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IN THE SUPREME COURT OF FLORIDA

JAMES WALTER HALLBERG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 82,189

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 261041

SUSAN D. DUNLEVY
Assistant Attorney General
Florida Bar No. 229032
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of facts only for purposes of the issues raised in his jurisdictional brief.

SUMMARY OF THE ARGUMENT

There is no conflict between the instant District Court opinion and any opinion of this Court or any other District Court on any of the issues raised in Petitioner's jurisdictional brief in the instant case, and the instant District Court opinion does not affect a class of constitutional or state officers. Consequently, this Court does not have jurisdiction to review the instant District Court opinion unless it has such jurisdiction based on the issues raised by the State in case no. 82,172, the case in which the State has sought review of the instant District Court opinion on other grounds.

ARGUMENT

ISSUE I: WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND A DECISION OF THIS COURT OR OTHER DISTRICT COURTS ON THE ISSUE OF THE MEANING OF THE TERM "FAMILIAL OR CUSTODIAL AUTHORITY" AS USED IN SECTION 794.041, FLORIDA STATUTES (1987).

The instant decision does not conflict with *Coleman v. State*, 485 So. 2d 1342 (Fla. 1st DCA 1986). *Coleman* held that the legislature "intended, by its use of the words, 'familial or custodial', to *include* within the statute's [Section 794.011(4)(e), Florida Statutes (1983), the predecessor to Section 794.041[1]] proscriptions

[1]The language of Section 794.011(4)(e) was removed from that section, reworded to delete the requirement of lack of consent, and given its own section by Chapter 84-86, Laws of Florida.

any person maintaining a close relationship with children of the ages specified in the statute, and who lived in the same household with such children." *Id.* at 1345 (emphasis supplied). Neither *Coleman* nor any other Florida appellate opinion known to Respondent has so much as intimated, much less held, that the legislature intended to exclude from the statutory proscriptions in question persons who did *not* live in the same household with the child or children with whom they engaged in sexual activity, despite the language in *Stricklen v. State*, 504 So. 2d 1248 (Fla. 1st DCA 1986), and in the instant decision indicating that residence in the same household was required under *Coleman*. Moreover, even if *Coleman had* so held, inasmuch as the defendant in that case lived in the same household and would not have been affected one way or the other by such a requirement, such language would have been mere *obiter dicta*, which is not a basis for conflict jurisdiction. *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976).

Petitioner's contention that the rule in the First District is that "there is indeed a linkage between the words 'custodial' and 'familial'" (Petitioner's brief at p. 4) is specious. Both *Coleman* and *Stricklen* involved situations in which the defendant's custodial authority was obtained directly from the victim's parents, as opposed to the situation here, where Petitioner's custodial authority over the instant victim was derived in large part from the *in loco parentis* authority given to school teachers by statute[2] and

[2]§§ 232.25 and 232.27, Fla. Stat. (1987).

common law.[3] As noted in Respondent's answer brief below, *Collins v. State*, 496 So. 2d 997 (Fla. 5th DCA 1986), *review denied*, 506 So. 2d 1040 (Fla. 1987), upheld a conviction on far less compelling facts than those sub judice.

Vandiver v. State, 578 So. 2d 1145 (Fla. 4th DCA 1991), does not establish conflict jurisdiction here because the defendant in that case had no authority whatsoever over the alleged victim. The purported victim there was a runaway from a juvenile delinquency placement in an HRS camp who met the defendant for the first time when she and the defendant's daughter escaped from the camp and decided to go to the defendant's house. The purported victim was a mere voluntary guest in the defendant's home—he never attempted to exert any authority over her—and was only there for two days. *Vandiver* is factually distinguishable from the instant case and from all of the other cases cited by Petitioner and does not appear to be in conflict with any of them.

Finally, the instant decision is not in conflict with *Bierer v. State*, 582 So. 2d 1230 (Fla. 3d DCA), *review denied*, 591 So. 2d 180 (Fla. 1991), because *Bierer* was not construing the statute in question here but rather involved the question of whether the "familial context" rule for similar fact evidence announced by this Court in *Heuring v. State*, 513 So. 2d 122 (Fla. 1987), was applicable to the charges of attempted sexual battery and lewd assault on a neighbor child that the defendant contended should have been severed for trial from the charges of sexual battery on his step-

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[3]See 68 AM. JUR. 2D *Schools* § 242 (1973).

daughters. *Bierer* has absolutely nothing to do with the instant case.

Thus, it is clear that the instant decision does not conflict with any other Florida appellate opinion on the interpretation of the language "familial or custodial authority" as used in Section 794.041.

> ISSUE II: WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND A DECISION OF THIS COURT OR OTHER DISTRICT COURTS ON THE ISSUE OF THE STANDARD OF REVIEW IN SEXUAL BATTERY CASES WHERE THE SOLE WITNESS IS THE VICTIM.

