS ABOUT WITHOUT REGARD TO THE WILLINGNESS OR CONSENT OF THE VICTIM, DOESN'T APPLY. IF YOU ARE OVER THE AGE OF 16. IS THAT RIGHT?

IF YOU OVER THE AGE OF 16, THEN YOU ARE UNDER THE LEWD AND LASCIVIOUS, AND THAT, ALSO, SAYS CONSENT IS NOT A DEFENSE.

UNDER -- IF YOU ARE 18?

17 OR 18.

IT IS NOT --

THEN YOU WOULD -- THE ONLY TIME THAT THAT WOULD BE THE CRIME IS UNDER 794.05, I BELIEVE, WHEN THE DEFENDANT IS 24 YEARS OF AGE OR OLDER.

AGAIN, IN NONE OF THESE DO THEY TALK ABOUT WHAT THE LEGAL AGE OF CONSENT IS. THE LANGUAGE IS ALWAYS QOUT REGARD TO THE WILLINGNESS OR CONSENT.

THAT'S CORRECT. I SEE I AM INTO MY REBUTTAL TIME.

YOU MAY. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS BARBARA DAVIS. I REPRESENT MR. RIFE, AND TO MY LEFT IS ROWS MARIE FARRELL, WHO REPRESENTS MR. BROOKS AND WE WILL BE DIVIDING THE TILE. I AGREE THAT THIS IS A CASE OF STATUTORY CONSTRUCTION. THAT IS THE BASIS THAT THE FIFTH DISTRICT DECIDEDED THIS UPON. IF YOU NOTICE, IN FOOTNOTE TWO, THEY STATE THAT, IF THE LEGISLATURE HAD WANTED TO SAY THIS, IT WOULD HAVE BEEN VERY SIMPLE FOR THEM TO WRITE THIS IN THE STATUTE. THE MITIGATING CIRCUMSTANCES ARE VERY NARROWLY GRAUN DRAUN. YOU MAY, IN -- VERY NARROWLY DRAWN. YOU MAY, IN THE EXCEPTIONAL CASE, DEPART DOWNWARD FOR THESE REASONS. THESE TWO CASES WERE THE EXCEPTIONAL CASES THAT THE TRIAL JUDGE EXERCISED HIS DISCRETION IN IMPOSING A DOWNWARD DEPARTURE. IT IS SUPPORTED BY THE RECORD, IN THE FIFTH DISTRICT COURT, IT FOUND THAT, EVEN THOUGH THEY DID NOT MARCH OUT ALL THE SORDID FACTS AS THE DISSENT DID, THERE WAS RECORD SUPPORT TO SHOW THAT THE MINOR WAS A WILLING PARTICIPANT. THE FIFTH DISTRICT COURT DID NOT DEAL WITH THE SECOND DEPARTURE REASON, WHICH WAS REMORSE, ISOLATED INCIDENT. HOWEVER, THAT IS, ALSO, SUPPORTED BY THE RECORD. THE STATE HAS SAID THAT THE LEGISLATURE SHOULD NEVER, NEVER ALLOW A DOWNWARD DEPARTURE.

ARE YOU ON THE RIFE CASE. IS THIS THE YOUNG LADY WHO WENT TO LIVE WITH SOMEONE ELSE WHEN SHE WAS KICKED OUT OF HER HOUSE?

I REPRESENT MR. RIFE, AND THIS WAS THE YOUNG LADY WHO WAS A RUNAWAY FROM HOME, WHO WAS KICKED OUT OF SCHOOL, AND WHO WAS ACTUALLY HAD HAD THE SEXUAL RELATIONSHIP WITH MR. RIFE SIX WEEKS BEFORE SHE SHOWED UP ON HER DOORSTEP AND ASKED TO LIVE THERE. FIVE MONTHS LATER, THEN, H.R.S. FOUND OUT WHERE SHE WAS AND CAME TO GET HER TO TAKE HER TO A HOME, AND SHE DID NOT WANT TO GO TO THE HOME, AND THEN MR. RIFE AND SHE, AS SHE TESTIFIED, THEY WERE IN A POSITION OF FIANCE. SHE CONSIDERED

THEMSELVES BOYFRIEND AND GIRLFRIEND. SHE WOULD CALL HIS WORK AND SAY TELL THEM HIS WIFE IS THERE.

HOW OLD IS HE?

HE IS 49.

AND HOW OLD WAS SHE AT THAT TIME?

SHE WAS 16 WHEN THE RELATIONSHIP STARTED, 17 TO 17 AND-A-HALF DURING THE TERM OF THE RELATIONSHIP. AND WE AGREE CONSENT IS NO DEFENSE.

THE OTHER CASE IS A SINGLE INCIDENT. IS THAT CORRECT?

