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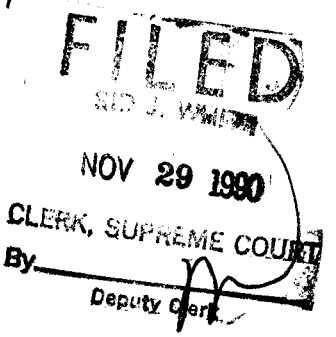
IN THE SUPREME COURT OF FLORIDA



KENNETH D. SCHMITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 76,317

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal. Respondent was the prosecution in the trial court and the appellee in the District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

On January 7, 1988 Detective John Silvas, a Martin County Sheriff's Detective with six years experience, conducted a 28 minute interview with 12 year old C[redacted] S[redacted] (R 114-127). According to Silvas' affidavit, upon being questioned, C[redacted] told Silvas that her father had taken "numerous nude photographs of her in various poses" over the years (R 108). Her father had also taken pictures of a nude adult female. C[redacted] had taken nude pictures of Petitioner as well (R 108). With a video camera Petitioner had recorded C[redacted] and a friend disrobe and dance in their underpants and had recorded C[redacted] swimming in the nude (R 108). According to Silvas' testimony, the pictures taken were described as "modeling shots" taken in the nude (SR 37). There was no description or inference from C[redacted] that the pictures were in any way obscene or pornographic (SR 38). In fact, she described them as "nice" poses, saying he photographed her standing up, not sitting or lying down (R 119).

Based on the interview with C[redacted] S[redacted] Silvas prepared an affidavit for a search warrant for Petitioner's home (R 107-108). The warrant was issued based entirely on the affidavit (SR 37). Silvas and others executed the warrant seizing various videotapes and photographs, some of which became the basis for the instant prosecution.

An information was filed charging Petitioner with: Count I: sexual battery, Count II: soliciting sexual activity by a child, Count III: lewd assault, Counts IV and V: promoting a sexual

performance, and Counts VIII and XIV: possession of photographs depicting sexual conduct by a child (R 50-54).

Petitioner filed three motions to dismiss various counts of the information (R 90-91, 94-96) and a motion to suppress (R 92-93). Following a hearing, all motions were denied (R 132-135).

Petitioner entered pleas of nolo contendere to Counts II through XIV reserving the right to appeal the denial of his motions to dismiss and suppress (R 6-7). Count I was nolle prossed. Petitioner was adjudicated guilty and sentenced to 15 years imprisonment on Count III (R 173) to be followed by a total of 100 years of probation, each other count receiving the maximum probation sentence to run consecutively (R 167). Notice of appeal was timely filed (R 180). This appeal follows.

SUMMARY OF ARGUMENT

I.

A search warrant was issued for Petitioner's home. The affidavit for the warrant alleged that Petitioner had taken nude photographs of his daughter and others. The affidavit did not state probable cause for any crime because photographs of nudity are not illegal. Despite having interviewed the subject of the photographs the detective preparing the affidavit failed to allege that anything in those photographs was obscene, lewd, or pornographic, and further failed to allege any of the elements of any crime which the detective thought Petitioner was committing.

Reliance on the good faith doctrine of Leon cannot save the search here. Good faith must be objectively reasonable and necessarily fails where the affidavit is so lacking in indica of probable cause that no reasonable officer would rely thereon. Further, here the officer admitted he had no reason to believe that the photographs were obscene or pornographic. Therefore there was no reasonable basis for him to believe their possession was prohibited by law. The motion to suppress was therefore improperly denied.

II.

The statute is also violative of the First and Fourteenth Amendments because it is vague and/or overbroad. The statute prohibits the possession of any material which depicts "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast..."

That language is vague because it does not convey reasonable notice of what is prohibited. If not vague then it is overbroad because it criminalizes a substantial amount of constitutionally protected speech.

Further, the statute violates the Fifth and Fourteenth Amendment protection of due process. Substantive due process is violated where the legislative means are not rationally related to the goal. One indication of this type violation is the criminalizing of inherently innocent conduct. The statute prohibits depictions of actual physical contact with a child's clothed or unclothed genitals, pubic area, buttocks, or female breast. Included in the prohibition would be virtually every family's photo album, National Geographic magazine, numerous widely distributed and accepted videotapes, etc. Prohibiting these items does nothing to further the goal of eliminating child pornography.

