IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC07-128**
Lower Court Case No. 3D 04-2149

DONALD DEAN KASISCHKE,
Petitioner,

-vs.-

THE STATE OF FLORIDA,
Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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May 14, 2007

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ISSUE ON APPEAL

The rule of lenity requires that ambiguous penal statutes be construed in favor of the accused. The Third District found that a statute governing the petitioner's probation was "susceptible to *multiple and irreconcilable interpretations*," but chose to construe the statute in the way *least* favorable to the accused. Does this violate the rule of lenity?

STATEMENT OF THE CASE AND FACTS[1]

Donald Kasischke is a 60-year-old man with a Ph.D. in gerontology.[2] He has no criminal record prior to the offenses at issue in this case.[3] On July 8, 2000, he was arrested for allegedly having sex with a fifteen-year-old male to whom he paid forty dollars.[4] He was charged with three counts each of lewd or lascivious battery and exhibition on a person between the ages of 12 and 15.[5]

Mr. Kasischke pled guilty to the charges on August 3, 2001 and was sentenced to 364 days in jail, followed by two years of community control and eight years of probation; he was also required to attend a Mentally Disordered Sex Offenders (MDSO) program.[6] One of the conditions of his probation prohibited him from possessing pornographic materials relevant to his behavior:

> The Defendant is 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***, unless otherwise indicated in the offender's treatment plan.[7]

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[1] This is a review of a decision from the Third District Court of Appeal, Case No. 3D 04-2149. The petitioner, Donald Kasischke, was the appellant in the district court, and the respondent, the State of Florida, was the appellee. In this brief, **"R."** = record on appeal.

[2] R. 59, 95, 135, 427.

[3] R. 95, 101.

[4] R. 25-30; *Kasischke v. State*, 946 So. 2d 1155, 1156 (Fla. 3d DCA 2006).

[5] R. 25-30; *see* § 800.04, Fla. Stat. (1999).

[6] R. 219.

[7] R. 222 (emphasis added).

The provision regarding pornographic materials in Mr. Kasischke's plea agreement is based on, and is substantially identical to, the applicable statute, which imposes the following condition:

> 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***.[8]

Mr. Kasischke was serving out the terms of his community control fairly successfully for over a year. He had difficulty finding employment, but he enrolled in an accounting and computer programming course at Palm Beach Community College.[9] Then in late 2003, the college alleged that he had viewed pornography on a college computer and prohibited him from returning to the campus.[10] Based on that, probation officers conducted a search of his house on December 5, 2003 and seized an allegedly pornographic video, three computer printouts, and numerous pictures stored on the hard drive of his computer.[11]

Detective Larry Wood, who waited with Mr. Kasischke outside his house while it was being searched, later testified that Mr. Kasischke seemed more concerned at

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[8] § 948.03(5)(a)(7), Fla. Stat. (1999) (redesignated as § 948.30(1)(g) by Ch. 2004-373, § 18, Laws of Fla.) (emphasis added).
[9] R. 135-36, 141, 158.
[10] R. 195-96, 363.
[11] R. 195-96.

that time about flossing his teeth than about officers finding forbidden pornography in his house.[12] Detective Thomas Mark, who searched Mr. Kasischke's computer, said that Mr. Kasischke admitted that he had pornography but was confident that nothing he had seen was prohibited by the terms of his probation.[13] Mr. Kasischke reportedly said he had viewed some pornography, but not any child pornography.[14]

At Mr. Kasischke's probation violation hearing on July 23, 2004, the video, printouts, and computer images were entered into evidence.[15] The judge admitted that it was possible for a person to unknowingly receive a "cookie" on his computer simply from the act of downloading an e-mail from a website, and the judge confessed that this had happened to him.[16]

Officer Catherine Viera, Mr. Kasischke's community control officer, testified that she found three printouts of young, nude black males near Mr. Kasischke's computer.[17] She admitted, however, that she could not tell if the young men in the pictures were underage.[18] She said she had not specifically discussed with Mr. Kasischke what the phrase, "relevant to the offender's deviant behavior pattern,"

[12] R. 373-77.
[13] R. 389-92.
[14] R. 390.
[15] R. 366, 382-87, 403.
[16] R. 403.
[17] R. 365.
[18] R. 369-71.

meant in his terms of probation.[19] She claimed that Mr. Kasischke's previous community control officer had told him he couldn't have *any* pornography.[20]

Mr. Kasischke's attorney argued that the materials presented did not violate Mr. Kasischke's probation terms because they were not relevant to his deviant behavior pattern.[21] He pointed out that Mr. Kasischke could have been genuinely confused about what pornography was prohibited and what wasn't, and therefore any violation couldn't be willful.[22] He argued that a defendant "must have fair warning of what conduct is prohibited, and if reasonable people can differ as to what the meaning of certain wording is that prohibits conduct, then there is not fair warning."[23] Additionally, the State had failed to produce an expert who might testify as to what was "sexually stimulating" in Mr. Kasischke's case.[24]

The State argued that "you know pornography when you see it" and that the videotape in evidence "should shock your conscience."[25]

The judge found that Mr. Kasischke had willfully and substantially violated his probation: "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

