IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC06-_____

STATE OF FLORIDA,

Petitioner,

- versus -

EDWARD MUNAO,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive, Ninth Floor
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Petitioner

Table Of Contents

Page:

Table Of Citations

Cases: **Page:**

Constitutional Provisions: **Page:**

Statutes and Other Authorities: **Page:**

III

Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. Petitioner was Appellee and Respondent was Appellant in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

A copy of the opinion issued by the Fourth District Court of Appeal is attached as Appendix A.

Statement Of The Case And Facts
(limited to the issue of jurisdiction)

Respondent gave verbal instructions to his six-year old son to "go in the kitchen, get a knife and stab [his mother]." Munao v. State, 939 So. 2d 125, 126-27 (Fla. 4th DCA 2006). The son had been diagnosed with Oppositional Defiant Disorder, a behavior disorder that displays defiance, disobedience and sometimes, swearing and physical aggression. Id. at 127. Expert witnesses testified at the trial that Respondent's directions to his son were "'extremely damaging' to a child with N.M.'s problems" and "could reasonably be expected to be the cause of substantial impairment in the ability of a child to function within the normal range of performance and behavior." Id. at 127.

Respondent was convicted of child abuse and solicitation to commit aggravated battery. He was sentenced to five years on each count, to be served consecutively.

On appeal to the Fourth District Court of Appeal, Respondent argued, inter alia, that his child support conviction must be vacated because oral statements alone could not support a conviction for child abuse under § 827.03(1)(b), Fla. Stat.

By opinion dated September 1, 2006, the Fourth District reversed

Respondent's child abuse conviction and remanded with directions to the trial court to enter a judgment of acquittal on that charge. Munao v. State, 939 So. 2d 125 (Fla. 4th DCA 2006). Although the Fourth District determined that Respondent's statements to his son were "deeply troublesome and offensive" and conceded that they constituted unprotected speech because they advocated the use of force and lawless action, and were likely to produce such action, the Court reiterated its holding in State v. Dufresne, 782 So. 2d 888 (Fla. 4th DCA), approved, 826 So. 2d 272 (Fla. 2001), that "section 827.03(1)(b) cannot be applied to speech of any kind . . . to avoid overbreadth because the statute does not limit its application to any recognized exception to the First Amendment." Munao v. State, 939 So. 2d at 128-29.

The State's motions for rehearing and request for certification of conflict were denied, as was its motion to stay mandate. The State's motion to this Court to stay the mandate is currently pending.

On November 29, 2006, the State filed a timely notice to invoke the discretionary jurisdiction of this Court and this Brief on Jurisdiction follows.

Summary Of The Argument

This Court has jurisdiction to review the instant case because the decision of the Fourth District Court of Appeal expressly and directly conflicts with this Court's decisions in Bouters v. State, 659 So. 2d 235 (Fla. 1995), and State v. Saunders, 339 So. 2d 641 (Fla. 1976). The Fourth District's decision also expressly and directly conflicts the decision of the First District Court of Appeal in State v. Coleman, 937 So. 2d 1226 (Fla. 1st DCA 2006). Therefore, this Court may review the case at bar.

Argument

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN BOUTERS v. STATE, 659 So. 2d 235 (Fla. 1995), AND STATE v. SAUNDERS, 339 So. 2d 641 (Fla. 1976); AND THE DECISION OF THE FIRST DISTRICT IN STATE v. COLEMAN, 937 So. 2d 1226 (Fla. 1st DCA 2006).

The decision of the Fourth District Court of Appeal in Munao v. State, 939 So. 2d 125 (Fla. 4th DCA 2006), expressly and directly conflicts with the decisions of this Court in Bouters v. State, 659 So. 2d 235 (Fla. 1995), and State v. Saunders, 339 So. 2d 641 (Fla. 1976). The Fourth District's decision also expressly and directly conflicts the decision of the First District Court of Appeal in State v. Coleman, 937 So. 2d 1226 (Fla. 1st DCA 2006).