YES, SIR. THE BROOKS CASE IS A SINGLE INCIDENT.

AND THAT WAS PROSTITUTION CIRCUMSTANCE?

YES, SIR.

THAT IS THE OTHER CASE.

BUT THE TRIAL JUDGE, IN THIS CASE, FOUND THAT THIS WAS AN ISOLATED INCIDENT? THAT IS WHAT I WAS GETTING AT. IS THAT WHAT YOU JUST SAID?

HIS SECOND DEPARTURE REASON, THERE WERE TWO DEPARTURE REASONS. FIRST WAS WILLING PARTICIPANT AND SECOND WAS ISOLATED INCIDENT. NOW, THE FIFTH DISTRICT DIDN'T SPEAK TO THE ICE LATED INCIDENT.

THAT WAS NOT BEFORE THEM OR WAS IT NOT RAISED AS AN ISSUE?

IT WAS BEFORE THEM. THE STATE RAISED THE ISSUE OF THE DOWNWARD DEPARTURE, AND THEY DEALT WITH THIS ONE INSERTFYING THE QUESTION, SO THERE IS NOTHING IN THIS DECISION -- IN CERTIFYING THE QUESTION. IN THE DISSENSION, JUDGE THOMPSON SAID THAT IT WAS NOT ISOLATED INCIDENT.

HOW COULD THIS BE?

THERE WAS ONE PERSON THAT THIS MAN, IN 49 YEARS, HAD HAD THIS REINGS SHIP. IT WAS THE MINOR -- RELATIONSHIP. IT WAS THE MINOR WHO CAME TO HIM, WANTED TO LIVE WITH HIM, HAD INITIATED SEX SIX WEEKS PRIOR TO COMING TO LIVE WITH HIM AND ASKED HIM TO BE THE GUARDIAN, AND THIS HAPPENED FOR SIX MONTHS. NOW, THEY HAD PLANNED TO BE MARRIED, AND THE REASON THEY DID NOT GET MARRIED WAS BECAUSE SHE COULD NOT GET PARENTAL CONSENT UNTIL SHE WAS 18. SHE TESTIFIED ABOUT THAT AND SO DID HE, AND THE TRIAL JUDGE FOUND THAT SHE WAS IN LOVE WITH HIM, AND SHE WAS A WILLING PARTICIPANT. NOW, AS FAR AS THE SECOND REASON, I DON'T THINK THAT IS REALLY BEFORE THIS COURT. IF YOU, AND I DON'T THINK THAT, BASICALLY, YOU COULD EVEN DEAL WITH THE ABUSE OF DISCRETION ON THE FIRST DEPARTURE REASON. WHAT WE ARE HERE ABOUT IS THE TWO CERTIFIED QUESTIONS. CAN THE TRIAL JUDGE EVER DEPART DOWNWARD? THE STATE SAYS NEVER. IN NO CIRCUMSTANCES CAN YOU DEPART DOWNWARD, WHICH IS -- JUST FLIES IN THE FACE OF THE STATUTE, WHERE THE LEGISLATURE HAS NOT CARVED OUT AN EXCEPTION FOR SEXUAL BATTERY OR LEWD ASSAULT CASES. THEY SPECIFICALLY SAY THAT YOU MAY DEPART DOWNWARD FOR WILLING PARTICIPANT. JUDGE EATON, WHO WAS THE JUDGE IN MR. BROOKS' CASE, SAT ON THE SENTENCING COMMISSION AND SAID THIS IS SPECIFICALLY SOMETHING. WE PUT THIS DOWNWARD DEPARTURE REASON IN THERE SPECIFICALLY FOR THESE STATUTES.

BUT WHY DOESN'T THE IDEA OF THERE BEING A WILLING PARTICIPANT RUN DIRECTLY INTO THIS COURT'S ANALYSIS IN JONES?

IN JONES.

IN JONES.

NOW, JONES IS AN INTERESTING CASE, BECAUSE WHAT HAPPENED THERE IS THE DEFENDANT RAISED THE RIGHT OF PRIVACY OF A MINOR TO CONSENT, AND THAT WAS A CONSTITUTIONAL RIGHT TO PRIVACY, WHETHER, SINCE THIS COURT HAD SAID A MINOR CAN CONSENT TO AN ABORTION, CAN THEY, NOW, CONSENT TO SEX? AND THIS COURT SAID, NO, A MINOR DOESN'T HAVE A RIGHT TO PRIVACY TO HAVE SEX, BECAUSE OUR RESPONSIBILITY IS TO PROTECT THESE MINORS, EVEN FROM THEMSELVES. THAT IS WRITTEN INTO THE 894.011, AND THE -- I MEAN THE 794.011 AND THE 800.04 TAKE CONSENT IS NOT A DEFENSE. THAT GOES TO THE CRIME WHICH WE ARE GUILT OF. IT DOES NOT GO TO THE MITIGATION. SO JONES WAS A CONSTITUTIONALITY PROBLEM, AS TO THE BASIC DEFENSE.

