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IN THE SUPREME COURT OF FLORIDA

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CASE NO: 01-179

ST. DAVID CATHOLIC CHURCH and THE ARCHDIOCESE OF MIAMI,
Petitioners,

vs.

JANE DOE I and JANE DOE II,
Respondents.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

✓ MAY L. CAIN, ESQUIRE
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and

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CERTIFICATION OF SIZE AND STYLE OF TYPE

It is hereby certified that the size and style of type used in this brief is 12 point proportionately spaced Courier.

IN THE SUPREME COURT OF FLORIDA

CASE NO: 01-179

ST. DAVID CATHOLIC CHURCH and THE ARCHDIOCESE OF MIAMI,

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vs.

JANE DOE I and JANE DOE II,

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ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

INTRODUCTION

The Petitioners filed a Petition for Discretionary Review filed pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, on the basis that the decision of the Third District Court of Appeal is in direct and express conflict with the decisions of two District Courts of Appeal of Florida.

The Petitioners, St. David Catholic Church and The Archdiocese of Miami, were the appellants in the Third District Court of Appeal and the defendants in the trial court, the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida. The Respondents herein, Jane Doe I and Jane Doe II, were the appellees in the District Court of Appeal and the plaintiffs in the trial court.

STATEMENT OF THE CASE AND FACTS

Although generally correct, the Petitioners' Statement of the Case and Facts omits two important facts: 1. That at the time of the alleged incidents, Jane Doe I was a **minor** parishioner who worked for the church in exchange for free tuition at St. Thomas High School; and 2. That the sexual batteries occurred on the premises of the Petitioner Church in the office where the minor worked, and in the church rectory. Doe v. Malicki et al, 771 So. 2d 545 (Fla. 3d DCA, 2000) reh. den., reh. en banc denied, certification denied.

An answer was never filed by the Petitioners, as the Motion to Dismiss on the basis of the First Amendment was granted by the trial court, so the Petitioners' statement at page 1 of their Brief on Jurisdiction, that the Petitioners adamantly deny the allegations, is de hors the record and should not be considered by this Court. The case before the trial court is not at issue. The allegations contained in the Complaint must be taken as true for purposes of this appeal.

The Third District Court denied rehearing en banc by a vote of eight (8) to one (1) (Judge Schwartz dissenting) with two additional judges recused, denied rehearing unanimously, and denied certification by a vote of 2 to 1 with the dissenting judge voting to grant. See Appendix to Petitioners' Brief on Jurisdiction at Tab B. Further, on January 24, 2001, the Third District Court of Appeal denied the Petitioner's/Appellee's Motion for Stay of Mandate by a two to one vote. (See Respondents' Appendix, page 1).

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal below is not in express and direct conflict with the cases of Doe v. Evans, 718 So. 2d 286 (Fla. 4th DCA, 1998) rev. granted, 735 So. 2d 1248 (Fla. 1999) and Carnesi v. Ferry Pass United Methodist Church, 770 So. 2d 1286 (Fla. 1st DCA, 2000) and jurisdiction should be declined.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA DOES NOT EXPRESSLY CONFLICT WITH DOE V. EVANS, 718 So. 2d 286 (Fla. 4th DCA, 1998) review granted 735 So. 2d 1284 (Fla. 1999) AND CARNESI V. FERRY PASS UNITED METHODIST CHURCH, 770 So. 2d 1286 (Fla. 1st DCA, 2000) ON THE SAME QUESTION OF LAW, AS TO WHETHER THE FIRST AMENDMENT BARS A PARISHIONER, WHO CLAIMS TO HAVE BEEN SEXUALLY ASSAULTED BY A CLERGYMAN, FROM BRINGING AN ACTION AGAINST A RELIGIOUS INSTITUTION BASED ON THEIR EMPLOYMENT AS A CLERGYMAN. (respectfully restated).

The decision in the case at bar does not expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law as required for jurisdictional purposes in this Court, pursuant to Fla. R. App. P. 9.030(2)(iv).