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[19] R. 368-69.
[20] R. 358.
[21] R. 406-07.
[22] R. 407-08.
[23] R. 409. The attorney cited *United States v. Lanier*, 520 U.S. 259, 265-67 (1997).
[24] R. 409.

conjunction or separately, however you want to read it, with regard to deviant behavior."[26] He said that Palm Beach Community College had put Mr. Kasischke on notice that he was doing something wrong when it expelled him for viewing pornography.[27]

The judge sentenced Mr. Kasischke to five years in prison, followed by two years of community control and eight years of probation.[28] He added that Mr. Kasischke would have the same probation conditions when he got out that he had before, and this meant that "there's no doubt whatsoever that he is not to view any pornography whatsoever. . . . no pornography whatsoever of any kind."[29]

On direct appeal, Mr. Kasischke argued that none of the allegedly obscene materials found in his house were "relevant to his deviant behavior pattern."[30] The State argued that "relevant to your deviant behavior pattern" only modified "telephone, electronic media, computer programs, or computer services," but did not modify any words before "including."[31] The Third District agreed, at first, with Mr. Kasischke and reversed the trial court in an opinion issued December 20, 2005. The majority opinion stated that "were we to conclude that the condition [of probation]

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[25] R. 410.
[26] R. 180, 412.
[27] R. 412.
[28] R. 416.
[29] R. 416.
[30] Initial Br. 13-17 (June 16, 2005).

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."[32] The court found that, "[a]s the state did not prove that the subjects of the pornography were underage children, the state did not prove that the materials were relevant to Kasischke's deviant behavior pattern."[33]

The State filed a motion for rehearing and rehearing en banc.[34] On June 9, 2006, the motion for rehearing en banc was granted, and the original panel decision was withdrawn.[35] The parties argued the issues before the court, en banc, on September 6, 2006. On December 20, 2006, the en banc court returned the case to the original three-judge panel, which issued a new opinion affirming the trial court's decision.[36] The court found that the statute was "***undeniably susceptible to multiple and irreconcilable interpretations***," but, after studying its legislative history, the court held that the phrase, "relevant to the offender's deviant behavior pattern" only modified "sexually stimulating material," and not the terms "obscene" or

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[31] Ans. Br. 18 (Sept. 8, 2005).
[32] *Kasischke v. State*, 31 Fla. L. Weekly D7 (Fla. 3d DCA Dec. 20, 2005) (withdrawn June 9, 2006) (*available at* http://www.3dca.flcourts.org/Opinions/3d04-2149.pdf) (last visited May 9, 2007).
[33] *Id.*
[34] State's Mot. Rehear. (Jan. 4, 2006).
[35] Or. Granting State's Mot. (June 9, 2006).
[36] *Kasischke v. State*, 946 So. 2d 1155 (Fla. 3d DCA 2006).

"pornographic."[37] This Court accepted review on April 20, 2007, based on conflict with the Second District's decision in *Taylor*.[38]

SUMMARY OF THE ARGUMENT

The state has a duty to give clear notice to its citizens of the behavior that will subject them to criminal punishment. Where people of common intelligence are forced to guess at the meaning of a statute, that statute violates due process by failing to give clear warning of what behavior is required or prohibited. The district court found that the statute in question is "undeniably susceptible to multiple and irreconcilable interpretations," yet affirmed petitioner's punishment for violating one of the many possible interpretations of this ambiguous statute. Mr. Kasischke should not be punished for misunderstanding the statute. If this Court approves the district court's construction of the statute, its holding should only be applied prospectively because the statute is susceptible to various interpretations.

Furthermore, the district court's interpretation of the statute does not make grammatical sense. In the phrase, **"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,"** the words "obscene," "pornographic," and "sexually stimulating"

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[37] *Id.* at 1157-59 (emphasis added).
[38] *Taylor v. State*, 821 So. 2d 404 (Fla. 2d DCA 2002).

are adjectives or adjectival phrases modifying the noun, "material." Because "obscene" and "pornographic" are adjectives, they cannot stand alone and must be interpreted in relation to the noun they modify, namely, "material." "Material" is further qualified by the phrase that follows it: "including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern." Thus, the phrase, "relevant to the offender's deviant behavior pattern," applies to all three categories: (1) obscene material, (2) pornographic material, and (3) sexually stimulating material.

Even if the statute is capable of various interpretations, the legislative history, viewed as a whole, lends more support to Mr. Kasischke's understanding of the statute than to the court's construction. The district court decision selectively ignored those aspects of the legislative history that contradict its interpretation – such as language in a National Institute of Justice Study on which the legislature relied, recommending that containment programs for sexual offenders be "offense-specific" and "tailored" to the offender's deviant behavior pattern.

As both the language of the statute and the legislative history are inconclusive, the rule of lenity applies and the statute must be construed in favor of the accused.

A narrow reading of the statute would indicate that Mr. Kasischke was not allowed to view visual or auditory materials that were (1) obscene, pornographic, or sexually stimulating *and* (2) relevant to his offense, namely, sex with a person age 15

or under. Most of the pictures seized from Mr. Kasischke's house do not qualify as obscene or pornographic under U.S. Supreme Court standards because they do not depict any sexual conduct. The few that are arguably pornographic are not relevant to his deviant behavior pattern because they do not depict underage people.

