IN THE SUPREME COURT OF FLORIDA

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CASE NO. 65,245

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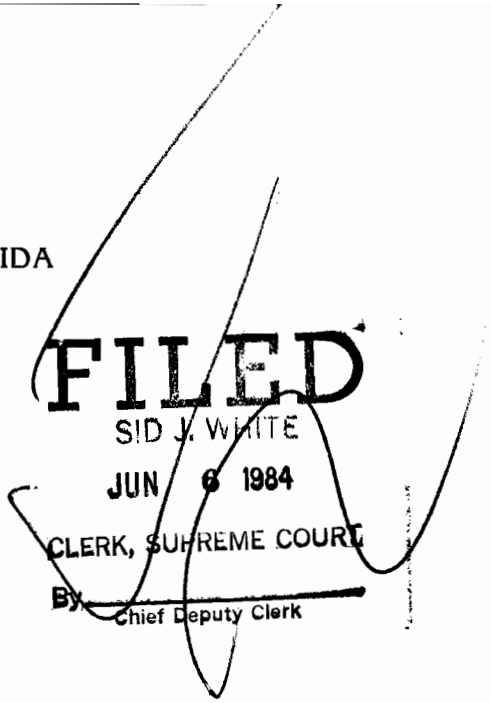

WILLIAM LEON HURST,
MICHAEL IAN DUSAKTO, and
HUGH RAVEN WALKER,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONERS

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ISSUES PRESENTED FOR REVIEW

ISSUE I

FLORIDA STATUTE 856.021 COMMONLY REFERRED TO AS THE LOITERING OR PROWLING STATUTE IS UNCONSTITUTIONAL PER SE IN LIGHT OF THE UNITED STATES SUPREME COURT OPINION OF Kolender v. Lawson, 103 S.Ct. 1855 (1983).

ISSUE II

FLORIDA STATUTE 856.021 COMMONLY REFERRED TO AS THE LOITERING AND PROWLING STATUTE IS UNCONSTITUTIONAL IN THAT IT PERMITS ARREST ON LESS THAN PROBABLE CAUSE.

SUB ISSUE

FLORIDA STATUTE 856.021 IS UNCONSTITUTIONAL IN THAT IT IS IN DEROGATION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY MAKING ARTICULABLE SUSPICION OF A CRIME ITSELF A SUBSTANTIVE CRIMINAL OFFENSE.

INTRODUCTION

The Petitioners, WILLIAM LEON HURST, MICHAEL IAN DUSAKTO, and HUGH RAVEN WALKER, were the defendants in the lower court and the appellees in the District Court of Appeal of Florida for the Third District. The Respondent, State of Florida was the prosecutor in the lower court and the appellant in the District Court of Appeal of Florida for the Third District. The parties will be referred to herein as they stand in this Court. The symbol "R" will be used to designate the Record on Appeal. All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On April 11, 1983, an information was filed charging the Petitioners with conspiracy to traffic in Cannabis; possession with intent to sell a controlled substance; trafficking in Cannabis; and loitering or prowling (R. 1-4A). The Petitioners plead not guilty.

Thereafter, the Petitioners filed a motion to dismiss Count IV of the information, loitering or prowling, alleging, that said statute was unconstitutional (R. 5). On August 8, 1983, the trial court granted their motion to dismiss finding:

> "...that based upon Kolender v. Lawson, 103 S.Ct. 1855 (1983) and State v. Ecker, 311 So.2d 104 (Fla. 1975), the Florida Loitering and Prowling Statute 856.021 (F.S. 1981) is unconstitutional for vagueness..." (R. 43).

Thereafter, an extension of the speedy trial period was obtained (R. 48).

On April 17, 1984, the Third District Court of Appeal affirmed the lower

court's ruling and certified the issue to this Court.

A timely notice to invoke discretionary jurisdiction was filed and this appeal ensues.

