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

REPLY BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

THOMAS REGNIER
Assistant Public Defender
Florida Bar No. 660000
Counsel for Petitioner

July 26, 2007

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

OTHER AUTHORITIES

ARGUMENT

I. The State does not address the ample evidence in the legislative history that shows that the legislature meant to narrow the statute, in harmony with the National Institute of Justice Study.

The State's Answer Brief contends that the Third District found the statute in this case ambiguous but resolved the ambiguity by examining the legislative history.[1] The State's brief offers no analysis of its own of the legislative history and conspicuously fails to address abundant evidence that the legislature intended to modify its outright ban on pornography and tailor restrictions of such materials to the offender's particular crime. Consider, for example, theses statements from the National Institute for Justice (NIJ) Study on which the legislature relied:

(1) "The distinctive characteristics of sex offenders and the unique trauma they inflict require use of *more than routine, one-size-fits-all methods* of supervision."[2]

(2) "*Sex offender-specific containment* . . . focuses on a containment approach to case processing and case management that can be *tailored* to the

---

[1] Ans. Br. on Merits 29 (July 9, 2007).

[2] U.S. Dept. of Justice, National Institute of Justice, *Managing Adult Sex Offenders in the Community—A Containment Approach* 1 (January 1997) (*available at* http://www.ncjrs.org/txtfiles/sexoff.txt (last visited Apr. 29, 2007) (emphasis added) [hereinafter NIJ Study]. 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.

individual sex offender and his or her deviant sexual history."[3]

The State asserts that the NIJ Study "revealed the dangers of permitting sex offenders to possess, view, or own pornography" and in support quotes two paragraphs from the NIJ Study that discuss an offender's thoughts, fantasies, and attitudes, but never speak about his possession of pornography.[4] This is a misdirection, as the State fails to mention the section of the NIJ Study that actually speaks squarely to the issue of offenders possessing pornography:

> "Sex offender-specific probation or parole conditions, such as those that follow, play a crucial role:
>
> . . .
>
> "You shall not possess any pornographic, sexually oriented, or sexually stimulating visual, auditory, telephonic, or electronic media and computer programs or services *that are relevant to your deviant behavior pattern*."[5]

Thus, the NIJ Study emphasizes tailoring restrictions on pornographic materials to the offender's particular offense.

Also important to the Third District's analysis was an 11-page Senate Staff Analysis of the 1997 amendment of the statute that the court claimed supports its interpretation.[6] But the Third District's analysis and the State's

---

[3] NIJ Study 6 (emphasis added).
[4] Ans. Br. on Merits 32.
[5] NIJ Study 8-9 (emphasis added).
[6] Fla. S. Comm. on CJ, CS for SB 1930 (1997) Staff Analysis (final Apr. 8,1997) [hereinafter Senate Staff Analysis].

brief ignore such language as:

(1) "[This 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 . . . .*"[7]

(2) "[T]he *characteristics of the sex offenders* themselves *dictate the form and style of treatment* that will be most effective."[8]

(3) "The five components of the sex offender containment process are: an overall philosophy and goal of community and victim safety, *utilizing sex offender-specific containment strategies*, interagency and interdisciplinary collaboration, consistent public policies, and quality control."[9]

(4) "[U]tilizing sex offender-specific containment strategies . . . focuses on a containment approach to case processing and case management that can be *tailored to the individual sex offender* and his or her *deviant sexual history*."[10]

The above statements taken directly from the legislative history on which the Third District's analysis purportedly relies, completely undercut the court's assertion that there is "nothing" in the legislative history to

[7] Senate Staff Analysis 1 (emphasis added).
[8] Senate Staff Analysis 6 (emphasis added).
[9] Senate Staff Analysis 6-7 (emphasis added).
[10] Senate Staff Analysis 7 (emphasis added).

suggest that the legislature intended to modify its previous total ban on pornographic material.[11] On the contrary, the tailoring of containment policies to the sexual offender's particular crime is a constant theme of the legislative history. The State does not mention the above principles or try to explain how they can possibly fit with its interpretation of the statute. Its assertion that it is "simply inconceivable" that the legislature would allow sexual offenders to have pornography[12] is more an exercise in wishful thinking than in legal analysis or argument.

II. The State makes no attempt to explain the grammatical impossibility of the Third District's construction of the statute.

