IN THE SUPREME COURT OF FLORIDA

15,730

EDWARD MICHAEL PALMIERI,

Petitioner, : Case No.

-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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BRIEF ON JURISDICTION FOR PETITIONER

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PRELIMINARY I

The Second District Court of Appeal of the State of Florida entered its opinion in this case and the companion case of State of Florida v. Kathleen Denise Warren, Thomas George Secchiari, and Joni L. Hicks, Case Number **88-2884**, on January **19, 1990**. A Petition for Rehearing was filed in this case on January **29, 1990**. The order denying rehearing was entered by the Second District Court of Appeal on February **22, 1990**. The Notice to Invoke Discretionary Jurisdiction of the Supreme Court was timely filed on March **19, 1990**. The Brief on Jurisdiction for Petitioners is being timely filed within ten days of said Notice.

The Second District Court of Appeal, in its opinion in the companion case of State v. Warren, supra, page **9**, "expressly declared" Section **796.01** of the Florida Statutes valid in these criminal matters, to "permit the Supreme Court to review this issue, State v. Warren, supra, at page **9**.

This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(i), Florida Rules of Appellate Procedure.

STATUTE INVOLVED

Section **796.01** of the Florida Statutes states:

"Whoever keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness, is guilty of a felony of the third degree, punishable as provided in **s. 775.082, s. 775.083**, or **s.** 775.084."

STATEMENT OF THE CASE

Petitioner was twice charged by information in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County with keeping a house of ill fame. Following an extensive

hearing, the trial court dismissed the information, concluding that Section 796.01 of the Florida Statutes, "whoever keeps a house of ill fame", was "nebulous at best" and violated the due process clause of the Florida Constitution and the United States Constitution. The trial court stated that the statute was unconstitutionally vague and was, therefore, unconstitutional both facially and as applied to the defendant. (The Order of Dismissal is appended as Exhibit A). The Second District Court of Appeal reversed specifically declaring this section constitutionally valid, although agreeing with the trial court's opinion. (The Court of Appeal's opinion, filed on January 19, 1990, is appended as Exhibit B). This Petitioner seeks this Court's discretionary review in this case, which involves constitutional legal issues as well as state-wide effect. It is the understanding of this Petitioner that the defendants in the companion case of State v. Warren, supra, shall also seek this Court's discretionary review.

SUMMARY OF ARGUMENT

A criminal statute must be written with sufficient specificity so that citizens of ordinary intelligence are given fair warning of what does or does not constitute a criminal act, (the conduct), and so that law enforcement officers are not given too much discretion, thus preventing them from engaging in arbitrary and erratic enforcement. Kolender v. Lawson, 461 U.S. 352, 357-358 (1983).

As the Second District Court of Appeal, in its opinion of State v. Warren, supra, articulated, at page 8, the "ill fame" section of Chapter 796 is undefined.

> "Because the undefined element distinguishes a misdemeanor from felony, there is a greater need for the public to have fair notice of the distinction it creates. Not only does the statute fail to provide a definition of ill fame, but there are no standard jury instructions, nor are there any precedents, which attempt to clarify this element."

This archaic and draconian section, subjective as opposed to objective in nature, fails to meet Justice O'Connor's two-prong test of vagueness, as set forth in Kolender. Since this section of Chapter **796** of the Florida Statutes clearly fails to provide the average citizen of normal intelligence the merest, let alone, the necessary notice of what constitutes the forbidden conduct, it further allows almost unlimited discretion on the part of the law enforcement officers, the prosecutors, and the judiciary to misuse this statute.

The trial court concluded that Section **796.01,** Florida Statutes, "Keeping house of ill fame" was "nebulous at best", and was unconstitutionally void for vagueness, which Petitioner now urges before this Court:

1) There is no standard for operating a house of ill fame in Section **796.01,** Florida Statutes, and that said statute is unconstitutionally vague, provides inadequate notice of what constitutes the offending conduct, and fails to provide any meaningful guidelines for law enforcement.

FLORIDA STATUTE **796** CONSTITUTIONAL ISSUE: THE "ILL FAME" STATUTE DENIES DUE PROCESS OF LAW

Petitioner requests that review by this Court be granted because:

> "A statute is unconstitutionally void for vagueness if it fails to give a person of ordinary intelligence fair notice of what conduct is forbidden by the statute." Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 E.Ed 989, (1954).

This is the first prong of the Kolender vagueness test as set forth by Justice O'Connor in her opinion for the Court. As this Court is aware, the United States Supreme Court in Kolender went on to establish a second prong in determining vagueness, that "law enforcement officers not be granted too much discretion, thus preventing them from engaging in arbitrary and erratic enforcement". Kolender, supra.

