IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
Lower Court Case No. **3D04-2149**

DONALD KASISCHKE,
Petitioner,

-vs.-

THE STATE OF FLORIDA,
Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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January 26, 2007

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INTRODUCTION

This is a petition for discretionary review on the grounds of express and direct conflict of decisions.[1] In this brief, "A." refers to the slip opinion in the attached appendix. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS[2]

The Petitioner, Donald Kasischke, was convicted of three counts of lewd and lascivious assault on a boy under age 16.[3] He was sentenced to 364 days in jail, followed by two years of community control and eight years of probation.[4] Mr. Kasischke's community control conditions included a restriction regarding obscene, pornographic, or sexually stimulating materials based on statutory language that prohibits:

> 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**.[5]

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[1] *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); 9.120.

[2] The district court issued its decision on December 20, 2006. A notice to invoke discretionary jurisdiction of the supreme court was filed on January 17, 2007.

[3] A. 2-3.

[4] A. 3.

[5] A. 3, 5. § 948.03(5)(a)7, Fla. Stat. (1999) (later renumbered as § 948.30(1)(g), Fla. Stat.)

While Mr. Kasischke was under community control, officers searched his home and found several photographs of nude young men and men performing various sexual acts.[6] Officers also found a videotape of a "young-looking" male engaging in sex with other males, which the parties agree shows pornographic images.[7] Based on these materials, the trial court found that Mr. Kasischke had violated his community control.[8] On appeal, however, the parties disagreed about whether possession of the videotape constituted a violation of community control conditions.[9] Mr. Kasischke argued that

> the phrase "relevant to the offender's deviant behavior pattern" should modify all aspects of the community control condition and, as such, only prohibits defendant from viewing or possessing material which is specifically related to his prior deviant acts.[10]

The State, however, argued that the condition "imposes a total ban on viewing or possessing any pornographic or obscene material."[11]

The district court, in construing the relevant statutory language in section 948.03(5)(a)7, Florida Statutes, declared (on rehearing[12]) that "the

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[6] A. 3.
[7] A. 3-4.
[8] A. 14-15.
[9] A. 4.
[10] A. 5.
[11] A. 6.

language . . . as currently written, is undeniably susceptible to multiple and irreconcilable interpretations."[13] The district court reasoned that the statute might be read, for example, as (1) imposing a ban on any obscene, pornographic, or sexually stimulating materials; (2) requiring all prohibited material to be "relevant to the offender's deviant behavior pattern;" or (3) imposing a complete ban on obscene and pornographic material, but limiting the ban on "sexually stimulating visual or auditory material" to that which is "relevant to the offender's deviant behavior pattern."[14]

The district court held that "[b]ecause we recognize that the statute is ambiguous, we must look beyond the plain language of the statute."[15]

The district court then turned to the statute's legislative history.[16] The court noted that an earlier version of the statute "imposed a total ban on viewing, owning, or possessing 'any obscene, pornographic, or sexually

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[12] A. 1. The court had originally reversed the revocation of Mr. Kasischke's community control. *See Kasischke v. State*, 31 Fla. L. Weekly D7, D8 (Fla. 3d DCA Dec. 20, 2005) (withdrawn June 9, 2006) ("[W]ere we to conclude that the condition [of probation] does not require relevance to the defendant's deviant behavior pattern, we would be stripping [the statute] of some of its language, effectively rewriting the statute. This, of course, we cannot do.").

[13] A. 6.

[14] A. 6-7.

[15] A. 7.

[16] A. 7-10.

explicit material.'"[17] The district court found that "there is nothing in the legislative history of the 1997 amendment that indicates that the legislature intended to modify the pre-existing total ban on viewing, owning, or possessing pornographic material."[18]

After considering a Senate Staff Analysis and Economic Impact Statement concerning the amendment[19] and research regarding the management of sexual offenders funded by the National Institute of Justice (NIJ) on which the legislature relied,[20] the district 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."[21]

Based on this holding and the pornographic nature of the videotape found in Mr. Kasischke's home, the district court affirmed the trial court's order revoking his community control.[22]

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[17] A. 7.
[18] A. 8.
[19] A. 8-9.
[20] A. 9-10.
[21] A. 10 (emphasis in district court opinion).
[22] A. 15.

SUMMARY OF THE ARGUMENT

The district court's decision conflicts with the Second District's decision in *Taylor*,[23] which construes "relevant to his deviant behavior pattern" as relating to the prohibition against "obscene, pornographic, or sexually explicit material," not just to the prohibition against "sexually explicit material." This leaves probationers in the Third District with a different probation condition from that which is applied to probationers in the Second District.

ARGUMENT

The Third District's opinion in this case is in express and direct conflict with the Second District's decision in *Taylor*.

