DA 10-4-90

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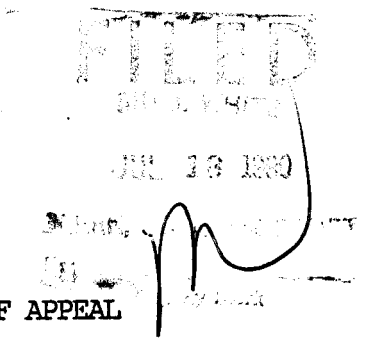
IN THE SUPREME COURT OF FLORIDA

KATHLEEN DENISE WARREN
THOMAS GEORGE SECCHIARI
Petitioners,

v.

CASE NO. 75,191

STATE OF FLORIDA,
Respondent.



APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners are managers of establishments which h a . dancers who dance nude for patrons. The establishments are licensed and designated specifically for nude dancing. Factually, *after* a person satisfies the requirements for admission into the establishment, dancers take turns dancing on a center stage disrobing until they are completely nude. A patron may elect to receive a private dance from a dancer. Normally, a fully clothed patron is seated on a chair or sofa and a dancer performs a dance for him while nude. Police officers observed these dances, deemed their performance to be lewd and arrested the managers in charge for keeping a house of ill fame resorted to for the purpose of lewdness.

The Petitioners were charged with violating Section 796.01, Florida Statutes (1987). This statute, in its entirety, reads as follows:

> KEEPING A HOUSE OF ILL FAME - 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 Section 775.082, Section 775.083, or *Section* 775.084.

The Petitioners moved the Circuit *Court*, Honorable *Harry* Lee Coe, 111, Judge, to dismiss the charge against them on the grounds that the statute with which they were charged was unconstitutionally void for vagueness. After careful consideration, the lower court ruled that Section 796.01, Florida Statutes (1987) is unconstitutionally vague. Specifically, the lower *court's* Order Dismissing Information states, in pertinent part, as follows:

> ORDERED *AND* ADJUDGED that this *court* hereby rules that Florida Statute 796.01, "Keeping House of 111 Fame" is unconstitutionally vague *on* its face.
>
> This court further finds that the terms "ill fame", "prostitution" and "lewdness" are unconstitutionally vague as used in this statute.

The State then appealed the order and a three (3) judge appellate panel reversed the trial court's order and declared that the statute was not unconstitutionally vague. State v. Warren, 558 So.2d 55 (Fla. 2d DCA 1990). The Appellate *Court* in Warren seriously questioned the constitutionality of the statute but upheld it based upon a line of precedent erroneously determined to be applicable. The Appellate *court* in Warren refused to rehear the case en banc and did not specifically certify the question to the Supreme Court. However, the Appellate *Court* did state:

> ... We expressly declare the validity of Section 796.01, Florida Statutes (1987) in anticipation that the Supreme *Court* will exercise its discretionary jurisdiction to review the constitutionality of this statute. Warren at 55.

This court has invoked jurisdiction and the Petitioners seek to have the findings of *the* Appellate *Court* overturned and the order of *the* trial court reinstated.

SUMMARY OF THE ARGUMENT

Section 796.01, Fla. Stat. (1987) is void for vagueness on its face in that no person of ordinary intelligence can contemplate what conduct is forbidden by the wording of the statute.

In the alternative, Section 796.01, Fla. Stat. (1987) is unconstitutional as applied in the instant case because the unintelligible terms of "ill fame" and "lewdness" fail to give notice to people of ordinary intelligence of what conduct is prohibited. Neither the statutes nor the case law defines the term "ill fame" or "lewdness" sufficiently enough and any use of this statute to prohibit otherwise lawful activity is an unconstitutional application of the statute.

Finally, the statute is unconstitutional because the statute does not define the criminal offense with sufficient definiteness to discourage arbitrary and discriminatory enforcement. The utilization of this statute by the authorities is an example of the unbridled discretion law enforcement have with which they pick and choose whom to arrest, prosecute and convict. Such conduct is forbidden by both this court and the united States Supreme court.