YOU WOULDN'T AGREE THAT THE SENTENCE OF JONES AND ESPECIALLY READING JUSTICE KOGAN'S CONCURRING OPINION, IS THAT WE ARE JUST NOT GOING TO VIEW THIS AS A MINOR BEING ABLE TO GIVE CONSENT TO A SEXUAL ACT. ISN'T THAT WHAT JONES SAYS?

YES. AND --

SO WHY ISN'T, THEN, IF YOU FOLLOW THAT REASONING, THEN WHY ISN'T JUDGE GRIFFIN TOTALLY CORRECT IN RIFE THAT THAT ONLY TLEEDZ -- LEADS TO THE VIEW THAT THIS WILLINGNESS CANNOT OCCUR, WHETHER IT BE AS FAR AS THE CRIME OR AS FAR AS THE MEDIATION, THE MITIGATION? IN THIS TYPE OF CRIME.

THAT IS WHAT THE STATE IS ARGUING, IS THAT, BECAUSE IT IS NOT A CONSENT, THE LEGISLATURE MEANT THAT IT COULD NEVER BE MITIGATION. THEY COULD HAVE SAID. THAT NOW, THIS ISSUE HAS DOWN OUT THERE SINCE 1991, WHEN THE FIFTH DISTRICT SAID, IN JOHNS, THAT IN THIS CASE WE DON'T THINK THERE IS A REASON TO DEPART DOWNWARD BUT WE ARE NOT SAYING THAT COULD NEVER HAPPEN. NOW, THIS HAS REPEATEDLY COME BACK AND BACK AND BACK. 1991, '95, '96, '97. IF THE LEGISLATURE HAD WANTED TO EXCLUDE SEXUAL BATTERY AND LEWD ASSAULT CASES FROM THAT DOWNWARD DEPARTURE REASON, THEY HAD SIX YEARS TO DO THAT, EVEN AFTER THE JONES CASE. AND I SUBMIT THE JONES WAS A COMPLETELY DIFFERENT ISSUE. I MEAN, THEY WERE DEALING WITH CAN A MINOR CONSENT. IS THAT A DEFENSE TO A CASE, BECAUSE THEY HAVE A RIGHT TO PRIVACY. AND THIS COURT SAID, NO, THEY CANNOT.

DID THE LEGISLATURE RECENTLY TAKE IT OUT OF THE STATUTE?

NO.

OKAY.

THEY JUST REMOVED THE WHOLE DOWNWARD DEPARTURE IS WHAT HAPPENED. THAT WHOLE SUBSECTION.

IN OCTOBER 1998 FERCKTS, WHAT HAPPENED THEY -- IN OCTOBER 1998, THEY TOOK OUT THE UPWARD DEPARTURES, SO THE AGGRAVATING AND THE MITIGATING FOR THE UPWARD AND DOWNWARD DEPARTURES BECAME 921.0026, WHICH TOOK OUT THE AGGRAVATING BUT LEFT IN THE MITIGATING. I THINK THEY TOOK OUT ONE, THE REHABILITATION, BUT THE WILLING PARTICIPANT, INVOKER, WILLING PARTICIPANT, AGGRESSOR, PROVOKER, THAT IS EXACTLY SAME.

SO IT IS STILL IN THERE.

YES. YES. AND IT IS 921.0026. ACTUALLY IN THE FIFTH DISTRICT COURT OF OPINION THEY CITE THE .0026, BUT THIS IS A '97 CASE. IT WOULD HAVE BEEN .0016. SO, YES, IT IS STILL IN THERE. AND I JUST WANTED TO ADDRESS THE SECOND CERTIFIED QUESTION, BECAUSE THE FIRST CERTIFIED QUESTION WAS --

BEFORE YOU GET -- BEFORE YOU GO ON TO THAT, YOU MENTIONED THAT JUDGE EATON HAD -- HE WAS THE JUDGE IN BROOKS?

HE WAS THE JUDGE IN MR. ELLS'S CASE.

AND HE HAD MADE THE COMMENT ABOUT THE SENTENCING COMMISSION. IS THAT HOW WE GOT INTO THE SENTENCING COMMISSION? HAVE YOU BEEN ABLE TO FIND A SENTENCING COMMISSION REPORT THAT SHOWS THAT IS WHY THE LEGISLATURE DON'TED THIS PARTICULAR MITIGATING FACTOR FOR LEWD AND LASCIVIOUS CRIMES?

