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CLERK COURT OF APPEALS OF GA.

**IN THE COURT OF APPEALS  
STATE OF GEORGIA**

**THE STATE OF GEORGIA  
Appellant**

**v:**

**Case Number: A05A2123**

**L.A.N.,**

**Appellee**

**BRIEF OF APPELLANT**

**Tommy K. Floyd  
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## **PART I**

### **STATEMENT OF FACTS**

A complaint alleging that L.N. had committed the delinquent offense of fornication was filed in the Henry County Juvenile Court on March 8, 2005. Transcript of the Record, Page 7. The complaint specifically alleged that L.N. had “sexual intercourse with her eighteen year old stepbrother identified as Curtis Scott Friar.” Transcript of the Record, Page 8. Mr. Friar was charged with Statutory rape in connection with his relationship with L.N. Transcript of the Hearing, Page 4, Lines 6 – 8.

Based on the complaint, the State of Georgia filed a petition of delinquency on March 8, 2005. The child was summoned to appear to answer to the allegation on March 29, 2005.

On March 28, 2005, the child, by and through her attorney, Robert Mack, Jr. filed a number of motions including a general demurrer. Transcript of the Record, Pages 17 – 27. The Juvenile Court of Henry County heard spontaneous argument on the motions at the arraignment hearing on March 29, 2005.

At the State’s urging, the trial court allowed each party to submit written briefs to the Court regarding the child’s general demurrer. Transcript of the Hearing, Page 5, Lines 24 – 25.

The State’s response to the child’s general demurrer and a Memorandum of Law in support of the State’s response was filed on April 6, 2005. The child responded on April 18, 2005. Each issue raised on appeal was briefed to the trial court in the Memorandum of Law.

The trial court granted the demurrer and dismissed the petition on April 28, 2005.

The facts of the case will be developed further as necessary as part of the Appellant's argument and citation of authority.

The constitutional question now before the Court was preserved by the Trial Court's Order Granting General Demurrer and Dismissing Delinquency Petition Transcript of the Record, Pages 1 – 2. The State filed a timely notice of appeal of that order. Transcript of the Record, Pages 3 – 4.

**Part II**  
**ENUMERATION OF ERRORS**

1. THE TRIAL COURT IMPROPERLY CONSIDERED THE CHILD'S GENERAL DEMURRER WHEN THAT DEMURRER DID NOT COMPORT WITH THE PROCEDURAL DEMANDS OF BRINGING A CONSTITUTIONAL CHALLENGE.
  
2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE DEFENDANT'S GENERAL DEMURRER AND DISMISSING THE DELINQUENCY PETITION.

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**PART III**  
**ARGUMENT AND CITATION OF AUTHORITY**

**First Enumeration of Error**

**THE TRIAL COURT IMPROPERLY CONSIDERED THE CHILD'S GENERAL DEMURRER WREN THAT DEMURRER DID NOT COMPORT WITH THE PROCEDURAL DEMANDS OF BRINGING A CONSTITUTIONAL CHALLENGE.**

The child, by and through her attorney, Robert Mack, Jr., filed a general demurrer in the Juvenile Court of Henry County. Transcript of the Record, Page 25. It was a one-page document that generally alleged “the Fornication statute is unconstitutional and had been declared unconstitutional.” Transcript of the Record, Page 25.

Such a bald assertion does not meet the necessary specificity required to raise a question **as** to the constitutional validity of a solemn act of the legislature.

It has long been the rule that “a solemn act of the General Assembly carries with it a presumption of constitutionality that is overturned only when it is established that the legislation manifestly infringes upon a constitutional provision or violates the rights of the people.” Powell v. State, 270 Ga. 327 (1998) *citing* Miller v. State, 266 Ga. 850 (1996). *See also* Thompson v. Talmadge, 201 Ga. 867 (1947).

In order to properly raise a constitutional challenge, a petitioner must satisfy a three-part test. Wallin v. State, 248 Ga. 29 (1981).<sup>1</sup> First, the Statute or particular part of the Statute, which the party would challenge, must be stated or pointed out with fair precision. In this case, the movant child did identify the Statute under challenge by claiming the “Fornication Statute is unconstitutional.” Transcript of the Record, Page 25.

Second, the provision of the Constitution which is claimed to have been violated must be clearly designated. Wallin at 30. The child's demurrer failed utterly to meet **this**

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<sup>1</sup> The test announced in Wallin v. State was applied to judging the sufficiency of general demurrers in Evans v. State, 252 Ga. 312 (1984).

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portion of the test. No provision of the United States Constitution or the Constitution of the Georgia is ever mentioned in any part of the child's demurrer. The demurrer even fails to cite how the fornication statute **has** allegedly "been declared unconstitutional". Transcript of the record, Page **25**.