ISSUE PRESENTED

WHETHER SECTION 796.01, FLORIDA STATUTES, IS UNCONSTITUTIONAL BECAUSE IT IS SO VAGUE THAT IT FAILS TO GIVE A PERSON OF ORDINARY INTELLIGENCE FAIR NOTICE THAT HIS CONTEMPLATED CONDUCT IS FORBIDDEN BY THE STATUTE

ARGUMENTS

I. Section **796.01** is vague on its face.

The constitutional attack on this statute is an issue of first impression in this state. The Second District *Court* of Appeal declined to invalidate this statute because of *their* mistaken belief that this Court has previously upheld its validity rather than merely defined its elements or enforced it. State v. Warren, 558 So.2d 55, 58 (Fla. 2d DCA 1990) However, a careful analysis of the cases involving the statute reveals that there was no decision by this *Court* ever declaring the statute constitutional because its terms are sufficiently definite to give a person of ordinary intelligence fair notice of what conduct is forbidden. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); State v. Warren, supra. The appellate court itself questioned the term "ill fame" as being vague and would have affirmed the trial court's ruling but for the misapplied prior decisions of this court. Warren, at 58.

Section 796.01, Fla. Stat. (1987) *states* in its entirety:

> KEEPING A HOUSE *OF* ILL FAME - 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 *Section* 775.082, Section 775.083, or *Section* 775.084.

Our inquiry begins with the question, what is the definition of "ill fame?" Black's Law Dictionary defines "ill fame" as follows:

> Ill fane. Evil repute; notorious bad character. Houses of prostitution, *gaming* houses and other such disorderly place are called "houses of ill fame," and a person who frequents them is a person of ill fane. Black's Law Dictionary, 673 (5th ed. 1979); State v. Warren, at 56 n.2.

What definition shall we give to "evil repute," "notorious bad character," or "other disorderly places?" The statute certainly does not help. In fact, the Appellate Court could not sufficiently define "ill fane" and it stated:

> The undefined, essential element of "ill fame," however, presents a more troubling issue. Because this undefined element distinguishes a misdemeanor from a 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 fane, but there are no standard jury instructions or precedents which attempt to clarify this element. State v. Warren, at 58.

If neither the statute nor the Courts can define "ill fame," how can one know if he is violating a statute if he manages a nude dancing establishment with a questionable reputation? As the *Court* in Warren *implied*, is a quiet little bordello with a sterling reputation a house of ill fane? What purpose does the term "ill fame" serve in today's modern society?

what is "lewdness?" The only definition of "lewdness" that can be found within the criminal statutes is in Section 796.07(1)(b) which states in part:

> (1) As used in this section:
> * * *
>
> (b) "Lewdness" means any indecent or obscene act.
> * * *

(emphasis added)

By statute, this definition does not apply to 796.01; however, assuming arguendo that the statutes should be read in pari materia with each *other*, the Petitioners were accused of keeping a place with a bad reputation resorted to for the purposes of indecent acts. what is *the* meaning of "indecent?"

This term is not defined in *any* statute, so where do the Petitioners or any other people of ordinary intelligence go to *answer* these questions? The quandary presented to this Court concerns **(1) whether 796.01 is** unconstitutionally void for **vagueness** on its face because it *does* not sufficiently define what acts constitute conduct which is prohibited, or (2) **whether 796.01** is unconstitutional **as** applied because it enfringes on the constitutionally protected rights of free speech and artistic expression, or **(3)** whether **796.01 has become** unconstitutionally void for **vagueness** because it encourages arbitrary and discriminatory enforcement on the part of law **enforcement** officers.