I HAVE NOT, BUT I WOULD ASK IF MISS FARRELL COULD ANSWER THAT QUESTION. I THINK THAT WAS IN THE TRANSCRIPTS BY THE TRIAL JUDGE AND THE FIFTH DISTRICT ADOPTED THAT STATEMENT. THE SECOND CERTIFIED QUESTION, THE THRESHOLD QUESTION, IS CAN IT EVER, AND THE STATE SAYS NEVER. THE STATE SECOND IS, OKAY, IF IT EVER CAN BE A DOWNWARD DEPARTURE REASON, THE WILLING PARTICIPANT, HOW ABOUT A CUSTODIAL OR FAMILIAL RELATIONSHIP? NOW, AGAIN, THE LEGISLATURE DID NOT CARVE OUT THAT PRECOLLUSION IN THE DOWNWARD DEPARTURE REASONS. THIS IS A CASE THAT SHOWS THAT, YES, THERE NEED TO BE EXCEPTIONS FOR THESE CASES. HERE THE CHILD WAS TAKEN BY H.R.S.. THE TESTIMONY OF THE H.R.S. WORKER, LINDA WARD, WAS THAT THE CHILD REFUSED TO LEAVE MR. RIFE'S HOME, SAID I THREATEN TO TAKE HER OUT BODILY, AND I WOULD HAVE ACTUALLY NEEDED SEVERAL PEOPLE TO GET HER OUT OF THERE. SHE ABSOLUTELY WOULD NOT GO. BUT HE ENCOURAGED HER TO GO. HE TOLD HER YOU DO WHAT YOU WANT TO DO. SHE DID NOT WANT TO GO TO THE HOME. SHE ASKED HIM TO BE HER GUARDIAN, AND THAT IS WHY HE DID IT. SO THIS IS NOT LIKE THE IMPOSING STEPFATHER SITUATION OR PERSON WHO USES THEIR AUTHORITY, LIKE IN THE WHITING CASE, THE TRUANT OFFICER POSITION OF CUSTODY, THE POLICE OFFICER IN THE JOHNS CASE. THIS WAS A SITUATION WHERE SHE ASKED HIM TO BE HER GUARDIAN AND HE AGREED, BECAUSE THEY WERE GOING TO BE MARRIED IN SIX MONTHS, AND THAT WAS THEIR PLAN. SO I WOULD ASK THAT THE CERTIFIED QUESTIONS BE ANSWERED IN THE POSITIVE THAT IT MAY BE CONSIDERED, IN THE EXCEPTIONAL CASE, THAT THE CUSTODIAL OR FAMILIAL AUTHORITY, THAT MAY BE A DOWNWARD DEPARTURE. THAT MAY, ALSO, BE A DOWNWARD DEPARTURE REASON, THAT THAT WOULD NOT PRECLUDE THE DOWNWARD DEPARTURE REASON OF WILLING PARTICIPANT.

WHAT SENTENCE DID YOUR CLIENT RECEIVE?

HE HAD 10 AND-A-HALF YEARS -- NO. HE HAD 8 AND-A-HALF YEARS IN JAIL FOLLOWED BY TEN YEARS PROBATION.

AND WHAT WERE THE CONDITIONS OF PROBATION?

WELL, FIRST OF ALL THERE WAS A PATERNITY TEST, BECAUSE SHE WAS PREGNANT AT THE TIME AND THEY WEREN'T ASSURE THAT IT WAS -- THEY WEREN'T SURE THAT IT WAS HIS CHILD, AND HE WAS DECLARED A SEXUAL PREDATOR. HE HAD TO DO COUNSELING, AND EVERYTHING THAT GOES ALONG WITH A SEXUAL OFFENSE WAS IMPOSED ON HIM AS CONDITIONS OF PROBATIONS.

SO, THEN, I GUESS, SO THE JUDGE COULDN'T HAVE FOUND THAT THIS WAS A PERSON THAT WAS JUST ACTING OUT OF THE GOODNESS OF HIS HEART, TAKING THIS POOR PERSON IN, IF THE JUDGE IMPOSED ALL OF THESE CONDITIONS ON THIS PERSON.

WELL, I DON'T THINK WE REVIEWED THE EXTENT OF THE DOWNWARD DEPARTURE.

I AM JUST SAYING YOU ARE PORTRAYING THIS, AND THIS IS -- I HAVE A HARD TIME WITH IT AS SOMEBODY THAT JUST, OUT OF THE GOODNESS OF HIS HARD AND PLANS TO GET MARRIED, TOOK THIS YOUNG WOMAN IN, YET IT SEEMS TO BE A LITTLE DIFFERENT THAN WHAT THE ACTUAL PROBATION AND SENTENCE IS IN THIS CASE.

