IN THE SUPREME COURT OF FLORIDA

DONALD DEAN KASISCHKE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____ /

Case No. SC07-128

ON PETITIONER FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **DONALD DEAN KASISCHKE**, petitions for discretionary review of a decision of the Third District Court of Appeal which affirmed a trial court order revoking Petitioner's community control. *Kasischke v. State*, 946 So. 2d 1155 (Fla. 3d DCA 2006). (Appendix 1). Petitioner, was the appellant in the district court. Respondent, THE STATE IF FLORIDA, was the appellee. In this brief, the parties will be referred to by their proper names. The symbol "R." refers to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Donald Dean Kasischke, a fifty-four year old man with a Ph.D. degree, solicited a fifteen year old boy for sex. Kasischke offered the boy forty dollars to allow him to perform oral sex on the boy. Kasischke

> took the boy to a park where, behind the bushes, he unzipped the boy's pants and performed oral sex on the victim until the boy ejaculated in the [Kasischke's] mouth. Additionally, [Kasischke] masturbated in the boy's presence.

Kasischke v. State, 946 So. 2d 1155, 1156 (Fla. 3d DCA 2006). Based on this incident, the State, on July 28, 2000, charged Kasischke with three counts of lewd and lascivious assault on a child (Counts 1-3), and three counts of lewd and lascivious exhibition on a child under sixteen years (Counts 4-6). (R. 25-30). On August 3, 2001, Kasischke appeared before the trial court for a plea hearing. (R. 423-443). At that time, Kasischke entered a guilty plea to the charges, (R. 434)[1], in exchange for a sentence of 364 days in jail followed by two years of community control followed by eight years of probation with a special condition that he successfully completes the Mentally Disordered Sexual Offender Program. (R. 442).[2] As part of the plea agreement, the court granted Kasischke a furlough and

[1] Kasischke admitted his guilt as to Count 1 but claimed that the plea as to the remaining counts was a plea of convenience. (R. 437-439).
[2] The plea agreement was reduced to writing. (R. 219-223).

sentenced him to a total of sixty years in prison to be mitigated upon his return from the furlough as agreed. (R. 441-442). The court entered judgment and sentence in accordance with the plea agreement. (R. 106-111). Kasischke returned from his furlough as agreed and the court entered the order mitigating his sentence. (R. 112).

Kasischke signed the Order of Supervision on October 5, 2001. (R. 119). Paragraph III, of that order, titled "SEX OFFENDER STANDARD CONDITIONS", provides, in part:

> (g) unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, you shall not view, own or possess any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to your deviant behavior pattern.

(R. 118).[3]

On December 16, 2003, the State filed an Affidavit of Violation of Community Control against Kasischke alleging that he violated condition III(g) of the Order of community Control. (R. 193-196). The affidavit alleged that "obscene, pornographic, or sexually stimulating pictures" were found in Kasischke's possession during an administrative search of his home on December

[3] These "Sex Offender Standard Conditions" of community control are required by section 948.03(5)(a), Fla. Stat. (1999). The statute has been renumbered and is now section 948.30(1)(g), Fla. Stat. (2006).

3, 2003. (R. 193). The affiant stated that the search was conducted as a result of a report by Palm Beach Community College that Kasischke had been viewing pornography on the school computers. (R. 195). The affidavit stated that the offending materials found in Kasischke's possession included photographs depicting "young nude black males", and a videotape containing males performing "what appeared to be sexual acts on themselves and on each other." (R. 195). Kasischke denied violating his community control.

The community control violation hearing commenced on July 23, 2004. (R. 351). The evidence adduced at that hearing established the following:

Community Control Officer Vierra began supervising Kasischke in October 2003. (R. 357, 358). At that time, Vierra reviewed with Kasischke the conditions of his supervised release and he told her that he understood the conditions and he signed the form evidencing his understanding of his obligations. (R. 358-361). Ms. Vierra knew that Mr. Shatterfiled, Kasischke's first community control officer, had informed him of the conditions of his supervised release prior to October 2003. (R. 361-362). She testified that Mr. Shatterfiled had visited Kasischke's home and found some pornographic magazines. (R. 357-358). At that time, Shatterfiled told Kasischke that he was prohibited from possessing such materials. (R. 358). Ms. Vierra assisted in the administrative search of Kasischke's home. (R. 364-365).

She found three photographs of nude young males that appeared to have been downloaded off a computer. (R. 365).

On cross-examination, Ms. Vierra testified that she did not have any discussions with Kasischke's therapist regarding his deviant behavior pattern when she reviewed the conditions of supervised release with him. (R. 369). She testified that she did not make any attempt to determine the nature of Kasischke's deviant behavior pattern. She testified that she could not determine from the photographs the age of the nude males depicted in the photographs. (R. 369). She testified that she considered the photographs obscene. (T. 370). She conceded that the males depicted in the photographs were not engaged in any kind of physical activity. (R. 371).