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** which does not **encourage** arbitrary and discriminatory enforcement. **Kolender v. Lawson, 461** U.S. **352, 103 S.Ct. 1855, 75** L.Ed.2d **903 (1983). Furthermore,** criminal statutes must be written with sufficient specificity so that citizens are given fair warning of the offending conduct, and law enforcement officers are prevented from **engaging in** arbitrary and erratic **enforcement** activity. Papachristou v. City of Jacksonville, **405** U.S. **156, 92 S.Ct. 839, 31** L.Ed.2d **110 (1972); Thornhill v.** Alabama, **310** U.S. **88, 60 S.Ct. 736, 84** L.Ed. **1093 (1940);** Lanzetta v. New **Jersey, 306 U.S. 451, 59 S.Ct. 618, 83** L.Ed. **888 (1939); McKenney v. State, 388 So.2d 1232** (Fla. **1980); State** v. **Warren, 558** So.2d **55** (Fla. 2d **DCA 1990),** certiorari granted, Case **no. 75,791** (Fla. **June 19, 1990).**

A manager of a nude **dancing** establishment, **so licensed** and designated, cannot expect as a common person of ordinary intelligence to be in **violation of** the *law* merely because the community or law enforcement **assigns** a "bad

reputation" to the locale involved. This statute fails miserably to define what is an "ill fame" or a "lewd" and therefore, "indecent act." There is no issue of obscenity or prostitution in these cases. There is no "sexual activity" as defined by the statute. Thus, the statute is void for vagueness because the statute fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. It is insufficient to define "lewd" as something that is indecent because the word "indecent" is not definite enough to put a person of ordinary intelligence on notice of what conduct is prohibited.

Petitioners concede at the outset, that within constitutional limits, the legislature may prohibit any act, determine the grade and class of the offense, and prescribe the punishment. State v. Bailey, 360 So.2d 772 (Fla. 1978); Kimmons v. State, 156 Fla. 448, 23 So.2d 523 (1945). Moreover, to make a statute sufficiently *certain* to comply with constitutional requirements, we also concede that it is not *necessary* that it furnish detailed plans and specifications of the acts or conduct prohibited. Orlando Sports Stadium, Inc. v. State ex rel Powell, 262 So.2d 881 (Fla. 1972).

The establishments in these cases are set up to exercise certain "free speech" aspects guaranteed to citizens *by* the First Amendment to the United states constitution. Entertainment, as well as political and ideological speech is protected, as are motion pictures, programs broadcast by radio and television. Live entertainment falls herein as well. See generally: Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); Schact v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974); Southeastern Promotions v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d A48

(1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 1225 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); and FCC v. Pacifica Foundations, 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1073 (1912). Is the manager of an art gallery, which is known for displaying sexually explicit artwork and has a bad reputation as the result of such display, guilty of keeping a house of ill fare? Is the manager of a movie theatre which shows movies which are considered indecent to *many* people in the community guilty of keeping a house of ill fare because of the bad reputation of the theatre? If a person desecrates an American flag by urinating or defecating on it within his business and displays this grossly indecent act to the community, is he guilty of keeping a house of ill fare?

Under the due process clauses of Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Florida Constitution, a penal statute must be *expressed* in language that is definite *enough* to provide notice of what conduct will constitute a violation. Brock v. Hardie, 114 Fla. 670, 154 So. 690 (1934). The Fourteenth Amendment is violated when the certainty of a statute's meaning is itself not revealed until a court's decision is issued. In such a *case,* a person is not even afforded an opportunity to *engage* in speculation as to a statute's *coverage* before committing the act in question. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In . . whether a criminal statute is void for vagueness, the underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. United States v. Harriss, 347 U.S. 612, 74 S.Ct.

808, 98 L.Ed. 989 (1954); Palmer v. City of Euclid, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971); Wainwright v. Stone, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973); Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Due process requires fair warning of prohibited conduct. Bouie v. City of *Columbia*, supra; Rabe v. Washington, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). In other words, the void for vagueness doctrine requires that a penal statute define a 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. Bouie V. City of Columbia, supra; Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Furthermore, the average person should not have to speculate as to statutory meaning or proscription. *Franklin* v. State, 257 So.2d 21 (Fla. 1971); Bouie v. City of Columbia, supra; Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961).

Query: What is "ill fame" as proscribed by 796.01? Who is to determine or establish the bad reputation? What is an "indecent *act*" as proscribed by 796.01? What, indeed, is the prohibited conduct? Must we not speculate as to the statute's coverage? Can we reasonably understand what is proscribed? Do we have fair warning? Is "ill fame" or "indecent" sufficiently definite that ordinary people can understand what *conduct* is prohibited? Is this statute not subject to arbitrary enforcement?