YES. WHICH, SEE, IT IS NOT A COMPLETE DEFENSE. THIS WAS REPREHENSIBLE, WHAT HE DID. HOWEVER, IT IS MITIGATING, SO HE WAS FACING 24-41 YEARS.

THANK YOU. MISS FARRELL.

MAY IT PLEASE THE COURT. I AM ROWS MARIE FARRELL, AND I AM -- I AM ROSE MARIE FARRELL, AND I AM REPRESENTING THE APPELLEE, ROBERT BROOKS, IN THIS CASE. BEFORE I GET TO DO SO, I WOULD LIKE TO ADDRESS JUSTICE PARIENTE'S QUESTION ABOUT THE SENTENCING COMMISSION REPORT. TRUTHFULLY, I HAVE HAD OTHER CASES WITH JUDGE EATON, AS THE PRESIDING JUDGE, AND I HAVE KNOWN THAT HE HAS BEEN ON THE COMMISSION, AND I DIDN'T QUESTION HIS STATEMENT. I CAN REFER TO THE RECORD. IT WAS AT THE SENTENCING TRANSCRIPT AT PAGE 9, WHERE THE STATE QUESTIONS THE DOWNWARD DEPARTURE REASON, AND THE COURT SAYS THAT IS THE ONE THAT THE SENTENCING COMMISSION CONSIDERED FOR THIS PARTICULAR STATUTE AND RECOMMENDED TO THE LEGISLATURE, AND IT IS THE THING THAT THE LEGISLATURE ADOPTED WORD FOR WORD, FROM THE SENTENCING COMMISSION, AND THAT IS THE REASON FOR IMPOSING THE DOWNWARD DEPARTURE. NOW, I DON'T KNOW FROM THAT IF THERE WILL BE DOCUMENTATION. I CAN LOOK INTO THAT, AND IF THERE IS, FILE IT AS SUPPLEMENTAL AUTHORITY WITH LEAVE OF THE COURT TO DO SO.

IF YOU CAN FIND IT, BECAUSE WE HAVEN'T BEEN ABLE TO FIND IT.

IT MAY HAVE BEEN A DISCUSSION. IT MAY HAVE BEEN THE JUDGE SPEAKING ABOUT WHAT WAS THIS THE MINDS OF THE PANEL AT THE TIME THAT THAT WAS PUT IN PLACE. BUT THAT WAS MY UNDERSTANDING. I WOULD, ALSO, LIKE TO REITERATE THE IDEA ON WE TALKED ABOUT THE JONES CASE AND THE REASONING IN THAT CASE, AND SUGGESTED THAT THE STATE IS MAKING CONCEPTUAL LEAPS IN ITS ARGUMENT THAT, IN NO CASE, CAN THERE EVER BE MITIGATION, BASED ON CONSENT. LAST EVENING I WAS REVIEWING THE JONES CASE, AND I NOTED THAT THE LANGUAGE IN THAT OPINION, WHICH TALKED ABOUT SEXUAL ACTIVITY WITH A MINOR, QUOTE, OPENING THE DOOR TO EXPLOITATION, AND POTENTIAL EXPLOITATION. NOW, LISTENING TO THE STATE'S ARGUMENT, THE SEXUAL ACTIVITY, ITSELF, IN ALL CASES, ARGUES THE STATE, HAS BECOME THE EXPLOITATION. ANOTHER LEAP. THE INABILITY TO USE A MINOR'S CONSENT IN DEFENSE OF A SEXUAL ASSAULT OR BATTERY, ACCORDING TO THE STATE, MEANS THAT A SENTENCE CAN NEVER BE MITIGATED, BASED ON UNIQUE FACTS, DESPITE THE LAW ALLOWING SUCH DISCRETION. BEFORE I LOOKED INTO THE BRIEFS AND THE RECORD OF THE RIFE CASE, I FELT THAT THAT WAS A MUCH TOUGHER ISSUE THAN THE BROOKS CASE, WHICH I AM GOING TO ADDRESS IN A MINUTE. IN LOOKING AT IT, I AM STARTING TO UNDERSTAND THAT THESE CASES ARE THE EXCEPTIONAL CASES THAT ARE ENVISIONED IN DEPARTURES WHICH, THEMSELVES, ARE EXCEPTIONAL CASES. IN MY CASE, THE BROOKS CASE, WHEN THE STATE RESTED ITS CASE, JUDGE EATON SAID IT WAS THE MOST MITIGATED LEVEL SEVEN HE HAD EVER SEEN, AND THE ASSISTANT STATE ATTORNEY AGREED. FORCE WAS NOT AN ISSUE.

WHAT IS LEVEL SEVEN?

THAT WAS SECOND-DEGREE FELONY, LEWD AND LASCIVIOUS SEXUAL BATTERY ON A MINOR. THAT IS THE LEVEL OF THE OFFENSE.

