DA 10-4-90

neg APD

IN THE SUPREME COURT OF FLORIDA

EDWARD MICHAEL PALMIERI,

Petitioner, : Case No. **75,730**

-v-

THE STATE OF FLORIDA, : Case No. **88-2586** and **88-3107**

Respondent. : IN THE SECOND DISTRICT COURT

: OF APPEAL

Discretionary Review of Decision of The District Court of Appeal of Florida, Second District

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INITIAL BRIEF OF PETITIONER ON THE MERITS

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SUMMARY OF ARGUMENT

In appellate cases, **88-02586** and **88-03107**, the trial court did not commit error in dismissing the Informations upon ruling that the Statute upon which defendant was charged, to wit: Keeping House of Ill Fame, Florida Statute **796.01**, on the ground that the said statute is unconstitutionally vague. The terms "ill fame", "house of ill fame", and "lewdness" are not so clearly and definitely expressed that a man or woman of common intelligence could determine in advance whether his or her actions were within or without the law, nor does it establish minimal guidelines to govern law enforcement. Additionally, the charging instrument does not specifically state what acts were committed that were allegedly lewd and, therefore, the Informations are fatally defective.

ARGUMENT

I. CONSTITUTIONALITY OF SECTION **796.01**, FLORIDA STATUTES **(1987).**

The Appellee, Edward Michael Palmieri, m kes the following argument in support of the trial court's orders dismissing the informations in cases **88-2392** and **88-11466**, and in appeal from the Second District Court of Appeal's reversal in that Order of Case Numbers **88-0258** and **88-03107.**

The trial court did not error in dismissing the Informations in Supreme Court Case Number **75,730** on the ground that Florida Statute **796.01** is unconstitutionally vague.

In the case placed before this Court, the trial court confronted the issue of constitutionality of Section **796.01**, Florida Statutes, **(1987).**

After careful evaluation, the trial court ruled the section at issue unconsitutionally vague. That court felt Section **796.01,** Florida Statutes, was "**nebulous** at best". The order set forth by that Court determined not only that the terms used in the section at issue, i.e. **, "lewdness",** "prostitution", and "ill fame" vague, but in addition stated that Section **796.01** is unconstitutionally vague on its face.

The Second District Court of Appeal, while reversing the trial court's decision, at least in part agreed with Circuit Court Judge Harry Lee Coe, 111, in determing that the essential element of Section **796.01,** Florida Statutes, i.e., "ill fame" was neither defined nor is there a standard jury instruction or precedent which provides any clarification. (Page **8,** Opinion, Second District Court of Appeal, State v. Warren and Secchiari, **15** FLW **234).**

Florida Statute **796.01** reads,

> "Keeping house of Ill Fame - Whoever keeps a house of ill fame, resorted to for the purpose of lewdness, is guilty of a felony of the third degree, punishable as provided in Section **775.082,** Section **775.083,** or Section **775.084.** "

The determinative legal reasoning in deciding whether a criminal statute is void-for-vagueness is set forth by Justice Sandra Day O'Connor in the U.S. Supreme Court case of Kolender v. Lawson, **461** U.S. **352, 103** S.Ct. **1855, 75** L.Ed.2d **903 (1983).** As the court aptly 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." Kolender at page **1858.**

The court goes on to point out that,

> "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 rather the other principal element of the doctrine - 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.'" Kolender at page **1858.**

In the Kolender case the state appealed the lower court decisions declaring California Penal Code Ann. Section 647(e) facially invalid. The statute required persons who loiter or wander on the streets to provide "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, **88** S.Ct. **1868.** Kolender at page **1856.** In considering any limiting instruction that a state court or enforcement agency has proffered, the United States Supreme Court found only one construction of "credible and reliable" identification by a California Appellate Court, as

identification "carrying a reasonable assurance that the identification is authentic and providing a means for later getting in contact with the person who has identified himself. Failure to provide such identification justifies arrest. Kolender at pages **1858-1858.**

The United States Supreme Court found such limiting construction insufficient. It is interesting to note the Court's reasoning as it is quite applicable to the statute and facts confronting this Court today,

> "Section 647(e) as presently drafted and construed by the state courts, contains no standard for determining what a person has to do in order to satisfy the requirement to provide a '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 statue and must be permitted to do on his way in the absence of probable cause to arrest." Kolender at page **1858.**
>
> **...**
>
> "It is clear that the full discretion accorded to the police to determine whether a suspect has provided a `credible and reliable' identification necessarily 'entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat...Section 647(e) furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasures,...and confers on police a virtually unrestrained power to arrest and charge persons with a violation.'' Kolender at page **1959-1860.**

The majority in Kolender, further rejected the minority opinion that one to whose conduct a statute clearly applies may

not successfully challenge it for vagueness. See footnote 8 at Kolender, page 1879.