Detective Wood impounded the videotape that was found at Kasischke's home. (R. 376-377). He viewed the tape and found that it appeared to contain pornography. (T. 379). Kasischke admitted to Detective Mark that he had been viewing pornography online about two hours before the search. (R. 381). Pornographic photographs were recovered from Kasischke's computer. (R. 387). On cross-examination, the detective testified that Kasischke admitted to viewing young teenagers, "14, 16" year olds. (R. 391). The subjects depicted in the photographs appeared to be young and the detective could not say that they were not obviously teenagers. (R. 391). The detective testified that Kasischke did not

explicitly admit to viewing child pornography but that his admission in fact amounted to a confession to viewing child pornography. (R. 391-392). He testified that he did not know whether Kasischke was confused about what materials would be considered pornography under the terms of his probation but that he appeared confident that whatever was found in his home would be permissible. (R. 392).

Officer Sherard found a pornographic videotape in a drawer in a cupboard in Kasischke's kitchen. (R. 399-400). The videotape was admitted into evidence. (R. 403). There were other non-pornographic videotapes found near the video player in Kasischke's home. (R. 400).

Defense counsel argued that the State did not prove a willful and substantial violation of community control because there was no evidence of Kasischke's "deviant behavior pattern." (R. 406-407). Defense counsel argued that the videotape depicted "one mature gentleman and somebody who was obviously younger than him, not touching each other." (R. 407). He argued that even if the videotape is considered pornographic, it was not indicative of any deviant behavior and there was no evidence that Kasischke found it sexually stimulating. (R. 407, 409). Defense counsel argued that Kasischke was obviously confused as to what constituted pornography and that his confusion precluded a finding of a willful

violation. (R. 408). Defense counsel argued further that Kasischke did not have fair warning of exactly what behavior was prohibited. (R. 409).

At the conclusion of the hearing the court made the following findings:

> I think the State has met its burden of proof. This is a violation of probation hearing. It's the greater weight of the evidence. Okay. I find that this violation is willful. I find it's substantial. I find that anyone reading paragraph 3G, it says specifically any obscene pornographic or sexually stimulating visual or auditory material, whether you read it in conjunction or separately, however you want to read it, with regard to deviant behavior.
>
> Further, when he was in, according to the testimony, he was at the Palm Beach Community College he was concerned, put on notice that what he was doing was considered wrong by somebody, because he was asked to leave. So he was put on notice, once again, that that behavior was not the type of behavior that was appropriate.

(R. 412). The court entered the written Order of Revocation of Community Control. (R. 919). That order reflects that Kasischke violated his community control by viewing, owning or possessing "obscene, pornographic, or sexually stimulating" pictures, videotape and pictures on his personal computer. (R. 419). The court sentenced Kasischke to five (5) years imprisonment followed by two (2) years of community control followed by eight (8) years probation with the sexual offender probation. (R. 416).

Kasischke appealed his conviction to the Third District Court of Appeal. (R. 6, Tab A). In support of his appeal, Kasischke claimed that the trial court erred in

finding that he violated his community control because he did not possess any pornographic material that was relevant to his deviant behavior pattern. He argued that his offence consisted of "fellatio on, and masturbation in front of, a boy aged 15 or under [,]" (R. 6, Tab A, p. 9), and that he did not possess any material relating to fellatio on, and masturbation in the presence of an underaged boy. (R. 6, Tab A, p. 12). He argued further that even if he was prohibited from possessing the pornographic materials, he did not willfully violate his probation because he reasonably believed that the materials did not violate his probation. (R. 6, Tab A, p. 18-20).

In response, the State argued that Kasischke's possession of any pornographic material violated his community control. (R. 6, Tab B, p. 11-16). The State argued further that the requirement that the prohibited materials be relevant to the deviant behavior pattern refers only to "telephone, electronic media, computer programs, or computer services," and did not apply to "obscene, pornographic, or sexually stimulating visual or auditory material." ((R. 6, Tab B, p. 18-21).

In his reply brief, Kasischke took issue with the State's argument that he was prohibited from possessing or viewing any pornography. He argued that he was only prohibited from possessing or viewing child pornography. He agued further that the State's construction of the paragraph would lead to an absurd result. He

noted that if the requirement that the pornography be relevant to the deviant behavior pattern referred only to computer images, a probationer could view pornography that was not relevant to his deviant behavior pattern in a magazine. (R. 6, Tab. C, p. 5). He argued that under the principal of lenity, any ambiguity in the prohibition should be construed in his favor. (R. 6, Tab. C, p. 5). Kasischke argued lastly, that he did not violate his community control because the pornographic materials found in his home were computer images or videotape and that they qualify as "electronic media or computer program services" and therefore had to be relevant to his deviant behavior pattern. (R. 6, Tab. C, p. 5-7).

