IN THE SUPREME COURT OF FLORIDA

KIMBERLY BRABSON, III,

Petitioner,

vs. Case No. SC09-136

STATE OF FLORIDA,

Respondent.
_____/

On Review from the District Court of Appeal, Second District
State of Florida

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, Kimberly Brabson, III, seeks discretionary review of the opinion of the Second District Court of Appeal[1] in this case, attached as an Appendix ("App."). Brabson was charged with 19 counts of promoting a sexual performance by a child, in violation of Fla. Stat. § 827.071(3). App. 3. Brabson was a school swim coach. App. 2. He asked a number of female students to try on swimsuits in his office. *Id.* Without the students' knowledge, Brabson had placed a video camera in the office that recorded the students changing into swimsuits and then redressing. *Id.*

The Second District reversed the trial court's order dismissing the charges of promoting a sexual performance by a child. App 15. The charges were based on the theory that the videotape depicted "sexual conduct by a child" by showing an "actual lewd exhibition of the genitals." App. 4-5. The Second District held that the determination of whether images of students changing into and out of swimsuits depict "sexual conduct" is "a factual inquiry for a jury and not a legal question for the court."[2] App. 2. It held that the "lewdness" necessary to make an exhibition of the genitals "sexual conduct" under § 827.071 "may be satisfied by the intent of the person

[1]Following the recusal of the entire Second District Court of Appeal from this case, a panel of judges from the Third District was appointed and decided the appeal.

[2]The trial court also dismissed the § 827.071(3) charges on the second ground that there were no genitals exhibited on the videotape. The appellate opinion reverses without noting or addressing this independent ground for the trial court's dismissal.

promoting" the child's performance. App. 7. Brabson's notice to invoke the Court's discretionary jurisdiction was timely filed on January 23, 2009.

SUMMARY OF THE ARGUMENT

The Second District's holding that images of students trying on swimsuits can be deemed to depict "sexual conduct" expressly and directly conflicts with the Fourth District's opinion in *Lockwood v. State*, 588 So. 2d 57 (Fla. 4th DCA 1991). It also conflicts with the Second District's opinion in *Fletcher v. State*, 787 So. 2d 232 (Fla. 2d DCA 2001). *Lockwood* and *Fletcher* hold that innocent conduct such as dressing and undressing is not "sexual conduct" under § 827.071. 588 So. 2d at 58; 787 So. 2d at 235. In further conflict with *Lockwood* and *Fletcher*, the holding that images of students trying on swimsuits could be "lewd" rests on the premise that the producer's lewd intent can transform images of otherwise innocent conduct into a "sexual performance." This premise is inconsistent with the plain language of § 827.071, which provides that the nature of conduct depicted–not the intent of the person recording it–determines whether a performance is "sexual conduct."

ARGUMENT

I. The Second District's decision expressly and directly conflicts with the Fourth District's opinion in *Lockwood v. State*.

The Second District's decision expressly and directly conflicts with the decision of the Fourth District in *Lockwood v. State*, 588 So. 2d 57 (Fla. 4th DCA 1991), as

well as the Second District's own opinion in *Fletcher v. State*, 787 So. 2d 232 (Fla. 2d DCA 2001), in its interpretation of "sexual conduct" under § 827.071. Section 827.071(3) prohibits producing, directing, or promoting "any performance which includes sexual conduct by a child less than 18 years of age." The statute defines "sexual conduct" to include, among other things, "actual lewd exhibition of the genitals." § 827.071(1)(g). Both *Lockwood* and *Fletcher* hold as a matter of law that images of minors dressing and undressing are not "sexual conduct" under § 827.071. 588 So. 2d at 58; 787 So. 2d at 235. Here, the Second District held to the contrary that whether images of students trying on swimsuits depict sexual conduct is a factual question. The Second District's distinction of *Lockwood* and *Fletcher* on the theory that the legal significance of an image varies with the mental state of its producer is inconsistent with the plain language of the statute.

A. *Lockwood* and *Fletcher* hold as a matter of law that innocent conduct of the type depicted here is not "sexual conduct."

The Second District's opinion expressly and directly conflicts with *Lockwood*, as well as *Fletcher*, because those cases held as a matter of law that images that are not distinguishable in any material respect from the images here did not depict "sexual conduct." The defendant in *Lockwood* possessed videotapes depicting "a sixteen-year-old girl (who was apparently unaware of the filming) undressing, showering, toweling herself dry, and performing other acts of feminine hygiene and donning clothing." 588

So. 2d at 57. The Fourth District reversed the denial of the defendant's motion for a judgment of acquittal as to § 827.071 charges because the videotape did not depict "sexual conduct as defined by the statute," but rather "innocent, normal everyday occurrence[s]." *Id.* at 58.