Finally, the demurrer failed to show, as required, how the Statute violates the cited constitutional provision. Wallin at 30. The demurrer contains no analysis of the constitutional implications of the State's petition. Rather, the demurrer stands solely on a one-sentence assertion that the fornication statute is unconstitutional.

The Courts in the State of Georgia have followed a long established rule that applies a strong presumption in favor of the constitutionality of a Statute. Bohannon v. State, **497 Ga. 130 (1998)**. As part of the judicial presumption in favor of constitutionality, The Supreme Court has persistently ruled that a court should avoid reaching an attack on the constitutionality of a statute if there are other grounds upon which the case can be decided. Powell at **327** (*citing* Bd. of Tax Assessors v. Tom's Foods, **264 Ga. 309 (1994)**).

Clearly, the general demurrer is procedurally deficient. The trial court erred when it failed to deny the general demurrer on the procedural grounds in that the demurrer failed to follow the requirements of Wallin v. State. **It** was error for the trial court to reach the merits of the child's general demurrer.

## Second Enumeration of Error

### **THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE DEFENDANT'S GENERAL DEMURRER AND DISMISSING THE DELINQUENCY PETITION.**

The very first pronouncement of the Georgia Constitution is that “No person shall be deprived of life, liberty or property except by due process of law.” Ga Const. art. 1 § 1 ¶ 1. For nearly a century, the Court has recognized that a right to privacy is implied in this constitutional provision.

In Pavesich v. New England Life Insurance Co. et al., 122 Ga. 190(1905), Justice Cobb, writing for a unanimous Court, authored the seminal opinion regarding the foundation of a right to privacy. It was declared “the right to privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called on to establish its existence.” Id. at 194.

Ultimately, the Court declared “an individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy.” Id. at 195. Seizing on the above proviso, the Court held that “the right to privacy must be kept within proper limits, and in its exercise must be made to accord with the rights of those who have other liberties.” Id. at 201,

The Court applied the legal concepts surrounding the right to privacy to matters of sexual concern in Powell v. State, *supra*. The Powell case was the watershed opinion that first recognized that sexual conduct, under certain circumstances was worthy of full Constitutional protection under Article 1, Section 1, Paragraph 1 of the Constitution of the State of Georgia. It was this case that gave rise to basis for the Appellee's general demurrer.

In Powell, the defendant was tried for the rape and aggravated assault of his seventeen-year-old niece. At trial, the defendant admitted that sex acts had occurred as alleged, but he maintained that the sex acts were consensual. The jury acquitted Powell of rape and aggravated sodomy, but convicted Powell of the lesser included offense of sodomy. Id. at 327.

The Georgia Supreme Court voided the conviction for sodomy on the grounds that the private, unforced sexual acts are protected by the concept of liberty and privacy as announced by the Georgia Constitution. Id. at 332.

This means that private, unforced sex acts between consenting adults are considered a "fundamental right" and the State may only interfere with that right in order to protect a compelling State interest. The Court applied this concept to the facts of Powell and concluded:

O.C.G.A. 16-6-2 insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent, "manifestly infringes upon a constitutional provision" (Citation omitted) which guarantees to the citizens of Georgia the right of privacy. Appellant was convicted for performing an unforced act of sexual intimacy with one legally capable of consenting thereto in the privacy of his home. Accordingly, appellant's conviction for such behavior must be reversed.

In 2003, the Supreme Court relied heavily on Powell and applied the above reasoning to the fornication statute<sup>2</sup>. In Re: J.M., 276 Ga 88 (2003). In that case, a sixteen-year-old male, J.M. was adjudicated delinquent of the offense of fornication for engaging in sexual intercourse with his sixteen-year-old girlfriend in her bedroom. In appellate opinion, the Court took pains to note that both individuals engaged in the sex act were sixteen at the time of the incident. Both J.M. and his girlfriend G.D. had reached

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<sup>2</sup> O.C.G.A. 16-6-18: **an unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person.**

the age of consent for sexual conduct as set out by O.C.G.A. 16-6-3<sup>3</sup>. The Court concluded that each juvenile was able to legally consent to engage in sexual conduct and J.M.'s adjudication was reversed. Id. at 90.

The trial court erroneously concluded that “the Georgia Supreme Court declared that the statute prohibiting fornication unconstitutional.” Transcript of the Record, Page 1. Indeed, the exact opposite is true. The appellate Courts of this State have consistently ruled “the right to privacy is not absolute; its successful exercise is dependent upon the facts and circumstances **from** which its assertion arises.” Powell v. State, *supra*.