On December 20, 2005, the Third District issued its opinion agreeing with Kasischke that the prohibited pornographic material must be relevant to his deviant behavior pattern. *Kasischke v. State,* 31 Fla. L. Weekly D7 (Fla. 3d DCA Dec. 20, 2005)[4]. The court, citing *Taylor v. State*, 821 So. 2d 404 (Fla. 2d DCA 2002) and *Ertley v. State*, 785 So. 2d 592 (Fla. 1st DCA 2001), held that the statute, Section 948.30(1)(g), Florida Statutes, mandates that the prohibited pornographic material be relevant to the defendant's deviant behavior pattern and that to hold otherwise would effectively rewrite the statute by stripping it of some of its language. *Kasischke v. State*, 31 Fla. L. Weekly at D7. The court found that because the

[4] Opinion withdrawn and rehearing en banc granted, June 9, 2006.

State presented no evidence of the ages of the subjects of the pornographic materials, it did not prove that Kasischke violated his community control.

The State filed for rehearing and rehearing *en banc*. The court granted rehearing en banc and withdrew the opinion. (R. 498-499). The parties filed supplemental briefs. In his supplemental brief, Kasischke essentially argued the position taken by the panel decision, that the pornographic material must be relevant to the deviant behavior pattern. (R. 6, Tab D). He argued that "relevant to the offender's deviant behavior pattern" limits the types of prohibited obscene material to those that are reasonably related to the probationer's offense. (R. 6, Tab D, p. 9-18). The State, in its supplemental brief, argued, *inter alia*, that in Kasischke's case, if "relevant to the offender's deviant behavior pattern" refers only to child pornography, the condition would be redundant as possession of child pornography is illegal. The State argued further that it did not have to prove the age of the actors in the pornographic material, it needed to show to the court only that they appeared to be underaged. (R. 6, Tab E, p. 16-22).

The parties filed supplemental memoranda briefs in response to the court's inquiry regarding the proper interpretation of section 948.03(5)(a)(7), Florida Statutes (1999), in light of its legislative history. In his brief, Kasischke argued that the legislative history of the statute suggests that "relevant to the offender's deviant behavior pattern" was intended to apply to all pornographic materials because the

legislature intended to tailor the community control to the offender's specific needs. (R. 6, Tab F, p. 2-15). The State argued that the legislative history indicated that the legislature intended that "relevant to the offender's deviant behavior pattern" apply only to telephone, electronic media, computer programs, or computer services because, prior to the addition of that language, the statute had prohibited the possession of any pornographic material. The State argued that with the legislature's pattern of increasing restrictions on sexual offenders, it would be somewhat inconsistent for the legislature to permit pornographic material that was prohibited prior to the amendment. (R. 6, Tab G, p. 2-7).

The original panel of the Third District subsequently issued the opinion under review. The court noted that "[t]he language of section 948.03(5)(a)7, as currently written, is undeniably susceptible of multiple and irreconcilable interpretations." *Kasischke v. State*, 946 So. 2d at 1157. Recognizing that the statute is ambiguous, the court looked to the legislative history for guidance. *Id.* at 1158. The court concluded that the statute had prohibited the possession of obscene or pornographic materials prior to the amendment adding the "relevant to the offender's deviant behavior pattern" language, and that there is nothing in the legislative history of the amendment that suggests that the legislature intended to modify the complete ban on obscene and pornographic materials. *Id.* at 1159. The court, then, agreed with the State that Kasischke was prohibited from possessing

any pornographic material and that the trial court did not abuse its discretion in violating his community control. *Id.* at 1161.

Kasischke petitioned this Court for review. In his Brief on Jurisdiction, Kasischke argued, as the basis for the exercise of this Court's discretionary jurisdiction, that the decision below is in express and direct conflict with the decision from the Second District Court of Appeal in *Taylor v. State*, 821 So. 2d 404 (Fla. 2d DCA 2002). This Court granted Kasischke's petition for discretionary review by order entered on April 20, 2007.

ISSUE PRESENTED

WHETHER SECTION 948.03(5)(a), FLORIDA STATUTES (1999) PROHIBITS A PROBATIONER OR A COMMUNITY CONTROLLEE FROM VIEWING, OWNING, OR POSSESSING ANY PORNOGRAPHIC MATERIAL.

STANDARD OF REVIEW

Statutory interpretation is a question of law subject to de novo review. *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001). The Court's purpose in construing a statute is to give effect to the Legislature's intent. *State v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002). The language used in the statute is the first guide to ascertaining legislative intent. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). If the statutory language is unclear, rules of statutory construction is applied, including the exploration of the legislative history, to determine legislative intent. *Id*

SUMMARY OF ARGUMENT

Section 948.03(5)(a), Florida Statutes prohibits a probationer or community controllee from viewing, owning, or possessing any pornographic material. In construing the statute, the Third District first determined that the language of the statute is susceptible of differing interpretations. The court then looked to the legislative history of the amendment which added the "relevant to the deviant behavior pattern" language. The court determined that there was nothing in the legislative history of the amendment indicating that the Legislature intended to alter the existing ban on all obscene and pornographic materials.

