IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE No. SC06-2386

STATE OF FLORIDA,

Petitioner,

-versus -

EDWARD MUNAO,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Defendant/Respondent Edward Munao will be referred to as he stands in this Court, as he stood in the trial court, and by name. Plaintiff/Petitioner the State of Florida will be referred to as it stands in this Court, as it stood in the trial court, and as "the State." Minors involved in this case will be referred to by initials to protect their identity. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State seeks review of a Fourth District Court decision reversing one of two counts of conviction. Mr. Munao was convicted of child abuse and solicitation to commit aggravated battery. He was sentenced to five years on each count to be served consecutively. The Fourth District Court of Appeal affirmed the solicitation count and reversed the child abuse count and remanded for entry of a judgment of acquittal on that count. Munao v. State, 939 So.2d 125 (Fla. 4th DCA 2006).

Mr. Munao's child abuse conviction under section 827.03(1)(b), Florida Statutes (2003), was based solely on oral statements. The State relied primarily, but not exclusively, on statements made during two telephone conversations between Mr. Munao and his child, N.M.

On appeal, Mr. Munao argued that this case was controlled by the Fourth District Court's prior opinion in State v. DuFresne, 782 So.2d 888 (Fla. 4th DCA), *approved*, 826 So.2d 272 (Fla. 2001), in which the court upheld the child abuse statute "against an overbreadth challenge by narrowly construing it as 'not applicable to speech.'" Munao, slip op. at 4, 939 So.2d at 128. The Fourth District agreed, declined the State's invitation to reconsider DuFresne, and vacated Mr. Munao's conviction for child abuse.

The Fourth District Court focused on the specific language of section 827.03(1)(b), prohibiting "[a]n intentional act that could reasonably be expected to

result in physical or mental injury to a child." *See* Munao, slip op. at 5, 939 So.2d at 129. The court noted that "the statute contains no parameters or guidelines as to what constitutes an act under the statute," and therefore any statements that cause mental injury to a child would be subject to prosecution. Id., 939 So.2d at 129.

The Fourth District Court denied, without comment, the State's motions for rehearing, rehearing en banc, certification of a question of great public importance, motion to amend the motion for rehearing to add a request for certification of conflict, and motion to stay the mandate. The State filed another motion to stay the mandate in this Court, which is still pending at this time. Mandate issued on December 15, 2006.

SUMMARY OF ARGUMENT

The Fourth District Court's decision in this case does not expressly or directly conflict with Coleman, Bouters, or Saunders. Moreover, even if conflict exists, this Court should decline to exercise its discretion because circumstances of this case make re-examination of the district court's decision inappropriate.

ARGUMENT

I. THERE IS NO EXPRESS OR DIRECT CONFLICT BETWEEN THE DECISION IN THIS CASE AND EITHER *COLEMAN*, *BOUTERS*, OR *SAUNDERS*.

The State claims the decision of the Fourth District Court in this case conflicts with the recent decision of the First District Court in State v. Coleman, 937 So.2d 1226 (Fla. 1st DCA 2006), and the earlier decisions of this Court in Bouters v. State, 659 So.2d 235 (Fla. 1995), and State v. Saunders, 339 So.2d 641 (Fla. 1976). These claims must fail. Theses cases involve different statutory language, different statutes, and different factual circumstances. There is no conflict as required for jurisdiction.

A. *State v. Coleman.*

Of the three cases the State cites for conflict, Coleman presents the closest question, but only because the First District Court, which issued its opinion only days after the Fourth District Court released its opinion in this case, certified conflict with Munao. On the other hand, presented with the State's subsequent motion to certify conflict with Coleman, the Fourth District Court declined. While the Fourth District Court did not explain its action, the reason may be that while there may seem to be conflict on first blush, in reality the cases are distinguishable and there is not the kind of express and direct conflict required for this Court to have jurisdiction.

The key is that the First District, and the State, fail to recognize that Coleman and Munao interpret different subsections of the child abuse statute. Munao involves a prosecution and conviction under section 827.03(1)**(b)**. Slip op. at 1, 939 So.2d at 126. Coleman involves a prosecution under section 827.03(1)**(a)**. 937 So.2d at 1227. This difference is crucial.