Finally, the statute is violative of article I, section 23 of the Florida Constitution. That provision gives Florida citizens additional protection beyond what is guaranteed by the United States Constitution. To break the zone of privacy, the state must first show a compelling state interest. There is no evidence in this record of any such interest. Second the state must adopt the least intrusive means to achieve its goal. Here the means are not the least intrusive because the statutes here are both vague and overbroad.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS ITEMS SEIZED DURING THE EXECUTION OF A SEARCH WARRANT WHICH WAS ISSUED IN THE ABSENCE OF PROBABLE CAUSE.

On January 7, 1988, Detective John Silvas, a Martin County Sheriff's Deputy with six years experience, conducted a twenty-eight minute interview with twelve year old C[redacted] S[redacted] A transcript of the entire interview is included in the record (R 114-127). Based on that interview, Silvas prepared a two page affidavit for search warrant (SR 35-37, R 107-108). The affidavit contained a total of twenty lines describing the conduct which was the basis for the issuance of the warrant (R 108). The affidavit alleged the search would be for photographs and equipment kept in violation of the following statutes:

> "827.071 sexual performance by a child,
>
> 800.04 lewd/lascivious acts or indecent assault or act upon or in presence of a child,
>
> 827.04 child abuse and
>
> 847 obscene literatures/profanity."

(R 107). Based solely on the affidavit, a search warrant was issued (SR 37). Detective Silvas and others executed the warrant on Petitioner's home and property. Seized in the search were various videotapes and photographs some of which became the basis for Petitioner's prosecution in all but Count III of the information (R 50-54).

Petitioner moved to suppress the videotapes and photographs on the basis that the warrant was issued without probable cause (R

92-93). After a hearing, the court concluded that the warrant did state probable cause "for violation of chapter 827, that is, sexual performance by a child and 847, obscene literature" (SR 81). This was error.

The total affidavit, excluding the residence description and officers experience, alleges the following (emphasis added to identify pertinent allegations):

> On this date, 1-7-88, your affiant interviewed juvenile Rachel Christine Schmitt, 4-6-75, of 300 E. Salerno Rd., Pt. Salerno, Fl. The interview revealed that the juvenile resides at the premises to be searched, along with her brother and father. She has lived at this residence for the past eight years. The juvenile revealed to your affiant that in 1983 her father, Kenneth Schmitt, had taken numerous nude photographs of her in various poses. These photo sessions started in 1983 and continued through 1987, the last photo session being shortly after Christmas. The juvenile was eight years of age when these photo sessions commenced. The juvenile victim revealed to your affiant that her father had a nude adult white female pose for nude photographs in her presence. The juvenile victim also stated that she has taken nude photographs of her father numerous times.
>
> In December 1987 the father obtained a VHS video recording system. During this time, December 1987, the father utilized the camera to record the juvenile victim and a white female friend disrobe, or as the juvenile described it, stripping down to their panties. The juvenile victim also stated that she has reviewed this same video recording on the premises to be searched. During this same time frame, December 1987, the father utilized the same VHS camera to record the juvenile victim swimming in the nude.

(R 108).

PROBABLE CAUSE

Probable cause was defined by the United States Supreme Court in Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) as follows:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved. `The substance of all the definitions' of probable cause `is a reasonable ground for belief of guilt' (citations omitted.) And this `means less than evidence which would justify a condemnation' or conviction, as Marshall Ch. J., said for the court more than a century ago in Locke v. State.... Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where `the facts and circumstances within their (the officers) knowledge, and of which they had sufficiently trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed (citations omitted). (emphasis added).

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), further provides that "...given all the circumstances set forth in the affidavit...there is a fair probability that contraband will be found in a particular place."