ARGUMENT

ISSUE I

FLORIDA STATUTE 856.021 COMMONLY REFERRED TO AS THE LOITERING OR PROWLING STATUTE IS UNCONSTITUTIONAL PER SE IN LIGHT OF THE UNITED STATES SUPREME COURT OPINION OF Kolender v. Lawson, 103 S.Ct. 1855 (1983).

Florida Statute 856.021 provides:

"(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

(3) Any person violating the provisions of this section shall

be quilty of a misdemeanor of the second degree, punishable as provided in Section 775.082 or Section 775.083."

In this Court's landmark decision of State v. Ecker, 311 So.2d 104 (Fla. 1975), rehearing denied April 30, 1975, this Court upheld challenges to the instant statute which alleged its constitutional infirmity on the grounds that it was (1) vague and overbroad, (2) required self-incrimination, and, (3) was subject to arbitrary enforcement. In the Ecker opinion, this Court addressed each issue raised by the defendant and upheld the constitutionality of the act by limiting its application. In noting that the Supreme Court had the obligation to construe the wishes of the legislative body in a manner that would make the legislation constitutionally permissible, the Court limited the application of the statute by finding what the Court considered a fair construction of the legislation (at 109). In order to uphold the attack against the vagueness and overbreadth of the statute, the Supreme Court discussed particular opinions which have upheld similar attacks in other jurisdictions. The Court, at 108, discussed the leading California case at the time. People v. Solomon, 33 Cal. App. 3rd 429, 108 Cal. Rep. 867, cert. denied 415 US 951, 94 S.Ct. 1476, 39 L.Ed. 2d 567 (1974). In this case the Court of Appeals for the Second District of California upheld the constitutionality of a loitering statute which provided that a loiterer may be found guilty of disorderly conduct if (1) he loiters without apparent reason and refuses to identify himself and account for his presence when requested by a peace officer to do so, and if (2) surrounding circumstances indicate that public safety demand such inquiry. Further, the California Court held that once a person had furnished suitable identification, he had satisfied the statute and could not be arrested or prosecuted for failure to account for his presence or failure to give a satisfactory or plausible account to

the interrogating peace officer. In the second challenge, the Court discussed the issue of whether the statute was unconstitutional because for all practical purposes it required an accused to "identify himself and explain his presence and conduct." The Court held, "under circumstances where the public safety is threatened, we find no constitutional violation in requiring credible and reliable identification".[1] The Court went on to reiterate that there was no constitutional infirmity in the requirement that an individual identify himself under circumstances where the public safety was threatened (at 110). As to the final attack discussed in the Ecker opinion, the Court dismissed defense charges that the statute authorized police officers to use their unbridled discretion to arrest whomever they please. The Court noted that although the statute might be unconstitutionally applied in certain circumstances there was no ground for finding the statute itself unconstitutional. The Court interpreted the statute to only come into operation when the surrounding circumstances suggested to a reasonable man some threat and concern for the public safety (at 110). The Court emphasized that (1) under circumstances where there is loitering or prowling in a place, at a time or in a manner not usual for law-abiding individuals, and (2) such loitering and prowling were under circumstances that threatened the public safety, the accused upon being confronted by a law enforcement officer, properly produces credible and reliable identification and complies with the orders of the law enforcement officer necessary to remove the threat to the public safety, or voluntarily offers a

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1. Apparently the District Courts will not permit a conviction under this Statute, unless an accused is permitted an opportunity, prior to arrest, to explain his presence. See, Z.P. v. State, 440 So.2d 601 (Fla. 3d DCA 1983).

reasonable explanation for his presence that dispels the alarm and threat, then the charge under the statute can no longer properly be made.