In *Fletcher*, a search warrant was issued based on allegations that the defendant had hidden video cameras in a bedroom and bathroom used by his daughters. 787 So. 2d at 233. The Second District held these allegations were insufficient to establish probable cause that the defendant violated § 827.071 because there was no evidence the "cameras could have captured anything more than innocent conduct such as children using the toilet, dressing, and bathing." *Id.* at 235.

Like *Fletcher* and *Lockwood*, this case involves children engaged in normal, innocent conduct. This case and *Lockwood* presented the same issue: whether the State established a prima facie case of guilt. Just as the State failed to establish a prima facie case in *Lockwood* because depictions of a girl showering, dressing, and undressing are not of "sexual conduct," the State's case against Brabson fails because trying on swimsuits is not "sexual conduct." Likewise, *Fletcher* found the allegation of videotaping innocent conduct such as dressing and bathing to be insufficient to establish probable cause to believe depictions of "sexual conduct" were being created. 787 So. 2d at 235. Trying on swimsuits is equally innocent conduct and as a matter of law under *Lockwood* and *Fletcher* is not "sexual conduct."

B. An image's lewdness does not depend on its producer's intent.

The distinction the Second District draws between this case and *Fletcher* and *Lockwood* – and the crux of its holding that a factual question exists as to whether the videotape depicts "sexual conduct" – rests on the premise that the intent of the producer of a depiction rather than the nature of the conduct depicted determines whether an image is "lewd." App. 9-12. This premise is inconsistent with the plain language of

§ 827.071. Moreover, the Second District's interpretation of this Court's opinion in *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991), App. 7, 12, to mean that the producer's intent may transform a depiction of innocent conduct into a "sexual performance" is a misreading of *Schmitt*.

The plain language of § 827.071(3) establishes that whether an exhibition of the genitals is "lewd" depends not on the intent of the image's producer, but on the nature of the conduct depicted. The statute prohibits promoting "any performance which includes sexual conduct *by a child.*" (Emphasis added). The relevant definition of "sexual conduct" is the "actual lewd exhibition of the genitals." § 827.071(1)(g). This Court stated in *Schmitt* that "[u]nder Florida criminal law," lewdness "require[s] an intentional act of sexual indulgence or public indecency." 590 So. 2d at 410. Because there was no "public indecency" here, the videotape depicted a "sexual performance by a child" only if it showed an "exhibition of the genitals" "by a child" in a "lewd" – that

is, sexually indulgent – manner. Nothing in the language of the statute suggests the intent of the image's producer affects whether the image is lewd.

Florida's "voyeurism" and "video voyeurism" statutes address the conduct of secretly videotaping another with lewd intent. At the time relevant to this case, Fla. Stat. § 810.14(1) (2005) provided that a person commits "voyeurism" by "with lewd, lascivious, or indecent intent, secretly" observing or recording a person when that person has a reasonable expectation of privacy.[3] Similarly, the "video voyeurism" statute, Fla. Stat. § 810.145(2)(a), prohibits secretly recording for a person's own "sexual arousal" or "gratification" another person "who is dressing, undressing, or privately exposing the body, ... when that person has a reasonable expectation of privacy." Section 827.071, by contrast, does not include the phrases found in the voyeurism statutes, such as "with lewd, lascivious, or indecent intent" or "for his or her own ... sexual arousal [or] gratification," but instead provides that it is the "exhibition of the genitals" "by a child" that must be "lewd" to violate that statute.

The Second District's opinion, however, interprets this Court's opinion in *Schmitt* to mean that "the lewdness requirement under section 827.071(1)(g) may be satisfied by the intent of the person promoting the performance which included sexual conduct by the child." App. 7; *see also* App. 12. That is not *Schmitt*'s holding.

[3]Brabson was also charged with 11 counts of voyeurism that remain pending.