The United States Supreme Court also discusses a two-pronged standard in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). This two-pronged standard implicates the following general principles:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that the 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 than. A vague law impermissible delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory applications (Footnotes omitted). Schwartzmiller v. Gardner, 752 F.2d 1341 (9th Cir. 1984), citing, Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 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); Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1383, 16 L.Ed.2d 434 (1966); Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Herndon v. Lowry, 301U.S. 242, 71 S.Ct. 312, 95 L.Ed. 280 (1937).

The wording of Section 796.01, Florida Statutes (1987), fails to notify citizens of what specific conduct falls within the limits of ill fame and lewd, therefore indecent behavior. In fact, Black's Law Dictionary defines indecent as: "offensive to common propriety; offending against modesty or delicacy; grossly vulgar; *obscene;* lewd; unseemly; unbecoming; indecorous; unfit to be seen or heard." Black's Law Dictionary 691 (5th ed. 1979). Terms such as "offensive to common propriety", "offending against modesty" and "unbecoming" do not provide any more guidance to a common person of ordinary intelligence of what conduct is prohibited than does the term indecent and this is conceded by the Black's Law Dictionary authors when they state that the term "public indency" has no fixed legal meaning, is vague and indefinite, and cannot, in itself, imply a definite offense. Black's Law Dictionary 692 (5th ed. 1979).

This archaic keeping a house of ill fame statute is certainly timeworn. Today's modern educated society demands definite statutes. If people accept the loose term of indecency as a definition for ill fame, then whom should they ask for a definition of indecency? Surely not the police. The legislature has a duty to inform citizens of the prohibitive law. When the legislature neglects that duty after repeated urging from the courts, then the courts must act to protect the citizenry. Today's society is not satisfied with the archaic definitions of "indecency" and "ill fame."

As stated at the outset, the Petitioners in these cases are unsure of their rights and status given a statute that has been seemingly enforced by the Florida courts (*See* Campbell v. State, 149 Fla. 701, 6 So.2d 828 (1942), but is being applied with extremely divergent interpretation. Certainly, to insure that the legislature speaks with special clarity when marking boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably proscribed. Dunn v. United States, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). The aspect of the statutes before this court, as they are being applied by the police, prompted the United States Supreme Court in similar situations to comment:

> "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." Papachristou, supra at 166, citing United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1876).

The interpretation of "ill fame" and "lewdness", i.e., "indecency", are as confusing as the terms "abominable and detestable crime against nature." A Florida Statute which prohibited "an abominable and detestable crime against nature, either with mankind or beast..." Section 800.01, Fla. Stat. (1971) was held invalid as being vague in Franklin v. State, 257 So.2d 21 (Fla.

1971). The Florida Supreme Court held that the statute did not meet the constitutional test (ie., that it is understood by the average man of common intelligence) and recognized that "This statute provides a penalty for a crime, but fails to deliniate [sic] what conduct will violate its terms." (Emphasis theirs) Id. at 23. Noting that the statute had been *drafted* in 1858 in language more appropriate to that time period than to the time period in which Franklin was decided, the Court specifically stated that "[t]his *statute* and *others* relating to a variety of sex offenses need immediate legislative review and action." Id. at 22. The court reasoned that this need for legislative review and action, as well as for a reconsideration of the constitutionality of the specific statute involved in Franklin, was occasioned *by* the transition of language and the everchanging nature of *our* society. Thus, the *court* stated as follows:

> The change and upheaval of modern times are of drastic proportions. People's understandings 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 ... the law must be a living thing, responsive to the society which it *serves*, and to which that society looks as the last true depository of truth and justice. Id. at 23.