Effect of Lawson Opinion:

Ecker, supra, twice, in discussing the challenge on the basis of self-incrimination and arbitrary application, refers to the production of credible and reliable identification (at 109 and 110) as a basis of preventing a waiver of Fifth Amendment privilege and arbitrary police action. In Kolender v. Lawson, 103 S.Ct. 1955 (1983), Justice O'Connor begins:

> "This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of Terry v. Ohio, 392 US 1 (1968). We conclude that the statute as it has been construed is unconstitutionally vauge within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a 'credible and reliable' identification."

This California statute was interpreted in the case of People v. Solomon, 33 Cal. App. 3rd 429 (1973). That is the same case relied upon by this Court in State v. Ecker, supra. Credible and reliable identification was defined by the Court in People v. Solomon, as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Under the terms of that statute failure of the individual to provide credible and reliable information permits the arrest. This, of course, should be compared with the Supreme Court of Florida's opinion at 109 which states "under cricumstances where the public safety is threatened we find no constitutional violation in requiring credible and reliable identification." Further,

at 110, the Supreme Court of Florida has stated that no charge under the loitering statute can be made where an individual produces credible and reliable identification and complies with the orders of law enforcement officers necessary to remove the threat of public safety. As the Court stated "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement", Lawson, supra, at 3064. The Court went on:

> "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the docrine / the requirement that a legislature establish minimal guidelines to govern law enforcement'. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections'."

In striking down the California statute, the Court stated that it contained no standard for determining what a suspect has to do in order to satisfy the requirement to provide "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and may be permitted to go on his way in the absence of probable cause to arrest. The Court further stated that it is clear that the full discretion accorded to the police to determine whether the suspect has provided a credible and reliable identification necessarily entrusts lawmaking to the moment to moment judgment of the policeman on his beat. The statute further furnishes a convenient tool for harsh and discriminatory enforcement for local prosecution officials against particular groups deemed to merit their

displeasure. Most significantly, the court noted that although the initial detention may, in fact, be justified the state had failed to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement. This is identical to Ecker, supra. In Ecker, supra, the Court noted that the initial detention would be justified where loitering or prowling is done in a place, at a time or in a manner not usual for law-abiding individuals, and such loitering and prowling were under circumstances that threatened the public safety. The unfettered discretion lies in the eliminating factor of Ecker, supra,[2] where the Court, in order to assure the Constitutional firmity, states that when the individual properly produces credible and reliable identification and complies with the orders of the law enforcement officer necessary to remove the threat to public safety no charge under the statute can be properly made.[3] This, as in the Lawson decision, leaves the same unfettered discretion into the hands of the

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2. Although stated as "the eliminating factor" it is further articulable circumstances which change the character of the stop from Terry type detention to probable cause to arrest.

3. This Court in Hardie v. State, 333 So.2d 13 (Fla. 1976) found that behavior observed by police, (riffling through the contents of a glove box of a car, after seeing defendant in another car) the time of day (2:55 a.m.), and defendant's failure to properly identify himself, constituted circumstances warranting justifiable and reasonable alarm and immediate concern for the safety of property in the vicinity. That is to say, there was probable cause to arrest and sufficient evidence to convict. However, it is clear that the element which provided probable cause to arrest was failure to identify. The Court stated: "We held, in State v. Ecker, supra, that under circumstances where the public safety was threatened by an individual, no constitutional provision was violated in requiring credible and reliable identification." "...an individual nevertheless may be required to identify himself where the public safety is threatened." (Emphasis added). This interpretation requires identification on less than probable cause, since if there was probable cause a defendant could not be required to identify himself. See, Miranda; See, also, BRS v. State, 404 So.2d 195 (Fla. 1st DCA 1981) excluding evidence of conflicting statements since no Miranda warning prior to explanation.

police by containing no standard for determining what a suspect has to do in order to satisfy the requirement to provide a credible and reliable identification. Therefore, Florida Statute 856.021 is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.[4] As the Court in Ecker, supra, incorrectly noted, "we are not here dealing with the historical loitering and vagrancy statute that makes status a crime and gives uncontrolled discretion to the individual law enforcement officer to make the determination of what is a crime." What the Court has done by its limiting application is given the individual law enforcement officer the discretion to determine, without guidelines, whether a suspect has, in fact, satisfied the requirements of the statute.