AND THIS CASE DOESN'T INVOLVE THAT WHOLE FAMILIAL CUSTODIAL, THIS IS THE PROSTITUTE,

YOUNG PROSTITUTE CASE?

YES. THEY ARE BOTH A TYPICAL IN THEIR GENRE, BUT THIS IS AN ONE-TIME INCIDENT OF PROSTITUTION. THERE WAS NO FORCE IN ISSUE. THE GIRL ADMITTED THAT SHE WAS PROSTITUTING HERSELF. THE DEFENDANT CAME, AS REQUESTED, TO THE POLICE DEPARTMENT AND WAIVED HIS RIGHT TO COUNSEL. HE SPOKE FREELY AND COMPLETELY ABOUT THE INCIDENT. HE WAS CLEARLY LOOKING AT THE RECORD, HORRIFIED TO LEARN THAT THE WOMAN WAS GIRL. AND HE PLED NO CONTEST, WITHOUT AGREEMENT AS TO SENTENCE.

AND HIS SENTENCE WAS?

HIS SENTENCE WAS HE HAD WAITED IN JAIL FOR 408 DAYS AND HE WAS GIVEN CREDIT FOR TIME SERVED. THE ISSUE IN THE BROOKS CASE, I THINK, BEST STATED IN THE OPINION AS OPPOSED TO THE CERTIFIED QUESTION, WAS HIS IT AT LEAST NOT --

LET ME ASK YOU THIS. DO YOU SEE ANYTHING SLIGHTLY DIFFERENT, AT LEAST, IN A SITUATION WHERE THERE IS A YOUNGER CHILD, THIS CHILD WAS 14, THOUGH, WASN'T SHE?

SHE WAS 13.

HE HAVE AND CHILD THAT AGE, WHO IS IN SOME KIND OF FAMILIAL, CUSTODIAL ARRANGEMENT, AND A PERSON IS CONVICTED OF SOME KIND OF SEXUAL BATTERY, ALLUDE ASSAULT, AND THEN THE JUDGE GIVES THEM -- A LEWD ASSAULT, AND THEN THE JUDGE GIVES THEM CREDIT FOR TIME SERVED, WITHOUT THE CIRCUMSTANCES THAT YOU HAVE OF THIS CHILD BEING A PROSTITUTE AND LOOKING LIKE AN ADULT WOMAN AND THOSE KINDS OF THINGS, ISN'T THERE SOME DIFFERENCE HERE?

ARE WE TALKING, RIGHT NOW, ABOUT THE FAMILIAL, CUSTODIAL RELATIONSHIP IN RIFE, OR THE ONE --.

EVEN IF IT IS NOT A FAMILIAL CUSTODIAL BUT SOMEONE WHO IS OBVIOUSLY A CHILD, AS OPPOSED TO SOMEONE WHO LOOKS AND ACTS LIKE AN ADULT PROSTITUTE.

CERTAINLY. I WOULD LIKE TO POINT OUT THAT I VERY MUCH AGREE WITH THE ARGUMENTS ADVANCED BY THE STATE THAT THERE IS A TREMENDOUS PUBLIC INTEREST IN PROTECTING AND SAFEGUARDING CHILDREN. AND I SEE THESE CASES, BOTH OF THEM, THE CUSTODIAL SITUATION, NO LESS THAN THE BROOKS CASE, AS EXTREMELY UNUSUAL, IN THE RIFE CASE, THE CUSTODIAL RELATIONSHIP, ITSELF, WAS SOMETHING THAT WAS CONSENTUAL, NOT MANY OF US GET TO CHOOSE OUR GUARDIANS OR OUR PARENTS. I THINK THAT THERE IS A DANGER IN TRYING TO MAKE ALL CASE RULES, GIVEN THE FACT THAT SITUATIONS LIKE THAT IS JUSTICE ANSTEAD POINTED OUT, ARE BOUND TO OCCUR. IF WE COULD JUST LOOK, FOR A MOMENT, AT THE FACTS IN THE BROOKS CASE, WHAT WE KNOW ABOUT THIS CHILD, SHE LIVED IN A HOUSE IN SANFORD WITH HER MOM, HER BROTHER AND HER SISTER. HER SINGLE-PARENT MOTHER WAS A CUSTODIAN WITH THE SCHOOL SYSTEM AND LIKELY WORKED NIGHTS. THIS MIGHT EXPLAIN WHY SHE WAS ON THE STREETS, PEINGDZ PEDALING HER BODY -- PEDALING HER BODY FOR $20, BETWEEN 4:00 A.M. AND 5 A.M. ON A SATURDAY. IT DOESN'T EXPLAIN WHY. THE RECORD DOESN'T EXPLAIN WHY. THERE IS NO RECORD SUPPORT FOR THE NOTION, HOWEVER, THAT THIS PROSTITUTION WAS FOR ANYTHING OTHER THAN PROFIT, AND I WOULD ARGUE THE CONTRARY, AS SUGGESTED BY THE RECORD, THAT THE $20 WAS VERY IMPORTANT TO THIS CHILD. THERE WAS NO DISPUTE OVER THE FACT THAT THE GIRL AGREED TO HAVE SEX. AND SHE COULD NOT KEEP HER BARGAIN, NOT BECAUSE SHE BECAME SQUEAMISH OR GOT COLD FEET OR BECAME FRIGHTENED. THIS 13-YEAR-OLD SAID SHE WAS WORN OUT. SHE WAS SORRY FOR P. FROM HAVING HAD SEX WITH HER BOYFRIEND EARLIER THAT EVENING. AFTER THE UNCOMPLETED CONTRACT, MY CLIENT ASKED FOR HIS $20 BACK. THE PROSTITUTE PUT ON HER CLOTHES, WENT ACROSS THE STREET, CALLED THE POLICE ABOUT THE SEXUAL ASSAULT. WE TALKED ABOUT HER APPEARANCE. THE RECORD IS SILENT. IT

