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Hey Diddle Diddle

PAUL RUBIN | **DECEMBER 14, 2006** | **4:00AM**

Some time ago, *New Times* got a letter from an inmate in Florence named James Stites, who is serving a six-year prison sentence for attempting to molest a child.

Stites was writing about his cellmate at the time, the infamous diddling doctor Brian Finkel, who was sentenced in January 2004 to almost 35 years in prison for sexually abusing patients.

"Since I've been in here," Stites wrote, "I have heard how he loved his job because he got to play with a lot of breasts and how he enjoyed rubbing their crotch. Now he's telling us he will be out on the streets in 2006 because the courts screwed up on his case. . . . Can you let me know if this is true or not because this is one sick son-of-a-bitch and doesn't need to be on the inside."

The answer is no, the former king of the local abortion market apparently won't be getting out of the slammer anytime soon.

In an unpublished decision issued November 21, the Arizona Court of Appeals upheld Finkel's high-profile convictions on 22 counts (involving 13 victims), and reaffirmed the sentence in all but four of those counts. The court reduced the sentence in two of those four counts by two years, and remanded the other two counts for resentencing because of a procedural error.

In the best-case scenario for Finkel – who turned 57 last week – he will become eligible for parole in about 20 years instead of 25.

Written by Judge Susan Ehrlich, the 3-0 opinion was a big defeat for Finkel, who had been flooding supporters (and *New Times* writers) since his imprisonment with missives about how his retrial and acquittal was a certainty.

Actually, attorneys at the Arizona Attorney General's Office privately had expressed concern over the appellate outcome. Their main worry seemed to be how the higher court would respond to Judge Jeffrey Cates' crucial decision to consolidate all the cases.

But Judge Ehrlich wrote that Cates had a "reasonable basis upon which to conclude that Finkel had a character trait giving rise to an aberrant sexual propensity to commit the offenses charged . . . and thus did not err in denying [Finkel's] motion to sever [each of the cases]."

Because of Judge Cates' ruling, jurors learned about Finkel's practice of improperly touching his patients' clitorises, breasts and anuses from one woman after another on the witness stand.

The Finkel criminal case was filed after a *New Times* story broke the news of the allegations ("**Bedside Matter**," **September 20, 2001**). In that story, Finkel denied any wrongdoing (as he later would reiterate during five days on the stand).

"When you're a nationally prominent abortion provider such as myself," the doctor said, "you have to be more vigilant than others . . ."

Finkel said he never had "clit-flicked a patient for improper motive or improper gratification. I don't want to, I don't need to, and I don't have to. Do I touch their breasts as anything other than a professional part of their exam? No. I have no reason to, and I am not going to."

But the appellate court noted that "five of Finkel's medical assistants testified, each of whom stated that she had observed Finkel improperly touching a patient's clitoris and/or fondling or groping the patient's breasts."

Eventually, two Maricopa County grand jury indictments against Finkel listed 35 alleged victims.

The trial, in late 2003, lasted 44 days, during which 53 witnesses testified.

During closing arguments, Finkel's attorney Richard Gierloff called his client's accusers "narcissistic, deliberately manipulative human beings . . . a mob which was created by the media . . . the Victims Club."

During breaks in the proceedings at the Maricopa County Superior Court, Finkel displayed the same confidence that he was going to be acquitted as he later did from behind bars about his then-pending appeal. He joked constantly, and during one recess stared at a woman who had been testifying against him and whistled the familiar melody to "If I Only Had a Brain."

Shortly before the jury came back with its verdicts on December 2, 2003, he told Judge Cates in chambers that he just *knew* he was going to walk.

The jury disagreed.

Judge Cates increased Finkel's sentence from the average to an "aggravated" term on each count, telling the defendant that he had "caused emotional harm to his victims, including depression, humiliation and fear, had caused physical harm to some of them," and that his lack of remorse and failure to accept responsibility for acts committed over a long period of time "did not bode well for rehabilitation."

In his appeal, Finkel claimed that Judge Cates' decision to add time to each of the guilty counts had been wrong.

But Judge Ehrlich and her colleagues found that Cates had "imposed aggravated sentences because the offenses were not isolated instances of sexual abuse, but, rather, part of a prolonged and extensive pattern of sexual misconduct. This reflected Finkel's criminal character and history . . ."

Judge Ehrlich also noted that "[Finkel] contends that, because he denied guilt, his lack of remorse cannot be used as an aggravating factor because this violates his constitutional privilege against self-incrimination." But the judge pointed out that "because Finkel chose to speak at the sentencing proceedings, the privilege against self-incrimination does not prohibit the trial court from considering his own statements at sentencing as a basis for finding that he lacked remorse."

And as for remorse, the appellate judge wrote, "Finkel stated that he felt remorse for the victims because he did not understand their feelings and needs, and because they had been traumatized by the trial. The trial court was not persuaded by his statements. It believed that Finkel thought that the prosecution had been politically motivated because he had performed abortions, that Finkel thought it was he who had been victimized and that he was not remorseful. We will defer to the court in the better position to assess whether a defendant is truly remorseful."

Next stop: the Arizona Supreme Court, if it agrees to hear Finkel's case.

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