IN THE SUPREME COURT OF FLORIDA

MICHAEL JOHN SIMMONS,

Petitioner,

v. **CASE NO. SC04-2375**

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review
From the District Court of Appeal
First District of Florida

RESPONDENT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Simmons seeks discretionary review of a decision by the First District Court of Appeal. That decision upheld the facial validity of §847.0138, Florida Statutes, against First Amendment, vagueness and Commerce Clause challenges. (copy attached as App. A). Simmons v. State, 886 So.2d 399 (Fla. 1st DCA 2004). The decision below was issued November 15, 2004. Simmons filed his notice to invoke December 15, 2004.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review the First DCA's decision under Art. V, §3(b)(3), Florida Constitution. However, the opinion below is well-reasoned. It correctly distinguishes §847.0138 from statutes at issue in recent decisions by the U.S. Supreme Court. Further review is not necessary.

ARGUMENT

ISSUE

SHOULD THIS COURT EXERCISE ITS JURISDICTION TO REVIEW THE DECISION BELOW, WHICH UPHELD THE FACIAL VALIDITY OF §847.0138, FLORIDA STATUTES, AGAINST FIRST AMENDMENT AND COMMERCE CLAUSE CHALLENGES? *(Restated).*

Two preliminary observations are in order. First, this Court has jurisdiction to review the First DCA's decision under Art. V, §3(b)(3), Florida Constitution, because that decision "expressly declares valid a state statute."

Second, the decision below does not expressly construe a provision of the Florida or U.S. Constitution. It does not explain or compare provisions of either constitution. It does not, for example, decide whether Simmons' rights under the Florida Constitution are the same or greater than his rights under the U.S. Constitution. This Court should not labor under Simmons' misapprehension, that the decision expressly construes a constitutional provision.

At no time does Simmons' argument address why this Court should review the First DCA's decision. Instead, it parses his points on the merits, and assumes they speak for themselves. Thus, he makes ringing but wrong pronouncements. His opening sentence is the best example:

> Statutes virtually identical to §847.0138, Fla. Stat. (2003), have been declared unconstitutional by almost every other court to have examined them.

(juris. brief, p.3).

To the contrary, §847.0138 is significantly different from all statutes that have been invalidated. Simmons carefully notes this difference:

> Appellant argues that section 847.0138 is overbroad .... We disagree because section 847.0138 only pertains to harmful images, information, or data that is sent to a specific individual known by the defendant to be minor, "via electronic mail." *See* §§847.0138(1)(b), 847.0138(3), Fla. Stat. Because the defendant must have actual knowledge or believe that the recipient of the communication was a minor, *see* §847.0138(1)(a), Fla. Stat., adults are not deprived of their constitutional right to engage in protected speech. Communications from adult to adult(s), from adult to those who are believed to be an adult (including minors who are posing as an adult on the Internet), and from adult to those who are not known (by actual knowledge or belief) to be an adult or minor are not restricted by this statute. Only communications to a minor are prohibited. [emphasis supplied].

(App. A, p.7). *Id.*, 886 So.2d at 403.

Simmons' recognition of the narrow field of operation for §847.0138 renders further review unnecessary. As the court said:

> We agree with the State that Florida's law differs from the federal law at issue in Reno because section 847.0138 only applies to electronic mail sent to a specific individual known to be a minor, not to a group that is "likely" to include a minor. Section 847.0138(1)(b) requires a transmission, which means sending "to a specific individual known by the defendant to be a minor via electronic mail." Significantly, the Communications Decency Act of 1996 at issue in Reno has no similar provision. [FN5]
>
> > FN5. Likewise, the Child Online Protection Act, at issue in ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir.2003), *aff'd and remanded*, --- U.S. ----, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004), does not have a provision similar to section 847.0138. Therefore, the case is not applicable and the recent ruling by the

> United States Supreme Court does not substantively affect the analysis in this case.
>
> Adults may address communications directly to other adults, and to a large group, without violating section 847.0138. Only messages sent to a "specific individual known to be a minor" that are harmful to minors are prohibited. The Florida statute is more narrowly tailored than the Communications Decency Act at issue in Reno. The level of discourse reaching a mailbox may be limited to that which would be suitable for a sandbox if the mail is knowingly sent to a mailbox that is in the sandbox. That is what section 847.0138 does.

Id. at 405. (App. A, p.11-12).

Undaunted, Simmons continues with argument on the merits before this Court:

> However, neither §847.0138, nor any other Florida Statute, defines "electronic email," and a plain reading of the term ... encompasses a vast array of electronic communications, not just one to one, personal messages.

(juris. brief, p.5). To the contrary, and as noted in Simmons, criminal culpability attaches only when harmful material is sent to a known minor, or person reasonably believed to be a minor. The only way to incur such culpability is to send the material by individually-addressed messages; not, for example, by posting a description of one's proclivities in a chatroom.

Simmons next claims §847.0138 "restricts adult speech to that which is suitable solely for minors." (juris. brief, p.7). Any fair reading of the statute and decision below leads to the opposite conclusion. The statute restricts speech that is

"harmful to minors"[1] only when such speech is sent to known minors. Speech sent to others is not restricted. The statute never forces adults to communicate with other adults only in minor-suitable speech.

As interpreted by Simmons, §847.0138 is constitutional when applied to protect a minor--anyone under 18 years old.[2] That the statute does not distinguish among minors of different ages is immaterial; and not, as Simmons suggests (juris. brief, p.7-8) unconstitutional vagueness. This Court should see through his attempt to parlay an unreasonable interpretation of the statute into grounds for discretionary review. Similarly, his Commerce Clause claim does not justify further review.

The decision below is soundly reasoned. It adopts a fair and constitutional construction of §847.0138, and carefully

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[1]In pertinent part, §847.001(6), Fla. Stat. provides:

> "Harmful to minors" means any reproduction ... of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
> (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
> (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

[2]§847.001(8), Fla. Stat., provides: "[As used in this chapter, the term:] 'Minor' means any person under the age of 18 years."

distinguishes leading U.S. Supreme Court cases involving other computer-crimes statutes. This Court need not do the same.

CONCLUSION

Further review is not necessary. This Court should decline to exercise its jurisdiction to review the First DCA's decision.

CERTIFICATES OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this BRIEF has been sent by U.S. mail to Simmons' counsel: **WILLIAM J. SHEPPARD** & **MATTHEW R. KACHERGUS,** Sheppard, White and Thomas, P.A., 215 Washington Street, Jacksonville, Florida 32202; on January ___, 2005. I also certify this brief complies with Fla.R.App.P. 9.210.

Respectfully submitted,

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