O/a 3-5-85

In The

SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH,

Petitioner,

v. CASE NUMBER 65,384

LEONARD DEL PERCIO and
LAURA IRIS MOORE,

Respondents.
_____/

On Writ of Certiorari to the
District Court of Appeal,
Fifth District of Florida.

District Court Case Nos. 83-155, 83-251

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

LEONARD DEL PERCIO and LAURA IRIS MOORE were Defendants in the trial court, Appellants in the circuit court, Petitioners in the Fifth District Court of Appeal, and will be referred to as "Respondents" in the text of this brief. The City of Daytona Beach will be referred to as "Petitioner." Daytona Beach Municipal Ordinance #81-334, creating §5-25 of the City Code of Daytona Beach, will be referred to as "the ordinance." The transcript of the Motion to Dismiss will be referred to by the letters "Tr" followed by the appropriate page numbers. The transcript of the Moore trial will be referred to by the letter "T" followed by reference to the appropriate page numbers. References to the Record on Appeal will be made by the letter "R" followed by the appropriate page numbers.

STATEMENT OF THE CASE AND OF THE FACTS

[Pursuant to Fla.R.App.P. 9.210(c), Respondents are filing their own Statement of the Case and of the Facts, in that they disagree with the Statement filed by Petitioner. In fact, it appears that Petitioner has not filed a "Statement" as such, but has only quoted part of the dissenting opinion from the District Court.]

In City of Daytona Beach v. Del Percio, the parties expressly agreed to the applicable facts, in their briefs to the Circuit Court (R. 14, 140).

In City of Daytona Beach v. Moore, the parties expressly agreed to the applicable facts, in their briefs to the Circuit Court, with the addition of three facts noted by Respondent (R. 62, 89). The statement of facts adopted by the City includes the statement "Ms. Grimes was charged although the area of her breast directly below the top of her areola was covered with tape (R. 62). A brief summary of those facts is as follows:

Laura Moore was behind the bar when police officers entered the Red Garter Club in Daytona Beach. According to the police, she was " . . . fulfilling the duties of a bartender or a barmaid."

At the same time, Judy Grimes was dancing on the stage. Her breasts were uncovered, except for tape which covered the nipple, areola and the area of the breasts directly below the areola on each breast.

The officer directed Moore to get Grimes off the stage and

bring her to him, which Moore did.

While the officer was issuing notices to appear to both women, the owner of the bar arrived. He corroborated Moore's assertions that she had no authority at the bar, and that she was not an employee but a friend of his who was tending bar for a short time while he left to get something to eat. He further said that all activities inside were at his direction and under his authority.

Nevertheless, Moore was charged with permitting topless dancing.

All other persons charged under the ordinance to that point entered pleas of nolo contendere before Judge Wiley G. Clayton; adjudication was withheld in all cases and court costs of $25.00 imposed. However, in Moore's case, she was convicted after bench trial before Judge Clayton. Her sentence: adjudication of guilt, $500.00 fine or 10 days in jail. In imposing sentence, Judge Clayton said:

> It's been my understanding that the cases to which you're directing yourself to -- which, by the way, I am not in terms of the manner in which I'm handling this particular case, but, since you've brought the issue up, it was represented to me that the other cases in question in essence acknowledged that if the ordinance was constitutional, that they in fact were guilty of violating that ordinance, and that they -- by entering a plea promptly, albeit no contest, nevertheless it was done promptly without maintaining that they were in fact innocent.
>
> I was not familiar with the facts in the individual cases. I relied on the representations of counsel with respect to that.

> In this particular instance we have -- rather I have before me the question of an individual who has not only previously maintained that this is an unconstitutional ordinance, but, that in spite of that argument, nevertheless, she is innocent of violating the ordinance.
>
> After hearing the testimony, I believe otherwise. I believe that she in fact was maintaining the premises in the absence of the owner at the time and that [she] had sufficient authority over the premises to come within the purview of the statute. And, her testimony was inconsistent with the officer's and I must view both individuals and their demeanor in deciding which one's being truthful and which one is not, and, that I have taken all these things into account and I believe that the punishment that I am imposing -- I am finding her guilty and I am adjudicating her guilty; as I indicated, I am fining her $500. I will waive court costs in this particular instance.
>
> (Emphasis added).

The Circuit Court affirmed the decision of the County Court in the Moore case and in the Del Percio case.

Del Percio filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal on February 2, 1983 (R. 1). An Order to Show Cause was issued on March 9, 1983 (R. 123).

Moore filed a Petition for Writ of Certiorari with the Fifth District on February 18, 1983 (R. 46). An Order to Show Cause was issued on February 22, 1983 (R. 122). The Moore and Del Percio cases were consolidated by the Fifth District at the request of the City on May 4, 1983 (R. 193).

On June 10, 1983, the Fifth District granted the Del Percio/Moore Emergency Motion for Order Requiring Clerk to Comply with Designation (R. 198). Del Percio/Moore filed a supplemental

appendix with the Fifth District on June 30, 1984 (R. 199).

On December 16, 1983 the Fifth District ordered, sua sponte, that "the parties shall supplement the record, within ten days from the date hereof, with all county court and circuit court orders, judgments and opinions, either in writing or otherwise recorded, which interpret the ordinance in question in the above-styled cause" (R. 199). In response to the order, both parties filed supplements to the record, which are contained in the supplemental documents section of the Record.

On March 29, 1984, the Fifth District Court of Appeal issued its ruling granting certiorari, quashing the lower court order, declaring the ordinance unconstitutional and remanding the cause with directions to reverse the convictions (R. 200).

This Court accepted the case for review on November 26, 1984 (R. 238).