Schmitt involved a search warrant based on allegations that the defendant had taken nude photographs of his daughter, videotaped his daughter and a woman "stripping down to their panties," and videotaped his daughter swimming nude. 590 So. 2d at 408. The defendant argued the allegations of the warrant did not establish probable cause for the search. *Id.* at 409. The Court noted that Schmitt's conduct indicated he "did not treat the nudity of himself, his daughter, and others in the offhand, natural manner that might be expected if the conduct were purely innocent" but rather "made nudity a central and almost obsessive object of his attention." *Id.* at 411. For that reason, the Court held probable cause existed to believe "that Schmitt's conduct toward his daughter included the 'lewdness' element required by the statute." *Id.* It concluded that, "While nudity alone would not have sufficed, this overall focus of Schmitt's conduct tended to show a lewd intent and thus created a substantial basis for believing that the search would fairly probably yield evidence of a violation of section 827.071." *Id.*

The Second District's opinion analogizes this case to *Schmitt*, and attempts to distinguish it from *Fletcher* and *Lockwood*, on the theory that Brabson's positioning of the camera resulting in waist-level images in some portions of the videotape shows "nudity and female genitalia were the focus of Brabson's filming." App. 9-10. In interpreting *Schmitt* to mean that Brabson's "focus" could determine the lewdness of the images depicted, App. 7, 12, the Second District fails to appreciate the critical

procedural distinction between this case and *Schmitt*. The issue in *Schmitt* was whether probable cause existed to believe a person – known to have photographed and videotaped a nude child – might knowingly possess images of a child engaged in "sexual conduct" that might be discovered through the execution of a search warrant. The case did not address whether particular known images in fact depicted "sexual conduct." *Schmitt* held that the defendant's "lewd intent" could be relevant to the former issue. 590 So. 2d at 511. Had the State sought a warrant to search Brabson's office based on the videotape, a reasonable court might well have found probable cause to support such a search. But here, Brabson challenges not whether the videotape might support the issuance of a warrant to seize other images but whether the videotape itself depicts "sexual conduct." Under the clear holdings of *Fletcher* and *Lockwood*, it does not, and neither *Schmitt* nor any other case holds that the alleged "intent" of the producer of a video depiction determines whether the contents of the depiction constitute "sexual conduct."

The Second District also sought to distinguish *Fletcher* and *Lockwood* because the minors in those cases were videotaped in bedrooms or bathrooms, locations where activities such as showering or dressing ordinarily occur. App. 11. This case is different, according to the Second District's opinion, because Brabson "orchestrated" a plan to videotape students "in a place where, but for Brabson's machinations, they would never have undressed." *Id*. The location in which the students tried on

swimsuits, and whether they chose that location, does nothing to change the factor that *Fletcher* and *Lockwood* hold matters: the nature of the conduct. Trying on swimsuits in private is simply not "sexual conduct" because it is not "lewd." Moreover, directing students to try on swimsuits in a particular location is hardly comparable to the *Schmitt* defendant's posing his daughter for photographs and videotaping her "stripping." More significantly, directing nude poses or stripping suggest a level of choreography that could create probable cause to believe the resulting images might involve an "actual lewd exhibition of the genitals." In this case, there was no posing and unlike *Schmitt*, the issue here is not whether there was probable cause for a search, but whether the fruits of a search violate § 827.071.

The Second District also held that application of the test set forth in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), which is applied in many jurisdictions to determine whether an image is lewd or lascivious for purposes of child pornography statutes, establishes that the State has made a prima facie case against Brabson. The Second District's reliance on the *Dost* test conflicts with its holding that the lewdness of images may depend on their producer's intent. *Dost* holds that a determination as to whether an image of a child is "lascivious," and therefore criminal under the federal child pornography statute, should be based on the "content of the visual depiction," 636 F. Supp. at 832 – not the intent of the image's producer. Cases applying *Dost* hold that the focus in determining whether an image is lascivious

"should be on the objective criteria of the [image's] design," not the "actual effect" of the images on a particular defendant. *United States v. Amirault*, 173 F.3d 28, 34-35 (1st Cir. 1999); *see also United States v. Villard*, 885 F.2d 117, 125 (3rd Cir. 1989) ("Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo.... We must, therefore, look at the photograph, rather than the viewer."). To hold otherwise, the *Amirault* court pointed out, would overly broaden the reach of the statute – if the defendant's "subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography." 173 F.3d at 34.

As *Amirault* describes, it will now be impossible in the Second District to know whether an image of otherwise innocent conduct could be treated as child pornography without knowing the intent of the image's creator. Possession of a photograph of a child at bathtime – present in many family photo albums – could be criminal depending on whether its creator was a proud parent or a deviant family friend. This result conflicts with the holdings in *Lockwood* and *Fletcher*, is inconsistent with the plain language of the statute, and misreads *Schmitt*.

CONCLUSION

For the reasons stated above, this Court should exercise its discretion to accept review of the Second District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by Federal Express on January 30, 2009, to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I certify that the forgoing complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). This Brief has been prepared using Times New Roman, 14-point font.

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James E. Felman