IS PRETTY OBVIOUS THAT SHE WAS A VERY MATURE CHILD. IF I MAY JUST CONCLUDE, MY LIGHT IS ON, THERE IS AN IMPORTANT PUBLIC POLICY. WE BELIEVE, IN TELLING THIS YOUNG LADY, IN NOT TELLING THIS YOUNG LADY THAT, NO MATTER WHAT YOU DO OR SAY, THERE IS NO POSSIBILITY THAT ANYTHING THAT YOU WILL HAVE TO TAKE RESPONSIBILITY FOR ANYTHING THAT HAPPENS TO YOU. WE BELIEVE THAT THAT CAN BE THE SLIPPERY SLOPE, THAT IT IS VERY IMPORTANT TO DEVELOP MORAL RESPONSIBILITY IN CHILDREN, AND THAT IT IS VERY IMPORTANT NOT TO BE IN A STATE OF DENIAL, WHEN FACTS DON'T CONFORM TO OUR GENERAL RULES. WE NEED TO LOOK AT WHAT THOSE FACTS ARE AND WHY DIDN'T WE PROTECT THE CHILD IN THIS CASE? THANK YOU.

THANK YOU. REBUTTAL.

MAY IT PLEASE THE COURT. IT IS THE STATE'S POSITION THAT, IF YOU TAKE THE DEFENSE'S VIEW, YOU HAVE PLACED THE BURDEN ON THE VICTIM, THE MINOR VICTIM, TO ACT APPROPRIATELY, RATHER THAN LOOKING AT THE ADULT'S BEHAVIOR. YOU -- THEY ARE EXPECTING A 13-YEAR-OLD TO SAY THE APPROPRIATE THINGS AND DO THE APPROPRIATE THINGS, AND THAT IS JUST NOT WHAT MINORS DO. AS THIS COURT HAS FOUND, THEY LACK THE PERSPECTIVE. THEY LACK HA LACK THE HISTORY. THEY LACK THE EXPERIENCE TO DO THAT, AND BY ALLOW THE WAY THAT VICTIM LOOKS, AND PERHAPS SHE MATURED EARLY, TO FAULT HER FOR THAT AND SOMEHOW BLAME HER AND ALLOW THE DEFENDANT TO ESCAPE THE PUNISHMENT THAT THE LEGISLATURE HAS SET OUT, BECAUSE OF SOMETHING THE VICTIM DID FLIES IN THE FACE OF WHAT THE LEGISLATURE INTENDED TO DO IN PROTECTING THE MINORS.

WHAT IS THE, IF THERE IS NO DOWNWARD DEPARTURE FOR BROOKS, WHAT IS THE SENTENCE?

THE SENTENCE WOULD BE HE WAS ORIGINALLY SENTENCED TO -- SHOULD HAVE RECEIVED 9.7 TO 12.9 YEARS IN THE DEPARTMENT OF CORRECTIONS, BUT HE RECEIVED CREDIT FOR TIME SERVED. THAT WAS HIS ONLY SENTENCE.

IS THERE NO FLEXIBILITY WHERE THE SITUATION LEADS TO A HORRIBLE, LET'S SAY, THIS GIRL LOOKED ADULT, SHE HAD ADULT IDENTIFICATION, THAT SHE HAD SOMEHOW GOTTEN, AND HAD BEEN A PROSTITUTE, LET'S SAY, FOR SOME LENGTH OF TIME, AND WAS OUT THERE ON THE STREET. IT WILL BE THE STATE'S POSITION THAT THIS SHOULD NOT BE TAKEN INTO CONSIDERATION?

