IN THE SUPREME COURT OF FLORIDA

KATHLEEN DENISE WARREN &
THOMAS GEORGE SECCHIARI,
Petitioners,

v.

STATE OF FLORIDA,
Respondent

Case. No. 75,791

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF THE RESPONDENT

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SUMMARY OF THE ARGUMENT

The only question is whether "ill fame" is impermissibly vague. "Prostitution" and "lewdness" are well-defined in the statutory scheme and have been expressly held to be adequately clear. "Ill fame" may not be defined statutorily, but it has been construed in Florida to refer to the reputation of the house wherein prostitution or lewdness occurs. The reputation of the house may be proven in the same manner that a person's reputation in the community may be established. Florida's construction gives literal meaning to the phrase and cannot be attacked for being obfuscatory.

In King, this court long ago recognized that some jurisdictions interpreted "ill fame" to merely mean a house of prostitution. However, this court chose to follow a different course, interpreting the words to refer to reputation and requiring proof of reputation as an essential element of the crime. In so doing, this court gave full effect to every word of the statute, Interpreting the phrase "ill fame" to mean merely a bawdy house would render the words redundant and superfluous. The courts have a duty to avoid such a construction.

The statute prohibits notorious houses of prostitution and lewdness. This court has consistently approved the statute. When "the abominable and detestable crime against nature," a deliberately obfuscatory statute, was voided in Franklin, this court recognized that reform of other sex offenses could only be carried out by the legislature. The legislature has chosen to retain this old but unambiguous statute, and it is not within the

purview of the judiciary to interfere with the legislative function where the legislature has acted constitutionally, regardless of this court's opinion of the wisdom of the action.

ARGUMENT

ISSUE

SECTION 796.01, FLORIDA STATUTES (1987), IS NOT UNCONSTITUTIONALLY VAGUE.

The reservations of the second district in the opinion below boil down to dissatisfaction with "ill fame," The second district, unlike the petitioners, had no difficulty in agreeing with this court that "prostitution" and "lewdness" are well-defined and need no further explication. State v. Warren, 558 So.2d 55, 57-58 (Fla. 2d DCA 1990), citing to § 796.07(1), Fla. Stat. (1987) and Bell v. State, 289 So.2d 388 (Fla. 1973) (holding that § 796.07(1)'s definition of "lewdness" is not void for vagueness). See also Bell v. State, 369 So.2d 932 (Fla. 1979) (holding that informations charging "prostitution" and "lewdness" under § 796.07 were not void for vagueness); State v. Coleman, 177 So. 725 (Fla. 1937) ("The words 'prostitution' and 'lewdness' each have a meaning so well known that it is not necessary for their meaning to be stated in an information." Id. at 725);[1] Law v. State, 355 So.2d 1174 (Fla. 1978) (rejecting attack on "lewdness" as being vague); Health Clubs, Inc. v. State ex rel. Eagan, 338 So.2d 1324 (Fla. 4th DCA 1976).

What gave the second district pause was "[t]he undefined, essential element of 'ill fame' . . . . Because this undefined .....

1. Ironically, Coleman did not also include "ill fame" in the statement that the meanings of the words in the other element of section 796.01 required no definition in an information. Presumably, even to the defendant in Coleman, "ill fame" was so well known in meaning that it was unnecessary to raise an attack alleging the vagueness of this phrase.

element distinguishes a misdemeanor from a felony, there is a greater need for the public to have fair notice of the distinction it creates." Warren, 558 So.2d at 58 (emphasis added).

"Ill fame" may be undefined, but if lack of definition were the criterion by which the constitutionality of statutes were measured, then the vast majority of Florida's statutory law would have to be declared unconstitutionally vague. Case law has found no problem with vagueness vis-a-vis this term.

"Ill fame" has, essentially, two meanings, depending on whether one adopts the majority or minority view as noted by the second district. Warren, 558 So.2d at 56 n.3. See generally 24 Am.Jur.2d Disorderly Houses § 18 (1983); Words and Phrases, "House of I11 Fame" (West 1970). The majority view adopts the connotation that "house of ill fame" is synonymous with "house of prostitution."

> A "bawdy house" and "house of ill fame" are synonymous terms. 1 Bouv.LawDict. 163. In State v. Smith, 12 N.W. 524, 29 Minn. 193, it was said: "The term 'house of ill fame' is no doubt a mere synonym for 'bawdy house,' having no reference to the fame of the place, but denoting the fact."

State v. Lee, 80 Iowa 75, __, 45 N.W. 545, 547 (1890) (quoted in Words and Phrases, "House of I11 Fame" at 523).[2] However, even where the phrase is unitary with "bawdy house" or other synonyms, the reputation of the house may be relevant and admissible evi-

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2. Lee, while citing to Minnesota authority for the principle that reputation of the house is not an element of the crime of keeping a house of ill fame, held that evidence of the general reputation of the house was relevant to prove that the house was used for prostitution. See United States v. Jamerson, 60 F.Supp. 281 (N.D. Iowa 1944).

dence. Lee.