Article V, § 3(b)(3) of the Florida Constitution restricts this Court's review of a district court of appeal's decision only if it expressly conflicts with a decision of this Court or of another district court of appeal. This Court's jurisdiction to review the Fourth District's decision in this case may be invoked by either the announcement of a rule of law which conflicts with a law previously announced by this Court or another district court of appeal or by the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). When determining

whether conflict jurisdiction exists, this Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 (Fla. 1988); White Constr. Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984).

Initially, this Court should exercise its discretionary jurisdiction to review the opinion of the Fourth District in the case at bar because the Fourth District's opinion expressly and directly conflicts with the opinion of the First District in State v. Coleman, 937 So. 2d 1226 (Fla. 1st DCA 2006). In Coleman, the First District certified conflict with the Fourth District's opinion in the case at bar and State v. Dufresne, 782 So. 2d 888 (Fla. 4th DCA), approved, 826 So. 2d 272 (Fla. 2001). The First District specifically stated that it did not agree with the Fourth District's determination in both of those cases that the child abuse statute was not applicable to **all** speech, not just protected speech. The First District determined the child abuse statute could withstand an overbreadth challenge if it was construed to be applicable only to specifically described unprotected speech. That proscribed speech could be defined by construing the child abuse statute in pari materia with the definitions in Chapter 39, which contains definitions of "abuse," "harm" and "mental injury." See § 39.01, Fla. Stat. As a result, constitutional speech will not be implicated and the statute will survive an overbreadth challenge. Further, the First District cited to this Court's reliance on Broadrick v. Oklahoma, 413 U.S.

601, 616 (1973), for the proposition that facial overbreadth has not been invoked when a limiting construction can be placed on a challenged statute. Because the State made the exact same arguments in the case at bar as those presented in Coleman, the State should be given the exact same opportunity to seek further review.

Furthermore, the Fourth District's opinion conflicts with this Court's opinion in Bouters v. State, 659 So. 2d 235 (Fla. 1995). In Bouters, this Court upheld the stalking statute, § 748.048, Fla. Stat., against a facial overbreadth challenge. In doing so, this Court examined not only the prohibited act, but it also considered the harm inflicted upon the victim by the defendant's act. Id. at 237**Error! Bookmark not defined.**. In the case at bar, the Fourth District refused to consider the harm to the victim resulting from speech in its overbreadth analysis. The Court determined that the child abuse statute "is seemingly an attempt to outlaw the act that inflicts the harm, not the actual harm itself," and went on to state that "[i]f the legislature specifically defined the applicable act or conduct, then the statute could be interpreted as targeting specific conduct, not any conduct which causes the defined result." Munao v. State, 939 So. 2d at 129. As a result, the Fourth District's overbreadth analysis overlooks, and is contrary to, that conducted by this Court in Bouters.

The Fourth District's opinion also conflicts with this Court's opinion in State v. Saunders, 339 So. 2d 641 (Fla. 1976), wherein this Court narrowed the scope of the breach of the peace statute to exclude constitutionally protected speech, but held that the statute would still criminalize "fighting words" and other words that would incite an immediate breach of the peace. In the case at bar, the Fourth District refused to narrow the application of the child abuse to cover only unprotected speech. Instead, the Court determined that to withstand an overbreadth challenge, application of the child abuse statute must broadly exclude all speech.

Accordingly, because the opinion of the Fourth District directly and expressly conflicts with decision of this Court, as well as the First District, this Court should exercise its discretion and review the Fourth District's decision.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Petitioner respectfully submits that this Court should exercise its discretionary jurisdiction and grant review in the above-styled cause.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive,
Ninth Floor
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Petitioner

Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Roy Black, Esquire, Black, Srebnick & Kornspan, P.A., 201 South Biscayne Blvd., Suite 1300, Miami, Florida, 33131, this _____ day of December, 2006.

_____

HEIDI L. BETTENDORF
Assistant Attorney General

Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

_____

HEIDI L. BETTENDORF
Assistant Attorney General