Mr. Kasischke therefore did not violate the terms of his probation. The trial court abused its discretion by ignoring the statutory language about relevance to the offender's deviant behavior pattern. Thus, Mr. Kasischke's probation should be reinstated.

STANDARDS OF REVIEW

Purely legal issues, such as the interpretation of a statute or a written legal instrument, receive *de novo* review.[39] A finding of fact by a trial court in a non-jury case is reviewed for abuse of discretion but may be set aside if it was induced by an erroneous view of the law.[40] Findings of fact by a trial court are subject to a higher review than the usual "clearly erroneous" test where the appellate court has the opportunity to review documents, transcripts, photos, and tapes in essentially the same form as the trial court viewed them.[41]

[39] *See Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376 (Fla. 5th DCA 1998); *Angell v. Don Jones Ins. Agency, Inc.*, 620 So. 2d 1012 (Fla. 2d DCA 1993).
[40] *See Arias v. State*, 751 So. 2d 184, 187 (Fla. 3d DCA 2000); *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).
[41] *See Thompson v. State*, 548 So. 2d 198, 204 n. 5 (Fla. 1989).

ARGUMENT

I. Mr. Kasischke's due process rights have been violated because the meaning of the statute under which his probation was revoked is not clear to a person of common intelligence.

The most telling fact in this case is Detective Larry Wood's testimony that Mr. Kasischke was more worried about flossing his teeth than about what officers would find in his house.[42] As Detective Thomas Mark testified, Mr. Kasischke knew police would find pornography, but he also knew they would not find child pornography.[43] Mr. Kasischke is an educated man, fully capable of reading the written conditions of probation given him. Since his offense involved consensual sex with a fifteen-year-old male, he thought his probationary terms prohibited viewing pornography relevant to his offense, not *any* pornography.

Revoking Mr. Kasischke's probation for violating the statute in question violates his federal and state due process rights because the statute is so unclear that probationers do not have fair notice of what constitutes acceptable behavior and prohibited behavior.[44] Before delving into this issue, we must deal with a threshold issue: the district court asserts in a footnote that "no due process claims were raised below . . . ."[45] This is incorrect. At the probation violation hearing, Mr. Kasischke's

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[42] R. 373-77.
[43] R. 389-92.
[44] *See United States v. Lanier*, 520 U.S. 259, 265-67 (1997).
[45] *Kasischke v. State*, 946 So. 2d 1155, 1160 n. 6 (Fla. 3d DCA 2006).

counsel argued that a defendant should have "fair warning" about what conduct is prohibited[46] and cited *United States v. Lanier*, which holds that due process requires that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[47] Appellate counsel also made this argument in the district court.[48]

"[T]he state has a duty to give clear notice to its citizens of the behavior that will subject them to criminal punishment."[49] "The Fourteenth Amendment to the United States Constitution provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.' Among the most fundamental protections of the Due Process Clause is the principle that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'"[50] Therefore, "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

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[46] R. 408-09 (Mr. Kasischke's attorney argued that "a Defendant must have fair warning of what conduct is prohibited, and if reasonable people can differ as to what the meaning of certain wording is that prohibits conduct, then there is not fair warning.").
[47] R. 408-09. S*ee Lanier*, 520 U.S. at 265.
[48] *See* Initial Br. 19-20 (June 16, 2005); Reply Br. 6 (Oct. 14, 2005); Resp. to State's Mot. Rehear. 6 (Feb. 21, 2006); Appellant's Supp. Br. 31 (July 7, 2006).
[49] *Farrell v. Burke*, 449 F.3d 470, 482 (2nd Cir. 2006).
[50] *Id*. at 484-85 (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

application violates the first essential of due process of law."[51] Mr. Kasischke does not contest the legislature's power to prohibit all obscene and pornographic materials to probationers; he merely asks that, if the legislature intends to do this, it do so in clear language that is understandable to a person of common intelligence.

Indeed, the appellate process so far has been a spectacle of reasonable persons guessing at the statute's meaning and differing as to its applications. The Second District, in *Taylor*, interpreted the phrase "relevant to the offender's deviant behavior pattern" as applying to the restrictions on obscene, pornographic, and sexually stimulating material.[52] The Third District agreed in its first panel opinion, then reversed itself. In its second opinion, the court, found the language of the statute ***"undeniably susceptible to multiple and irreconcilable interpretations,"*** listed three possible readings that could be gleaned from the statute, and suggested that there could be others.[53]

This goes to the heart of the due process issue. Where a statute is capable of several interpretations, some of which will subject a citizen's behavior to loss of liberty while others will not, it is a due process violation to punish that citizen for his

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[51] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). *See also Sieniarecki v. State*, 756 So. 2d 68, 74-75 (Fla. 2000); *Brake v. State*, 796 So. 2d 522, 526-28 (Fla. 2001).
[52] *Taylor v. State*, 821 So. 2d 404, 405-06 (Fla. 2d DCA 2002).
[53] *Kasischke*, 946 So. 2d at 1157-58 (emphasis added).

