IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-128

DCA NO. 3D04-2149

DONALD KASISCHKE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, DONALD KASISCHKE, was the Appellant in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner appealed an order revoking his community control for violating a condition of community control under section 948.03(5)(a)(7), Florida Statutes (1999), which provided that, unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, sex offenders on probation or community control are prohibited from:

> viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern. (emphasis added)

Petitioner, who has a Ph.D. degree, was fifty-four years old at the time of the underlying offense. He was convicted of three counts of lewd and lascivious assault on a child under sixteen years of age. Specifically, Petitioner solicited a fifteen year-old boy and offered him forty dollars so that he could perform oral sex on the boy. Petitioner took the boy to a park, unzipped the boy's pants and performed oral sex on the victim until the boy ejaculated in the

Petitioner’s mouth. Petitioner also masturbated in the boy's presence. Petitioner entered a guilty plea as part of an agreement which included the following standard condition for certain sex offenders on community control:

The Defendant is prohibited from viewing, owning or possessing any obscene, pornographic or sexually stimulating visual or auditory material[s], including telephone, electronic media, computer programs or computer services that are relevant to the offender's deviant behavior pattern, unless otherwise indicated in the offender's treatment plan. (emphasis added).

On appeal, Petitioner argued that the phrase "relevant to the offender's deviant behavior pattern" should modify all aspects of the community control condition, thereby only prohibiting Petitioner from viewing or possessing material which is specifically related to his prior deviant acts. According to Petitioner’s argument, the community control condition would be strictly limited to obscene and pornographic materials which depict fellatio or masturbation with an underage boy. The State argued that the phrase "relevant to the offender's deviant behavior pattern" only modifies "telephone, electronic media, computer programs, or computer services" or, alternatively, "sexually stimulating visual or auditory material" as opposed to all aspects of the community control condition. According to the State's argument, the community control condition imposes a

total ban on viewing or possessing any pornographic or obscene material.

On December 20, 2006, the lower court issued an opinion on rehearing, in which found that the language of section 948.03(5)(a)(7), as currently written, is susceptible to multiple and irreconcilable interpretations. Based on the finding that that the statute is ambiguous, the court held that it must look beyond the plain language of the statute. Kasischke v. State, 2006 Fla. App. LEXIS 21282, 7-8 (Fla. 3rd DCA 2006). The appellate court tracked the statutory prohibition on obscene or pornographic materials to an earlier version of the statute which read as follows:

> Unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, a prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually explicit material.
> Section 948.03(5)(g), Fla. Stat. (1995).

The court then found that the historical record of the statute and the legislative history of section 948.03(5)(a)(7) show that the legislature did not intend to alter the pre-existing ban on all pornographic or obscene material. Thus, the court held that the limiting phrase "relevant to the offender's deviant behavior pattern" only modifies the words "sexually stimulating . . . material," and not the terms "obscene" or "pornographic."

Based on their holding that section 948.03(5)(a)7 prohibited the defendant from viewing, owning, or possessing any pornographic material while on community control, the appellate court affirmed the

trial court's order, as the videotape found in Petitioner's home contained pornographic and obscene images. Kasischke v. State, 2006 Fla. App. LEXIS 21282, 16-18 (Fla. 3rd DCA 2006). Petitioner then sought this Court's discretionary review.

SUMMARY OF THE ARGUMENT

The Supreme Court of Florida does not have jurisdiction to review the Third District Court of Appeal's decision in the instant case. The lower court's opinion does not expressly and directly conflict with Taylor v. State, 821 So.2d 404 (Fla. 2nd DCA 2002).

The lower court's opinion in the instant case found that the statutory limiting phrase "relevant to the offender's deviant behavior pattern" only applies to "sexually stimulating . . . material" and not to the total ban on viewing, owning, or possessing pornographic or obscene material. Thus, Petitioner violated his community control by possessing pornographic material.

ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN Taylor v. State, 821 So.2d 404 (Fla. 2nd DCA 2002). (REPHRASED).