Just as in Franklin, the statute in question in the instant cause had its origins in the year 1868 and contains language of undefined and uncertain meaning in the context of contemporary society. As *such*, Section 796.01 is unconstitutionally vague and the lower court was correct *in joining* the ranks of those "[f]orward-looking jurisdictions [which] have expressly rejected the antiquated notion of the penal *code* should not clearly define *such* acts." Balthazar v. Superior *Court* of Com. of Mass., 573 F.2d 698, 701 (1st Cir. 1978); and District of Columbia v. Walters, 319 A.2d 332 (D.C. App. 1974). Therefore, the lower court's Order Dismissing Information in the instant cause

should be upheld. Likewise, 796.01 provides a penalty for a crime, i.e., keeping a house of ill fame resorted to for the purpose of lewdness, but fails to delineate what constitutes the vague, indefinite and overbroad term of "ill fame" as well as "lewdness" when lewdness is defined as an "indecent act." The "ill fame," "lewdness" or "indecent" provisions of Section 796.01 is as equally vague as the former Section 800.01, Fla. Stat. (1971) and must be declared equally unconstitutional.

The Second District Court of Appeal cited several cases which upheld the validity of Section 796.01[1], but none specifically address the vagueness argument presented today.

The holdings of those cases are based on common law interpretations and procedural aspects. The first and oldest case cited, King v. State, 17 Fla. 183 (1879), is challenged on grounds based in Florida's Declaration of Rights and not the United States Constitution as made applicable to the states through the Fourteenth Amendment. Those archaic statutes cited by the Appellate Court were decided many years before the United States Supreme Court articulated the criteria for determining whether or not a statute is unconstitutionally vague in Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L. Ed. 2d. 110 (1972).

[1]The cases cited by the Appellate Court in reference to the term "ill fame" are: King v. State, 17 Fla. 183 (1879); Atkinson v. Powledge, 123 Fla. 389, 167 So. 4 (1936); State ex rel. Libtz v. Coleman, 130 Fla. 410, 177 So. 725 (1937); Campbell v. State, 149 Fla. 701, 6 So.2d 828 (1942); Atkinson v. State, 23 So.2d 524 (Fla. 1945); Franklin v. State, 257 So.2d 21 (Fla. 1971); Carlson v. State, 405 So.2d 173 (Fla. 1981); and Bell v. State, 289 So.2d 388 (Fla. 1973).

Neither of the cases cited by the court in Warren which were decided *after* 1972[2] specifically challenge Section 796.01 as being void for vagueness. In Bell v. State, 289 So.2d 388 (Fla. 1973), the Florida Supreme Court addressed the definitions of the terms "prostitution" and "lewdness" as applied to Section 828.21, Florida Statutes. The Court also discussed Section 796.07 as applied to Section 828.21, but it did not address Section 796.01 because it was not an issue in the controversy. However, Bell does articulate a definition of lewdness which is supposed to give sufficient definition to the term. The Bell Court upheld Section 796.07(1)(b) as being sufficiently defined as anything "indecent or obscene." The Black's Law Dictionary definition of "indecent", supra, includes the term "lewd" as a synonym. Finally, the lengthy definition of lewdness in Cheesebrough v. State, 255 So.2d 675, 677 (Fla. 1971), upon which *the* State Supreme Court 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 Schwartzmiller v. Gardner, 567 F.Supp. 1371 (W.S.D.C. Idaho 1983), at page 1376:

> It aught 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 uncertainty.' Pryor v. Municipal *Court* of Los Angeles, 25 Cal.3d 238, 159 Cal. Rptr 330, 599 P.2d 636, 642 (1979).

Is not the Bell reasoning circular and non-enlightening?

The Appellate *court* in Warren *said* that "much of the criticism which the Court aimed at the sodomy statute could also be aimed at the ill fame statute." State v. Warren, at 57. What is "ill fame?" The same question was asked of "abominable and detestable crime against nature" in Franklin. The Franklin *Court* struck down its statute for vagueness and for the same reasons, *this Court* must strike down the keeping a house of ill fame statute.

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[2]Carlson v. State, 405 So.2d 173 (Fla. 1981); Bell v. State, 289 So.2d 388 (Fla. 1973).