The Third District's decision in this case holds 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."[24]

The Second District has also interpreted this statute, in *Taylor*.[25] There, the court noted that the defendant complained that "condition 29 [of his probation conditions], which prohibits him from viewing, owning, or

[23] *Taylor v. State*, 821 So. 2d 404 (Fla. 2d DCA 2002).
[24] A. 10 (emphasis in district court opinion).
[25] *Taylor v. State*, 821 So. 2d 404 (Fla. 2d DCA 2002).

possessing obscene, pornographic, or sexually explicit[26] material, violates his constitutional rights because it is not specific as to his particular deviant behavior."[27] The court found that the defendant's constitutional rights were not violated because he had notice of the condition based on the statutory language and the trial court's statement that it was imposing "all of the sexual offender provisions that apply when the offender is over eighteen and the victim is over seventeen."[28]

The Second District agreed with the defendant, however, that "condition 29 in the written order of probation should be more specific and relate to Taylor's particular deviant behavior pattern," as required by section 948.03(5)(a)7.[29] As the court had earlier described "condition 29" as including a prohibition on obscene, pornographic, or sexually explicit material, it is significant that the court said that "condition 29" should be relevant to the defendant's deviant behavior pattern, rather than saying that only sexually explicit material must be so relevant. Thus, it is clear that the

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[26] "Condition 29" appears to be based on the earlier wording of the statute, which prohibited "sexually explicit," rather than "sexually stimulating" material, and lacked the qualifying language inserted into the later version. *Compare* § 948.03(5)(g), Fla. Stat. (1995) *with* § 948.03(5)(a)7, Fla. Stat. (1999).

[27] *Taylor*, 821 So. 2d at 405.

[28] *Id.*

[29] *Id.* at 405-06.

Second District's construction of the statute directly conflicts with the Third District's.

This leaves Florida law with two different rules for probationers convicted of sexual offenses. Those in the Second District are restricted from viewing obscene, pornographic, or sexually stimulating material that is relevant to their crime,[30] while those in the Third District have an outright ban on obscene and pornographic materials. Although the Third District attempts to reconcile its opinion with *Taylor* by saying that *Taylor* "only required that the probationary condition track the statutory language,"[31] the Second District construed the phrase "relevant to his deviant behavior pattern" as applying to *all* elements of condition 29, not just to one of them.

Indeed, most probationers who read the condition telling them that they 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[32]

will likely read it the same way as the Second District because this is the most obvious and natural reading. The Third District offers no logical reason

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[30] *See Ertley v. State*, 785 So. 2d 592, 593 (Fla. 1st DCA 2001) (defining "deviant behavior pattern" by the crime for which defendant is convicted).
[31] A. 14.
[32] § 948.03(5)(a)7, Fla. Stat. (1999) (later renumbered as § 948.30(1)(g), Fla. Stat.)

why the qualifying language should apply only to sexually stimulating material but not to obscene or pornographic material.

The Third District's decision cites a Senate Staff Analysis without noting that the report contains a disclaimer that "[t]his Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate."[33] The report also notes that "Florida case law requires that conditions of community supervision be related to the offense committed by the defendant."[34]

Additionally, the district court cites a National Institute of Justice (NIJ) study on which the legislature relied[35] without mentioning that the study repeatedly recommends "offender-specific" or "offense-specific" practices and emphasizes that containment programs for sexual offenders must be "tailored" to the offender's individual pattern of deviant behavior.[36] Indeed, the NIJ Study *recommends* a more narrowly tailored prohibition on pornographic materials than that which existed in the earlier version of the statute:

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[33] Burt Sen. Crim. Just. Comm. Rpt. Bill CS/SB 1930 (April 8, 1997) [hereinafter Burt Report].
[34] Burt Report 11.
[35] National Institute of Justice, *Managing Adult Sex Offenders in the Community – A Containment Approach* (January 1997) [hereinafter NIJ Study], *available at* http://www.ncjrs.gov/txtfiles/sexoff.txt (last visited Jan. 18, 2007).
[36] NIJ Study.

> **Sex offender-specific** probation or parole conditions, such as those that follow, play a **crucial role**:
> . . .
> You shall not possess any pornographic, sexually oriented, or sexually stimulating visual, auditory, telephonic, or electronic media and computer programs or services **that are relevant to your deviant behavior pattern**.[37]

Here the phrase, "that are relevant to your deviant behavior pattern" appears to refer to all the items that appear before it: "pornographic, sexually oriented, or sexually stimulating visual, auditory, telephonic, or electronic media and computer programs or services." This would also fit in with the theme, repeatedly expressed in the NIJ Study, and again in the Senate Staff Analysis, that sexual offender containment policies should be "offender-specific" and tailored to the offender's particular offense.[38] Neither the NIJ Study nor the Senate Staff Analysis suggests any reason why the prohibition against sexually stimulating material should be tailored to the offense, but the prohibition against obscenity and pornography should not.

Because the meaning of the statute is not clear from its language *or* from its legislative history, the rule of lenity applies.[39] The statute should therefore be narrowly construed, in favor of the accused.[40]

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[37] NIJ Study.
[38] NIJ Study; Burt Report 7.
[39] *See* § 775.021(1), Fla. Stat. (1999). *See also State v. Byars*, 823 So. 2d 740, 742 (Fla. 2002); *Cabal v. State*, 678 So. 2d 315, 318 (Fla. 1996).

CONCLUSION

For the foregoing reasons, we respectfully request this Court to grant discretionary review based on the express and direct conflict between the district court's opinion and *Taylor*.

Respectfully submitted,
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[40] *See Wallace v. State*, 860 So. 2d 494, 497-98 (Fla. 4th DCA 2003) (holding that if there is a reasonable construction of a statute that favors an accused, a court must apply that interpretation).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by hand to Michael Hantman, Office of the Attorney General, Counsel for the State of Florida, 444 Brickell Avenue, Suite 650, Miami, FL 33131, on January 26, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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