Petitioner claims that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv),Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The Court has explained express and direct conflict as appearing within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). Thus, inherent or implied

conflict is not a basis for this Court's jurisdiction. Dept of HRS v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Respondent maintains that the Court is without jurisdiction to review this decision, as no such express and direct conflict exists.

In support of his claim of jurisdiction, Petitioner argues that the lower court's opinion is in conflict with Taylor v. State, 821 So. 2d 404 (Fla. 2nd DCA 2002). Taylor pleaded guilty to unlawful sexual activity with a minor. He appealed the denial of his rule 3.800(b) motion, which alleged several errors in connection with his order of probation. As it pertains to the subject case, Taylor alleged that condition 29, which prohibited him from viewing, owning, or possessing obscene, pornographic, or sexually explicit material, violated his constitutional rights because it was not specific as to his particular deviant behavior. He also argued that this was a special condition and should be stricken because it was not orally pronounced. The court in Taylor held as follows:

Because section 948.03 lists probation conditions for sexual offenses occurring on or after October 1, 1995, they are general conditions which need not be orally pronounced. State v. Williams, 712 So.2d 762 (Fla. 1998). Thus, condition 29 is a general condition of probation which the trial court was not required to orally pronounce. At the hearing, however, the trial judge stated that he was imposing all of the sexual offender conditions that apply when the offender is over eighteen and the victim is over seventeen.

While we conclude that Taylor had adequate notice of what was prohibited based upon the statutory language and the trial court's statements, we agree with Taylor that condition 29 in the written order of probation should be more specific and relate to Taylor's particular deviant behavior pattern. Accordingly, we affirm condition 29 but remand to the trial court so that the written condition can be modified to conform to the language of section 948.03(5)(a)(7).

Id. at 405-406.

Petitioner argues that Taylor's brief treatment of § 948.03(5)(a)(7), in which it remanded the matter so that the written probation condition conforms to the statutory language, constitutes a direct and express conflict with the lower court's opinion in the case at bar. A review of both opinions confirms that no such conflict exists. In the case at bar, the appellate court conducted a detailed and thorough statutory interpretation and analysis. Based on its exhaustive analysis, the court below held that the statutory limiting phrase "relevant to the offender's deviant behavior pattern" only applies to the portion of the condition prohibiting "sexually stimulating . . . material". As opposed to the subject case, Taylor did not find the statute to be either clear or ambiguous, nor did it discuss or clarify what portion(s) of the probation condition was limited to Taylor's particular deviant behavior pattern. Instead, the court in Taylor merely agreed that the prohibition set forth in

condition 29 did not track the statutory language of section 948.03(5)(a)(7).

Section 948.03(5)(a)(7), Florida Statutes (1999), provides that, unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, sex offenders on probation or community control are prohibited from:

> viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern. (emphasis added).

Based on the four corners of the Taylor opinion, condition 29 prohibited Taylor from viewing, owning, or possessing obscene, pornographic, or sexually explicit material. Id. at 405 . Clearly, the written condition did not include the concluding phrase “that are relevant to the offender's deviant behavior pattern”, as contained in the text of Section 948.03(5)(a)(7), Florida Statutes (1997).

Thus, the court in Taylor did nothing more than: 1) make an observation that the statutory language was not properly tracked in the œondition and 2) order the matter remanded in order for the statutory language to be included in the written condition. As opposed to the case at bar, the Taylor opinion made no mention whatsoever, much less a direct finding, as to whether or not the phrase “relevant to the offender's deviant behavior pattern” modified the prohibition on viewing or possessing pornographic material.

Therefore, the Taylor decision is not in direct and express conflict with the case at bar.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the lower court's opinion does not expressly and directly conflict with Taylor v. State, 821 So.2d 404 (Fla. 2nd DCA 2002). Thus, Respondent respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to Thomas Regnier, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125-2611 on this 12th day of March, 2007.

LINDA S. KATZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in font Courier New, 12 point, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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