misunderstanding of the statute.[54] As Florida Statutes, provide: "The provisions of this code and offenses defined by other statutes shall be strictly construed; ***when the language is susceptible of differing constructions, it shall be construed most favorably to the accused***."[55] In this case, Mr. Kasischke reasonably interpreted the statute as meaning that he was prohibited from viewing obscene, pornographic or sexually stimulating material that was relevant to his particular offense, namely sex with an underage person. The district court conceded this as a possible interpretation.[56] Because Mr. Kasischke did not view any child pornography, he believed he was not violating the statute.[57] Even if this Court should determine that the district court's interpretation of the statute is correct, Mr. Kasischke respectfully asks this Court to apply that holding prospectively only, in order that people who reasonably misunderstood the statute not be punished due to its vagueness.[58]

Mr. Kasischke does *not* ask that the statute be struck down as unconstitutionally vague, because a statute of questionable validity may be saved from

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[54] The district court opinion cited several cases from other jurisdictions that found bans on pornographic materials *not* to be constitutionally vague. *Id.* at 1160. All those cases, however, involved much less ambiguous language than the present statute, and none contained the "relevant to the offender's deviant behavior pattern" language.
[55] § 775.021(1), Fla. Stat. (1999) (emphasis added).
[56] *Kasischke*, 946 So. 2d at 1158 ("The statute could also be read as requiring all prohibited material to be 'relevant to the offender's deviant behavior pattern.'").
[57] R. 389-92.
[58] *Cf. Landgraf v. USI Film Products*, 511 U.S. 244, 267-69 (1994) (finding reason for applying statute prospectively may not justify applying it retroactively).

the constitutional scrap heap by construing it in a way that is consistent with constitutional rights.[59] If this statute is construed in its narrowest sense, no reasonable person can claim not to have notice of what behavior is prohibited when measured by common understanding and practice.[60] Under its narrowest reading, the statute would prohibit obscene, pornographic, or sexually stimulating materials that are relevant to the offender's deviant behavior pattern. Whatever other interpretations can be inferred from the statute's language, no one can reasonably deny that it at least prohibits this. This interpretation also harmonizes with the rule of lenity, which requires that ambiguous penal statutes be construed narrowly, in favor of the accused.[61]

II. The most natural and grammatically sensible reading of the statute is that the adjectives "obscene," "pornographic," and "sexually stimulating" modify the noun "material," which is further qualified by the phrase "relevant to the offender's deviant behavior pattern."

At least three possible readings of the statute have been proposed:

(1) <u>"Relevant to his deviant behavior pattern" modifies "sexually stimulating . . . material," but not "obscene" and "pornographic."</u> The district court settled on this interpretation.[62]

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[59] *See Brake*, 796 So. 2d at 527.
[60] *See id.*
[61] *See Lanier*, 520 U.S. at 266 ; *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998); *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).
[62] *Kasischke*, 946 So. 2d at 1159.

(2) "Relevant to his deviant behavior pattern" modifies only "telephone, electronic media, computer programs, or computer services . . . ." The State argued for this interpretation.[63]

(3) All prohibited material must be relevant to the offender's deviant behavior pattern. This is how Mr. Kasischke understood the statute.

Of the possible readings of the statute, the most logical reading, and the one most in line with common understanding and practice,[64] is the third one.

[63] Ans. Br. 18.
[64] *See Brake*, 796 So. 2d at 527.

A. The district court's reading is unsound because it ignores the grammatical construction of the statute.

The district court's ultimate interpretation of the statute does not make sense grammatically.[65] In the phrase, **"<u>obscene</u>, <u>pornographic</u>, or <u>sexually stimulating</u> visual or auditory <u>material</u>, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern,"**[66] the words "obscene," "pornographic," and "sexually stimulating" are adjectives or adjectival phrases modifying the noun, "material." Because "obscene" and "pornographic" are adjectives, they cannot stand alone and must be interpreted in relation to the noun they modify, namely, "material." "Material," in turn, is qualified by the phrase that follows it: "including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern."

The district court's construction would mean that one is prohibited from possessing "*pornographic*" (an adjective) – a construction that is grammatically incomplete. For the provision to make grammatical sense, one would have to prohibit possession of "pornographic *material*," or "*pornography*" (nouns). The district court's decision implicitly accepts that "material" is limited by the dependent clause

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[65] *See State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004) (using rules of grammar as aid in construing statute).
[66] Bold and underlining added.

"including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern." The statute only uses the word "material" once. Therefore, if "relevant to the offender's deviant behavior pattern" modifies "material" as it relates to "sexually stimulating," it modifies "material" in regard to the other adjectives modifying the same word ("obscene" and "pornographic").

Thus, the phrase, "relevant to the offender's deviant behavior pattern" applies to all three categories: (1) obscene material, (2) pornographic material, and (3) sexually stimulating material.

B. The State's construction is implausible because it mechanically applies the doctrine of the last antecedent.

The State argued in the district court that the "doctrine of the last antecedent" requires that the phrase, "relevant to his deviant behavior pattern," be construed to apply only to electronic, telephonic, or computer media.[67] But, as the U.S. Supreme Court has pointed out, the doctrine of the last antecedent is not an inflexible or controlling rule of statutory construction: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to

[67] Ans. Br. 18-21.

all."[68] Furthermore, a statute should not be construed so as to create an absurd result.[69] The State's interpretation would mean that the same photo might be prohibited if seen in a magazine, but not if viewed on a computer screen. The State has offered no logical reason to support such an anomalous result.