The record makes clear, as does the Second District Court of Appeal's Order, that, at the trial level, the prosecutor was having difficulty in determining what was required to establish his case. See, Warren opinion, footnote 4. Clearly, if the prosecutor, whose position it is to defend the State of Florida against those perpetrating this "crime", cannot determine the elements of this case, and how to prove the case, then the average man of normal sensibilities and intelligence cannot determine the crime.

As the District Court reviewed the history of this section, in Warren, pages 3 - 7, this statute, like the statutes this Court has previously ruled unconstitutional, i.e., Franklin v. State, 257 So.2d 21 (Fla. 1971), is written in the "guarded wording of the Victorian Era when proper etiquette discouraged a direct

discussion of sexuality, even in a statute penalizing sexual activity". Warren opinion at page 5.

In Franklin this court ruled Section 800.01 unconstitutionally vague. It went further and stated

> "This section and others relating to a variety of sex offenses need immediate legislative review and action. We urgently commend this important area of great social concern for appropriate remedial legislation." Warren opinion at pages **5 - 6**. Franklin at pages 21 - 22.

Chapter **796,** Florida Statutes, passed the same year as Section 800, is one of the statutes this court recommended for review. It is apparent that the Court recognized the need for a clearer, more precise definition of what constitutes a criminal act as it relates to Section **796.** In spite of this Court's recommendation, the legislature failed to modify the "archaic" description of the substantive offense. Because of the legislature's failure to modify the definition as recommended by this Court, the average citizen still does not understand what constitutes this crime. Yet the legislature felt the severity of this crime warranted raising the calibre of the crime from a misdemeanor to a felony.

Therefore, the vagueness standard set forth in Kolender becomes even more important with the increased penalty of a felony.

If allowed to stand in its present state, this vague, undefined, nebulous statute will continue to contravene the standards of justice, due process, the Florida Constitution and the Constitution of the United States.

CONCLUSION

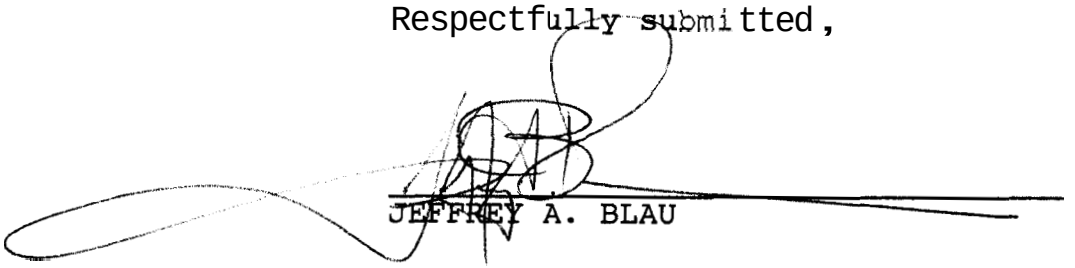
Review of this case is both warranted and necessary. The Second District Court of Appeal and the trial court both agree this section of Florida Statute 796 is vague, and fails to provide even minimal guidelines for law enforcement. It fails to provide the average person of normal sensibilities what constitutes the crime of "keeping a house of ill fame".

The legislature failed to heed the recommendations of this Court to review the archaic language of this section. It is essential that an average person be able to ascertain what constitutes a crime, especially when a conviction can mean incarceration for five years in the Florida State Prison.

For the reasons set forth above, Petitioner, Edward Michael Palmieri, respectfully requests this Court grant his petition for review.

Dated: March 26, 1990.

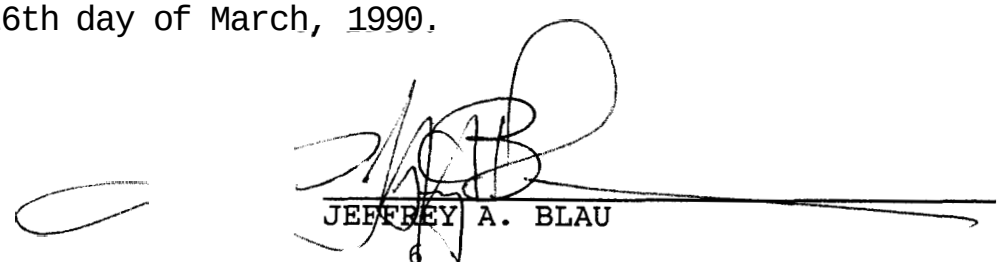
Respectfully submitted,



JEFFREY A. BLAU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States mail to David Gemmer, Esquire, Assistant Attorney General, 1313 North Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 26th day of March, 1990.



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