As the Court in Warren, clearly stated:

> Repeating the suggestion in Franklin we encourage the legislature to review this timeworn statute.
>
> ***
>
> The legislature could *enact* a felony statute for this offense predicated upon an express objective standard, rather than upon the subjective standard of ill fame.
>
> ***
>
> We would affirm the trial court's decision concerning the unconstitutional vagueness of "ill fame" except for the several decisions of the Florida Suipreme *Court* upholding or applying this statute over the last 120 years.

State v. Warren, at 59.

The Petitioners now urge this *Court* to act where the Appellate Court would not. The Court in Warren erroneously concluded that it was bound *by* stare decisis and declared that our request was within the sole province of this Court. Since a careful analysis of the Warren reasoning indicates that this issue is one of first impression in this state, this Court must strike down this timeworn statute.

II. The terms "ill fame," "lewdness" and "indecent" as used in Section 796.01 is unconstitutionally vague as applied.

Courts have also recognized that "mores and standards of behavior of our society change and that society's views on *exposure of* the body are more liberated today than in the not too distant past." Egal v. State, 469 So.2d 196, 198 (Fla. 2d DCA 1985), review denied, 476 So.2d 673 (1985). Franklin v. State, 257 So.2d 21 (Fla. 1971). The Florida Supreme Court has addressed this issue in Campbell v. State, 331 So.2d 289 (Fla. 1976). In Campbell, a homosexual waiter fondled a fully clothed patron around his groin area while holding a *tray* of drinks with the other hand. The waiter was employed at a known homosexual bar, known as the Yum Yum Tree, where the local police sought to enforce the law. The waiter was charged with lewd and lascivious behavior in violation of Section 798.02, Fla. Stat. (1984). The Supreme Court ruled that, viewing the acts of *the* waiter in the totality of the circumstances, there was no violation of the statute. Justice England, in a concurring opinion, stated that the term "lewdness" "necessarily cast[s] a net of potential arrests so broad that contemporary persons of common understanding cannot know whether *their* behavior is permitted or criminal." Id. at 291. (Emphasis added)

In the instant *case*, the managers managed a place where dancers (———ll's waiter) performed a "lap dance" *(similar* to Campbell's fondling of the patron) in *the* "dark and crowded recesses" of the establishments. *As* the Campbell Court stated: "Who in the dark and crowded recesses of the Yum Yum Tree ... was offended?" Id. at 290. *As* in Campbell, the circumstances surrounding the dancers' acts do not cross *over* the threshold of lewd behavior. If one homosexual fondling another, while holding a tray of drinks

no less, is not lewd or indecent under those facts, then how can this fall within the modern definition of lewd or indecent? How can managing a nude dancing establishrrrent be unlawful if the nude dancing with contact is not per se unlawful?

Although all citizens are presumed to know the law, no person can ever imagine, after reading Section 796.01 or Campbe11 v. *State*, 149 Fla. 701, 6 So.2d 828 (1942), that managing an establishment with a "bad" reputation featuring lap dancing is prohibited. How can such an establishment ever have a good or decent reputation? Even assuming that an ordinary citizen has enough legal knowledge to view all statutes dealing with ill fame or lewdness in pari materia with each other, there is still not enough definiteness to tell the citizen what conduct is prohibited. Legal scholars debate these issues and they do not have a definitive answer, yet an ordinary citizen is expected to know that managing an establishment which features lap dancing or any nude dancing involving contact between the participants is so lewd or indecent as to constitute a crime. The best and only solution to the problem is for the legislature to prohibit the conduct and not allow the police to intrude into the constitutional rights of others. The Appellate *Court* itself urged the legislature to review this "timeworn" statute. State v. Warren, 558 So.2d at 58. However, it seems that the only way for the legislature to take such a directive seriously is for this statute to be declared unconstitutional.