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4. i.e., prevent detention from becoming probable cause to arrest.

ARGUMENT

ISSUE II

FLORIDA STATUTE 856.021 COMMONLY REFERRED TO AS THE LOITERING AND PROWLING STATUTE IS UNCONSTITUTIONAL IN THAT IT PERMITS ARREST ON LESS THAN PROBABLE CAUSE.

SUB ISSUE

FLORIDA STATUTE 856.021 IS UNCONSTITUTIONAL IN THAT IT IS IN DEROGATION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY MAKING ARTICULABLE SUSPICION OF A CRIME ITSELF A SUBSTANTIVE CRIMINAL OFFENSE.

At first blush it should be noted that in State v. Ecker, 311 So.2d 104 (Fla. 1975), the opinion itself is confusing. At page 109 of the opinion this Court states:

> "We hold that Section 856.021, Florida Statutes, is not vague or overbroad and specifically the words 'under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity' mean those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized. In justifying an arrest for this offense, we adopt the words of the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed. 2d 889, 906 (1968): '...(t)he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or the public safety is threatened."

What the Court apparently has stated in this section is that a police officer may effectuate an arrest merely on the basis of the standards enumerated in Terry v. Ohio, supra, thereby allowing an arrest on less than probable cause in deprivation of the Fourth Amendment of the United States Constitution. At

page 110 of the Ecker opinion, however, this Court stated that:

> "This statute comes into operation only when the surrounding circumstances suggest to a reasonable man some threat and concern for the public safety. These circumstances are not very different from those that the United States Supreme Court described as 'specific and articulable facts' in Terry v. Ohio, supra. Clearly, when these elements are established and the individual either refuses or fails to properly identify himself or flees when confronted by a law enforcement officer, the offense has been established."

It is apparent that this Court recognized that loitering or prowling in a place, at a time or in a manner not usual for law-abiding individuals, and under circumstances that threatened the public safety would constitute specific and articulable facts as contemplated by Terry. These facts alone (these two elements) would not create sufficient probable cause to effectuate the arrest of the individual. This is clearly recognized by this Court where the Court stated that when these elements are established, and one of the following is also present (the individual either refuses or fails to properly identify himself or flees when confronted by a law enforcement officer) the offense has been established. It is this third element that the Court has expounded at 110 of the Ecker, supra, opinion that actually raises a Terry stop to probable cause to effectuate the arrest.[5]

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5. In Ecker, supra, this Court found that no constitutional infirmity in the statutes requirement that an individual, in circumstances where the public safety is threatened, provide "credible and reliable" identificaiton. The Court concluded that this issue had apparently been settled in California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971). This supposition was, of course, incorrect.

In Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, (1979), the Court held that a state may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. Further, the Court at footnote 3 stated: "We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements."

Clearly, where there is probable cause to arrest, the failure of an individual to furnish identification is immaterial. Where there is a Terry situation the refusal to answer a question of identity furnishes no basis for an arrest.

The two reasons for this conclusion are that as a result of the demand for identification, the statute bootstraps the authority to arrest on less than probable cause,[6] and the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest.

The first reason was explained by the Second Circuit when it considered a New York vagrancy statute. United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1171-74 (2d Cir. 1974), aff'd sub nom. Lefkowitz, Attorney General of New York v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975). In finding the statute unconstitutional, the Newsome court noted that such vagrancy statutes "conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause." Id. at 1172.

As the Ninth Circuit stated in Powell v. State, 507 F.2d 93 (9th Cir. 1974), the vagrancy ordinance subverts the probable cause requirement.