Even if this doctrine were applied, it would not matter in this case because the few arguably obscene or pornographic items found in Mr. Kasischke's house were all electronic media (videotape and computer images).[70] Therefore, the State would have to prove that those electronic items were relevant to his deviant behavior pattern.

Given the implausibility of the State's interpretation and the grammatical impossibility of the district court's interpretation, the defense's interpretation of the statute (requiring all prohibited material to be relevant to the offender's crime) is the most sensible, the most natural, and the most constitutionally sound.

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[68] *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).
[69] *See City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950) (en banc).
[70] *See* State's Mot. Rehear. 17, Initial Br. 16-17; R. 317, 333, 335, 337.

III. The legislative history, which emphasizes "offense-specific" treatment that is "tailored" to the offender's needs, supports the defense's interpretation. Even if the legislative history is ambiguous, the rule of lenity requires that the statute be construed in favor of the accused.

Upon finding the statute ambiguous on its face, the district court attempted to determine the statute's meaning from its legislative history. The district court found a clear-cut meaning, however, only by cherry-picking the legislative history. A more balanced assessment of the history shows a legislative intent to tailor containment policies for sex offenders to the offenders' specific deviant behavior patterns.

The district court began its survey of the legislative history by citing the previous version of the statute, which provided for an unambiguous "prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually explicit material."[71] The court then found that there was "nothing" in the legislative history of the 1997 amendment to indicate that the legislature intended to modify the outright ban on pornographic material.[72] But if the legislature had wanted to retain this outright ban, it would have better accomplished this by leaving the statute alone and not inserting the extensive qualifying language.

Furthermore, there is ample evidence that the legislature *did* intend to modify the ban. As the district court noted,[73] the statute in question was influenced by a

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[71] *Kasischke*, 946 So. 2d at 1158 (quoting § 948.03(5)(g), Fla. Stat. (1995)).
[72] *Id.*
[73] *Id.* at 1159.

National Institute of Justice (NIJ) Study published in January 1997.[74] The court quoted language from this study stressing that "deviant thoughts and fantasies by sex offenders are precursors to sexual assault and, therefore, are an integral part of the assault pattern."[75] The court argued that this was a reason for preventing sex offenders from viewing any pornography at all.[76]

But the court's argument ignored language elsewhere in the study that emphasizes that supervision of sex offenders must be "tailored" to that offender's specific characteristics. For example, the study finds that "[t]he distinctive characteristics of sex offenders and the unique trauma they inflict require use of more than routine, one-size-fits-all methods of supervision."[77] The study recommends a five-part containment process,[78] of which the second part involves "[s]ex offender-specific containment."[79] The study states that "[t]his component of the model process focuses on a containment approach to case processing and case management that can

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[74] *See* U.S. Dept. of Justice, National Institute of Justice, *Managing Adult Sex Offenders in the Community—A Containment Approach* (January 1997) (*available at* http://www.ncjrs.org/txtfiles/sexoff.txt (last visited Apr. 29, 2007) [hereinafter NIJ Study].
[75] *Kasischke*, 946 So. 2d at 1159.
[76] *Id.*
[77] NIJ Study 1. References to page numbers in the NIJ Study refer to the printout attached as an Appendix to Appellant's Supplemental Brief of July 7, 2006.
[78] NIJ Study 5.
[79] NIJ Study 6.

be *tailored* to the individual sex offender and his or her deviant sexual history."[80] Among the "crucial" offender-specific probation conditions recommended by the NIJ Study is one regarding the offender's ability to view pornography:

> 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***.[81]

The legislature apparently had this wording in mind when revising the statute. The policy behind the qualifying words, "relevant to your deviant behavior pattern" is the principle that containment approaches should be tailored to the individual offender and that "routine, one-size-fits-all" methods of supervision are inadequate.[82] Thus, the legislative history supports Mr. Kasischke's understanding that the statute requires that all prohibited materials must be relevant to the offender's deviant behavior pattern.

These principles align with those stated by the Florida Association for the Treatment of Sexual Abusers, which emphasizes in its position statement that, "[e]ffective public policy needs to be cognizant of the differences among offenders rather than applying a 'one size fits all' approach,"[83] and that "[m]any sexual abusers

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[80] NIJ Study 6 (emphasis added).
[81] NIJ Study 8-9 (emphasis added).
[82] *See* NIJ Study 1, 6.
[83] Florida Association for the Treatment of Sexual Abusers, *Position Statement* (January 1998), *available at* http://www.floridaatsa.com/ (last visited June 28, 2006), at 23 [hereinafter Florida ATSA Statement].

require long-term, comprehensive, *offense-specific* treatment."[84] Additionally, the Center for Sex Offender Management, a project of the Office of Justice Programs, U.S. Department of Justice, states that

> [s]ex offender treatment programs that include a relapse prevention component and cognitive behavioral techniques and that *tailor their treatment responses to meet the varying, diverse, and complex needs of sex offenders* have the greatest chance to reduce both sexual and general recidivism.[85]