To make a probable cause determination the court must consider the elements of the crime allegedly being violated. To state probable cause for search, an affidavit must state some facts which match up to the elements of the crime for which it is alleged that probable cause exists. See New York v. P. J. Video, Inc, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986). While it is true that the process of determining probable cause does not deal with

certainties but with probabilities, Schmitt v. State, 563 So.2d 1095 (Fla. 1990), determining "probabilities" or probable cause cannot be reduced to a mere guessing game based on a claim of "common sense". All that the so-called certainly versus probability analysis means is that proof beyond a reasonable doubt need not exist; but certainly requiring that the affiant have some evidence which corresponds to some element of a particular crime is not too high a standard. Such a requirement is not a technical nicety; it is the essence of the Fourth Amendment.[1]

The trial court here found that the magistrate in signing the warrant had probable cause to believe that the sexual performance by a child portion of chapter 827 and some unspecified portion of chapter 847, obscene literature, were being violated (SR 81). A comparison of the elements of those crimes with the allegations in the affidavit reveal the deficiency in the affidavit.

The crimes defined in chapter 847 prohibit certain acts in connection with obscene materials. The United States Supreme Court has defined obscenity as "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). It is a third degree felony to distribute, possess with intent to distribute, or advertise any obscene book,

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[1] Searches and seizures of items presumptively protected by the first amendment must strictly comply with the fourth amendment. Maryland v. Macon, 472 U.S. 463, 468 (1984); Stanford v. Texas, 379 U.S. 476, 485 (1965) (parallel cites omitted).

magazine, photograph, etc. 847.011(1)(a), Fla. Stat. (1987). It is a misdemeanor to possess the same obscene materials if there is no intent to distribute them in some fashion. 847.011(2), Fla. Stat. (1987). The affidavit here does not allege that Petitioner was in possession of obscene materials, let alone that there was any scheme to distribute them. Rather, it alleges that Petitioner had in his possession photographs "taken in...various poses" of C[redacted] S[redacted] from age 8 through 12, photographs of a nude adult female, photographs of Petitioner nude, and video recordings of C[redacted] and a juvenile friend "stripping down to their panties" and C[redacted] swimming in the nude (R 108). Nothing in these allegations imply that the materials depict anything more than nudity or partial nudity. There was absolutely no allegation of obscenity which is what 847.011 prohibits. Indeed, Detective Silvas was asked at the motion to suppress about the allegations in the warrant:

> Q. Would that be the photographs that she described that was taken as being just like modeling shots standing nude? No inference was there from her to you that there was anything obscene, pornographic of (sic) these photographs?
>
> A. Yeah, that is correct.

(SR 37-38).[2]

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[2] Ms. Schmitt was asked the following questions during her interview with the detectives:

> Q: Were you, your position, were you standing up or were you lying down or what kind of position did you...
>
> A: Standing up.
>
> Q: Ok. When he took these pictures uh, do you, how do you take these pictures? Does he

Continuing, there is no allegation that Petitioner knowingly promoted, conducted, performed in, or participated in any obscene show, exhibition, or performance by live persons before an audience in violation of 847.011(4), sold any picture, etc., to a minor in violation of 847.012, displayed in any retail establishment material harmful to minors in violation of 847.0125, sold admission tickets to prohibited movies in violation of 847.013, used a computer to transmit information in violation of 847.0135, transported in the state for purpose of sale or distribution obscene material in violation of 847.06, or wholesalely promoted obscenity in violation of 847.07.

Nowhere is the taking or possession of nude photographs prohibited by chapter 847. Mere nudity is not obscene under the Miller standard. Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 at 2755, 41 L.Ed.2d 642 (1974). Nor can all nudity be deemed obscene even as to minors. See New York v. Ferber, 458 U.S. 747,

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> tell you how to pose or do you pose on your own?
>
> A: I usually pose on my own.
>
> Q: Ok. And what position have you posed in before?
>
> A: Uh, just like standing uh, position and your (sic) know, like, just standing, you know, in a nice pose or something.
>
> * * *
>
> Q: Ok. Does he take any pictures of you sitting by any chance?
>
> A: Uh, not really....the only sitting position is when I'm clothed.

(R 119).

