

**IN THE SUPREME COURT OF FLORIDA**

STATE OF FLORIDA,

Petitioner,

v.

FSC NO. SC07-510

Lower Ct. No. 2D05-4568

DONALD MONINGER,

Respondent.

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DISCRETIONARY REVIEW OF A DECISION OF  
THE DISTRICT COURT OF APPEAL SECOND DISTRICT

**REPLY BRIEF OF PETITIONER**

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ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEAL OPINION IN STATE OF FLORIDA V. MONINGER, 957 SO. 2D (FLA. 2ND DCA 2007) CONFLICTS WITH THE FOURTH DISTRICT COURT OF APPEAL OPINION IN TREADWAY V. STATE OF FLORIDA, 534 SO. 2D 825 (FLA. 4TH DCA 1988), WHERE THE SECOND DISTRICT AFFIRMED THE TRIAL COURT'S FINDING THAT THE CHILD VICTIM ACTING AS AN AGENT OF THE POLICE WHEN SHE REMOVED USED CONDOMS FROM THE BEDROOM TRASH CAN IN HER FATHER'S BEDROOM.

Petitioner relies on all arguments made in the initial brief but finds it necessary to clarify Respondent's rendition of a two facts. The first misstatement occurred in Respondent's rendition of facts asserted in the Defendant's motion to suppress. Respondent asserts "the motion stated that the daughter spoke with Detective Ewald and told him that '*condoms were used in the bedroom*' of the residence, and that the daughter, upon Detective Ewald's prompting, went into the residence and returned with two condoms." (Answer Brief 4). A reading of the motion reflects it was it acknowledged that the daughter actually stated "***the condoms were used in the bedroom.***" (R22). It becomes clear after reading the defense counsel's rendition of the child victim's statement in its entirety and proper context that it was acknowledged in the motion that the child victim, in making the statement, was referring to a previous statement made to Detective Ewald. That statement being that two (2) condoms were used by her father during

the commission of a sexual battery against her and that the condoms were located in the bedroom. Petitioner next find it necessary to respond to Respondent's suggestion in the answer brief that "the child-victim's acts were wholly precipitated by Detective Ewald's suggestions and encouragement, so that the detective's interest in obtaining evidence to support a criminal prosecution would be fulfilled." (AnswerBrief 10). In advancing this argument, Respondent acknowledged the rule set forth in State v. Iaccarino, 767 So.2d 470 (Fla. 2nd DCA 2000) wherein the Second District Court of Appeal held "that the intent of the individual is a necessary consideration." (Answer Brief 7-8).

Here, Petitioner is in agreement the lower court record is factually limited to the proffers and stipulations of the parties. However, Petitioner contends it is a far stretch of the record to conclude the proffers and stipulated facts demonstrate the child victim acted exclusively with the intent to further law enforcement's interest in obtaining evidence to support a criminal prosecution. To draw that conclusion, this Court would have to first ignore the record reflects that it was the child victim who initiated the process wherein law enforcement was contacted, it was the child victim who alerted Detective Ewald that Respondent had committed an act of sexual battery against her a few days prior to the interview, it was the child victim who informed Detective Ewald that condoms were used during the commission of that act, it was

the child victim who alerted Detective Ewald that two condoms used in the commission of that act still remained in the residence in a wastebasket in her father's bedroom and it was the child victim who actually produced the evidence to Detective Ewald. (R2). The child victim's acts of initiating contact with law enforcement and her supplying information about the condoms occurred prior to Detective Ewald's inquiry as to the existence of evidence. The child victim responded to the inquiry by voluntarily furnishing evidence in support of her claim. In doing so, she acted in furtherance of her own personal interest which in no way violated Respondent's Fourth Amendment right.

Since there was no testimony during the suppression hearing from either the child victim or Detective Ewald as to what actually occurred the State, the Second District of Appeal, and this Court is left to draw its own conclusions as to the intent of the parties. Based on the record, it is unreasonable for this Court to find no dual purpose existed. To accept that the Second District's findings, this Court would make a determination that this minor child victim had no private interest in providing law enforcement with evidence in support of her claim that her father committed a sexual battery against her in her own home. This minor child would certainly have an interest in substantiating her claims against her sole custodial parent as in this instant case.

Petitioner further submits the child victim's assertion that

evidence existed in the home to support her claim provided probable cause for law enforcement to obtain a search warrant. Had the child victim had not provided the condoms to Detective Ewald, law enforcement would have had sufficient probable cause to obtain a search warrant, retrieve the evidence, and the evidence would have been admissible pursuant to the doctrine of inevitable discovery.

**CONCLUSION**

The State respectfully requests that this Court reverse the Second District Court of Appeal's decision in Florida v. Moninger, 957 So. 2d (Fla. 2nd DCA 2007).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished by U.S. mail to Ronald S. Guralnick, Esquire, Bank of America Tower at International Place, 100 S.E. 2nd Street, Suite 3300, Miami, Florida 33131, this 15th day of January 2008.

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COUNSEL FOR PETITIONER

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR PETITIONER