In the cases before this Court it is clear that the acts committed on the premises in question were not acts of prostitution but rather alleged acts **of** "lewdness". The record reflects as to the cases involving the Appellee Edward Michael Palmieri the acts in question were ones involving allegedly homosexual activity between consenting adults. (R)(1) pages 55-57. In the cases involving the Co-Appellees Kathleen Denise Warren and Thomas George Secchrari, the acts involved were nude dancing.

The core of the felony charges in the Palmieri cases is "keeping a house of ill fame". This is so because without the element of keeping a house of ill fame, the remaining elements, to wit: its use for prostitution or lewdness and its maintenance by the accused, constitute only a misdemeanor under Florida Statute 796.07(2)(a) wherein it is stated,

> "(2) It is unlawful in the state: (a) To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of lewdness, assignation, or prostitution."

This interpretation is born out by the ruling in the cases of Campbell v. State, 6 So.2d 828 (Fla. 1942) wherein the State Supreme Court ruled:

> "It appears that there are three elements of the offense denounced by the statute which must be proven beyond a reasonable doubt in order to substantiate conviction; namely, the ill fame of the place in question, its use for prostitution or lewdness, and its maintenance by the defendant." Campbell at page **828;**

and in the case of Carlson v. State, **405** So.2d **173** (Fla. **1981)** wherein the State Supreme Court declared Florida Statute **796.07(2)(a)** to be a lesser-included offense of maintaining a house of ill fame. Carlson at pages **175-176** and footnote **3**, page **176.**

The Second District Court of Appeal in the case of State v. Warren and Secchiari, supra, finds no satisfactory definition of the term "house of ill fame" to withstand the scrutiny and reasoning of the United States Supreme Court decision in Kolender v. Lawson, supra. The Second District Court of Appeal cites the reasoning in Atkinson v. Powledge, **123** Fla. **389, 167** So. **4** (Fla. **1936).** The Court, in that decision, was considering the validity of a municipal ordinance, not the statute in question. Yet the reasoning is enlightening for no better purpose than to show how, in fact, the Court's argument flies in the face of the standards set forth in Kolender, supra. The Court states in Atkinson that:

> "We find nothing in the ordinance controlling or limiting the quality of testimony which may be admissible to prove the offense of violating the ordinance."
>
> ...
>
> "Not only the reputation of the house so informed against but also the reputation of those who visit it, may be inquired into."

This is the particular vice of vagueness that the United States Supreme Court found objectionable in Kolender wherein it stated:

> "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." Kolender at page 1858.

...

> "...entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat" Kolender at page 1860.
>
> "...furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure."
>
> "...confers on police virtually unrestrained power to arrest and charge persons with a violation."

In the cases involving Mr. Palmieri, it is clear that the Sheriff's officers were "pursuing their personal predilections... against groups deemed to merit their displeasure" as Mr. Palmieri operates an adult bookstore. (R)(1) page 2.

The vagueness of the ill fame statute is further evidenced by the State's own difficulty in interpreting the meaning of the term "house of ill fame" as the Assistant State Attorney, Mr. Bedell admits:

> "Your Honor, this charge is one of keeping a house of ill fame and the notes in the file that from the chief who is reviewing the information concern our ability to prove the bad reputation of the business which is an essential element of keeping a house of ill fame. These notes go back and forth...and they talk about how are we going to prove that element, what witness are we going to use..." (R)(1) page 48.

The Second District Court of Appeal next cited the case State ex rel. Libtz v. Coleman, 177 So. 725 (Fla. 1937), for the proposition that the terms prostitution and lewdness are not vague.