If a citizen relies on a statute that does not prohibit a particular act, then he must be given the benefit of the doubt and favorable construction. Section 775.021(1) Fla. Stat. (1987); State v. Smith, 547 So.2d 613 (Fla. 1989); Carawan v. State, 515 So.2d 165 (Fla. 1987). Furthermore, the listing

of prohibited acts must be read as excluding those not expressly mentioned; expressio unius est exclusio alterius. Thus, when 796.07(1)(e) defines "sexual activity" as "oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by *any* other object, or the handling or fondling of the sexual organ of another for the purpose of masturbation" citizens are free to assume that conduct which does not involve *any* of these acts is permitted and not lewd, indecent or criminal. State v. Smith, supra; Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So.2d 234 (1944). *Yet*, while 796.07(1)(e) may not be void for vagueness, 796.01 is void as *applied* to these facts which do not involve *"sexual* activity" or "prostitution" and must be stricken from the statute books.

III. The police must not be allowed to use discriminatory and arbitrary enforcement to prohibit conduct they find offensive.

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 which does *not* encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Furthermore, criminal statutes must be mitten with sufficient specificity *so* that citizens are given fair warning of the offending conduct, and law enforcement officers are prevented from engaging in arbitrary and erratic enforcement activity. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 91940); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); McKennev v. state, 388 So.2d 1232 (Fla. 1980); State v. Warren, 558 So.2d 55 (Fla. 2d DCA 1990), Certiorari granted, Case no. 75,791 (Fla. June 19, 1990).

The Petitioners argue that *Section* 796.01, Fla. Stat. (1987), enacted in 1868, is unconstitutionally vague because it *encourages* arbitrary and discriminatory enforcement on the part of law enforcement officers. Even assuming that "lewdness" is sufficiently defined, the statute is unconstitutionally enforced in an arbitrary manner. The use of the keeping a house of ill fame statute to prohibit such behavior causes the very arbitrary and discriminatory enforcement *by* police officers which is despised *by* the United States Supreme Court. Kolender v. Lawson, 461 U.S. 352 103 S.Ct. 1855, 75 L.Ed.2 903 (1983).

If the act of touching a woman's *body* against the lap of a man is lewd, then how can "dirty dancing" or the "lambada" not be lewd? The "lambada" is a

modern popular Brazilian dance where two (2) people dance together in a sexually suggestive and rather indecent manner. The dancers rub their bodies together causing the woman's midsection area to come in contact with the man's thighs and groin area. Although both individuals are clothed, albeit scantily and sexually suggestive, the act involved is analogous to the instant case. The Appellants could not find one (1)instance of an arrest of lambada dancers for lewdness or indecency, although *many* would argue that it is both.

Patrick Swayze's Dirty Dancing is also a modern papular dance similar to lambada. Dancers also dance rubbing their midsections together in front of people on a crowded dance floor. The dance was popularized by a major successful motion picture, Dirty Dancing, shown in movie theatres throughout the United States. The dance is performed exactly like its name implies. An objective viewer of people performing these dances would conclude that these individuals are performing a sexually explicit and *suggestive* dance which *may* offend *many* people. Those dances involve the same act, yet they are permitted in public discoteques, night clubs and high school proms.

The classic plays Hair and *Oh!* Calcutta involved completely naked actors caning in physical contact with each other, yet no arrests have been made for lewdness or indecency when they have been performed live on stage. Why are the managers of the movie theatres, discoteques and performing arts centers not arrested for keeping a house of ill fame? The managers herein should have no *extra* likelihood for being charged with keeping a house of ill fame because their establishments are disdained by segments of the community.

viewing the totality of the circumstances involved in this *case* and comparing them to common forms of artistic expression which are not lewd, one can find no difference. If society wishes to prohibit certain "undesirable"

acts, then statutes should be written so that all such conduct is prohibited and not allow the police to pick and choose what is lewd and what is not. See State v. Bailey, 360 So.2d 772 (Fla. 1978).

In this case, there is no issue of offending anyone. Neither the patron nor the dancer complained of the act. No one else in the whole establishment complained. A police officer complained. It was his decision to arrest that declared the act lewd and nothing more. As a result, the Petitioners were charged with keeping a house of ill fame because they were the managers of an establishment which has become known for nude and "indecent" dancing. An adult entertainment club featuring nude lap dancing by its very nature provides patrons with a form of expression involving limited contact with the human body. The establishments involved provide ample warning to community residents and visitors of its features. They attract only those customers who have made the personal choice in a free society to enter and participate. No such establishments have sterling reputations. If our community wishes to do away with such acts, it should be done through adequate and effective legal channels such as restrictive *zoning* rather than erratic, arbitrary, and discriminatory enforcarrent.