Likewise, the State does not address Mr. Kasischke's argument that the Third District's interpretation is grammatically impossible. The court's construction would mean that the legislature banned "pornographic" (an adjective),[13] rather than "pornographic material" (adjective modifying noun).[14] Yet the legislature is presumed to know the rules of grammar.[15] Adjectives have to modify something – either a noun or a pronoun.[16] The

---

[11] *See Kasischke v. State*, 946 So. 2d 1155, 1158 (Fla. 3d DCA 2006).
[12] Ans. Br. on Merits 33.
[13] *Webster's Third New International Dictionary of the English Language Unabridged* 1767 (Merriam-Webster 1986).
[14] *See* Initial Br. on Merits 18-19 (May 14, 2007).
[15] *State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004).
[16] John E. Warriner & Francis Griffith, *English Grammar and Composition: Fourth Course* 7 (Harcourt 1973) ("An *adjective* is a word used to modify a

only noun in the statute that "obscene" and "pornographic" logically modify is "material." By analogy, if the legislature prohibited "careless or reckless driving," we would construe that as meaning that it prohibited (1) "careless driving" and (2) "reckless driving"– not that it prohibited (1) "careless" and (2) "reckless driving." "Careless," an adjective, would have to modify something, just as "obscene" and "pornographic" have to modify something in the present statute. The State makes no attempt to explain why the legislature would completely ignore the rules of grammar in framing the statute.

III. The State misapplies every step of its "fair warning" analysis.

The State attempts to show that the "fair warning" principles in *Lanier*[17] do not require reversal in this case. The State's application of *Lanier* to this case unreasonably distorts the facts and the law.

In *Lanier*, the U.S. Supreme Court held that there are three related manifestations of the "fair warning" requirement.[18] The first is that the vagueness doctrine prevents enforcement of a statute where its terms are so vague that people of common intelligence must "guess at its meaning and

---

noun or pronoun.")

[17] *United States v. Lanier*, 520 U.S. 259 (1997).

[18] *Id.* at 266.

differ as to its application."[19] This is a perfect description of the statute in question, which the Third District has described as "undeniably susceptible to multiple and irreconcilable interpretations."[20] The court suggested three plausible (and irreconcilable) interpretations and allowed that there may be others.[21]

The State asserts that this first manifestation is not at issue because "Kasischke concedes that the statute is not unconstitutionally vague."[22] This is a complete misstatement of Mr. Kasischke's position, which is that the statute is not unconstitutionally vague *only if it is construed in its narrowest sense*.[23]

The second manifestation of the "fair warning" doctrine is the rule of lenity, which requires that ambiguous statutes be construed narrowly, so that the ambiguity is resolved by applying the statute "only to conduct clearly covered."[24] This is exactly the resolution that Mr. Kasischke proposed in his Initial Brief on the Merits.[25] The State asserts that the rule of lenity is not at

---

[19] *Id.*
[20] *Kasischke*, 946 So. 2d at 1157.
[21] *Id.* at 1158.
[22] Ans. Br. on Merits 25.
[23] *See* Initial Br. on Merits 16.
[24] *Lanier*, 520 U.S. at 266.
[25] *See* Initial Br. on Merits 15-16.

issue unless the ambiguity is "grievous."[26] But where a statute is capable of "multiple and irreconcilable interpretations," the ambiguity *is* grievous, and people such as Mr. Kasischke, who reasonably believed he was abiding by the statute, may spend years in prison for guessing its meaning incorrectly.

According to the State, however, the Third District "resolved" any ambiguity by consulting the legislative history.[27] This assertion also fails because, as argued above, the legislative history gives far more support to Mr. Kasischke's interpretation than it does to the Third District's. Any support for the Third District's construction does not overcome the many references to "offense-specific" programs and "tailoring" treatment plans to the offender's deviant behavior pattern – references that the Third District did not address. Because it is unreasonable to say that the legislative history unequivocally resolves any ambiguity in the State's favor, the rule of lenity must apply.[28]

The third manifestation of the "fair warning" doctrine is that due process prevents courts from applying "a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has

---

[26] Ans. Br. on Merits 25-26.
[27] Ans. Br. on Merits 26.
[28] *See Dixson v. United States*, 465 U.S. 482, 491 (1984) ("If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of . . . criminal defendants in these cases.").

fairly disclosed to be within its scope."[29] Regarding this manifestation, the State merely asserts, without argument, that Mr. Kasischke's behavior was "clearly" within the scope of the statute.[30] But whether Mr. Kasischke violated the statute depends on which of the multiple and irreconcilable interpretations one chooses to enforce, so it is far from clear that his behavior falls within the scope of the statute.