> "It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large

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6. See, Terry v. Ohio, 392 U.S. 1, 34-35, 88 S.Ct. 1868, 1886, 20 L.Ed.2d 889 (1968)(White, J., concurring) ("the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest"); Michigan v. De Fillippo, 443 U.S. 31, 44-45, 99 S.Ct. 2627, 2635-2637, 61 L.Ed.2d 343 (1979) (Brennan, J., dissenting); United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1172 (2d Cir. 1974) aff'd sub nom. Lefkowitz, Atty. Gen. of New York v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975); People v. De Fillippo, 80 Mich. App. 197, 262 N.W.2d 921, 924 (1977), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, 414-15, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973); Keenan, supra note 7, at 298-301.

> will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquirey. But more is required to justify arrest."

Other courts considering similar statutes have reached the same conclusion.[7] Vagrancy ordinances cannot turn otherwise innocent conduct into a crime.

It is the third element of failure to properly identify oneself (credible and reliable identification) that Petitioners have addressed in Issue I of this brief as being void for vagueness, and which allows for arbitrary police enforcement. Justice Brennan concurring in the Kolender, supra, opinion noted that he would also have held the statute violative of the Fourth Amendment. He noted:

> "We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not 'authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct'. Sibron v. New York, 392 U.S. 40, 61 (1968)."

The question thus in this case is not whether particular conduct by the police violates the Fourth Amendment but is whether the state law purporting to authorize such conduct offends the Constitution. It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individuals person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of

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7. See, People v. De Fillippo, 80 Mich. App. 197, 262 N.W.2d 921, 923-924 (1977), rev'd on other grounds, 443 U.S. 31, 11 S.Ct. 2627, 61 L.Ed.2d 343 (1979); People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d411, 414-415, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973). See, also Hall v. United States, 459 F.2d 831, 835-36 (D.C.Cir. 1972) (en banc).

law enforcement and by the limited extent of the resulting intrusion on an individuals liberty and privacy. See, Davis v. Mississippi, 394 U.S. 791, 726 to 727 (1969). The scope of that exception to the probable cause requirement for seizure of the person has been defined by a series of cases, beginning with Terry v. Ohio, 392 U.S. 1 (1968), holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for purposes of limited questioning and in doing so, may conduct a brief frisk of the suspect to protect himself from concealed weapons. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 880 to 884 (1975); Adams v. Williams, 407 U.S. 143, 145, 146 (1972). Where probable cause is lacking the court has expressly declined to allow significantly and more intrusive detentions or searches on the Terry rationale, despite the assertion of compelling law enforcement interests.

> "For all but those narrowly defined intrusions, the requisite balancing has been performed in centuries of precedent and is embodied in the principle that seizures are reasonable only if supported by probable cause."

Dunaway v. New York, 422 U.S. 200, 214 (1979). What Terry, supra, and the subsequent cases recognize is law enforcement need for "intermediate" response, short of arrest, to suspicious circumstances. What the statute in question allows is more than a brief encounter among private citizens. The statute further permits police officers to do far more than this casual intercourse between police and citizens. If police have the requisite reasonable suspicion they may use a number of ligitimate police tools with substantial coersive impact on the person to whom they direct their intention, including an official "show of authority", use of physical force to restrain him, and a search of the person for weapons. Terry v. Ohio, 392 U.S. at 19, n. 16. See, United States v. Mendenhall, 446 U.S. 544, 554 (1979) (opinion

of Stewart, J.)