102 S.Ct. 3348, 3359, n. 18, 73 L.Ed.2d 1113 (1982); Osborne v. Ohio, ___ U.S. ___, 110 S.Ct. 1691, 1699, ___ L.Ed.2d ___ (1990). Nonobscene speech cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268 at 2275, 45 L.Ed.2d 125 (1975). According to the American Sunbathers Association and its 30,000 members, family photographs taken by its members routinely contain nudity which would subject them to prosecution if there were no requirement that the photographs be somehow lewd or obscene. See Massachusetts v. Oakes, 491 U.S. ____, 109 S.Ct. 2633, 105 L.Ed.2d. 493 (1989), Justice Brennan, 709 S.Ct. at 2643. The affidavit in question here only alleges that this family practices nudity in their home and has pictures to prove it. There was therefore no probable cause to believe that any section of chapter 847 was being violated by Petitioner as claimed by Silvas and found by the trial court.

As to the trial court's finding with regard to "chapter 827, that is, sexual performance by a child," sections 827.071(2) - 827.071(5), Florida Statutes (1987), provide that a person is guilty of a felony if he (1) uses a child in a sexual performance, (2) promotes a sexual performance by a child, or (3) possesses, with or without intent to promote, any photograph, motion picture, etc. which includes "any sexual conduct by a child". "Sexual performance" is defined as any performance which includes sexual conduct. 827.071(1)(h), Fla. Stat. (1987). "Sexual conduct" is defined as:

> ...actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual

> lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breasts; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

827.071(1)(g), Fla. Stat. (1987). Nothing in the affidavit here alleges that C[redacted] Petitioner, or anyone else engaged in sexual conduct as defined by statute or had photographs of the same. Simply put, this affidavit alleges nothing more than Petitioner took nude pictures of his family and friends. Not only is that not a crime, it does not state sufficient facts to warrant a man of reasonable caution in the belief that any of the specified offenses has been or is being committed.

In reaching the contrary conclusion, the district court relied on allegations which are not in the affidavit. First the opinion states that Petitioner "graduated into videotape recording after the child matured into womanhood" and was "physically developed." Schmitt v. State, 563 So.2d at 1099. There is no allegation in the affidavit concerning the physical maturity or lack thereof of C[redacted] (R 107-108). Clearly then this could not have been a factor considered by the magistrate in determining probable cause. Similarly the district court's claim that Petitioner took photographs of C[redacted] together with an adult female is not supported by the affidavit which merely says that on one occasion C[redacted] was present when an adult female was photographed (R 108).

The district court apparently relied on these erroneous "facts" in reaching its conclusion that "the magistrate had a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found at

appellant's house." Id. at 1099. Interestingly enough, even the district court was unable to identify what crime the affidavit here alleges! That deficiency demonstrates Petitioner's point: probable cause must correlate to a particular crime. There was no probable cause stated for the issuance of a warrant in this case.

GOOD FAITH EXCEPTION

In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Supreme Court held that evidence may be admitted despite a defect in the warrant where the officers acted in reasonable reliance thereon and in objective good faith. Since Leon examines the deterrent value of the exclusionary rule, the focus is not on the magistrate's decision, (though obviously if probable cause exists there is no good faith issue,) but instead on the police decision to seek and execute a particular warrant. Only the "good faith" of the police is at issue since in theory the exclusionary rule is thought to be an inappropriate device for deterring magistrates. Leon, 104 S.Ct. at 3417.

The question to be resolved under Leon is whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. Leon, 104 S.Ct. at 3421. The officer's "good faith" or objective reasonableness at the time he presents the warrant to the magistrate is what must be determined. A police officer is not entitled to rely on the magistrate's issuance of the warrant if a reasonably well-trained officer given similar facts would have known that the affidavit failed to establish probable cause. Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The purpose of Leon is not to allow a police officer to hide behind the signature of

the magistrate. Malley. Good faith cannot be relied on where the affidavit for the warrant is so clearly lacking in probable cause that no well-trained officer could reasonably have thought that warrant should issue. Illinois v. Gates, 103 S.Ct. at 2346 (J. White, concurring opinion); Vasquez v. State, 491 So.2d 297, 300 (Fla. 3d DCA 1986), rev. den. 500 So.2d 545 (1986); St. Angelo v. State, 532 So.2d 1346 (Fla. 1988). See also Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 2265, 45 L.Ed.2d 416 (1975) (where factors relied on by police are so lacking in indicia of probable cause as to render officer's belief in its existence entirely unreasonable, deterrent value of exclusionary rule most likely to be effective.)