ISSUES PRESENTED FOR REVIEW

I. THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN FINDING DAYTONA BEACH MUNICIPAL ORDINANCE 5-25 OF UNCONSTITUTIONALLY VAGUE.

This case involves an ordinance in the context of its application to an entertainment program consisting of nonobscene nude dancing. This form of expression has been held to be within the protections of the First and Fourteenth Amendments to the United States Constitution. Therefore, as an initial consideration, this Court must decide the standard of scrutiny to be applied to the ordinance.

In Schad v. Mt. Ephraim, 45 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671, (1981), appellants claimed that the impositions of criminal penalties under an ordinance prohibiting all live entertainment, including nonobscene nude dancing, violated their rights of free expression guaranteed by the First and Fourteenth Amendments. The Supreme Court stated:

> As the Mount Ephraim code has been construed by the New Jersey courts -- a construction that is binding upon us -- "live entertainment", including nude dancing, is "not a permitted use in any establishment" in the Borough of Mount Ephraim. By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendment. Nor may an entertainment program be prohibited solely because it displays the nude, human figure. "Nudity alone" does not place otherwise protected material outside the mantle of the First Amendment . . . Furthermore, as the state courts in this case recognized, nude dancing is not

> without its First Amendment protections from official regulation. Doran v. Salem Inn, Inc., supra; Southeastern Promotions, Ltd. v. Conrad, supra; California v. LaRue, supra.
>
> 101 S.Ct. at 2181.

See also Hughes v. Cristofane, 486 F.Supp. 541 (D.Md. 1980); Salem Inn v. Frank, 522 F.2d. 1045 (2d Cir. 1975).

Rigorous construction standards apply when the government attempts to regulate expression. When First Amendment freedoms are at stake, precision of drafting and clarity of purpose are essential. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). In fact, any prior restraint of expression bears a heavy presumption against constitutional validity. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

It is well settled that in an action alleging the infringement of speech, the governmental defendant bears the burden of demonstrating that the enactment is narrowly tailored to the accomplishment of a compelling state interest. Davenport v. Alexandria, 710 F.2d 148 (4th Cir. 1983).

The dancing in this case is also entitled to constitutional protection under Article I, Section 4 of the Florida Constitution which provides, in pertinent part, " . . . No law shall be passed to restrain or abridge the liberty of speech or of the press

afforded expression in Florida under Article I, Section 4 is the same as required under the First Amendment to the United States Constitution, and that the principles of freedom of expression as

announced in the decisions of the United States Supreme Court will not be limited by the Florida Supreme Court. Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982).

Therefore, as Respondents' claims are rooted in the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution, this Court must subject the restraint to the closest scrutiny and require the government to carry a heavy burden of showing justification of its imposition. In re adoption of proposed local rule 17 of criminal division of Circuit Court of Eleventh Judicial Circuit, 339 So.2d 181 (Fla. 1976), and require the City to overcome a presumption of invalidity. Schad, supra, Justice Stevens concurring.

Petitioner argues that reasonable men could not differ as to what conduct is proscribed by this ordinance. In fact, section (b) of the ordinance is unconstitutionally vague in at least two areas:

a) What is an establishment dealing in alcoholic beverages?

b) What portions of the breasts may not be exposed? Section (d) is vague in two additional areas:

c) Who is a person maintaining, owning or operating an establishment?

d) What constitutes suffering or permitting a violation?

The Moore case, involving a substitute bartender without power to approve costumes or regulate dancers, clearly raises issues "c" and "d." The fact that the dancer, Judy Grimes,

wore flesh colored tape which covered the areola and that area directly underneath raises issue "a." The Del Percio case, involving an establishment which was not serving alcohol or allowing it to be consumed, raises issue "b." The vagueness issue clearly was properly before the Fifth District Court of Appeal.

The City's reliance on the cases they have cited on the vagueness issue is not well founded. In New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), vagueness was not an issue. Vagueness also was not mentioned in Board of Commissioners v. Dexterhouse, 348 So.2d 916 (Fla. 2d DCA 1977), affirmed, Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978), appeal dismissed, 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed.2d 392 (1979) or Grand Falloon Tavern, Inc. v. Wicker, 670 F.2d 569 (11th Cir. 1982), cert. denied, 103 S.Ct. 132 (1982).

In City of Miami Springs v. J.J.T., Inc., 437 So.2d 200 (Fla. 3d DCA 1983) and Fillingim v. State, 446 So.2d 1099 (Fla. 1st DCA 1984) the vagueness claims were summarily rejected without discussion or case citation. The ordinances considered by the courts in Fillingimm and J.J.T, as well as the records on appeal, were apparently not the same as in this case. None of the cases cited by Petitioner provide any guidance as to the proper meaning and scope of the terms involved.

The vagueness doctrine was recently defined by this Court in State v. Gray, 435 So.2d 816 (Fla. 1983):

> Vagueness, of course, is the term given to

> that ground of constitutional infirmity of a statute that is based on its failure to convey sufficiently definite notice of what conduct is proscribed. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). E.g., Grayned v. City Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284 (1914).

The United States Supreme Court has also recently described the void-for-vagueness doctrine:

> Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on these freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).
>
> As generally 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. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Connelly v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Although the doctrine focuses both on actual notice

> to citizens and abritrary 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 doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, supra, 415 U.S. at 574, 94 S.Ct. at 1242, 39 L.Ed.2d 605. 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." Id., at 575, 39 L.Ed.2d 605, 94 S.Ct. 1242.
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> Kolender v. Lawson, U.S., 103 S.Ct. 75, L.Ed.2d 903 (1983).