WHEN THE INDIVIDUAL IS A MINOR, THEY HAVE THE TENDENCY TO MAKE THOSE UNINFORMED CHOICES AND TO PROTECT THEM EVEN FROM THEMSELVES, IT IS NECESSARY TO SAY THAT THAT CONSENT IS NOT ABLE TO BE UTILIZED TO MITIGATE THE DEFENDANT'S SENTENCE, JUST LIKE THEIR APPEARANCE SHOULD NOT BE ABLE TO BE UTILIZED AGAINST THEM. THE STATUTE PROVIDES THAT MISTAKE AS TO AGE, EVEN IF IT IS MISREPRESENTED OR THERE IS A BONA FIDE BELIEF, THAT SHOULD NOT BE CONSIDERED, AND FOR THE SAME REASON THAT THE STATE BELIEVES CONSENT CAN'T BE CONSIDERED IN THAT MITIGATOR, THAT IS THE SAME REASON THEY BELIEVE THAT MISTAKE AS TO AGE CANNOT BE CONSIDERED IN MITIGATION.

WHAT IS THE SENTENCE FOR THAT? IS THAT A MANDATORY SENTENCE?

YES.

WHAT?

WHATEVER IS IN THE GUIDE LIPS. JUST A GUIDELINE SENTENCE.

DO YOU KNOW WHAT THE GUIDELINES SENTENCE IS?

FOR MR. BROOKS? IT WAS 9.7 TO 12.9 YEARS IN THE DEPARTMENT OF CORRECTIONS. FOR MR. RIFE,

HIS GUIDELINES, OF COURSE, ARE 24.8 TO 41.3 YEARS IN THE DEPARTMENT OF CORRECTIONS.

AND FOR THE SITUATION, THE HYPOTHETICAL I GAVE YOU, IT WOULD FALL WITHIN ONE OF THOSE?

YES.

NINE YEARS AND SO FORTH.

YES.

THE -- LET ME ASK YOU TO ADDRESS WHETHER THE -- WHAT THE APPELLANTS OR THE APPELLEES HEARSAY IS ACCURATE. THAT IS THAT THE MITIGATING CIRCUMSTANCES IS MEANT, BY THE LEGISLATURE, TO BE THE EXCEPTION. WOULD YOU AGREE WITH THAT?

AS A GENERAL RULE, MITIGATORS ARE TO BE THE EXCEPTION. YES.

AND THIS HAS BEEN, THIS MITIGATING STATUTE HAS BEEN ON THE BOOKS TO SEVERAL YEARS. LOOKING AT THE APPELLANT DECISION, SINCE I IMAGINE THE STATE HAS APPEALED, ANY TIME THERE HAS BEEN A DOWNWARD DEPARTURE, AS A MATTER OF POLICY, ARE WE TALKING ABOUT, JUST SO THAT WE UNDERSTAND THE MAGNITUDE OF WHETHER THIS HAS SOME EFFECT ON HARMING CHILDREN, IF WE WERE TO AFFIRM THE FIFTH DISTRICT, IS THE -- DOES IT NOT APPEAR THAT THE OVERWHELMING NUMBER OF SEXUAL PREDATORS OF MINORS ARE GETTING THE GUIDELINES SENTENCE AS SET FORTH BY THE LEGISLATURE, JUST FROM LOOKING AT THE LEGAL LANDSCAPE OF THE OPINIONS, OVER THE LAST SEVERAL YEARS?

I SEE THAT MY TIME HAS EXPIRED, MA'AM.

YOU MAY ANSWER.

THE MAJORITY MAY RECEIVE THE GUIDELINES, BUT IF, AS JUDGE GRIFFIN NOTED IN HER DISSENT, IF YOU LOOK AT THE FACTS OF EACH OF THOSE CASES, WILLING PARTICIPATION COULD HAVE BEEN USED AS A DEPARTURE SENTENCE, IF THE COURTS HAD FELT THAT THEY WERE ALLOWED, BUT I BELIEVE THAT THE MAJORITY OF THE JUDGES REALIZE THAT A MINOR'S CONSENT SHOULD NOT BE UTILIZED IN THAT FASHION, AND WE BELIEVE THAT THE RATIONALE OF THE LEGISLATURE BEHIND FINDING A MINOR'S CONSENT IS EQUALLY RELEVANT IN SENTENCING, AND WE WOULD ASK YOU TO ANSWER THE CERTIFIED QUESTIONS IN THE AFFIRMATIVE.

THANK YOU, COUNSEL. THANKS TO ALL OF YOU. WE WILL BE IN RECESS.