The rule of lenity is inapplicable in this case because the resort to the legislative history resolved the ambiguity in the statute. Further, Kasischke's due process rights were not violated because his possession of the pornographic videotape is clearly within the scope of the statute. Kasischke therefore was on notice that his conduct violated his community control. And, the Third District's interpretation of the statute is consistent with the legislative intent to restrict sex offenders' exposure to sexually stimulating materials.

The evidence adduced at the revocation hearing amply supports the trial court's finding that Kasischke willfully violated his community control by possessing the pornographic material. Kasischke knew that he was prohibited

from possessing such materials because his community control officers told him that he was not permitted to have pornographic materials.

Lastly, this Court should dismiss this case for lack of jurisdiction because the decision below is not in conflict with the decision from the Second District.

ARGUMENT

I. SECTION 948.03(5)(a)(7), FLORIDA STATUTES (1999) PROHIBITS A PROBATIONER OR A COMMUNITY CONTROLLEE FROM VIEWING, OWNING, OR POSSESSING ANY OBSCENE OR PORNOGRAPHIC MATERIAL.

In the decision below, the Third District held that section 948.03(5)(a)(7), Florida Statutes (1999), prohibits a community controllee from possessing any pornographic material. In arriving at its conclusion, the Third District first looked to the plain language of the statute. Section 948.03(5)(a)(7), provides:

> 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 stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.

Id. The Third District concluded that the language of the statute "as currently written, is undeniably susceptible of multiple and irreconcilable interpretations." *Kasischke v. State,* 946 So. 2d at 1157-1158. It noted that the statute could be read as 1) "imposing a complete ban on 'any' form of obscene, pornographic or sexually stimulating material, including the listed material"; 2) "requiring all prohibited material to be 'relevant to the offender's deviant behavior pattern" and; 3) "imposing a complete ban on obscene and pornographic material but with the

limitation that, with respect to 'sexually stimulating visual or auditory material,' such material 'must be relevant to the offender's deviant behavior pattern.'" *Id* at 1158. The court concluded that because the statute is subject to these differing interpretations, it must look beyond the face of the statute to determine what the legislature intended. *Id*. Consequently, the court looked to the historical record of the statute and to the legislative history of the specific provision at issue.

The statute was first enacted in 1995. It provided, in parts:

> (1) Effective for probationers or community controllees whose crime was committed on or after October 1, 1995, and who are placed under supervision for violation of … s. 800.04 …the court must impose the following conditions in addition to all other standard and special conditions imposed:
>
> ….
>
> (g) 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.

Ch. 95-283 § 59, Laws of Florida, effective June 15, 1995.[5] The Third District found that the statute, as first enacted, imposed a total ban on "viewing, owning, or possessing 'any' obscene, pornographic, or sexually explicit material." *Kasischke v. State*, 946 So. 2d at 1158.

The court then looked to the legislative history of the 1997 amendment to the statute. *Id*. The language at issue, "relevant to the offender's deviant behavior

[5] *See* § 948.03(g), Fla. Stat. (1995).

pattern", was added to the statute by the 1997 amendment. That amendment provided:

> 7.~~(g)~~ 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 stimulating visual or auditory ~~explicit~~ material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.
>
> ch. 97-308, § 3, at 5520, Laws of Fla.[FN4]
>
> FN4. Words ~~stricken~~ are deletions and words underlined are additions.

Kasischke v. State, 946 So. 2d at 1158. The Third District found that the Senate Staff Analysis and Economic Impact Statement stated that the amendment would "clarify the condition of probation, community control and conditional release that prohibits the possession, viewing, or use of '*sexually 'explicit'* material to be sexually stimulating visual or auditory material that would include telephone, … that are relevant to the offender's deviant behavior." *Id.* [6] The Third District found further, that the stated purpose of the bill which proposed the amendment included "revising a provision that prohibits a sex offender from viewing, owning, or possessing certain materials; [and] prohibiting a sex offender from possessing

[6] Citing, Fla. S. Comm. On CJ, CS for SB 1930 (1997) Staff Analysis at 8 (final Apr. 8, 1997) (on file with Florida State Archives).

telephone, …., that are relevant to the offender's behavior pattern." *Id.* at 1158-1159, citing Ch. 97-308 at 5515, Laws of Florida.

The court noted that the amendment was based, in part, on the results of a study of the management of sexual offenders on supervised release into the community funded by the National Institute of Justice (NIJ). *Kasischke v. State*, 946 So. 2d at 1159.[7] The court cited to the following portions of the report of that study:

> '[M]any sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend.' … This study points out that 'deviant thoughts and fantasies by sex offenders are precursors to sexual assault and therefore, are an integral part of the assault pattern.' The report recommends that certain probation conditions are essential to reduce the opportunities of reoffense, to protect the victims and to safeguard the general public.