In the instant case the Fifth District cited with approval the opinions of the First District in Marrs v. State, 413 So.2d 774 (Fla. 1st DCA 1982) and the Third District in Steffens v. State ex rel. Lugo, 343 So.2d 90 (Fla. 3d DCA 1979) finding similar ordinances unconstitutionally vague:

> We believe that the record before us in the case at bar shows that the ordinance in question (particularly that portion dealing with exposure of the breasts) omits certain necessary and essential provisions which would serve to impress the acts committed as being wrongful and criminal and "the courts are not at liberty to supply the deficiencies or undertake to make the . . . (ordinance) definite and certain." State v. Buchanan, 191 So.2d 33, 36 (Fla. 1966). As stated by the Florida Supreme Court in Brock v. Hardie, 114 Fla. 670, 154 So. 690, 694 (1934):
>
> > We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or not in indicating the legislative purpose, so that a person who

> may be liable to the penalties of the act may know that he is within its provisions or not. We hold, as did the Court in Papachristou, et al. v. City of Jacksonville, 405 U.S. 156, 162-63, 92 S.Ct. 839, 843-44, 31 L.Ed.2d 110 (1972), that this ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his (or her) contemplated conduct is forbidden by the statute", United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989, and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed 1093; Herndon v. Lowrey, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066.
>
> Del Percio, supra, at 32627

The position of the Fifth District is amply supported by the record. The first construction in the record was the opinion of Orange County Circuit Judge Frank N. Kaney in Spees v. State. Judge Kaney ruled on September 7, 1979:

> In accordance with the principles laid down in Foley, the court interprets the phrase "at or below the areola" to mean from the upper portion of the areola to the bottom of it on each breast. This would not require a covering on a line running from the top of one areola across to the top of the other. That interpretation would require more covering than is presently seen on our beaches or behind ski towboats.

On January 12, 1982, during the hearing before Judge Clayton on the Motion to Dismiss, counsel argued on behalf of Grimes and Moore that since Grimes had performed with the areola portion of

her breast and all portions directly below covered with opaque tape, the ordinance was not violated (Tr. 66-81). Counsel cited to the Spees opinion as persuasive authority (Tr. 72). When Judge Clayton thought Spees was contrary to Respondents' position, and supported Petitioner, he said it was controlling (Tr. 74); however, when he discovered Spees would require him to dismiss the cases, he found it inapplicable and denied the motion (Tr. 81).

On September 23, 1982, County Judge Josephson wrote, in construing section 5-25-A:

> By the definitions there is no precise point at which the buttocks begins or ends and covers a wide undefined area.
>
> At least the ordinance in question, by proscribing the exposure of breasts has a reference point by prohibiting the exposing of the breast "below the top of the areola" (See Section 5-25(g)). This is a reasonable restraint, otherwise any person entering an establishment where alcoholic beverages are served and wearing a low cut dress would be subject to violation, having exposed the upper portion of her breast.
>
> In today's society where the female dress code is quite liberal, especially in bathing suit wear where female persons wear bikinis and french cut bathing suits, much of their buttocks are exposed to public view and can even be seen on television advertisements. One might even include females who wear "short shorts" and do their shopping in supermarkets where alcoholic beverages are sold. (See Steffens v. State, 343 So.2d 90). In Florida State Racing Commission v. McLaughlin, 120 So.2d 574, it was held that the use by the legislature of a comprehensive term ordinarily indicates everything embraced within the term. In construing an ambiguous statute it is proper to take into consideration the

> particular evils at which the legislation is aimed or mischief sought to be awarded (30 Fla. Jur. 203).
>
> The word buttocks by medical definition and common language is to say the least ambiguous for one cannot define the beginning or ending of that part of the anatomy. The evil sought to be avoided by the ordinance is nude dancing, not semi-nude dancing. To construe the ordinance to read partially exposed buttocks would place an unbridled discretion upon the Courts to determine how much of the buttocks should be partially exposed in order to find a violation of the ordinance.
>
> It is therefore the interpretation of the Court that in order to find any person in violation of the ordinance, all of his or her buttocks must be exposed.

The next interpretation of Section (b) was rendered by County Judge McDermott on April 21, 1983, when ruling on ten pending cases. He stated:

> The Court construes Section (b) of the ordinance to require a female person to expose at least a portion of her areola to the public view in order to be in violation. With these limitations engrafted the Court finds Section (b) of the ordinance is not unconstitutionally vague or overbroad.

[This construction is precisely the same as Spees, supra.]

Thereafter Judge McDermott reconsidered his position in considering eight cases, including City of Daytona Beach v. Keiser, pending before him in August, 1983. Judge McDermott stating in the relevant sections of his order:

> (2) "That the Defendants are alleged to have violated the above sub-section of the Code because "pasties" were taped on the areola of the female Defendants, allowing

the remainder of their breasts to be exposed to public view;

(3) That the Defendants contend, inter alia, that they acted in reliance upon Orders entered by the undersigned in April, 1983 which dismissed charges in previous breast-exposure cases brought under the same sub-sections of the code;

(4) That the previous cases involved use of a brassiere-type covering on the breasts, and did not involve the use of "pasties" to cover the areola of the female Defendants;

(5) That the undersigned hereby clarifies his Orders entered in April of 1983 to rule that the areola must be concealed by a brassiere-type cover made of opaque fabric which does not and cannot adhere directly to the breasts without the aid of supporting straps, for a defendant to be found not to have violated the pertinent sub-sections of the Code;

(6) That the undersigned belives that the Defendants herein acted in arguable reliance on the Orders he entered in April of 1983, and that it would therefore be unjust for them to be held to account for these alleged violations; they have now been placed on actual notice however, that the pertinent sub-sections of the code will be given a prospective construction by the undersigned as stated above.