Section 827.03(1) provides in pertinent part:

> (1) "Child abuse" means:
> (a) Intentional infliction of physical or mental injury upon a child;
> (b) An intentional act that could reasonable be expected to result in physical or mental injury to a child . . . .

Thus subsection (a) makes it a crime to intentionally cause physical or mental injury to a child, by whatever means. However, subsection (b) makes it a crime to intentionally do some act, if that act causes physical or mental injury to a child – **regardless of whether it was an intended consequence of that act.**

In Munao, the Fourth District Court affirmed its prior opinion in State v. DuFresne, 782 So.2d 888 (Fla. 4th DCA), *approved*, 826 So.2d 272 (Fla. 2001). DuFresne also involved a prosecution under section 827.03(1)(b). 782 So.2d at 889-90. The court ruled that in order to avoid striking it as overbroad, that statute should be narrowly construed as "not applicable to speech." 782 So.2d at 891.

It is this conclusion, reaffirmed and applied in Munao, to which the First District Court takes exception in Coleman:

> We do not agree with DuFresne I and Munao, however, that to withstand an overbreadth challenge to section 827.03(1), we must construe the statute to avoid its application to *all* speech. If section 827.03(1) can be construed to be applicable *only* to specifically described unprotected speech, it can withstand an overbreadth challenge.

937 So.2d at 1230 (emphasis in original). However, the court failed to recognize that its solution applies only to section 827.03(1)(a), not (b). The court stated: "We can envision limited circumstances in which speech alone could be used **to intentionally inflict psychological injury on a child**." Id. Indeed, that is what is prohibited under subsection (a) – the intentional infliction of injury. If speech is made with the intention to injure a child, it may be prosecuted without any constitutional impediment. By limiting application of the statute to conduct which **intentionally inflicts** injury, the statute by its terms applies only to unprotected speech. *See* Coleman, 937 So.2d at 1230 (agreeing with the court in Munao that "[s]peech which causes such mental injury as to constitute child abuse under chapter 30 is not constitutionally protected).

By contrast, the Fourth District Court in Munao, clarifying the reasoning in DuFresne, focused on the specific language of section 827.03(1)**(b)**, prohibiting "[a]n intentional act" which causes injury. An individual violates subsection (b) if he or she intends to do the act, even if he or she had no intention of causing harm to a child with that act. Yet, unlike subsection (a), there are "no parameters or

guidelines as to what constitutes an act" under subsection (b). Thus, subsection (b) "actually outlaws a result derived from **any** act, making the statute applicable to a wide range of acts that cause a 'physical or mental injury upon a child.'" Slip op. at 5, 939 So.2d at 129 (quoting §827.03(1)(b)). Because subsection (b), as presently constructed, does not limit the conduct proscribed "to any recognized exception to the First Amendment," the court ruled that it cannot be constitutionally applied "to speech of any kind." Slip op. at 5, 939 So.2d at 128-29.

The First District Court's decision in Coleman does not expressly and directly conflict with the Fourth District Court's decision in this case. The two simply address very different statutory language and circumstances.

B. *Bouters v. State.*

The fatal problem with the State's reliance on Bouters for conflict is that Bouters involved, not just a different subsection, but a completely different statute. Munao involves construction of the child abuse statute, section 827.03(1)(b). Bouters involved an overbreadth challenge to the stalking statute, section 784.048, Florida Statutes (Supp. 1992). 659 So.2d at 236.

Unlike the child abuse statute, the stalking statute "proscribes a particular type of conduct defined at length in the statute." Id. at 237. Unlike the child abuse statute, which proscribes **any** "intentional act" which causes the proscribed result, the stalking statute only proscribes acts that are "willful, malicious, and repeated,

and form a 'course of conduct'" which causes the proscribed result. Id. Moreover, "the statute expressly provides that '[c]onstitutionally protected activity is not included within the meaning of 'course of conduct'" Id. Therefore, this Court recognized that "[t]he conduct described at length in the stalking statute is clearly criminal and unprotected by the First Amendment." Id.

Bouters does not, as the State suggests, stand for the proposition that a court analyzing a statute for overbreadth may permissibly look only at the harm caused, and not at the language limiting the conduct causing that harm. There is no conflict, express, direct, or otherwise, between Bouters and Munao.