The Third District opinion placed much reliance on an 11-page Senate Staff Analysis of the 1997 amendment of the statute that the court claimed supports its interpretation.[86] But the Senate Staff Analysis loudly echoes the NIJ Study in its support of individualized treatment for sex offenders. On page 1, it states that the bill would "create a definition for 'sex offender probation or sex offender community control' which would involve an intensive form of supervision of sex offenders in accordance with an *individualized treatment plan* . . . ."[87] The analysis spends two pages approvingly summarizing the NIJ Study[88] and noting that "*the characteristics of the sex offenders* themselves *dictate the form and style of treatment* that will be most

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[84] Florida ATSA Statement 34 (emphasis added).
[85] Center for Sex Offender Management, *An Overview of Sex Offender Management* (June 2002), available at http://www.csom.org/pubs/csom_bro.pdf (last visited June 27, 2006), at 9 (emphasis added).
[86] Fla. S. Comm. on CJ, CS for SB 1930 (1997) Staff Analysis (final Apr. 8,1997) [hereinafter Senate Staff Analysis]; *Kasischke*, 946 So. 2d at 1158.
[87] Senate Staff Analysis 1 (emphasis added).
[88] Senate Staff Analysis 6-7.

effective."[89] The analysis notes that "sex offender-specific containment strategies" are an essential component of the treatment plan and explains that this component "can be *tailored* to the individual sex offender and his or her *deviant sexual history*."[90]

The Senate Staff Analysis shows an intent to implement the NIJ Study and provides no reason for diverging from the "tailored," "offense-specific" approach that the study recommends. Therefore, the analysis's summary of the "sexually stimulating" provision, on which the Third District relies,[91] appears to be no more than a legislative assistant's inartfully worded paraphrase that is inconsistent with the tenor of most of the analysis.[92]

> Finally, the district court cited the title of the 1997 bill that amended the statute:
>
> > revising a provision that prohibits a sex offender from viewing, owning, or possessing certain materials; prohibiting a sex offender from possessing telephone, electronic media, or computer programs that are relevant to the offender's behavior pattern.[93]

There is little to be gained from analyzing the title of a bill, which is no substitute for the actual wording of the corresponding statute. As this Court has held, the purpose of a bill's title is to inform the public and the legislators as to which bill is being voted

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[89] Senate Staff Analysis 6 (emphasis added).
[90] Senate Staff Analysis 6-7 (emphasis added).
[91] *Kasischke*, 946 So. 2d at1158.
[92] *See Davidson v. MacKinnon*, 656 So. 2d 223, 224-25 (Fla. 5th DCA 1995) (noting questionable validity of relying on staff reports as proof of legislative intent).
[93] Ch. 97-308, at 5515, Laws of Fla.

on.[94] The title, then, is a truncated summary of the bill's content, and parsing it to determine the exact meaning of the statute is a futile act. The title does not purport to contain every element of the bill, and it would be a mistake to give undue weight to it in interpreting legislative intent.

Thus, the legislative history gives more support to Mr. Kasischke's reading of the statute than it does to the district court's. There is enough ambiguity in both the legislative history and the language of the statute that this Court has no recourse but to apply the rule of lenity and construe the statute narrowly, in favor of the accused.[95]

In arguing for strict control of a probationer's access to pornography, the State has emphasized the legislature's concern about the supervision of sexual offenders as evidenced by its passage of the Sexual Predators Registration Act, the Sexual Offenders Registration Act, and the Jimmy Ryce Act.[96] The Petitioner does not dispute the legislature's legitimate concern about the supervision of sexual offenders. Rather, he notes that the main areas addressed by those statutes are the registration and civil commitment of sexual offenders and that the statutes shed no light on

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[94] *Franklin v. State*, 887 So. 2d 1063, 1074 n. 16 (Fla. 2004); *State v. Kaufman*, 430 So. 2d 904, 907 (Fla. 1983).

[95] § 775.021(1), Fla. Stat. (1999); *Thompson v. State*, 695 So. 2d 691, 693 (Fla. 1997) ("[W]here criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused").

[96] State's Mot. Rehear. 20. *See* § 775.21, § 943.0435, and § 394.910, Florida Statutes (2005).

whether sexually-offending probationers are allowed to view pornography.[97]

The legislature has, however, addressed the concern that there may be some sexual offenders for whom it would be inappropriate to view *any* obscenity or pornography. In line with the NIJ Study's emphasis on "tailored" containment practices, the statute allows for a broader pornography prohibition if it is indicated in the sexual offender's treatment program:

> **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.[98]

This should be read *in pari materia* with another subsection of the statute that requires the sexual offender to participate in a treatment program with therapists specially trained to treat sex offenders: "[T]he court must impose the following conditions . . . Active participation in and successful completion of a sex offender treatment program with therapists specifically trained to treat sex offenders . . . ."[99]

Therefore, if specialized therapists determine that the pornography prohibition is not restrictive enough in the case of a certain offender, they may tailor it to his needs. But this restriction would have to come from the therapists who devise the offender's

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[97] *See* § 775.21, § 943.0435, and § 394.910, Florida Statutes (2005).
[98] § 948.03(5)(a)7., Fla. Stat. (1997) (emphasis added).
[99] § 948.03(5)(a)3., Fla. Stat. (1997).

treatment program, not from probation officers who are not specially trained, and the offender would have to receive notice that this was a condition of his program.[100] Thus, the legislature has provided a procedure by which to make the condition more restrictive for those probationers for whom it may be necessary.