Judge McDermott's decision in Keiser was reversed by Circuit Judge Smith:

> The basic task for any court reviewing a statute or ordinance which has been challenged as being overbroad, is to attempt to give effect to the ordinance as written, while at the same time interpreting the statute or ordinance so that its constitutionality is preserved. Here that task involves reading the ordinance so that it prohibits the exposure of breasts as described in the ordinance, but without extending the prohibition to include those types of

> attire which are commonly accepted by modern society.
>
> In today's society, women's dress standards are quite liberal, especially in bathing suits and evening or "cocktail" wear. The modern woman is free to wear brief bikinis, french cut bathing suits and varying degrees of low-cut dresses and gowns. In its clarifying order of August 22, 1983, the trial court interpreted the ordinance to require a certain type of clothing - a brassiere-type top with supporting straps. In making this interpretation the trial court added terms to the ordinance which were not placed there by the City of Daytona Beach; and in so doing, the trial court brought into the ordinance's prohibition many types of female attire which are commonly accepted by modern society, therby rendering the ordinance overbroad. The City of Daytona Beach need not be accused of enacting an ordinance which would outlaw in lounges and restaurants clothing which is seen daily in public and even on primetime television.

Finally Judge Sharp in her dissent below points out two more possible interpretations to the ordinance:

> In view of the substantial constitutional challenge to this ordinance, we should, if possible, seek to interpret it in such a way that avoids those problems. In this case, a more limited interpretation of the challenged ordinance is possible. Some "topless" ordinances specify that part of the breast which cannot be exposed is any area at or directly below the top of the areola. See City of Miami Springs. Other ordinances with wording similar to Daytona's have been assumed to bar nudity as opposed to ordinary acceptable beachwear. See Bellanca; Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir 1982), cert. denied, 459 U.S. 859, 103 S.Ct. 132, 74 L.Ed.2d 113 (1982); Dexterhouse. I would construe this ordinance as barring only the exposure of the female breast encompassing the area of the areola and that portion of the breast directly below it.

The record clearly indicates in this case that persons of common intelligence must necessarily guess at the meaning of Section (b) of the ordinance and differ as to its application.

In State v. Wershow, 343 So.2d 605 (Fla. 1977), this Court said:

> When construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the state. Criminal statutes are to be strictly construed according to the letter thereof. Ex parte Bailey (1897), 39 Fla. 734, 23 So. 552, State v. Buchanan, 191 So.2d 33 (Fla. 1966), State v. Llopis, 257 So.2d 17 (Fla. 1971), State v. Dinsmore, 308 So.2d 32 (Fla. 1975). Discussing generally the construction to be given penal statutes, this court, in Ex parte Amos, 93 Fla.5, 112 So. 289 (1927), explicated:
>
> > The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, it to be considered as included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken. See Ex parte Bailey, supra.
>
> The requirements of due process of Article I, Section 9, Florida Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States are not fulfilled unless the Legislature, in the promulgation of a penal statute, uses language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited. It is

constitutionally impermissible for the Legislature to use such vague and broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong. The Supreme Court of the United States, in United States v. Reese, 92 U.S. 214, 23 L.Ed 563 (1876), opined:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

The test of vagueness of a statute as being whether the language conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice was succinctly stated by this court in Brock v. Hardie, 114 Fla. 670, 154 So. 690 (1934), as follows:

> . . . Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."
>
> Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase "so vague that men of

> common intelligence must necessarily guess at its meaning," so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of litle aid to us.
>
> We must apply our knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or not in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not. (Emphasis supplied)

More recently, this court in State v. Llopis, supra, held:

> When exercising its power to declare an offense punishable, the Legislature must inform our citizens with reasonable precision what acts are prohibited. There must be provided an ascertainable standard of guilt, a barometer of conduct must be established, so that no person will be forced to act at his peril. Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285; Locklin v. Pridgeon, 158 Fla. 737, 30 So.2d 102 (1947); State (ex rel. Lee) v. Buchanan, 191 So.2d 33, 336 (Fla. 1966).

See also State v. Dinsmore, 308 So.2d 32 (Fla. 1975), wherein this court determined Section 112.313, Florida Statutes, to be unconstitutionally vague and indefinite.

No person should be held responsible for conduct which one could not reasonably understand to be prohibited by statute.

> Not enough emphasis can be placed on the proposition that,
>
> > The vice of vagueness in statutes is the treachery they conceal in determining what persons are included or what acts are prohibited.....No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guildeliens and standards must appear expressly in the law or be within the realm of reasonable inference from the language of the law.
>
> Aztec Motel, Inc. v. State ex rel Faircloth, 251 So.2d 849 (Fla. 1971). To force one to act at one's peril is against the very fundation of American system of jurisprudence.
>
> Wershow at 608-09.

The Del Percio case raises the vagueness of the term "establishment dealing in alcoholic beverages." In that case, the charging document alleged only that the establishment had a license to sell liquor. The definition in section 5-1 of the ordinance Code states:

> Establishment dealing in alcoholic beverages:
>
> Any business or commercial establishment (whether open to the public at large or where entrance is limited by cover charge or membership requirement) including those licensed by the State for sale and/or service of alcoholic beverages and any bottle club; hotel; motel; restaurant; night club; country club; cabaret; meeting facility utilized by any religious, social, faternal or similar organization; business or commercial establishment where a product or article is sold, dispensed, served or provided with the knowledge, actual or implied, that the same will be, or is intended to be mixed, combined with or drunk in connection or combination with

> an alcoholic beverage on the premises of said business or commercial establishment; or business or commercial establishment where the consumption of alcoholic beverages is permitted.

