IN THE FLORIDA SUPREME COURT

JIM LEE WADE,

PETITIONER,

v. **Case No.SC00-214**

STATE OF FLORIDA,

RESPONDENT.
_____/

ON REVIEW OF DECISION FROM
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

MERITS BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The State Attorney has discretion to determine what charges to file.

ARGUMENT

ISSUE I

THE STATE ATTORNEY HAS THE DISCRETION TO DETERMINE WHAT CHARGES TO FILE.

Despite Petitioner's urging to the contrary, the instant case does not present an issue of statutory construction. Petitioner argues that because he stored his pornographic pictures of children engaged in sexual activity on his computer, he should have been charged under Section 847.0135 Florida Statutes (1995) which addresses child pornography via computers, rather than under Section 827.071 Florida Statutes (1995) which prohibits child pornography in general. Although the Respondent (as Appellee) argued in its brief before the Second District Court of Appeal that Petitioner waived this issue as no motion to dismiss the information was filed before the trial court, the Second District Court of Appeal addressed this issue in its opinion and correctly resolved it based on this Court's opinion in State v. Cogswell, 521 So. 2d 1081,1082 (Fla. 1988). There, this Court relied upon United States v. Batchelder, 442 U.S. 114, 99 S. Ct.2198, 60 L. Ed. 2d 755 (1979) where the United States Supreme Court said:

> There is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two

> statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements.....”

Both the section Petitioner was charged and convicted of violating and the provision he now claims he should have been charged with are third degree felonies, although they do possess different elements. Yet in Seybel v. State, 693 So. 2d 678 (4th DCA 1997) the court held that the prosecutor had the discretion to charge the defendant under the broader aggravated stalking statute which was a felony, rather than the more specific misdemeanor harassing phone calls provision even though the criminal conduct committed was harassing phone calls to the victim. See also Barber v. State, 564 So. 2d 1169 (1st DCA 1990).

In State v. Keith, 732 So. 2d 9 (3rd DCA 1999), the court went so far as to grant the State’s Petition for Writ of Certiorari finding the Circuit Court departed from the essential requirements of law in directing the State to elect between two charges on which to proceed at trial as interfering with prosecutorial discretion in the charging arena.

McKenley v. State, 641 So. 2d 45 (Fla. 1994) upon which the Petitioner relies for his allegation of conflict is clearly distinguishable. The McKenley court held that where there is a specific statutory minimum mandatory sentence for a particular

crime, the trial court cannot deviate from that minimum mandatory and exercise general discretionary sentencing principles derived from a broader sentencing statute. No where does the opinion in McKenley abrogate or strip the State Attorney from exercising its discretion in determining what charges to file.

CONCLUSION

WHEREFORE based on the foregoing, reliance by the Second District Court of Appeal on this Court's opinion in State v. Cogswell, supra is a correct expression of prosecutorial discretion in charging decisions and since the authority presented by Petitioner presents no conflict whatsoever, this Court should affirm the opinion of the Second District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jim Lee Wade, DC # H0 4015, Central Florida Reception Center, P.O. Box 628050, Main Unit, Orlando , Florida 32862-8050,this _____ day of June, 2000.

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COUNSEL FOR RESPONDENT