Since the Supreme Court's landmark ruling in Powell and its progeny, In Re: J.M., the Court has consistently held that the right to privacy does not extend to all forms of sexual conduct. Odett v. State, 273 Ga. 353 (2001), In Re: C.P., 274 Ga. 599 (2001). Rather, a sex act, such as fornication, that is normally protected may fall outside the realm of the right to privacy if the conduct is performed illegally, even if the exact same conduct would be protected if performed by consenting adults in private. *See* Odett v. State, *supra*, (Sears, J. concurring)

The Court engaged in this fact specific analysis when considering a similar challenge to the fornication statute brought in the case of In Re: C.P., 274 Ga. 599 (2001). The fourteen year old child in that case was “unmarried and had engaged in an act of sexual intercourse in the stall of a restroom in a local high school.” Id. at 599. The child's appeal rested on the claim that “the fornication statute is facially invalid because it manifestly infringes upon the constitutionally-guaranteed right to privacy.” Id. at 600.

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<sup>3</sup> O.C.G.A. 16-6-3(a): a person commits statutory rape by having sexual intercourse with someone other than spouse who is less than 16 years old.

The Court began with the proposition that “there is no activity more private and more worthy of protection from governmental interference than unforced, private, adult sexual activity.” Id. Immediately thereafter, the Court noted that the Powell decision “was, in and in itself, limited to the facts of the case – the sexual activity was non-commercial, it was between adults legally able to consent, it was unforced and it took place in a private setting.” Id.

Finally, it was held that “a stall in a public restroom is not a private place when it is used for other than its intended purpose.” Id. The Court refused to “conclude as a matter of law that a stall in a high school’s public restroom afforded its occupants a right of privacy regardless of the activity taking place within the stall.” Id.

“The right to privacy does not protect all sexual conduct [from prosecution].” Id. *citing Howard v. State*, 272 Ga. 242 (2000). Essentially, a right to privacy claim must be examined on a case-by-case basis and the Court must apply the facts of each individual claim to the general rule protecting sexual conduct. If the alleged conduct falls outside of the general rule, then no right to privacy exists and the State is authorized to regulate the alleged conduct.

As the facts of the instant case are applied to the law surrounding the right to privacy in the sexual context, it becomes immediately apparent that a right to privacy does not protect L.N.’s conduct. Her actions amounted to a delinquent act, properly subjecting her to the jurisdiction of the Juvenile Court.

The general demurrer was limited to the face of the petition, Transcript of the Record, Pages 25 – 27), and the parties both agreed that the constitutional question

regarding this case focused solely on L.N.'s age at the time of the offense. Transcript of the Hearing, Page 7, Lines 24 – 25; Page 8, Lines 1 – 4.

For the purposes of this appeal, there is no evidence that would suggest that L.N. engaged in sexual intercourse in a public place. Nor is there any evidence to that L.N. was forced to or was paid to have sexual intercourse With Curtis Friar. It is L.N.'s age at the time of the offense that takes her conduct outside the protections of the right to privacy **as** contemplated by Powell and In Re: J.M..

**As** a thirteen-year-old teenager, L.N. had not yet reached the age of consent in Georgia **as** defined by O.C.G.A. **16-6-3**. Her tender age prevents her from legally being able to consent to engage in sexual intercourse. Simply put, L.N. had not reached the age at which she could be considered a “consenting adult.” The right to privacy does not protect L.N.'s conduct because she is not a consenting adult. She is not part of the class of persons whose conduct is protected by the Constitution

**As** L.N.'s conduct is not protected by the fundamental right to privacy, the application of the fornication statute “need only bear a rational relationship to some legitimate state purpose” Odet v. State, at 354 *citing* Bamett v. State, 270 Ga. 472 (1999). A wide variety of legitimate State interests justify the regulation of L.N.'s conduct. L.N. is only thirteen years old; it is reasonable that she is not capable of fully understanding the physical, psychological and emotional consequences of engaging in sexual intercourse. Theses consequences are only exacerbated by the fact that L.N. allegedly engaged in the sex act with her step-brother while her father and step mother slept. Transcript of the Record, Page **8**.

One may argue that L.N.'s tender age also provides a defense to the State's petition of delinquency. It could be said that the mere fact that the child had not reached the age of consent to engage in sexual intercourse also means that she is not legally capable of forming the intent necessary to voluntarily commit the delinquent act of fornication. This argument confuses two separate areas of the law and has been previously rejected by the Appellate Courts of Georgia.