The Appellee, Mr. Palmieri, would argue that the ruling in State ex rel. Libtz, supra, is no longer valid in view of the reasoning cited earlier in Kolender, supra. Furthermore, this Court held that the information, which merely tracked the wording of the statute, was sufficient. However, in numerous cases since that time, the Courts of this state have struck down such vaguely worded informations. See Kitteson v. State , 9 So.2d 807 (Fla. 1942), State ex rel. Swanboro v. Mayo, 19 So.2d 883 (Fla. 1944). In both of these cases the Florida Supreme Court dismissed informations where the charging documents did not particularly allege the act committed and deemed to be lewd or lascivious. In both cases involving Mr. Palmieri, the information fails to set forth the specific acts deemed to constitute lewdness and are therefore insufficient. (R)(1) pages 10-11; (R)(II), pages 2-3.

The Second District Court of Appeal cites several other cases for the proposition that the term "lewdness" is not unconstitutionally vague. Each case is distinguishable on the

facts or were rendered before Kolender, supra, and so Appellee would argue are not applicable to the cases at bar. In Campbell v. State, 6 So.2d 828 (Fla. 1942), the State Supreme Court merely set fort the elements of the ill fame statute and the sufficiency of the evidence it did not pass on the constitutionality of the statute. In Carlson v. State, 405 So.2d 173 (Fla. 1981), the State Supreme Court again did not discuss the constitutional validity of the house of ill fame statute, 796.01. Rather, in Carlson the State Supreme Court looked into 796.01 only on the basis of a double jeopardy argument vis-a-vis 796.07(2)(a).

The Second District Court of Appeal also cited the case of Bell v. State, 289 So.2d 388 (Fla. 1973), wherein the Florida Supreme Court upheld the validity of Florida Statute 796.07 against a constitutional attack of vagueness regarding the term "lewdness". The Court ruled that:

> "This statute is sufficiently definite to withstand attacks of vagueness and overbreadth and to convey a sufficiently definite warning or proscribed conduct when measured by common understanding and practice."

This reasoning by the State Supreme court merely states the first prong of the vagueness doctrine as was later set forth in Kolender, supra, at page 1858, "that a penal statute defines a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" but it does not satisfy the second prong of Kolender wherein the United States Supreme Court stated

> "...the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine - the requirement that the legislature establish minimal guidelines to govern law enforcement." Kolender at page 1858.

The Florida Supreme Court in Bell v. State, supra, relied on Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972), wherein the Court stated:

> "To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." Bell v. State, supra, at page 390.

It should be noted that the statute under attack in Orlando Sports Stadium, Inc., supra, was a public nuisance statute regulating persons who maintained places where any law of the state is violated. The operative language in that case was "where any law of the state is violated". That language is clear and not susceptible to misunderstanding. The Court in Orlando Sports was merely stating that it was not necessary to define, in the statute, each type of law violation which would apply.

Having analyzed the cases cited by the Second District Court of Appeal, the Appellee, Michael Palmieri, now sets forth his case law in support of the Trial Court's determination that Florida Statute 796.01 is unconstitutionally void for vagueness on its face. In fact, the majority of the cases cited to the Second District Court of Appeal by the State date back to the 1930's and 1940's. The statute itself was enacted in 1868.

The term "house of ill fame" is clearly unconstitutionally vague under the Kolender guidelines. Nor do any of the cases cited by the State in any way shed any light or give any limitation to the broad ambiguous term "house of ill fame". The Florida Supreme Court has struck down other statutes relating to sex offenses. In the case of Franklin v. State, 257 So.2d 21 (Fla. 1971), this court declared unconstitutional for vagueness Florida Statute 800.01, which read:

> "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years." Franklin at page 22.

Interestingly enough, this statute also was enacted in 1868. The Court used reasoning later cited in the first prong of Kolender by noting that "A very serious question is raised as to whether the statute meets the constitutional test that it inform the average person of common intelligence as to what is prohibited so that he need not speculate as to the statutory meaning". Franklin at page 22. Noting that it had in the past upheld the statute despite constitutional challenges, it was persuaded that such holdings and the statute required reconsideration. It reasoned:

> "One reason which make this apparent is the transition of language over the span of the past 100 years of this law's existence. The change and upheaval of modern times are of drastic proportions. People's understanding of subjects, expressions and experiences are different than they were even a decade ago. The fact of these changes in the land must

> be taken into account and appraised. Their effect and the reasonable reaction and understanding of people today relate to statutory language."
>
> "...it seems to us that if today's world is to have brought home to it what it is that the statute prohibits, it must be set forth in language which is relevant to today's society and is understandable to the average citizen." Id at page 23.