Objective good faith must be determined on a case by case basis. In Rand v. State, 484 So.2d 1367 (Fla. 2d DCA 1986) rev. den. 494 So.2d 1153 (1986), an officer with six years experience sought a search warrant based on an affidavit wherein he stated that two confidential informants had within the last 10 days informed him that they saw marijuana growing on a certain property. The warrant issued. It was later determined to be invalid for failure to state when the marijuana was observed. The officer testified that he knew this was a requirement but still thought the affidavit and warrant were valid. In reversing the trial court's denial of the motion to suppress the district court was "unable to hold that the deputy acted in `objectively reasonable reliance' on this (facially deficient) warrant". The good faith exception of Leon did not therefore apply. Rand v. State, 484 So.2d at 1368. In Howard v. State, 483 So.2d 844 (Fla. 1st DCA 1986), a warrant was issued for a property and residence on the allegation that officers saw marijuana growing in a fenced backyard. The warrant

was determined to be wholly lacking in probable cause since it was devoid of any allegation that a violation of law was occurring inside the residence itself. Further, the district court found, citing Illinois v. Gates and Brown v. Illinois, that the good faith exception was not applicable since the warrant was in fact so wholly lacking in probable cause. Howard v. State, 483 So.2d at 847.

Similarly, in the case at bench, as detailed above there were insufficient facts before the magistrate upon which he could exercise his neutral and detached function of determining the existence of probable cause. Other than C[redacted] age as it relates to Florida Statute 827.071, there was not a single fact in the affidavit which correlated to a single element of any of the crimes which Silvas alleged were being committed. The objective good faith standard requires that police have some reasonable knowledge of what the law prohibits. United States v. Leon, 104 S.Ct. at 3419, fn. 20. Detective Silvas was an officer with six years experience including other investigations involving child abuse and sexual battery (R 107). Certainly he had some knowledge of the elements of the crimes which he alleged were being committed. Nevertheless Detective Silvas did not allege that the photographs or videotapes contained any prohibited material. In fact by his own admission, he had no reason to believe there was anything obscene, lewd, pornographic, or otherwise illegal in them (SR 36-37). Despite his having conducted an interview with C[redacted] his investigation had uncovered not a single fact which he could allege as a violation of the various statutes he cited. For these reasons the good faith exception of Leon cannot be relied

on to save this search warrant which was based on an affidavit utterly lacking in any indicia of probable cause. The denial of Petitioner's motion to suppress must be reversed.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN ADJUDGING PETITIONER GUILTY OF POSSESSION OF A PHOTOGRAPH OF A CHILD'S SEXUAL CONDUCT, BECAUSE THAT STATUTE IS UNCONSTITUTIONAL ON ITS FACE.

Petitioner was charged in Counts VIII through XIV of the information with violations of Florida Statute 827.071(5):

> It is unlawful for any person to knowingly possess any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child. Whoever violates this subsection is guilty of a felony of the third degree....

Petitioner moved to dismiss Counts VIII through XIV of the information claiming the prosecution was a violation of his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I section 23 of the Florida Constitution (R 94). The motion was denied (R 104). This was error.

Subsection (5) was added to Florida Statute 827.071 in 1985 for the purpose of making simple possession of child pornography unlawful. Prior thereto, the focus of the statute had been directed toward prohibiting the use of a child in a sexual performance, the promotion of a sexual performance by a child, or the possession with intent to promote any photograph, motion picture, etc. which includes any sexual conduct by a child. The focus of the issue here is <u>not</u> whether the state has a legitimate interest in protecting children from the exploitation of child pornography, but rather whether section 827.071 is sufficiently narrowly drawn to limit its application to the class of materials

generated by the sexual exploitation of children, and to convey sufficient definite notice of what conduct is proscribed. A litigant is permitted to challenge a statute on the basis of First Amendment overbreadth without requiring the litigant to demonstrate that his own conduct could not be regulated by a narrowly drawn statute. Because the real danger presented by an overbroad statute is the chilling effect it may have on the exercise of First Amendment rights, litigants are accorded standing to challenge a statute on the grounds that it lends itself (because of real and substantial overbreadth,) to unconstitutional application to others, in other situations, not before the court. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Florida courts have adopted or followed the federal courts in the area of standing. State v. Keaton, 371 So.2d 86 (Fla. 1979).