The Court of Appeals was asked to consider a similar argument in the case of In Re: N.A., 246 Ga. App. 204 (2000). In that case a twelve-year-old girl admitted to officers that she had been sexually active with several teenage boys. She was adjudicated delinquent on a petition alleging fornication. On appeal, N.A. argued that had she engaged in sexual intercourse with adults, those same adults could not rely on her "consent" as defense. By extension, it was argued that her legal incapacity to consent to sexual intercourse also incapacitated her ability to form the intent to commit the delinquent act of fornication. The court rejected such an argument.

N.A.'s argument that she can not be found delinquent for committing fornication is based on her attempt to link two areas of the law that cannot be properly joined, specifically, the voluntary element of fornication and our law that consent by a victim under a certain age is not defense to statutory rape. However, consent being no defense to statutory rape has no impact on whether a juvenile commits a delinquent act under the separate fornication statute by voluntarily having sex when unmarried. *See K.M.S. v. State*, 129 Ga. App. 683 (1973).

Indeed, it is this type of case that goes to the very heart of the purpose and objectives of the Juvenile Court system in Georgia. By filing the instant petition, the State does not seek simply to punish the child. Rather, the delinquency proceeding is the best available avenue to ensure that the child comes to understand the consequences of her

actions and to receive whatever counseling, mentoring and treatment may be appropriate after a thorough examination of the facts and circumstances of the case.

The Juvenile Code is intended to ensure that each child coming under the jurisdiction of the Juvenile Court “receive, preferably in his or her own home, the care, guidance and control that will be conducive to the child’s welfare and the best interests of the State.” O.C.G.A. 15-11-1 (2). More specifically, the Juvenile Courts are under a duty to provide “treatment and rehabilitation” to a delinquent child. In Re: L.C., 273 Ga. 886 (2001).

Because of the child’s tender age, the State has not only a rational basis for pursuing the instant petition, there is a compelling State interest in regulating L.N.’s behavior. There can be no doubt the State’s “interest in safeguarding the physical and psychological well-being of a minor is compelling and beyond the need for elaboration.” Phagan v. State, 268 Ga. 272 (1997). The primary concern of the Juvenile Court is the “care, guidance and well-being of children.” In Re: N. A., *supra* at 205.

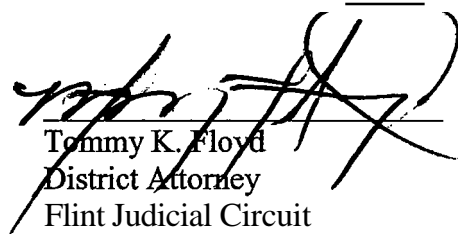
It is entirely appropriate for the prosecution of the instant petition to proceed and for an adjudicatory hearing to be held on the merits of the petition. Given L.N.’s tender age and the relationship between L.N. and Curtis Friar, it is important that the child receive treatment and rehabilitation as contemplated by the Juvenile Code.

While In Re: J.M. prohibits the prosecution of the fornication statute as it applies to consenting adults engaged in private, unforced, non-commercial sexual intercourse, the trial court incorrectly extended that ruling to apply to this case. L.N. is not old enough to be a “consenting adult.”

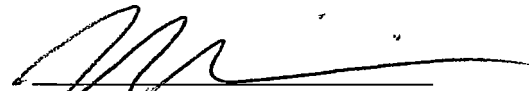
Moreover, the Juvenile Court is in a unique position to address the needs and welfare of this child that have come to light as a result of this accusation. It is the duty and purpose of the Juvenile Court to secure the proper treatment and rehabilitation in order to address the child's delinquent behavior. The trial court's order of dismissal should be reversed and the case should be remanded for further proceedings.

**CONCLUSION**

The trial court erred when it reached the merits of the child's general demurrer and when it erroneously that In Re: J.M. had declared the fornication statute unconstitutional and dismissed the petition of delinquency.



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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served upon a copy of the Brief of Appellee by depositing a copy with sufficient postage thereon into the United States mail, properly addressed as follows:

William L. Martin, III  
Clerk, Court of Appeals  
334 State Judicial Building  
Atlanta, Georgia 30334-1300

This the 18<sup>th</sup> day of July, 2005

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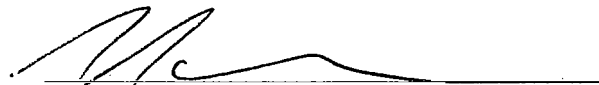
THOMAS L. WILLIAMS  
Assistant District Attorney  
Flint Judicial Circuit

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served upon a copy of the Response to the Defendant's General Demurrer and Memorandum of Law in Support of the State's Response by depositing a copy with sufficient postage thereon into the United States mail, properly addressed as follows:

Robert Mack, Jr.  
120 N. McDonough Street  
McDonough, Georgia 30236

This the 10<sup>th</sup> day of July, 2005



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