Del Percio read the ordinance to apply only in places where the consumption of alcoholic beverages is permitted. However, the trial court found that even though his establishment did not permit the sale of consumption of alcoholic beverages after 8:00 P.M. the ordinance applied. The definition of "establishemnt dealing in alcoholic beverages" is so vague as to arguably include merely every commercial establishment in Daytona Beach. The vagueness of the definition again permits a standardless sweep which allows policemen and prosecutors to pursue their personal predilections.

A similar problem is inherent in allowing police officers to arrest persons "maintaining, owning or operating" for suffering or permitting violations. Several examples of the vagueness in this language include: (a) Is a maintenance person who merely cleans the establishment subject to arrest if he is present when a patron violates the ordinance, if he does not stop the patron? (b) Is a shareholder who is not present at the time of the violation subject to arrest; or (c) Is a bartender serving drinks but without authority to hire, fire or discipline a performer responsible for the acts of others?

In Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) the court considered a vagueness challenge in the context of First Amendment rights. The Supreme Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone'. . .than if the boundaries of the forbidden areas were clearly marked.
>
> 408 U.S. at 108-110, 92 S.Ct. at 2298-99, 33 L.Ed.2d at 227.

All of the vices described by Justice Marshall are evident in the record. Persons have attempted in good faith to comply with the ordinance but have been arrested if an officer utilized a different interpretation, and convicted in factual circumstances where dismissals had previously occurred. Policemen and judges have been making and deciding cases on an ad hoc basis. Citizens were in the position of relying on a written judicial interpretation of the ordinance but were arrested, prosecuted and even convicted as interpretations changed. The result was the inhibition of the constitutional rights of persons

in Daytona Beach to enjoy harmless, nonobscene, constitutionally protected entertainment programs.

The Fifth District Court of Appeal was imminently correct in determining Daytona Beach Ordinance 5-25 to be "vague, not fairly enforceable and thus unconstitutional." Del Percio at 323.

II. THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN FINDING THAT DAYTONA BEACH MUNICIPAL ORDINANCE 5-25 WAS UNCONSTITUTIONALLY OVERBROAD

> Overbreadth . . . refers to a challenge to a statute on the constitutional ground that it achieves its governmental purpose to control or prevent activities properly subject to regulation by means that sweep too broadly into an area of constitutionally protected freedom. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948).
>
> State v. Gray, 435 So.2d 816, 819 (Fla. 1983).

"A statute is overbroad if it is so all encompassing in its reach that it ensnares both protected and non-protected conduct." State v. Ferrari, 398 So.2d 804, 807 (Fla. 1981).

This Court said in McKenney v. State:

> A vagueness and overbreadth challenge merits a three-fold analysis. First, the statute cannot infringe upon constitutionally protected First Amendment freedoms of expression and association . . . second . . . whether the statute is phrased so that persons of common intelligence have adequate notice as to the nature of the

> proscribed conduct . . . [l]astly, a statute may be worded so loosely that it leads to arbitrary and selective enforcement by vesting undue discretion as to its scope in those who prosecute . . . ."

It is now beyond argument that nude dancing is activity which is protected by the First Amendment. Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

[In Board of County Commissioners v. Dexterhouse, 348 So.2d 916 (Fla. 2d DCA 1977), the Second District held that nude dancing is conduct, not expression. 348 So.2d at 919. This Court, in Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978) expressly adopted that holding. 364 So.2d at 450.

In light of the holding to the contrary by the United States Supreme Court, which is binding on this Court, Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029 (1946); State ex rel. Hawkins v. Board of Control, 83 So.2d 20 (Fla. 1955), the viability of Dexterhouse is seriously in doubt - as is the same holding in Hoffman v. Carson, 250 So.2d 891 (Fla. 1971).]

What is involved in this case is protected activity. If the ordinance banned nude breasts in bars, exempting nudity in entertainment, it would perhaps pass constitutional muster. Moffett v. State, 340 So.2d 1155 (Fla. 1977); South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d. 608 (11th Cir. 1984); Southeastern Promotions, Inc. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Daytona Beach can ban nudity which is not part of expression. Beaches, supra. However, it

may not ban such nudity in a way which intrudes on protected nudity -that is, nude dancing. Schad, supra.

The District Court noted:

> Petitioners argue, reasonably, that they too are uncertain as to what conduct is permissible under the ordinance. For example, they argue and we accept that many modern-day bathing suits commonly worn in motel swimming pool and beach concession or bar areas, where alcoholic drinks are sold, reveal a portion of a female's breasts below the top of the areolae, either from a view of the side of the front, or both. Many halter tops, tank tops, tube tops and bikini tops, often worn by females in certain bars and other recreational areas serving alcoholic beverages, are so constructed that a lower portion of the breast may be partially exposed. Some evening gowns, split down the front or the sides, worn in style and considered acceptable by society, are also so revealing that they would probably violate the ordinance. The ordinance declares that any portion of the breast below the areola must not be exposed. We do not believe that the ordinance was intended to control all forms of attire where this exposure may occur (such as mentioned above), but the ordinance, as worded, does not make this clear. The ordinance is overbroad because it also bars acceptable, legitimate attire or conduct.
>
> Del Percio v. City of Daytona Beach, 449 So.2d 323,325 (Fla. 5th DCA 1984).

In State v. Wershow, 343 So.2d 605 (Fla. 1977), this Court said:

> The requirements of due process of Article I, Section 9, Florida Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States are not fulfilled unless the Legislature, in the promulgation of a penal statute, uses language sufficiently definite to apprise those to whom it applies what conduct on

> their part is prohibited. It is constitutionally impermissible for the Legislature to use such vague and broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong. The Supreme Court of the United States, in United States v. Reese, 92 U.S. 214, 23 L.Ed. 563 (1876), opined: "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."
>
> at 604.

