IN THE SUPREME COURT OF FLORIDA

KATHLEEN DENISE WARREN,
THOMAS GEORGE SECCHIARI,
Petitioners,

v.

STATE OF FLORIDA,
Responder

SUPREME COURT CASE NO.: 75,791

APPELLATE CASE No.: 88-02884

APPLICATION FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETTTIONERS ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal by Defendants/Appellees, Kathleen Denise Warren and Thomas George Secchiari, from the Second District Court of Appeal's reversal of the trial court's dismissal of the charge of keeping a house of ill fame in violation of Section 796.01, Florida Statutes (1987). State v. Warren, No. 88-02884 (Fla. 2d DCA, Jan. 19, 1990); Appendix A. The trial court originally ruled the statute unconstitutionally vague. The trial court specifically found the terms "ill fame", "prostitution" and "lewdness" to be vague and since those terms are among the elements of Section 796.01, the entire statute was struck down.

The State of Florida appealed the dismissal to the Second District Court of Appeal. The Appellate Court reversed and remanded the case and declared the statute was constitutional.. It should be noted that the Hicks decision is also pending discretionary review by this Court. See State v. Hicks, No. 88-02926 (Fla. 2d DCA, Feb. 21, 1990).

The reasoning of the Court in Warren was that Section 796.01 was valid because the Florida Supreme Court had upheld previous attacks on the statute on other grounds. The Court itself questioned the validity of the statute as to vagueness, but stated it would let the Florida Supreme Court decide the issue. State v. Warren, No. 88-02884, slip op. at 9 (Fla. 2d DCA, Jan. 19, 1990); A-9. However, the Appellate Court did not certify the question for a ruling from the Supreme Court.

On a Motion for Rehearing in Warren, which was denied, Appendix B, the Appellees maintained, as they continue to do here, that this issue was one of first impression because this is the first attack on the constitutionality of Section 796.01 for vagueness since 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, 96 S.Ct. 839, 31 L.Ed.2d 110 (1972); See Appendix C. Of all the authority cited by the Court in Warren, only two (2) cases were decided after Papachristou. Neither of those cases specifically addressed the vagueness of Section 796.01. Both cases were decided on grounds other than the void for vagueness doctrine.

The term "ill fame" is nowhere defined in the Florida case law or statutes. Since the term "ill fame" is an essential element of the "keeping a house of ill fame" statute, it should be defined, if possible, in order to give a person of ordinary intelligence fair notice of what conduct is forbidden by the statute. Papachristou, supra.

Since the vagueness of Section 796.01 has yet to be addressed, and since the Appellate Court stated in its decision "it is preferable for us to expressly uphold the validity of the statute and let the Supreme Court to review the issue" (Emphasis Added), the Supreme Court should exercise its discretion and review this issue over which it has jurisdiction.

SUMMARY OF THE ARGUMENT

The decision of the Second District Court of Appeals in this case gives the Supreme Court discretionary jurisdiction on two (2) separate *grounds:* 1) statutory validity, and 2) constitutional construction. Since the Second District's decision drastically interpreted Section 796.01, Florida Statutes to the detriment of fundamental, constitutional rights, this *Court* should accept jurisdiction and rule on this issue which is of great public concern.

ARGUMENT I

THE SUPREME COURT HAS JURISDICTION BECAUSE THE SECOND DISTRICT'S OPINION EXPRESSLY DECLARED VALID FLORIDA STATUTE, SECTION 796.01 (1987)

The Florida Supreme Court is vested with discretionary authority to review a District Court's decision declaring a state statute valid. Art. V, Section 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(i). The Supreme Court has the authority to hear the instant appeal on the ground that the Second District Court of Appeal's decision expressly declared valid the keeping a house of ill fame statute, Section 796.01 (1987).

This statute would have been struck down by the Second District Court of Appeal but for the Supreme Court's decisions upholding the statute on grounds other than vagueness. Of the cases cited, only Carlson v. State, 405 So.2d 173 (Fla. 1981) and Bell v. State, 289 So.2d 388 (Fla. 1973) were decided after the articulation of the void for vagueness doctrine by the United States Supreme Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Although none of the cases cited by the lower court addressed the vagueness of Section 796.01, the lower court declined to treat this new attack for vagueness as a case of first impression and relied on previous decisions upholding this statute on other *grounds*.

In its decision in State v. Warren, the Court stated:

> We would affirm the trial court's decision concerning the unconstitutional vagueness of "ill fame" except for the several decisions of the Florida Supreme Court upholding or applying this statute over the last 120 years. In light of those cases, it is preferable for us to expressly uphold the validity of the statute and permit the Supreme Court to review this issue. State v. Warren, No. 88-02884, slip op. at 9 (Fla. 2d DCA, January 19, 1990); A-9.