The State goes on to say that Mr. Kasischke's community control officer told him he could not have pornographic materials.[31] This does not qualify, however, as "fairly disclosing" what behavior is prohibited because, as *Lanier* tell us, the meaning of the statute must be fairly disclosed by either the statute itself or a "prior judicial decision."[32] A community control officer is neither a statute nor a judicial decision, and his statement of what is prohibited is not a substitute for either one.[33]

As *Lanier* states,

> 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.[34]

At the time that Mr. Kasischke possessed the pornographic videotape, the

[29] *Lanier*, 520 U.S. at 266.
[30] Ans. Br. on Merits 27.
[31] Ans. Br. on Merits 27.
[32] *See Lanier*, 520 U.S. at 266.
[33] *See Barber v. State*, 344 So. 2d 913, 914 (Fla. 3d DCA 1977).
[34] *Lanier*, 520 U.S. at 267.

only law that could apprise him of his duties consisted of one statute, susceptible to multiple interpretations, and one district court decision, *Taylor*, that interpreted the statute in the same way that Mr. Kasischke interpreted it.[35] As there was no established legal doctrine that warned him that he could not possess any pornography whatsoever, it violates his due process rights to punish him for an action for which he had no fair warning.

IV. This case is in conflict with *Taylor* because the two cases are irreconcilable, not because of their procedural postures.

The State argues that this case is not in conflict with *Taylor* because the defendants in the two cases were in procedurally different positions.[36] The State cites no case law suggesting that procedural posture determines conflict. Contrary to the State's assertion, these two cases are in conflict because their holdings are irreconcilable.[37] *Taylor* holds that "relevant to the offender's deviant behavior pattern" applies to obscene and pornographic materials,[38] while *Kasischke* holds that it does not.[39] The conflict is express

---

[35] *See Taylor v. State*, 821 So. 2d 404, 405-06 (Fla. 2d DCA 2002).
[36] *Id.*; *see* Ans. Br. on Merits 37.
[37] *See Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006).
[38] *Taylor*, 821 So. 2d at 405-06 ("[W]e agree with Taylor that condition 29 in the written order of probation [which prohibits him from viewing, owning, or possessing obscene, pornographic, or sexually explicit material] should be more specific and relate to Taylor's particular deviant behavior pattern.").
[39] *Kasischke*, 946 So. 2d at 1159.

and direct; that is, it appears within the four corners of the two decisions.[40] Thus, this Court's exercise of discretionary review is proper.

V. The defense's position is not inconsistent; it is merely alternative argument.

The State chides us for being inconsistent about whether the statute is ambiguous.[41] On the contrary, we are merely following the well-established practice of arguing in the alternative.[42] Mr. Kasischke's position may be summed up as follows:

(1) Mr. Kasischke's reading of the statute, that "relevant to the offender's deviant behavior pattern" modifies "obscene," "pornographic," and "sexually stimulating" material, is the most logical and natural. Both the Third District's reading and the State's reading in the district court are strained and unnatural.[43]

(2) Alternatively, if one should consider all the suggested interpretations as plausible, the statute is ambiguous on its face, as it is

---

[40] *See* Art. V, § 3(b)(3), Fla. Const., *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).
[41] Ans. Br. on Merits 29.
[42] *See e.g. TRW Automotive U.S. LLC v. Papandopoles*, 949 So. 2d 297, 300 (Fla. 4th DCA 2007) ("TRW independently filed a motion to dismiss for forum non conveniens, arguing in the alternative that Michigan was another adequate, alternative forum.").
[43] Initial Br. on Merits 17-20.

capable of various interpretations.[44]

(3) Consulting the legislative history to resolve the facial ambiguity only confirms Mr. Kasischke's interpretation.[45] Alternatively, it still leaves the statute ambiguous.

(4) If the statute is still ambiguous even after consulting the legislative history, Mr. Kasischke lacked fair warning. The rule of lenity then applies and the statute must be construed narrowly in Mr. Kasischke's favor so that he may be reinstated to probation.[46]

[44] Initial Br. on Merits 14-15.
[45] Initial Br. on Merits 21-28.
[46] Initial Br. on Merits 12-16, 29-32.

CONCLUSION

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.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960
fax: (305) 545-1999
e-mail:TRegnier@pdmiami.com

By: _____
THOMAS REGNIER
Assistant Public Defender
Florida Bar No. 660000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was sent to Richard Polin and Paulette Taylor, Office of the Attorney General, Counsel for the State of Florida, 444 Brickell Avenue, Suite 650, Miami, FL 33131, on July 26, 2007.

_____
THOMAS REGNIER
Assistant Public Defender
Counsel for Petitioner
Florida Bar No. 660000
(305) 545-1960

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).

_____
Thomas Regnier
Assistant Public Defender