The minority view adopted in Florida is that the literal denotation of the words should be followed, i.e. that the reputation of the house is an essential element of the crime. A house's reputation for prostitution or lewdness is not undefined. The words have plain meaning.

This court adopted the literal meaning of the words, rendering reputation an element of the crime, in 1879.

> Another ground of error assigned is "that the court erred in admitting evidence of the reputation of the house in which the defendant resided and those who visited it, though objected to by the defendant."
>
> On the trial one Frank Touart testified that "he knew the defendant; she lived on Saragosa street, in Pensacola, Escambia county, Florida; do not know that she kept a house of ill fame resorted to for purposes of prostitution and lewdness."
>
> . . . .
>
> "I do know the general reputation of the house; it was a loose house; he knew the reputation of the house for prostitution and lewdness; it was bad; it was resorted to by men and women in 1876 at all hours of the night; character of women there for virtue bad; do not know that it was resorted to for purposes of prostitution and lewdness."
>
> . . . .
>
> . . . . "I do not know the reputation [of the women who resorted there]."
>
> Other evidence of the same character was given under like objections, rulings, and exceptions. Not only the reputation of the house, but also the reputation of those who visit it, may be inquired into. It would be difficult to prove the particular instances of the offence which gives character to such a house, in order to convict its keeper. It is this very character acquired by it as the resort of prostitutes and lewd persons that makes it criminal in the eye of the law. Having established a reputation among the citizens of the district, that reputation may be proved in the same wag as may the general character of an individual witness. [Citations to treatise and authority from other states omitted.]
>
> We are aware that the courts of some of the States have held that evidence of reputation of the house as a house of ill fame is not admissible, but believe that the better rule to be that adopted in Connecticut. In that State the language of the statute is precisely

> similar to our own, "keeping a house of ill fame resorted to for purposes of prostitution or lewdness," and the courts of that State have held that by force of these particular words, it is both permissible and necessary to prove the reputation of the house,"
>
> The case cited by defendant's counsel from 39 Iowa, 379, 339, State v. Lyon, is not applicable to this case. There the indictment was found upon a statute against a lessor for leasing a building "for the purpose of prostitution and lewdness," and the "ill fame" of the house was not in question, therefore the evidence was not admissible.[3]

King v. State, 17 Fla. 183, 189-91 (1879) (emphasis added). This court reversed for a new trial because the witness, one Touart, was unable to testify that the house had ill fame in the community.

Giving effect to the literal meaning of the words makes sense vis-a-vis statutory construction, since one of the duties of this court is to give meaning to all the words enacted by the legislature, there being no presumption that the legislature would adopt language which was redundant or superfluous. Terrinoni v. Westward Ho!, 418 So.2d 1143 (Fla. 1st DCA 1982); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). Cf. Ervin v. Collins, 85 So.2d 852 (Fla. 1956) (presump-

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3. The Iowa case quoted supra, Lee, was decided after statutory changes rendered reputation admissible:

> In Iowa it was early held that while the general reputation of those frequenting the premises could be shown on the question of the character of a place as a house of prostitution, yet evidence as to general reputation of the place was not admissible, State v. Lyon, 1874, 39 Iowa 379. However, by Chapter 142 of the Acts of the Twentieth General Assembly (1884) it was provided that in prosecutions for keeping a house of ill fame that the general reputation of the house could be shown. . . . Subsequently such evidence has been admitted. State v. Lee, 1890, 80 Iowa 75, 45 N.W. 545, 20 Am.St.Rep. 401 . . . .

United States v. Jamerson, 60 F.Supp. 281, 286-87 (N.D. Iowa 1944).

tion that drafters of Florida Constitution had grasp of English language and knew what they wanted to say).

The evil to be protected against is "this very character acquired by it as the resort of prostitutes and lewd persons," and this character of ill fame "makes it criminal in the eye of the law." It is this evil which renders the crime a felony. While the second district and petitioner may find it difficult to envision an offense based on the good reputation of a house of prostitution or lewdness, defense lawyers in other jurisdictions have raised defenses to the element of ill fame.

> A house solely occupied by one woman, who there indulges in illicit sexual intercourse with numerous men, but not resorted to by any other woman for the purpose of prostitution, is not a "house of ill fame," within the meaning of a statute making it an offense to keep such a house.

State v. Pyles, 86 W.Va. 636, 104 S.E. 100 (1920). See generally Words and Phrases, "House of I11 Fame" (West 1970).