[100] *See United States v. Lanier*, 520 U.S. 259, 265 (1997). In this case, Mr. Kasischke's treatment program never imposed any such restriction on him.

IV. Mr. Kasischke did not violate his probation terms because the materials seized from his home either (1) were not obscene, pornographic or sexually stimulating or (2) were irrelevant to his offense. The trial court abused its discretion by misapplying the statute.

All but a few of the items seized from Mr. Kasischke's house are manifestly innocuous and do not qualify as obscene, pornographic, or sexually stimulating. The few that are arguably pornographic do not show sex with children. The probation officers seized some computer printouts and computer images of nude or partially nude males, [101] but mere nudity does not constitute obscenity or pornography.[102] Additionally, they found some computer images of young women, all clothed, and none engaging in any kind of sexual activity.[103] These pictures do not appeal to "prurient interest," nor are they patently offensive or designed to arouse sexual excitement.[104] Hence, these pictures are not obscene or pornographic.[105] The State presented no evidence that they are sexually stimulating to Mr. Kasischke.[106]

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[101] R. 225, 227, 229, 325, 327, 329, 331.
[102] *See Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991).
[103] *See* R. 303, 305, 307, 309, 311, 313, 315, 319, 321, 323.
[104] *See Miller v. California*, 413 U.S. 15, 24 (1973) (defining "obscenity" as including the trait of being "patently offensive"); *see also Ertley*, 785 So. 2d at 593 (finding that the U.S. Supreme Court has defined "obscenity" in *Miller*); *Black's Law Dictionary* (8th ed. 2004) (Westlaw version) (defining "prurient" as "[c]haracterized by or arousing inordinate or unusual sexual desire").
[105] *See Black's Law Dictionary* (8th ed. 2004) (Westlaw version) (defining "pornography" as "Material (such as writings, photographs, or movies) depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement.").
[106] R. 409.

A few computer images[107] are arguably pornographic, but they do not appear to depict underaged people. While the videotape found in Mr. Kasischke's house is admittedly pornographic, the men shown in it are not underage, and certainly not 15 or under, and so the tape is not relevant to Mr. Kasischke's behavior pattern.

As the First District has held in *Ertley*, a probationer is put on notice of the meaning of "relevant to your deviant behavior pattern" by the statute he is found to have violated.[108] Mr. Kasischke's underlying offense was illegal, and therefore deviant,[109] because it was performed with a person aged 15 or younger. If performed with an adult male, the act would have been legal and, therefore, not deviant.[110] The video and photos do not show deviant behavior, as far as the law is concerned, and thus they are not relevant. The trial court made no factual finding that the materials seized from Mr. Kasischke's house constituted child pornography,[111] and the materials adduced at the hearing would not have supported such a finding.

The U.S. Court of Appeals of the Eleventh Circuit, citing the U.S. Supreme Court, has held that in child pornography cases, the burden is on the State to prove that any persons depicted in pornographic materials are actually underage and not

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[107] R. 317 (duplicated on page 339), 333, 335, and 337.
[108] *Ertley v. State*, 785 So. 2d 592, 593 (Fla. 1st DCA 2001).
[109] *See id.*
[110] *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).
[111] R. 412-17. *See also* Appellant's Supp. Br. 26-30 (July 7, 2006).

merely adults who may appear to be underage.[112] The same burden applies to the State in this case.[113] At the very least, it is up to the State to prove that the materials are relevant to the probationer's deviant behavior pattern. Even if, as the State argued in its motion for rehearing, all that matters is the "perceived age" of the actors,[114] none of the actors in the pornographic pictures even *appears* to be 15 or younger. In the original district court decision, both the majority and the dissent agreed that the pictures and video in evidence did not prove that the actors were underage children.[115] Where the State cannot prove that the actors are under 18, it is difficult to maintain that they "appear" to be 15 or under. Thus, the State failed to demonstrate relevance to Mr. Kasischke's specific offense.

A trial judge abuses his discretion when he acts arbitrarily or unreasonably.[116] In construing a statute, one must give meaning to all words and phrases in the statute.[117] The trial judge here, in effect, arbitrarily deleted the language "relevant to the offender's deviant behavior pattern" in the controlling statute and unreasonably revoked Mr. Kasischke's probation based on that reading: "there's no doubt

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[112] *See United States v. Dodds*, 347 F.3d 893, 899 n. 5 (11th Cir. 2003) (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)).
[113] *See e.g. Hicks v. State*, 890 So. 2d 459, 461 (Fla. 2d DCA 2004) (burden on State to prove probationer willfully and substantially violated conditions of probation).
[114] State's Mot. Rehear. 11 (Jan. 4, 2006).
[115] *Kasischke*, 31 Fla. L. Weekly at D7 (maj. op.), D8 (Cortiñas, J., dissenting).
[116] *Woodson v. State*, 864 So. 2d 512, 514 (Fla. 2d DCA 2004).
[117] *See Terrinoni v. Westward Ho!*, 418 So. 2d 1143, 1146 (Fla. 1st DCA 1982).

whatsoever that he is not to view any pornography whatsoever."[118] Mr. Kasischke's probation violation hearing was fundamentally flawed because the judge used the wrong legal standard throughout. His conclusion that Mr. Kasischke violated his probation is therefore an abuse of discretion.