It is abundantly clear that if the terms "abominable and detestable crime against nature" is unconstitutionally vague, the term "house of ill fame" is equally so. As pointed out earlier in the argument, the State Attorney's Office had difficulty in determining the meaning of the term. (R)(1) pages 55-57.

Moreover, the term "house of ill fame" is vague because it fails to pass the second prong of Kolender in that it "fails to establish minimal guidelines to govern law enforcement" Kolender, supra, at page 1858. The statute permits "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender, supra, at page 1858.

If the Court were to strike the term "house of ill fame" from the statute then what remains is the misdemeanor offense of 796.02(2)(a) which provides that "it shall be unlawful in this state...to keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of lewdness, assignation or prostitution." (See reasoning in Carlson v. State, supra, at pages 175-176, and footnote 3 therein).

However, Florida Statute 796.01 is not only unconstitutionally void for vagueness because of the ambiguous term "house of ill fame", equally ambiguous and vague is the term

"lewdness". What is lewd is nowhere defined in the statute in question or in case law construing this particular statute. The state cites cases construing the term "lewdness" in Florida Statute 796.07 which defines "lewdness" as used in that section as "any indecent or obscene act". That definition of "lewdness" does not apply to Section 796.01. Assuming, for purposes of argument, that the said definition of lewdness did apply to 796.01, there is persuasive case law holding such a definition to be unconstitutionally void for vagueness.

In the case of Miami Health Studios, Inc. v. The City of Miami Beach, 353 F.Supp. 593 (S.D. Fla. 1972), the Federal District Court in Miami declared that provision of Florida Statute 796.07 proscribing lewdness, with lewdness defined to include any indecent or obscene act to to unconstitutionally vague and indefinite. Id, page 597. The District Court's reasoning is pertinent since it anticipates the second prong of Kolender, supra, rendered almost ten years later:

> "The vice of vagueness is not only the inability of the public to know what conduct is prohibited but is the statute's failure to provide explicit standards for those who apply and enforce the law, to prevent arbitrary and discriminatory enforcement.'' Miami Health Studios, supra, at page 598.

The District Court rejected the lengthy definition of "lewdness" as set forth by the Florida Supreme court in Cheesebrough v. State, 255 So.2d 675 (Fla. 1971).

Appellee advises the Court that the ruling in Miami Health Studios, Inc., supra, was later vacated and remanded based

specifically on procedural grounds. The Circuit Court of Appeals (5th Circuit) specifically did not address the facial constitutionality question, 491 F.2d 98, 101 (5th Cir. 1974). The Appellee also advises this Court that the reasoning of the Federal District Court in Miami Health Studios, Inc., supra, was rejected by the Florida Supreme Court in Bell v. State, supra, at page 391. However both cases, Bell v. State and Miami Health Studios, Inc., predate Kolender, supra, which decision was rendered in 1983. Appellee would argue that the decision and reasoning in Kolender rendered the case law cited by the State obsolete and, rather, reinforces the reasoning in Miami Health Studios, Inc., supra.

In addition, Appellee would cite to this Court as persuasive argument the case of District of Columbia v. Walters, 319 A.2d 332 (D.C. Court of Appeals 1974). In the Walters case the District Court declared unconstitutional for vagueness a D.C. statute which declares it unlawful to commit any lewd, obscene, or indecent act in the District of Columbia. In the Walters case the defendant was arrested for engaging in mutual masturbation. The Court's reasoning is very applicable to the case at bar,

> "The Statute betrays the classic defects of vagueness in that it fails to give clear notice of what conduct is forbidden and invests the police with excessive discretion to decide, after the fact, who has violated the law." Walters, supra, page 335.
>
> "Opposing segments of the public may well agree as to the lewdness, obscenity, or indecency of the many acts...but they will disagree about many other acts without approaching absurdity. Thus there is a broad grey area in which the words of the statute will convey substantially different standards to

> different people. An act that is obscene to one person may be quite innocent to another - and by proscribing `any other lewd, obscene, or indecent act' the statute is so encyclopedic in its reach that the areas of disagreement are limitless."
>
> "Its language makes the statute void for vagueness because it subject Appellee to criminal liability under a standard so indefinite that police, court and jury are free to react to nothing more than what offends them." Walters, supra, at page 337.