[An interesting observation can be made here, based on a statement in the dissent below. Judge Sharp pointed out an admission by Petitioner:

> I am more persuaded by Moore's argument that the wording "amy portion . . . below the top of the areola . . ." is itself ambiguous, and, if interpreted literally, as the city argues and the trial court ruled, the ordinance would be violated if any lateral portion of a female breast were exposed below a straight line drawn across her chest from the top of each areola. The city agreed at oral argument that under this interpretation of the ordinance, ninety percent of women's current bathing suits, and may low-cut evening gowns and cocktail dresses currently in fashion would violate this ordinance. Of course, the city assured us, female patrons who innocently entered a bar to consume a beer, dressed in beach clothes, would not be prosecuted.
>
> 449 So.2d at 330.

It seems, then, that the City's position can accurately be stated as follows: a female who walks into a bar dressed in a

manner which violates the ordinance, and having no First Amendment protection, would not be prosecuted; yet a female who performs in the entertainment presentation, and is thus entitled to First Amendment protection, should go to jail!

However, a search of the record in this case reveals deception in the City's admission. In City v. Del Pinto, included in the Supplement to the Record, the Court will see that a female who was wearing a "current bathing suit" was arrested and prosecuted. Coincidentally, she was dancing on stage at the time. One wonders if she would have been arrested if she were a patron, exercising no constitutional right whatsoever.]

The language in the ordinance that " . . . no female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages . . ." is so broad to have set the type of net condemned by this Court in Wershow.

III. ALTHOUGH DAYTONA BEACH WAS EMPOWERED TO ENACT MUNICIPAL ORDINANCE 5-25, THE SOURCE OF THAT POWER WAS NOT THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner has framed its third issue as "The City of Daytona Beach is empowered to enact Section 5-25, City Code." Petitioner's Brief, at 9.

Respondents do not question the power of the City to enact the ordinance. That question has been settled. Respondents candidly concede that the power exists.

However, the position of Petitioner that its authority springs from the Twenty-first Amendment to the United States

Constitution is clearly erroneous. Their authority comes from the police power.

In Board of County Commissioners v. Dexterhouse, 348 So.2d 918 (Fla. 2d DCA 1977), approved Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978), appeal dismissed, 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed.2d 392 (1979), the issue of municipal authority in this type of an enactment was expressly ruled upon by the Second District and (because this Court adopted the opinion of the District Court) by this Court. The precise language is:

> Appellees correctly point out that the regulation and operation of establishments selling alcoholic beverages is by statute vested in the Division of Beverage which is granted full power or authority to adopt regulations to carry out the beverage laws of this state. Sections 561.02 and 561.11, Florida Statutes (1975). Local control over establishments selling alcoholic beverages is limited to: (1) hours of operation; (2) location of business; and (3) sanitary regulations. Section 562.45(2), Florida Statutes (1975).
>
> 348 So.2d at 916.

That point has been followed consistently in each case which has dealt with the issue since that time, including both cases involved in the instant review! See Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943, 944 (11th Cir. 1982); City of Miami Springs v. J.J.T., Inc., 437 So.2d 200, 205 (Fla. 3d DCA 1983); Fillingim v. State, 446 So.2d 1099, 1102-03 (Fla. 1st DCA 1984); Del Percio v. City of Daytona Beach, 449 So.2d 323, 325 (Fla. 5th DCA 1984).

Petitioner argues that each and every court which has ruled contrary to its claim that it has Twenty-first Amendment authority - including this Court - was mistaken. Petitioner's brief, at 11. However, Petitioner can point to no authority for its claim. Indeed, the case from which this body of law has developed, California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), involved state regulations dealing with non-obscene nude dancing in establishments licensed to sell alcoholic beverages.

In fact, the regulation now before this Court springs from the police power of the City of Daytona Beach. The distinction is significant, because it changes the entire standard of review. As this Court said in Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1982), laws which impact on First Amendment freedom of expression ". . . are subject to exacting scrutiny; they must be supported by a compelling governmental interest and must be narrowly drawn so as to involve no more infringement than is necessary." And as the United States Supreme Court wrote in Widmar v. Vincent, 454 U.S. 263, 276, 102 S.Ct. 269, 277, 70 L.Ed.2d 440 (1981): ". . . First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content . . . ." See also, Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

In Larue, the United States Supreme Court found that the broad power of the states to regulate in the area of alcoholic

beverages created a presumption in favor of the validity of such regulations in the face of a challenge raised under the First Amendment. In Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), the Court wrote:

> . . . In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program.
>
> 422 U.S. at 932-33, 95 S.Ct. at 2568.

Since Daytona Beach can hardly claim to have a "liquor license program," it cannot seriously claim that its usurpation of the authority of the State of Florida comes from LaRue. Petitioner's brief, at 10.

In light of decisions of the United States Supreme Court which have expressly held that nude dancing is protected under the First Amendment, most notably Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), this Court and Florida's lower courts are no longer free to find to the contrary. For instance, see Board of County Commissioners v. Dexterhouse, 348 So.2d 918, 919 (Fla. 2d DCA 1977), approved Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978), appeal dismissed, 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed.2d 392 (1979).

The activity which led to these cases - nude dancing - is also protected under Florida's Constitution. As this Court stated:

> . . . Freedom of speech is also guaranteed under article I, section 4 of the Florida Constitution. The scope of the protection accorded to freedom of expression under article I, section 4 is the same as is required under the First Amendment . . . This Court has no authority to limit the constitutional protection and must apply the principles of freedom of expression as announced in the decisions of the Supreme Court of the United States.
>
> Department of Education v. Lewis, 416 So.2d 455, 461 (Fla. 1982).