V. Even if there was a probation violation, the violation was not willful because Mr. Kasischke reasonably believed the materials did not violate his probation terms.

Probation or community control may be revoked only where there is a willful and substantial violation of the terms of probation or community control.[119] Even if a court should find that some of the materials found in Mr. Kasischke's house violate his probation conditions, the violation could not have been willful because Mr. Kasischke reasonably believed he was within the guidelines of his probation terms.

When probation officers arrived to search Mr. Kasischke's house, Mr. Kasischke allegedly admitted he had viewed pornography, but said that none of it was child pornography.[120] According to the officer who waited with Mr. Kasischke outside his house while it was being searched, Mr. Kasischke seemed more concerned

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[118] R. 416. *See also* R. 412 ("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.").
[119] *Maseri v. State*, 752 So. 2d 719 (Fla. 3d DCA 2000); *McCray v. State*, 754 So. 2d 776 (Fla. 3d DCA 2000).

about flossing his teeth than about officers finding anything in his house that shouldn't be there.[121] He was apparently confident that nothing he had seen was prohibited by the terms of his probation.[122] This confidence was reasonable because Mr. Kasischke believed that he could view pornography as long as it did not concern sexual activity with children. If he is found to be in violation of his conditions, it can only be because he had a reasonable misunderstanding of the terms of his probation. Where a person is making reasonable, good faith efforts to comply with his probation terms, a failure to comply is not willful.[123] As argued above, due process requires that no one may be held criminally responsible for actions that he could not reasonably understand to be prohibited.[124]

The State argued that Mr. Kasischke was on notice that he shouldn't view *any* pornography because his probation officer had told him so.[125] But even if the officer had said this, Mr. Kasischke would have been justified in ignoring him because only a court may set the conditions on which probation may be revoked.[126] Moreover, the

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[120] R. 390.
[121] R. 373-77.
[122] R. 389-92.
[123] *See e.g. White v. State*, 619 So. 2d 429, 431 (Fla. 1st DCA 1993); *Jacobsen v. State*, 536 So. 2d 373 (Fla. 2d DCA 1988).
[124] *See Lanier*, 520 U.S. at 265.
[125] R. 410-11.
[126] *See Barber v. State*, 344 So. 2d 913, 914 (Fla. 3d DCA 1977).

probation officer has no authority to re-write statutes[127] and case law[128] that restrict the prohibited pornography to that which is relevant to the offender's deviant behavior. Nor should a probation officer be allowed to substitute his own definition of obscenity or pornography for a legal definition.[129]

The trial judge's statement that Palm Beach Community College had put Mr. Kasischke on notice that he was doing something wrong when it expelled him for viewing pornography[130] is just as specious. There is absolutely no evidence that the college was applying the same standard that the court was required to use – namely, a prohibition of pornography relevant to the offender's behavior. Indeed, the trial court assumed that the college didn't even know Mr. Kasischke was on probation when it asked him to leave.[131] The college may well have had a rule that students were not allowed to view *any* pornography on college computers. Mr. Kasischke might have violated that broad rule without violating the more narrow rule imposed as part of his probation. Therefore, expulsion from the college would not have put him on notice that he was violating his probation terms. Thus, the use of an incorrect standard

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[127] § 948.03(5)(a)(7), Fla. Stat. (1999).
[128] *Taylor v. State*, 821 So. 2d 404, 405-06 (Fla. 2d DCA 2002).
[129] *See Farrell v. Burke*, No. 97 Civ. 5708, 1998 WL 751695 at *6 (S.D.N.Y. 1998) (unpublished) (noting that parole officer believed "pornography" included any nude depiction, including Playboy Magazine or a photograph of Michelangelo's sculpture, "David").
[130] R. 412.
[131] R. 412.

distorted the judge's findings of willful and substantial violation. A finding of fact by a trial court in a non-jury case may be set aside where it was induced by an erroneous view of the law.[132]

CONCLUSION

The original district court decision[133] accurately noted the defects in the trial court decision, properly gave effect to all the words in the statute, and followed the legislature's intent to make probation conditions "offense-specific," and "tailored," to the offender's deviant behavior pattern, as recommended by the NIJ Study. Furthermore, that decision strictly construed, as it must, a penal statute, and provided that a defendant not be punished for a violation for which he had no notice. The district court's second panel opinion,[134] however, found the statute to be ambiguous, but ignored the rule of lenity. If the legislature believes that probationers should not be allowed to possess any pornography at all, then it must say so in clear, unambiguous terms that do not leave a probationer guessing as to what behavior is prohibited.

Because the trial court used an incorrect legal standard in determining whether Donald Kasischke violated his probation, his conviction for probation violation was an abuse of discretion. We therefore respectfully request this Court to reverse Mr. Kasischke's probation revocation and reinstate his probation.

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[132] *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).
[133] *Kasischke v. State*, 31 Fla. L. Weekly D7 (Fla. 3d DCA Dec. 20, 2005).

Respectfully submitted,

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[134] *Kasischke v. State*, 946 So. 2d 1155 (Fla. 3d DCA 2006).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was sent to Linda S. Katz, Counsel for the State of Florida, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, FL 33131, on May 14, 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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