Id. (footnote and citations omitted)

The Third District concluded that the legislative history of the 1997 amendment and the historical record of the statute show that the legislature did not intend to alter the complete ban on obscene and pornographic materials. *Id.* The court held, then, that "relevant to the offender's deviant behavior pattern" relates

[7] Referring to Kim English, *et al., Managing Adult Sex Offenders in the Community-A Containment Approach*, NIJ Research in Brief, Jan. 1997.

only to "sexually stimulating…material" and did not apply to "obscene" or "pornographic." *Id.*

II. KASISCHKE'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE REVOCATION OF HIS PROBATION

Kasischke claims that the violation of his community control based on his possession of the pornographic videotape violated his due process rights because he thought that he was only prohibited from viewing pornography that is relevant to his offense, and not all pornography. Relying on *United States v. Lanier,* 520 U.S. 259, 265-67 (1997), he argues that the statute is so unclear that "probationers do not have fair notice of what constitutes acceptable behavior and prohibited behavior." (Petitioner's Brief on the Merits at p. 12). Kasischke argues further that, as noted by the Third District, the statute is susceptible of at least three different interpretations, and that as such, it should be construed in his favor; i.e., the prohibited pornographic material must be relevant to his particular offense. He argues further that if this Court determines that the lower courts correctly interpreted the statute, that that interpretation should be applied prospectively only, so that those who reasonably misunderstood the statute are not punished due to its vagueness. Interestingly, Kasischke concedes that the statute is not void for

vagueness as it can be, and was, construed in a manner to uphold its constitutionality. (Petitioner's Brief on the Merits at p. 16).

As a preliminary matter, Kasischke has no standing to raise this due process argument because he had actual knowledge that his possession of pornography was prohibited. A statute will not be held void for vagueness if the person challenging it had sufficient warning that his own conduct was unlawful. *See United States v. Mazurie*, 419 U.S. 544, 550 (1975), *United States v. Powell*, 423 U.S. 87, 92, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975). Ms. Vierra testified that she knew that Mr. Shatterfiled, Kasischke's first community control officer, had informed him of the conditions of his supervised release prior to October 2003. (R. 361-362). She testified that Mr. Shatterfiled had visited Kasischke's home and found some pornographic magazines. (R. 357-358). At that time, Shatterfiled told Kasischke that he was prohibited from possessing such materials. (R. 358). Kasischke therefore had ample warning that he was prohibited from possessing the pornographic videotape.

In the opinion under review, the Third District noted that "[a]s no due process claims were raised below, we do not address this issue on appeal." *Kasischke v. State,* 946 So. 2d at 1160, fn 6. Kasischke now claims that the Third District erred in finding that he did not raise the due process issue in the trial court because his counsel in fact made the argument at the revocation hearing.

Kasischke misunderstands the due process claim to which Third District referred. Immediately prior to the statement that Kasischke raised no due process claims in the trial court, the Third District cited to two cases, *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002) and *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001), standing for the proposition that a complete ban on "any" and "all forms" of pornography provides inadequate notice of what is prohibited. In the trial court, Kasischke argued that because the statute is subject to differing interpretations, including his interpretation of it, the violation of his community control violated his right to due process. Kasischke's due process argument, then, is quite different from the due process claim that the Third District noted was not raised in the trial court. *See Trushin v. State*, 425 So.2d 1126, 1130 (Fla. 1982) (holding that challenge to constitutionality of statute as applied must be raised in the trial court).

Kasischke's due process argument is based on his contention that because the language of the statute is susceptible of differing interpretations, including his interpretation of it, he did not have fair warning that his conduct in possessing the pornographic videotape would violate the terms of his community control. He claims that the Third District should have applied the rule of lenity and construed the statute in his favor, i.e, adopt his construction of it. The Third District's failure to apply the rule of lenity to construe the statute in Kasischke's favor was not error because the statute is not ambiguous.

The fair warning requirement is derived from the Due Process Clause which mandates that a criminal statute describe each offense with sufficient clarity to give persons of ordinary intelligence fair notice that the contemplated conduct is illegal. *See United States v. Harriss*, 347 U.S. 612, 617 (1954). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 … (1926); accord *Kolender v. Lawson*, 461 U.S. 352, 357… (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, … (1939). Second, as a sort of "junior version of the vagueness doctrine," [co], the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *See, e.g., Liparota v. United States*, 471 U.S. 419, … (1985); *United States v. Bass*, 404 U.S. 336, 347-348, … (1971); *McBoyle* [*v. United States*, 283 U.S. 25, 27 (1931)]. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, *see, e.g., Bouie*[*v. City of Columbia*, 378 U.S. 347, 357-359 (1964)]; *Kolender, supra*, 461 U.S. at 355-356; *Lanzetta, supra*, 306 U.S. at 455-457… due process

> bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, *see, e.g., Marks v. United States*, 430 U.S. 188, 191-192, … (1977); *Rabe v. Washington*, 405 U.S. 313, … (1972); *Bouie, supra*, 378 U.S. at 353-354 (Ex Post Facto Clauses bar legislatures from making substantive criminal offenses retroactive). In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

United States v. Lanier, 520 U.S. 259, 266-267 (1997).