C. ***State v. Saunders.***

Nor does Munao conflict with Saunders. In Saunders, this Court did precisely what the Fourth District Court did in DuFresne and Munao – narrowly construed a statute so that it could withstand a facial overbreadth challenge. 339 So.2d at 644. Although this Court in Saunders was able to narrow construction to a small category of unprotected speech, rather than prohibiting application of the statute to all speech, that difference in construction reflects the difference in the statutes involved.

Saunders involved section 877.03, Florida Statutes (1975), which prohibits breaches of the peace or disorderly conduct. This Court construed that statute to apply only "to 'fighting words' or words like shouts of 'fire' in a crowded theatre,'

well-recognized types of speech that clearly 'by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace," which is the harm addressed by the statute. 339 So.2d at 644. The fact that this Court was able to more narrowly construe the language of the disorderly conduct statute in Saunders does not mean that the same result is either mandated, or indeed appropriate, for the child abuse statute. Therefore, the Fourth District Court's decision in Munao does not conflict with either the result, the reasoning, or the express language of Saunders. This Court does not have jurisdiction to review the decision of the Fourth District Court of Appeal in this case.

II. EVEN IF CONFLICT EXISTS, THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Even if this Court finds it has jurisdiction based on conflict, this Court should decline to exercise its discretion to review this case. The decision of the Fourth District Court correctly balances the First Amendment rights of parents, teachers, and child care workers with the state's interest in protecting children. The State's proposed solution – judicial construction of subsection (b) to apply to some category of "unprotected" speech – fails for several reasons.

First, the State argued below that this category of "unprotected" speech encompassed speech whose sole intent was expected injury to a child. If so, there would be no material difference between subsection (a) and subsection (b) when it

came to speech. Subsection (a) covers speech **intended** to cause injury.

Second, it will be extremely difficult to narrowly describe the particular speech that runs afoul of subsection (b) – speech that is not intentional, but "could reasonably be expected to result in" injury. In Saunders, there was a general societal and legal consensus that shouting 'fire' in a crowded theater is likely to cause a dangerous breach of the peace as people stampede out. However, it is much more difficult to determine a general societal, scientific, or legal consensus as to which specific categories of speech "could reasonably be expected to result in" injury. Reasonable people can differ as to proper child rearing techniques, and context is very important. Attitudes change with time; child rearing techniques once considered strict, but acceptable, are now considered abusive. The Fourth District Court properly found that this decision should be made by the legislature, not the courts.

Furthermore, this case poses ex post facto and due process issues if the scope of liability under section 827.03(1)(b) is enlarged by judicial decision. *See* State v. Snyder, 673 So.2d 9, 11 (Fla. 1996). There is no question that in 2003, the time of the underlying conduct in this case and the time of Mr. Munao's conviction, section 827.03(1)(b), as construed by the Fourth District Court and tacitly approved by this Court, did not apply to **any** speech. Therefore, at that time, Mr. Munao's conduct was not a crime. A judicial enlargement of that statute

cannot constitutionally be retroactively applied to Mr. Munao. *See* State v. Barnum, 921 So.2d 53, 521 (Fla. 2005)("a conviction runs afoul of due process guarantees if, **at the time it was rendered**, the activity in which the defendant was engaged was not a crime"). These concerns are not present in Coleman, not only because it is an interlocutory appeal, but because there is no judicial decision expressly holding that the crime with which Coleman has been charged, section 827.03(1)(a). does not include speech. Unlike Coleman, the circumstances of this case make accepting jurisdiction inappropriate.

CONCLUSION

For the reasons set forth above, Respondent, EDWARD MUNAO, respectfully requests that this Court decline to exercise discretionary jurisdiction to review the decision of the Fourth District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to Bill McCollum, Attorney General, The Capitol, PL-01 Tallahassee, FL 32399-1050, Celia A. Terenzio, Assistant Attorney General, Chief, West Palm Beach Bureau, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401 and to Heidi L.Bettendorf, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, FL 33401, on this 4th day of January, 2007.

By: _____
ROY BLACK, ESQ.

Certificate of Type Size and Style

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

By: _____
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