It is also possible that a house operated for prostitution or lewdness might be operated on such a discrete basis that it had no community reputation, i.e. no one had heard of it, or, as in King, the reputation was not specific as to prostitution or lewdness. The legislature, when it originally enacted the statute, desired to punish those who operated notorious houses. The average brothel operates on a public basis, taking in all who appear in its doorway and relying on its ill fame to bring in new trade. It is "a house where many people may frequent for immoral purposes, or a house where one may go for immoral purposes without an invitation." Wilson v. State, 84 So. 783, 17 Ala.App. 307 (1920). "It is this very character acquired by it as the resort

of prostitutes and lewd persons that makes it criminal in the eye of the law." King v. State.

The second district in the opinion below found that the difficulty the prosecution had in determining how to prove "ill fame" supports its conclusion that the phrase is vague, Warren, 558 So.2d at 58 n.4. However, the manner of proving ill fame is clearly stated by this court in the primogenitor case: "Having established a reputation among the citizens of the district, that reputation may be proved in the same way as may the general character of an individual witness." King, 17 Fla. at 190. The definition of "community" may be determined by reference to the case law determining the community for purposes of impeaching a witness by his reputation for truthful character in the community. See Ehrhardt, Florida Evidence § 609.1 (2d ed. 1984), and cases cited therein. It may simply be that the prosecutors in the companion case did not have ready access to King. It appears only in Florida Reports, and is unreported in Southern Reports. King dispels any doubts regarding "ill fame" which might be raised from reading subsequent case law, especially with the adv ce regarding proof of ill fame, and the rendition of facts and outcome vis-a-vis the failure to prove ill fame in King.

This court has consistently upheld section 796.01 without a single problem regarding vagueness. Atkinson v. Powledge, 167 So. 4, 5 (Fla. 1936) (quoting substantial portion of the portion of King quoted herein supra). ~~See also~~ Lashles v. State, 67 So.2d 648 (Fla. 1953); Powell v. State, 23 So.2d 727 (Fla. 1945) (cases showing no difficulty in proving ill fame).

Thus, in Atkinson and the other cases, this court has had no difficulty in concluding that "ill fame" has a concrete definition, provable by evidence, and, therefore, not vague. This court has also had occasion to examine all the essential elements of the statute:

> It appears that there are three elements of the offense denounced by the statute [section **7576**, C.G.L. **1927**, predecessor to section **796.01**] 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 v. State, **6** So.2d **828** (Fla. **1942**). **No** question of the constitutionality of the statute was raised, suggesting that this court saw no problems at that time.

Even when viewed in a constitutional context, this court raised no suggestion of vagueness. In Carlson v. State, **405** So.2d **173** (Fla. 1981), the court undertook a constitutional analysis of the elements of section **796.01**, for purposes of applying the test of Blockburger v. U.S., 284 **U.S. 299, 52** S.Ct. **180, 76** L.Ed. **306** (1932) in **a** double jeopardy case. Even though constitutional issues were joined, again, the court found no constitutional infirmity for vagueness.

In Franklin v. State, **257** So.2d 21 (Fla. 1971), this court declared the statute prohibiting "the abominable and detestable crime against nature" to be unconstitutionally vague and uncertain. This court then wrote:

> This statute 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.

Franklin, **257** So.2d at **22-23**. The second district recognized

this court's apparent affirmation of the constitutionality of section **796.01** by its unquestioning use of the statute in Carlson a decade after Franklin. Warren, 558 So.2d at **57**. More importantly, the Franklin decision recognized a fundamental difference between the deliberately obfuscatory language of the sodomy statute discarded in Franklin, and the other sex offense statutes arising from the Victorian era. Although section **796.01** may be timeworn, its language is not obfuscatory, and a review of its earliest interpretation by this court, in King, clarifies any possible question regarding the meaning of the words used. Archaic language might best be updated to contemporary standards, but the language does not render the statute void for vagueness. The solution, if any, is legislative, not judicial. This court recognized where the responsibility lay in its call for legislative action, and it is a legislative prerogative whether to heed those words of advice.

If this court desires to send a message to the legislature to hasten reform of the statutory scheme in the area of sex offenses, section **796.01** is not the section to single out for instruction. This court's long history of affirming the statute has developed a body of case law consistently interpreting the clear and unambiguous language of the legislature. The statute is neither vague in its terms, nor vague in its application. The legislature has chosen to retain this old but unambiguous statute, and it is not within the purview of the judiciary to interfere with the legislative function where the legislature has acted constitutionally, regardless of this court's opinion of the wisdom of the action.

CONCLUSION

This court should approve the decision below.

Respectfully submitted,

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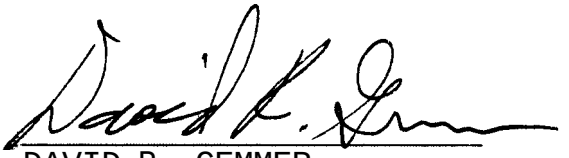
ATTORNEY GENERAL



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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 to Manuel A. Machin, 505 South Magnolia Avenue, Tampa, Florida 33606, this date, August 22, 1990.

OF COUNSEL FOR THE STATE