It is respectfully submitted that the cases of Doe v. Evans and Carnesi v. Ferry Pass et al are not in express and direct conflict with the case at bar. Neither of those cases deals with sexual abuse of a minor, nor criminal sexual battery committed against an adult by the religious institution's clergyman/employee against another of the religious institution's employees. Doe v. Evans deals with a consensual relationship between a non-employee parishioner and pastor; and Carnesi v. Ferry Pass et al involves the alleged sexual harassment of Carnesi, a church secretary, by a **church volunteer** who served as the chairman of a committee staffed by volunteers, who hired Carnesi. Carnesi involves lay employees of a church making decisions about lay employees.

The Respondents would take issue with the Petitioners' statement in their Brief on Jurisdiction at page 3 thereof, that "the Third District Court of Appeal expressly recognized that their

opinion was in conflict with the Fourth District decision in Doe v. Evans" If that were true, then the Third District Court of Appeal would have certified a conflict, which it declined to do. In fact, in Doe v. Malicki at pages 547-548, the Third District Court of Appeal concluded its opinion of the case at bar by stating:

In their complaint, the plaintiffs alleged that they were both employees and parishioners of the defendant church, that they were sexually assaulted and/or battered by Father Malicki while working at the defendant church, and that, despite knowing that Father Malicki had committed several sexual assaults and/or batteries, he was retained by the defendants as a priest and given the task of supervising the plaintiffs. The issue to be determined by the court, therefore, is whether the defendants had reason to know of Father Malicki's misconduct and did nothing to prevent reasonably foreseeable harm from being inflicted upon the plaintiffs. **This determination is one governed by tort law and does not require inquiry into the religious doctrines and practices of the Catholic church.** [Emphasis Added.]

after citing to the United States Supreme Court case of Jones v. Wolf, 443 U.S. 595, 99 S.Ct. 3020, 61 L. Ed.2d 775 (1979) which held that applying neutral principles of law to the secular conduct of a religious institution does not violate the First Amendment.

Doe v. Evans is presently pending on appeal before this Court in Case no. 94,450. Oral argument was heard on December 7, 1999. There has not been a decision to date. Carnesi v. Ferry Pass United Methodist Church is also pending before this Court as to whether this Court has jurisdiction for review.

The Third District Court of Appeal, in Doe v. Malicki at page

546, noted that the instant case is more factually similar to Doe v. Dorsey 683 So. 2d 614 (Fla. 5th DCA, 1996). It stated at page 546:

Of the two cases, Dorsey is the more factually similar to the instant case. In that case a claim of negligent hiring or retention was brought against a church and its bishop on allegations of sexual misconduct by a priest with a minor. The plaintiff, however, was twenty-six years old when he filed the action. Because of this, the appellate court decided the case in favor of the defendants on the statute of limitations defense and did not reach the First Amendment issue. Nevertheless, the court stated:

"In any event, we are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur." 683 So. 2d at 617)

The Court went on to say that it would draw the line at criminal conduct.

The Third District Court of Appeal noted that in Evans the Fourth District Court of Appeal recognized that the facts therein presented a "less compelling factual scenario" than cases involving criminal assaults, especially against children.

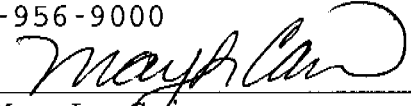
Although factually distinguishable from the instant case, as can be seen from the above, both the Petitioners and the Respondents herein filed Amicus Curiae Briefs in the case of Doe v. Evans, so both parties have been heard on the very issue raised by the Petitioners herein, by this Honorable Court. Jurisdiction should be declined.

CONCLUSION

Based on the foregoing, the Respondents respectfully request that this Court deny discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was furnished via U.S. Mail to James F. Gilbride, Esq., Gilbride, Heller & Brown, P.A., One Biscayne Tower, Suite 1570, 2 South Biscayne Boulevard, Miami, Florida 33131, J. Patrick Fitzgerald, Esq., 110 Merrick Way, Suite 3-B, Coral Gables, Florida 33134 and to Philip M. Burlington, Esq., Caruso, Burlington, Bohn & Compiani, P.A., Barristers Building, Suite 3A, 1615 Forum Place, West Palm Beach, Florida 33401 this 1st day of February, 2001.

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