In applying the three "manifestations" to the case at bar, Kasischke clearly had fair warning that his possession of the pornographic videotape violated his community control. The first "manifestation" is not at issue because, as noted above, Kasischke concedes that the statute is not unconstitutionally vague. The second "manifestation", the rule of lenity also is not at issue because the statute is not ambiguous.

The rule of lenity mandates that any "grievous ambiguity" in a criminal statute be construed in the defendant's favor. *See United States v. Lanier,* 520 U.S. at 266. "The simple existence of some statutory ambiguity, however, is not sufficient to warrant applications of that rule, for most statutes are ambiguous to some degree." *Muscarello v. United States,* 524 U.S. 125, 138-139 (1998). *See also Rose v. Locke*, 423 U.S. 48, 49-50 (1975)("Many statutes will have some inherent vagueness, for 'in most English words and phrases there lurk

uncertainties.'")(citation omitted). The rule of lenity "applies only if, after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 65 (1995). *See also, United States v. Shabani*, 513 U.S. 10, 17 (1994)("The rule of lenity however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute."), *Dixson v. United States*, 645 U.S. 482, 491 (1984)("If the legislative history fails to clarify statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.").

The Third District, after recognizing that the statute is ambiguous, resorted to traditional canons of statutory construction and resolved the ambiguity. The court looked to the historical record of the statute and to the legislative history of the amendment and resolved the ambiguity. The court found that as originally enacted, the statute imposed a ban on all pornographic and obscene materials and that the legislative history of the amendment showed that the legislature did not intend to alter the pre-existing ban on all pornographic and obscene materials when it amended the statute in 1997. *Kasischke v. State*,946 So. 2d at 1159. Since the purported ambiguity in the statute was resolved by the legislative history, the rule of lenity does not apply in the instant case because the statute is not ambiguous.

The third "manifestation" prohibits the application of a "novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. at 266. This "manifestation" is not at issue because Kasischke's possession of the pornographic videotape is clearly within the scope of the statute. Further, as stated above, Kasischke's community control officer in fact told him that he was prohibited from possessing pornographic materials. Kasischke ignored his community control officer's warning and proceeded under his own construction of the statute; he proceeded at his own peril. *See Smith v. United States*, 508 U.S. 223, 239 (1993)("The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable.").

III. THE THIRD DISTRICT COURT'S CONSTRUCTION OF THE STATUTE IS CORRECT.

Kasischke contends that, in applying the rules of grammar to aid in construing the statute, his construction of the statute, that "relevant to his deviant behavior pattern" applies to pornographic and obscene materials as well as to sexually stimulating materials, is "the most logical reading, and one most in line with common understanding and practice[.]" (Petitioner's Merits Brief at p. 17). He argues that the Third District's holding, that "relevant to his deviant behavior

pattern" modifies "sexually stimulating material" but not "obscene" and "pornographic" is grammatically unsound because "obscene", "pornographic" and "sexually stimulating" are all adjectives. He claims that "material" is the noun and that "obscene", "pornographic" and "sexually stimulating" modifies "material." His argument continues that because "material" is the noun it is qualified by anything that comes after it, i.e., "including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern." (Petitioner's Merits Brief at p. 18).

The law is well settled that the court's purpose in construing a statute is to give effect to legislative intent. *See e.g., State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001). When determining legislative intent, courts first consider the plain meaning of the language used in the statute. *Clines v. State*, 912 So. 2d 550, 555 (Fla. 2005). "When the language is unambiguous and conveys a clear and definite meaning, that meaning controls unless it leads to a result that is either unreasonable or clearly contrary to legislative intent." *Tillman v. State,* 934 So. 2d 1263, 1269 (Fla. 2006). "However, if the statutory intent is unclear from the plain language of the statute, then 'we apply rules of statutory construction and explore legislative history to determine legislative intent.' *Koile v. State,* 934 So. 2d 1226, 1231 (Fla. 2006), citing *BellSouth Telecommunications, Inc. v. Meeks,* 863 So. 2d 287, 289 (Fla. 2003).

In the instant case, the Third District first considered the plain language of the statute and determined that as written, it "is undeniably susceptible to multiple and irreconcilable interpretations." *Kasischke v. State,* 946 So. 2d at 1157. Indeed, Kasischke's first argument is premised on the fact that the statute is susceptible of these multiple interpretations. Now, however, he argues that the Third District's interpretation is unsound because it ignores the grammatical construction of the statute. In essence, then, his argument is that properly considered, the statute is unambiguous and conveys a clear and definite meaning, that the prohibited material must be relevant to the offender's deviant behavior pattern. (Petitioner's Merits Brief at p. 17). Kasischke clearly cannot take these inconsistent positions, the statute is either unambiguous or it is ambiguous

Having determined that the statute is ambiguous, the Third District properly applied the rules of statutory construction and looked to the legislative history. *Koile v. State, supra*. It determined that the legislative history did not indicate that the legislature intended to alter the existing ban on obscene and pornographic materials. The court then construed the statute to give effect to the legislative intent. It held that "relevant to his deviant behavior pattern" modifies "sexually stimulating material" but not "obscene" and "pornographic". *Kasischke v. State*, 946 So. 2d at 1159. Since legislative intent is the guiding principle in statutory

construction, the grammatical construction of the interpretation is not determinative.