Petitioner's claim that "the Second District held that the alleged victim's testimony in such cases need not be 'carefully scrutinized' by the courts" (Petitioner's brief at p. 6) is patently false. That court cited the cases upon which Petitioner relied, *Thomas v. State*, 167 So. 2d 309 (Fla. 1964), and *Robinson v. State*, 462 So. 2d 471 (Fla. 1st DCA 1984), *review denied*, 471 So. 2d 44 (Fla. 1985), with apparent approval, although it noted the more positive expression of the "careful scrutiny" rule contained in *Robinson*. The Second District went on to say: "Appellant's real focus in regard to this issue seeks to have us determine that S.S.'s testimony was so unreasonable, inconsistent and uncorroborated as to render her testimony legally insufficient to support the verdict" (App. 15). It was this proposed determination, not the "careful scrutiny" rule, that the instant opinion says "is in fact an issue of credibility which is for the trier of fact to determine" (App. 15). The opinion then discussed the fact that Petitioner's relationship with S.S. was corroborated by many wit-

nesses and that some of the "inconsistencies" in S.S.'s testimony asserted by Petitioner were actually corroborated by other evidence, and the opinion concludes as to this issue that S.S.'s "testimony is not so incredible or unreasonable that we should overturn the jury's verdict" (App. 16). The instant decision does not conflict with *Thomas* or *Robinson*.

ISSUE III: WHETHER THE INSTANT DECISION AFFECTS A CLASS OF STATE OFFICERS.

Firstly, it is not at all clear to Respondent that public school teachers constitute a class of constitutional or state officers within the meaning of Article III, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iii), Florida Rules of Appellate Procedure. Respondent would agree that the definition found in *Advisory Opinion to Governor*, 146 Fla. 622, 1 So. 2d 636 (1941), which requires, inter alia, that a "State officer" be one "whose field for the exercise of his jurisdiction, duties and powers is co-extensive with the limits of the State and extends to every part of it," *id.* at 538, is confusing, at least in light of this Court's holdings in *Heath v. Becktell*, 327 So. 2d 3 (Fla. 1976), and *State v. Laiser*, 322 So. 2d 490 (Fla. 1975), that clerks of state circuit courts and sheriffs, respectively, whose fields are limited to their respective circuits and counties, are constitutional or state officers. However, given the fact that the duties of "[m]embers of the instructional staff of the public schools" are prescribed by rules promulgated by their respective school boards, § 231.09, Fla. Stat. (1987), rather than by either the state constitution or by statute, Respondent would suggest that

Petitioner's claim to be a member of a class of constitutional or state officers is doubtful at best.

Moreover, even assuming arguendo that school teachers are constitutional or state officers, Respondent strenuously disagrees with Petitioner's blithe conclusion that the instant decision by the Second District affects an entire class of constitutional or state officers. *Spradley v. State*, 293 So. 2d 697 (Fla. 1974), suggests otherwise.

Spradley receded from this Court's broader jurisdictional holding in *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), and held that "[t]o vest this Court with certiorari [now discretionary review] jurisdiction, a decision must *directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." 293 So. 2d at 701. Respondent fails to see how the "duties, powers, validity, formation, termination or regulation" of public school teachers are affected by the instant decision. The only thing that *is* affected is the severity of the criminal charge(s) to which a school teacher may be subject should he or she engage in sexual activity with a student between the ages of 12 and 16, which has nothing to do, even indirectly, with any of the above.[4]

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[4]School officers are subject to removal from office for cause for, inter alia, immorality or misconduct in office, § 229.771, Fla. Stat. (1987). A teacher's teaching certificate may be revoked either temporarily or permanently for, inter alia, "gross immorality or an act involving moral turpitude," § 231.28(1)(c), Fla. Stat. (1987), or conviction of any criminal charge other than a minor traffic violation, § 231.28(1)(e), and he or she may be dismissed

Furthermore, *Spradley*, which involved the denial of a motion to dismiss an indictment on the ground that the Assistant State Attorney who had signed it had not yet recorded his oath of office despite the requirement of Section 27.181(2), Florida Statutes, that he do so before assuming the duties of his office, stated that

> any decision on that issue made by the trial court or by the District Court...does not affect a class of constitutional or state officers so as to invoke our jurisdiction. A decision on that issue affects only the substantive and procedural law regarding the sufficiency of indictments in general, the rights of petitioner, and the authority of one particular assistant state attorney in relation to the specific facts of this case. At most, any decision on this issue could be said to affect only a sub-class of a class of constitutional or state officers, specifically, those assistant state attorneys who have failed to record their oaths of office.

Id. at 702. Similarly, in the instant case, at most, any decision on the issue of whether a school teacher is contemplated by Section 794.041 as being in a position of custodial authority over his or her students could be said to affect only a subclass of constitutional or state officers (assuming arguendo that public school teachers qualify as such a class), specifically, those school teachers who engage in sexual activity with one or more of their students who are between the ages of 12 and 18. Accordingly, under *Spradley*, the instant decision does not affect a class of state officers so as to qualify for discretionary review by this Court

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from employment at any time during the school year for just cause, which includes, inter alia, misconduct in office or conviction of a crime involving moral turpitude, § 231.36(1)(a), Fla. Stat. (1987), even if he or she has a continuing contract, § 231.36(4)(c).