And while Twenty-first Amendment considerations outweigh the First Amendment protection afforded nude dancing, the Twenty-first Amendment has no application whatsoever to questions arising under Florida's Article I, Section 4. See, N.Y. State Liquor Authority v. Bellanca, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1982).

Thus, although Petitioner had the power to enact its anti-topless as an exercise of the police power, it has not justified the exercise of that power sufficiently to allow its impact on protected expression. Accordingly, based on the record before this Court, Martin v. Board of County Commissioners, supra, the ordinance should be declared invalid as an arbitrary and improper exercise of the police power.

IV. DAYTONA BEACH MUNICIPAL ORDINANCE 525 WAS APPLIED UNCONSTITUTIONALLY IN BOTH CASES.

A. DAYTONA BEACH ORDINANCE 525 WAS UNCONSTITUTIONAL AS APPLIED TO LAURA MOORE AND/OR THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HER CONVICTION.

The relevant facts for the purpose of appeal stipulated by the City are as follows:

> A. Appellant was arrested on December 9, 1982 and charged with violating section (d) of the ordinance. Her alleged violation consisted of being a person maintaining, owning or operating an establishment dealing in alcoholic beverages and suffering and permitting a Ms. Grimes to violate section (b) of the ordinance by exposing to the public view a portion of her breasts below the top of the areola. Ms. Grimes was charged although the area of her breast directly below the top of her areola was covered with tape. (Emphasis added)
>
> B. At trial the arresting officer, Richard Zachary, testified that Appellant seemed to be fulfilling the duties of a barmaid, and that he had no indication that Appellant had the authority to hire and fire employees, set working hours, or change schedules or draw up rules of conduct and that all he knew was that Appellant was handling the money, putting it in the drawer and doing the normal duties at the bar.
>
> C. Zachary also testified that after the arrest of Appellant, the owner of the establishment arrived and confessed that it was under his specific orders, and no one else's, that the girl (Ms. Grimes) had violated the ordinance and that this statement was corroborated by Ms. Grimes.

This Court has consistently stated that penal statutes must be strictly construed in favor of the accused where there is doubt as to their meaning. State v. Winters, 346 So.2d 991 (Fla. 1977); Wershow, supra; Earnest v. State, 351 So.2d 957 (Fla. 1977); Reino v. State, 352 So.2d 853 (Fla. 1977); and Ferguson v. State, 377 So.2d 709 (Fla. 1979). As the ordinance is susceptable to differing construction, the construction most

favorable to the accused should have been adopted. Regarding the Grimes/Moore incident, if the trial court had adopted a more narrow construction of the ordinance (as did Judge Sharp in her dissent in the Fifth District) the case should have been dismissed. However, based on the trial court's construction that exposure meant any portion of the breast, either directly below or below and to the side of the areola, the Motion to Dismiss was denied in its entirety.

In order to establish a prima facie violation of 5-25 (d) of the ordinance, Petitioner should have been required to allege in the charging document and to prove at trial:

(1) That Moore was a person maintaining, owning or operating a establishment dealing in alcoholic beverages;

(2) That a female person exposed to public view any portion of her breast below the top of her areola or any simulation thereof;

(3) That Moore suffered or permitted the violation to take place.

Petitioner failed to prove (1), since Moore was shown to be only a bartender. The city also failed to allege or prove that Grimes exposed any portion of her breast below the top of the areola, utilizing the reasonable construction of the ordinance most favorable to the accused that below the top of the areola means that area from the upper portion of the areola to the bottom of it on each breast.

Furthermore, all the evidence demonstrated conclusively that the actions of Grimes were not "permitted" by Moore. In Bach

v. Board of Dentistry, 378 So.2d 34 (Fla. 1st DCA 1980), the court stated:

> The word "permit" includes within its definition, consent, authorization, toleration and the granting or giving leave to do something.

In the instant case it is uncontradicted that Grimes had performed as she did under the owner's specific orders. Moore had no authority to hire, fire or discipline Ms. Grimes, and certainly should not be held accountable for her actions.

It is clear that on the facts of this case, Moore's Motion for Judgment of Acquittal at trial should have been granted as well as the Motion(s) to Dismiss filed by Moore and Grimes. The ordinance could not be applied to the conduct of Moore or Grimes without violating the guarantees of due process of law contained in the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

B. DEL PERCIO'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED BASED ON THE FACTS OF THE CASE AND/OR BECAUSE THE ORDINANCE IS UNCONSTITUTIONAL AS APPLIED

The charges against Del Percio should have been dismissed based upon the fact that the city failed to allege and/or prove that a violation took place in an establishment dealing in alcoholic beverages.

The city maintains, even in its brief to this Court, that the harm which is the "target" of the ordinance is the mixture of nudity and alcohol.

The ordinance must be strictly construed in favor of the

accused and, where ambiguity exists, the construction which operates in favor of liberty must be adopted. Wershow, supra.

In Del Percio case there was no mixture of alcohol and nudity. The parties below stipulated at the hearing on the Motion to Dismiss, and for the purposes of appeal, that no alcoholic beverages were served or consumed at the premises on November 20, 1981 at the time Ms. Young danced. To apply the ordinance to situations where alcohol is not present would clearly violate the constitutional protections of free expression in the Florida and Federal Constitutions.

The Del Percio case should have been dismissed, because the ordinance cannot be constitutionally applied to situations where alcohol is not being sold and consumed.