Kasischke's construction of the statute, that the obscene and pornographic material must relate to his offense, is contrary to this legislative intent as it alters the existing ban on obscene and pornographic materials by permitting materials that would have been prohibited before the amendment. Under his interpretation of the statute, the only obscene and pornographic materials that are off limits to him are those depicting underaged boys. Since possession of such materials is unlawful under any circumstances, that condition would not apply to him, or any pedophile for that matter. Further, if the legislature intended to prohibit only obscene and pornographic materials that are relevant to the offender's deviant behavior pattern, it could have accomplished that goal by prohibiting only sexually stimulating material. This is so because obscene and pornographic materials depicting a particular deviant behavior pattern is doubtless sexually stimulating to a person with that particular sexual deviancy. Sexually stimulating then, of necessity, would also include obscene and pornographic. Kasischke's construction, then, is contrary to logic and common sense. A statute should not be interpreted in such a manner as to lead a result that is either unreasonable or clearly contrary to legislative intent. *Tillman v. State,* 934 So. 2d at 1269.

IV. THE DISTRICT COURT'S ASSESSMENT OF THE LEGISLATIVE HISTORY OF THE STATUTORY AMENDMENT WAS CORRECT.

In Argument III, Kasischke contends that the legislative history of the statute is ambiguous and that the Third District found the clear meaning by "cherry-picking" the legislative history. (Petitioner's Merits Brief at p. 21). He claims that a "more balanced assessment" of the legislative history reveals that the legislature intended to "tailor containment policies for sex offenders" to the specific deviant behavior pattern of the sex offender. Thus, he concludes, the only logical reading of the statute is to apply the "relevant to the deviant behavior pattern" to all of the prohibited materials. He argues further that because the legislative history is ambiguous, he should get the benefit of the ambiguity by a construction in his favor.

The legislative history of the 1997 amendment to the prohibition on all obscene, pornographic or sexually stimulating materials is, of course, not ambiguous. As the Third District noted, the amendment was based, in part, on the results of a study of the management of sexual offenders on supervised release into the community funded by the NIJ. *Kasischke v. State,* 946 So. 2d at 1159. *See* U.S. Department of Justice, National; Institute of Justice, *Managing Adult Sex Offenders in the Community- A Containment Approach*, (Research in Brief) (January 1997) ("NIJ"). (R. 462-475). The results of that study revealed the

alarming rate of recidivism for sex offenders and the alarming increase in the number of sex offenders. *Id*. at p. 2-3. That study noted that "the public's awareness of sex offenders is increasing and often manifested in outrage at particularly heinous sexual assaults, especially those committed by offenders under community supervision. In many States, victim and family outrage is fueling legislation requiring registration of convicted sex offenders with law enforcement agencies, and enactment of community notification and sexual predator laws." *Id.* at p. 4.

The study revealed the dangers of permitting sex offenders to possess, view, or own pornography:

> Research reveals that deviant thoughts and fantasies by sex offenders are precursors to sexual assault and, therefore, are an integral part of the assault pattern.
>
> By instilling in offenders the dictum that deviant attitudes and fantasies reinforce deviant behavior and are not acceptable, treatment providers and supervising officers are prepared to intervene B set limits B at the incipient stages of reoffending patterns. Although such thoughts and feelings are not crimes, they are signals that constitute good reasons B based on empirical research and clinical experience B to increase supervision and Atighten the reins@ on an offender.

Id. at 7. Further, the study revealed the importance of treating, managing, and supervising sex offenders differently from other criminals. As this study holds, there is an inherent danger in permitting sex offenders from holding deviant

attitudes and fantasies. Treatment providers and officers must set limits in order to curtail such thoughts and feelings.

Against this backdrop, it is simply inconceivable that the Legislature would lessen control over the sex offenders by permitting them access to any obscene and pornographic material. In fact, over the last decade, the Legislature has repeatedly and consistently strengthened sexual offender laws and penalties. In 1996, the Legislature amended Florida Statutes § 775.21, significantly strengthening that statute by providing steeper penalties for failure to register as Sexual Predators and barring Sexual Predators from employment at places where children typically congregate such as day care centers, schools, parks and playgrounds. In 1999, the Jimmy Ryce Act, codified at Florida Statutes § 394.910, provided for the involuntary civil commitment of sexually violent predators upon their release from prison or other confinement. In 2001, the amendment to Florida Statutes § 90.404 permitted for the first time the admission at trial of evidence of a defendant's commission of other acts of child molestation against a defendant charged with child molestation. The Third District's conclusion that the Legislature did not intend to alter the existing prohibition on obscene and pornographic materials is consistent with the NIJ's findings, and with the Legislature's pattern over the last decade of increasing constraints on sexual offenders.