The similarity between the factual circumstances in Walters and the case at bar, i.e. homosexual activity and the wording of the statute in Walters and the case at bar reinforces the applicability of the reasoning and decision in Walters to the decision of the Trial Court in this instant case to hold Florida Statute 796.01 void for vagueness.

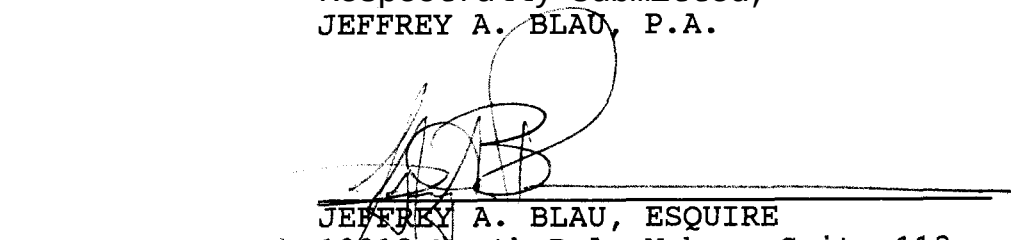
Finally, the lengthy definition of lewdness in Cheesebrough v. State, supra, at page 677, upon which the Supreme Court of Florida ruled in Bell v. State, supra, in no way places any limiting construction on the term "lewdness". As the U.S.D.C. of Idaho stated in Schwatzmiller v. Gardner, 567 F.Supp. 1371 (U.S.D.C. Idaho 1983), at page 1376:

> "It ought to be apparent to all, as it is to this court, that the Idaho Courts' queueing up of an imposing list of synonyms does little to clarify what conduct is forbidden. Rather it serves to muddle an already murky statute. `In short, vague statutory language is not rendered more precise by defining it in terms of synonyms of equal or greater uncertainity'. Pryor v. Municipal Court of Los Angeles, 25 Cal.3d 238, 158 Cal. Rptr 330, 599 P.2d 636, 642 (1979)."

CONCLUSION

Based upon the argument and citations of authority cited herein, this Court should uphold the decision of the Circuit Court dismissing case **88-02586,** (lower Court case number **88-2392),** and reverse the decision of the Second District Court of Appeal on the ground that defendant/Appellee, Edward Michael Palmieri, and dismiss both cases **88-02586** and **88-03107,** (lower Court case number **88-11466),** on the ground that Florida Statute **976.01** is unconstitutional on its fact in that the terms "house of ill fame" and "lewdness" are facially unconstitutionally vague.

Respectfully submitted,
JEFFREY A. BLAU, P.A.



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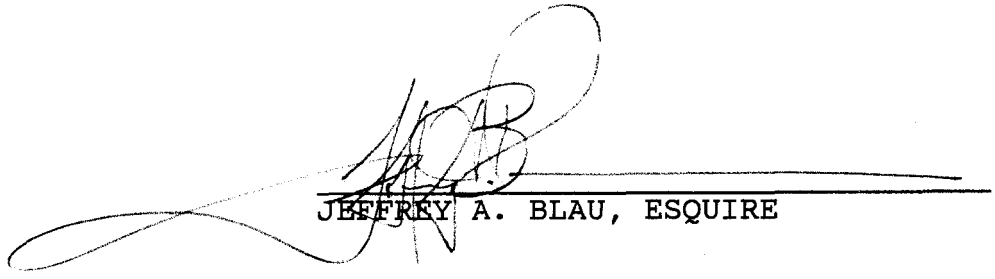
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, this 18th day of July, **1990,** to David R. Gemmer, Assistant Attorney General, **1313** Tampa Street, Suite **804,** Park Trammel Building, Tampa, Florida **33602.**



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