The *Court* further suggested that the legislature should review this "timeworn" statute. Id. The questioning of the statute by the Appellate *Court* gives the Supreme *Court* further prodding to review this issue. Since the Second District *Court* of Appeal has expressly declared Section 796.01, Florida Statutes (1987), valid on its face and as applied, the Supreme *Court* has discretionary jurisdiction.

II.

THE SUPREME COURT HAS JURISDICTION BECAUSE THE SECOND DISTRICT'S OPINION EXPRESSLY CONSTRUED THE FLORIDA AND FEDERAL CONSTITUTIONS

The Florida Supreme Court has discretionary jurisdiction in this case for the additional reason that the Second District Court of Appeal's decision expressly construes provisions of both the Florida and United States Constitutions. *Art.* V, Section 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(ii). In upholding the validity of Section 796.01, the District Court decided for the first time the constitutionality of the statute under the void for vagueness doctrine. In reversing the Trial Court's dismissal, the District Court impliedly ruled that the statute was not unconstitutionally vague, thereby construing the void for vagueness doctrine. This Court has jurisdiction because in reaching its decision, the Second District was required to "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional prwvisions." Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958).

The Appellate Court's opinion clearly reveals that at the same time the Second District declared Section 796.01 valid, it also expressly doubted the constitutionality of the statute. The Court stated that "[a]lthough we have substantial doubt concerning the constitutionalitv of a statute which makes 'ill fame' an undefined essential element of a crime, we decline to invalidate the statute because the Florida Supreme Court has repeatedly enforced it." (Emphasis added). State v. Warren, No. 88-02884, slip op. at 2 (Fla. 2d DCA, Jan. 19, 1990); A-2. However, contrary to the Second District's belief, no case cited by the Court has addressed the vagueness of Section 796.01.

REASONS WHY THE SUPREME COURT SHOULD ACCEPT JURISDICTION

The Appellate Court questioned the constitutionality of the term "ill fame" because of vagueness. The law has been settled by the United States Supreme Court concerning the vagueness of state statutes. The law is clear that any statute is 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 L.Ed. 989 (1954); State v. Warren, No. 88-02884, slip op. at 7 (Fla 2d DCA Jan. 19, 1990); A-7. None of the cases or statutes cited by the Appellate Court defines the tenn "ill fame" in accordance with Papachristou.

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; 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).

The tenn "ill fame" is nowhere defined in Florida case law or statutes. Nor is the term "ill fame" defined specifically in any of the cases cited by the Appellate court. [1] The holdings of those cases are based on common law interpretations and procedural aspects. The first and oldest case cited, King

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[1] The cases cited by the Appellate court in reference to the tenn "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).

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).

Neither of the cases cited which were decided after 1972[2] specifically challenge Section 796.01 of the Florida Statutes 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.

Additionally, in Carlson v. State, 405 So.2d 173 (Fla. 1981), the Florida Supreme *Court* only addressed Section 796.01 in relation to Florida's RICO statute,[3] and it also decided a question of double jeopardy. The RICO statute was challenged on the grounds of being unconstitutionally vague, but Section 796.01 was not so challenged. Therefore, the petitioners' appeal remains a question of first impression in this jurisdiction, and it consequently remains a question of great ***importance*** to be decided by this Court.

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

[3]Racketeer Influenced and Corrupt Organization Act, Section 943.46-943.464. Fla. Stat. (1977).

CONCLUSION

The Second District Court of Appeal's opinion is the most recent decision upholding the validity and constitutionality of Florida's "keeping a house of ill fame" statute. The Second District has rendered at least two (2) other opinions within the last sixty (60) days based on the reasoning of State v. Warren, No. 88-02884 (Fla. 2d DCA, Jan. 19, 1990).[4]

Relying on the mandates of the Florida and the United States Supreme Court, the Second District's opinion expressly and directly conflicts with controlling authority. Since the District Court's opinion expressly declares Section 796.01, Florida Statutes (1987) valid, and since it expressly construes the void for vagueness doctrine based on the Florida and United States Constitutions, the Florida Supreme Court has jurisdiction to decide this case and should exercise its discretion to review this issue.

Respectfully submitted,

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[4] State v. Hicks, No. 88-02926 (Fla. 2d DCA, Feb. 21, 1990); State v. Palmieri, Nos. 88-02586, 88-03107 (Fla. 2d DCA, Jan. 19, 1990).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to STATE ATTORNEY'S OFFICE, 3rd Floor, County *Courthouse Annex,* Tampa, Florida, ATTORNEY GENERAL'S OFFICE, 1313 N. Tampa Street, Tampa, Florida 33602 by U.S. Mail/hand delivery, this 27th day of March, 1990.

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