V. WHETHER THE TRIAL COURT IMPERMISSIBLY CONSIDERED RESPONDENT'S CHOICE OF PLEA IN IMPOSING SENTENCE

Respondent Moore was sentenced more harshly solely because she plead not guilty and went to trial.

Respondent adopts Point III of the dissent below, Sharp, J., on this point:

"A reversible error which did occur in Moore's case was that the trial judge imposed a fine on her of five hundred dollars ($500.00) or an alterative jail term primarily because she insisted on her right to trial and refused to enter a nolo contendere plea, as had the other defendants charged with the violation of the ordinance. The other defendants received no fines or penalties. In justifying this discrepancy the trial

judge said:

> In this particular instance, we have - rather I have before me the question of an individual who has not only previously maintained that this is an unconstitutional ordinance, but, that in spite of that argument, nevertheless, she is innocent of violating the ordinance.

However, a defendant's choice of plea or insistence on right to trial should play no part in the determination of her sentence by the trial judge. Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979). For this reason, I would vacate the sentence imposed on Moore and remand her case to the lower court for resentencing. See State v. Smith, 360 So.2d 21 (Fla. 4th DCA), cert. denied, 366 So.2d 885 (Fla. 1978); Davis v. State, 277 So.2d 790 (Fla. 2d DCA 1973); Daniels v. State, 262 So.2d 725 (Fla. 3d DCA 1972)." [See also, McEachern v. State, 388 So.2d 244, 248 (Fla. 5th DCA 1980)].

VI. DAYTONA BEACH ORDINANCE 5-25 IS INVALID AS APPLIED TO ENTERTAINMENT UNDER THE PREEMPTION CLAUSES OF FLORIDA STATUTES §847.09 AND §847.013.

Daytona Beach Ordinance 525 cannot be applied to motion pictures, exhibitions, shows, representations or presentations as the field has been preempted by the State. Florida Statute §847.09 provides:

> 847.09 Legislative intent
>
> (1) In order to make the application and enforcement of statutes 847.07-847.09 uniform throughout the state, it is the intent of the Legislature to preempt the field, to the exclusion of counties and

> municipalities, insofar as it concerns exposing persons over 17 years of age to harmful motion pictures, exhibitions, shows, representations and presentations. To that end, it is hereby declared that every county ordinance and every municipal ordinance adopted prior to July 1, 1973, and relating to said subject shall stand abrogated and unenforceable on and after such date and that no county, municipality or consolidated county-municipal government shall have the power to adopt any ordinance relating to the subject on or after such effective date . . . .

Florida Statute §847.013 contains a similar preemptive clause concerning persons under 17 years of age.

It appears that the intent of the legislature in enacting §847.09 and the related sections is to make uniform through the state the requirement that only motion pictures, exhibitions, shows, etc. which are obscene and are outside the mantle of the First Amendment protection can be regulated on the basis of content, such as nudity. In fact, if counties and municipalities were free to regulate entertainment they considered harmful, indecent, or immoral which is nonobscene on the basis of nude content, they would render the preemption contained in §847.09 and 847.013 meaningless, as uniformity would not be obtained throughout the State.

Ordinance 5-25 cannot be validly applied to motion pictures, exhibitions, shows, representations or exhibitions. Therefore, the ordinance is improperly applied in both the Moore and Del Percio cases.

CONCLUSION

Based on the record before it, the Fifth District Court of Appeal was correct in holding Daytona Beach Municipal Ordinance unconstitutionally vague and overbroad.

Absent the opportunity to fully consider these issues, the First District assumedly did not view the ordinance before it with the same scrutiny as the Fifth District; perhaps it did not properly apply First Amendment standards. However, when it becomes clear that there are almost as many different interpretations as courts considering the ordinance, the ordinance does not comply with constitutional requirements.

Respondents urge the Court to quash the opinion in Fillingim v State, 446 So.2d 1099 (Fla. 1st DCA 1984) and to approve the opinion of the Fifth District in Del Percio v. State, 449 so.2d 323 (Fla. 5th DCA 1984) on the issues of vagueness and overbreadth.

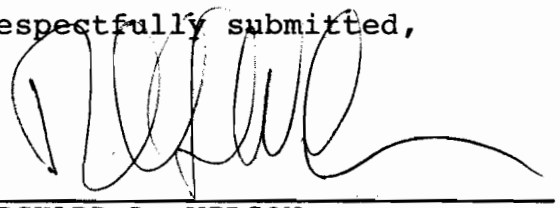
Further, Respondents urge the Court to clarify that the authority of a municipality to enact such an ordinance is based on its police power, not on the Twenty-First Amendment to the United States Constitution.

Respondents urge the Court to reaffirm the principle that a defendant may not be punished more harshly based on his decision to plead not guilty.

Finally, Respondents urge the Court to expressly recede from any prior opinions which held that nude dancing is conduct not

entitled to protection, and to find that it is protected under the First Amendment to the United States Constitution.

Respectfully submitted,



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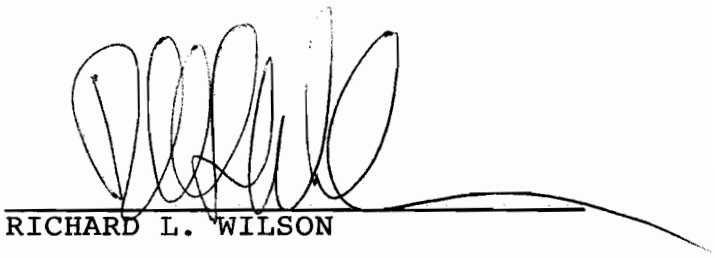
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery to the Office of the City Attorney, Post Office Box 551, Daytona Beach, Florida 32015 this 22nd day of January, 1985.



RICHARD L. WILSON