The Supreme *Court* in Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), pointed 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 enforcarrent... 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.

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 statute and must be permitted to go 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.

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 co-Appellees Kathleen Denise Warren and Thomas George Secchiari, that the acts involved management of an establishment where nude dancing with some contact was occurring. Individual police officers on the beat viewed these isolated acts, deemed them lewd in their personal predilection at the moment and effected an arrest.

None of the cases cited by the Appellate court in Warren give a

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 court in Warren cites the reasoning in Atkinson v. Pourledge, 167 So.4 (Fla. 1936). The Court, in that decision, was considering the validity of a municipal ordinance, not the statute in question.

This case exemplifies 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.
>
> ... 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. Kolender at page 1859-1860.

In the cases involving warren and Secchiari, it is clear that law enforcement was "pursuing [its] personal predilections... against groups deemed to merit [its] displeasure" as Warren and Secchiari operate nude dancing establishments disdained by segments of the community.

The *other* two cases cited by the Appellate *Court* in Warren concerning the term "house of ill fame" *to* wit: Campbell v. State, 149 Fla. 701, 6 So.2d 828 (1942), and King v. State, 17 Fla. 183 (1879), do not discuss *the* issue *at* hand that being the constitutionality of the statute in question but merely deal with defining the elements of the crime, and are, therefore, unenlightening.

The Appellate Court also cites 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. Specifically, the Appellate *Court* cites the sentence, "The words 'prostitution' and 'lewdness' each have a meaning so well known that it is not necessary for the meaning to be defined in an information." Warren at 56. The Petitioners 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.

The Appellate Court in Warren, also cites other cases for the proposition that the tenn "lewdness" is not unconstitutionally vague. Each case is distinguishable on the facts or were rendered before Kolender, supra, and so Petitioners would argue are not applicable to the cases at bar. For instance, in Campbell v. State, 6 So.2d 828 (Fla. 1942), the State Supreme Court merely set forth the elements of the ill fane 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), this *Court* again did not discuss the constitutional validity of the house of ill fane statute, 796.01. Rather, in Carlson, this Court looked into 796.01 only on the basis of a double jeopardy argument vis-a-vis 796.07(2)(a).

The Appellate Court in Warren, also cites 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.

This Court should first be aware that all of the case law cited by the Appellate Court in Warren predates the decision and reasoning of Kolender, supra, which was rendered in May, 1983. In fact, the majority of the cases cited by the Appellate Court in Warren 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 Appellate Court in Warren in any way shed any light or give any limitation to the broad ambigous 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 State's highest 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.

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).

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. 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 subjects Appellee to criminal liability under a *standard* so indefinite that police, court and jury are free to react to nothing more than what offends than. Walters, supra, at page 337.

Section 796.01's vagueness is not only due to a lack of notice to potential offenders, but also, the unfettered discretion the police have been allowed under the guise of enforcing the statute. Where, as here, there *are* no standards *governing* the exercise of discretion granted *by* the statute, the scheme permits arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for harsh and discriminatory enforcement *by* police against particular groups deemed to merit *their* displeasure. See, generally, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). It results in a situation where otherwise law abiding *dancers* are permitted to express themselves solely at the whim of the police officers. Shuttlesworth v. Birmingham, 382 U.S. 87, 90, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). Such enforcement offends the constitution and makes this statute void.

CONCLUSION

Based upon the foregoing analysis, this Court must declare Section 796.01, Florida Statutes (1987) void for vagueness and therefore unconstitutional. The learned trial judge's ruling must be reinstated and this unintelligible statute must be forever striken from Florida's statute books.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnish to ATTORNEY GENERAL'S OFFICE, Park Trammel Building, 1313 N. Tampa St., Suite 804, Tampa, Florida 33602, by U.S. Mail delivery, this 16th day of July, 1990.

MANUEL A. MACHIN, ESQUIRE
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