During a Terry type encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3W LaFave, Search and Seizure, Section 9.2 at 53 to 55 (1978). As the Court in Ecker, supra, stated the whole purpose of the statute is to provide law enforcement with a suitable tool to prevent crime and allow specific means to eliminate a situation which a reasonable man would believe could cause a breach of the peace or a criminal threat to persons or property. The price of this effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment. The Supreme Court has on numerous occasions held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures under the Fourth Amendment" as Justice Brennan pointed out in Kolender, supra. For precisely that reason, the scope of seizures of the person on less than probable cause that Terry permits is strictly circumscribed, to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect may not be moved or asked to move more than a short distance, physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter and most importantly the suspect must be free to leave after a short time and to decline to answer the questions put to him. "(T)he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." Id. at 34 (White, J. concurring). Since, as the Court in Ecker, supra, acknowledged the elements of the loitering statute are no different than the circumstances that the United States Supreme Court has

described as specific and articulable facts as enumerated in Terry. It becomes clear additionally that the refusal to answer questions serving as the third element to establishing probable cause under the loitering and prowling statute is in direct violation of the principles espoused in Terry and compelled upon the states by the Fourteenth Amendment. As the Court stated, failure to observe these limitations convert a Terry encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. Justice Brennan in Kolender, supra, added:

> "The power to arrest/or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers[8]/would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, e.g. Brown v. Texas, 443 U.S. 47, 52 (1979). But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See, Dunaway v. New York, supra; United States v. Brignoni-Ponce, 422 U.S. at 878."

Detention beyond the limits of Terry without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, but it would expose individual members of the public to expotential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends.

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8. This, of course, relates back to Petitioners' first issue as to the potential arbitrary enforcement in the ultimate unbridle discretion of the law enforcement officer in determining what constitutes credible and/or reliable identification.

Furthermore, regular expansion of Terry encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist between the police and the public. See, Report of the National Advisory Commission on Civil Disorders, 157 to 168 (1968). In sum, Justice Brennan concluded that, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. They may ask their questions in a way calculated to obtain an answer. But they may not compel an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest.

What the Court has reasoned in Ecker, supra, is similiar to the arguments of the government in Kolender, supra. Both did not claim that the statute advanced any interest other than general facilitation of police investigation and preservation of the public order. Factors which were addressed at length in Terry, Davis, and Dunaway. Nor did the Court or government show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and pose questions under the aegis of state authority, is so necessary in pursuit of the state's legitimate interests as to justify the substantial additional intrusion on individuals rights.[9]

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9. When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the state and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed. Probable cause, and nothing less, represents the point at which interests of law enforcement justifies subjecting an individual to any significant intrusion beyond that sanctioned by Terry.

Again, what Florida Statute 856.021 does is make the events caused by an individual which would otherwise constitute reasonable and articulable suspicion a crime in and of itself and allows arrest which trenches upon Fourth Amendment rights. The state has made conduct which would be inadequate under the Fourth Amendment to permit the police to effectuate an arrest on another charge a substantive crime in and of itself. One of the dangers to this type of proceding is that the validity of these arrests will be open to challenge only after the fact in individual prosecutions. Such case by case scrutiny cannot vindicate the Fourth Amendment rights of persons many of whom who will not even be prosecuted after they are arrested.[10]

A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion" without which they may not demand identification because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, first-hand knowledge of local jail conditions a "search incident to arrest", and the expense of defending against possible prosecution. The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in Court. Mere reasonable suspicion cannot be allowed to justify subjecting the

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10. In Ecker this Court found it disturbing that the police frequently used section 856.021 as a catchall criminal offense. In reality this statute is the single most abused statute in the State of Florida resulting in tens of arrest daily in Dade County alone.

innocent to such a dilemma.

By defining as a crime the elements of what constitutes a Terry encounter, and by permitting arrests for a violation of that crime the State of Florida attempts through this statute to compel what may not be compelled under the Constitution and is therefore violative of the Fourth Amendment.

CONCLUSION

Based on the foregoing argument and citations of authority, Petitioners, WILLIAM LEON HURST, MICHAEL IAN DUSAKTO, and HUGH RAVEN WALKER, respectfully pray that this Court reverse the decision of the District Court of Appeal of Florida for the Third District and declare Florida Statute 856.021 unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners was furnished by mail this 4th day of June, 1984, to Michael J. Neimand, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128.

ALAN I. KARTEN