V. THE EVIDENCE ADDUCED AT THE COMMUNITY CONTROL REVOCATION HEARING AMPLY SUPPORTS THE TRIAL COURT'S FINDING THAT KASISCHKE VIOLATED HIS COMMUNITY CONTROL.

Kasischke next argues that he did not violate his community control. He claims that none of the materials found in his home were prohibited. He argues that although "few" of the material "are arguably pornographic" because they did not depict sex with children they were not related to his deviant behavior pattern and therefore did not violate his community control. This argument is based on Kasischke's claim that the prohibited pornographic material must relate to his deviant behavior pattern. However, as argued above, Kasischke was prohibited from viewing or possessing any obscene or pornographic material.

Further, "[t]he trial court has broad discretion to determine whether there has been a willful and substantial violation of a term of probation and whether such a violation has been demonstrated by the greater weight of the evidence." *State v. Carter*, 835 So. 2d 259, 262 (Fla. 2002). The standard of review by an appellate court is abuse of discretion. *Id*. The Third District held that because Kasischke was prohibited from viewing, owning or possessing any pornographic material, his possession of the pornographic videotape violated his community control. The court held that the trial court therefore did not abuse its discretion in violating

Kasischke's community control. *Kasischke v. State*, 946 So. 2d at 1161. The evidence adduced at the revocation hearing supports the lower court's holding.

At the revocation hearing, defense counsel argued that even if the videotape is considered pornographic, it was not indicative of any deviant behavior. (R. 407, 409). The State argued that the videotape was pornographic and depicted two individuals appearing to be fourteen to seventeen years old. (R. 405). The age of the actors in the pornographic videotape then, was debatable. Age, like any element of an offense may be proved through circumstantial evidence. *See State v. Castillo*, 877 So. 2d 690 (Fla. 2004)(*quoting Moorman v. State*, 25 So. 2d 563, 564 (Fla. 1946) ("It is too well settled to require citation to authorities that any material fact may be proved by circumstantial evidence, as well as by direct evidence."). The trial court viewed the videotape. The trial court therefore was in the best position to determine whether the possession of the pornographic videotape violated the conditions of Kasischke's community control. It so found, and the appellate court found that the trial court did not abuse its discretion in doing so.

VI. KASISCHKE'S VIOLATION OF HIS COMMUNITY CONTROL WAS WILLFUL.

Lastly, Kasischke argues that he reasonably believed that the prohibited pornographic material must relate to his deviant pattern of behavior, therefore, his possession of the pornographic material was not a willful violation of his community control. He argues that even if his community control officer told him that he was not permitted to possess pornographic materials, he was justified in ignoring the officer's admonishment because "only a court may set the conditions on which probation may be revoked." (Petitioner's Merits Brief at p. 34). As argued above, however, the Third District's interpretation of the statute was ascertainable form the face of the statute. Consequently, Kasischke was on notice at least of that possible interpretation. He community control officer told him that he was not permitted to possess any pornography. His argument now, that he was at liberty to ignore his community control officer's warning, is entirely consistent with the NIJ's finding that sexual offenders are skillful manipulative people. It notes that "[t]he skills used to manipulate victims have also been employed to manipulate criminal justice officials." NIJ at p. 3.

VII. THIS COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION.

In his Jurisdictional Brief, Kasischke argued that the decision below is in "express and direct conflict with the Second District's decision in *Taylor [v. State*, 821 So. 2d 404 (Fla. 2d DCA 2002)]." (Petitioner's Brief on Jurisdiction at p. 5). However, the Third District's decision is not in conflict with the decision in *Taylor*. Kasischke and Taylor were in procedurally different positions. Kasischke had violated his probation and claimed as his defense that he did not know that "relevant to the deviant behavior pattern" applies to obscene and pornographic materials. Taylor, however, was appealing the order imposing the probation. He claimed that the order violated his constitutional rights because it was not specific as to his particular deviant behavior. *Id.* at 405. The Second District agreed with Taylor, that the condition of probation prohibiting him from viewing, owning, or possessing obscene, pornographic, or sexually stimulating materials should be specific and relate to Taylor's particular deviant behavior pattern. *Id.* at 405-406. The Second District did not hold that the "relevant to the deviant behavior pattern" applies to obscene and pornographic materials. The decisions are not in conflict. This Court should therefore dismiss the case for lack of jurisdiction..

CONCLUSION

Based on the foregoing, the Third District's construction of the statute should upheld and the revocation of Kasischke's community control affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits was mailed this 9th day of July 2007 to Thomas Regnier, Assistant Public Defender, 1320 N.W. 14 Street, Miami, Florida 33125.

_____
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CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney certifies that the foregoing Answer Brief of Respondent on the Merits has been typed in Times New Roman, 14-point type.

_____
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