VAGUENESS AND OVERBREADTH

The holding in New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), declaring "child pornography" to be outside the ambit of the First Amendment is not without limits. "...the conduct must be adequately defined...the category of sexual conduct must also be suitable limited and described." 102 S.Ct. at 3358. (emphasis added). Florida Statute 827.071(5) is not so suitably limited and described; it suffers from the defects of overbreadth and vagueness, and is violative of substantive due process as well.

Overbreadth refers to a challenge to a statute on the constitutional grounds that the statute achieves its governmental

purpose to control or prevent activities properly subject to regulation by means that sweep too broadly into an area of constitutionally protected freedom. Broadrick v. Oklahoma, supra. In other words, a statute is overbroad if it prohibits a substantial amount of constitutionally protected conduct. Id. Vagueness, on the other hand, is the term given to that ground of constitutional infirmity that is based on the statute's failure to convey sufficiently definite notice of what conduct is proscribed. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); State v. Wershow, 343 So.2d 605 (Fla. 1977). The gist of the void-for-vagueness doctrine is that a penal statute must 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, 1858, 75 L.Ed.2d 903 (1983). While vagueness and overbreadth are separate concepts, their application often overlaps as it does in the case at bench.

In a facial challenge to the overbreadth and vagueness of a law, the court's first task is to determine whether the law reaches a substantial amount of constitutionally protected conduct. Kolender v. Lawson, 103 S.Ct. at 1859. This necessarily involves the court in examining the full scope of the law's potential applications, including any ambiguities in the statute. To the extent that ambiguities exist, the vagueness which results affects the overbreadth analysis. Falzone v. State, 500 So.2d 1337, 1339 (Fla. 1987). Another factor relevant to the determination of whether demonstrable overbreadth is substantial or not, is whether a criminal penalty is involved. If so, the statute is to be

"scrutinized with particular care" and is subject to being declared facially invalid if it makes unlawful a substantial amount of constitutionally protected conduct, even though it undoubtedly has legitimate application. New York v. Ferber, 102 S.Ct. at 1363; Kolender v. Lawson, 103 S.Ct. at 1859, n. 8.

Where a legislative enactment does not succeed in articulating a boundary between expression which is protected and expression which is not, it is constitutionally overbroad and facially invalid. Spears v. State, 337 So.2d 977, 980 (Fla. 1976) (finding § 847.05 Fla. Stat. (1975), which prohibited public use of indecent or obscene language, overbroad).

When determining whether a statute is overbroad a court may consider a wide range of hypothetical situations to which the state might apply and is not limited to a case by case analysis. Id. In State v. Keaton, 371 So.2d 86 (Fla. 1979), this Court found section 365.16(1)(a), Florida Statutes (1977), prohibiting obscene comments over a telephone to be overbroad because the qualifying element of an unwilling listener was missing, despite the exceedingly slim possibility that there would ever be such a prosecution.

> We recognize that a prosecution for an obscene telephone call to which the listener does not object would rarely occur, for absent an offended party to report the incident, it would generally not come to the attention of law enforcement officials. However, the danger of an overbroad statute lies in its possible chilling effect upon the exercise of a precious first amendment right by those who read its provisions.

Id. at 91. An analysis of the statutes at issue here which considers the possible applications of that statute should draw the

court to the conclusion reached in Keaton and Spears, that the statutes are overbroad.

The statute here prohibits possession of materials which include "any sexual conduct by a child." 827.071(5), Fla. Stat. (1987). Sexual conduct is defined in Florida Statute 827.071(1)(g) as:

> Actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. (emphasis added).

Florida Statute 827.071(5) as defined by 827.071(1)(g) prohibits the possession of all photographs, films, videotapes, which include any "...actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is female, breast..." That portion of the statute is vague because it fails to sufficiently warn persons of what is proscribed under it: Is it really a third degree felony to possess a videotape of a parent patting (actual physical contact) its baby's diapered (clothed) behind (buttocks)? How about the high school yearbook with prom photos showing couples draped around each other in a "slow dance" (actual physical contact with at least the clothed female breast)?

If this definition is not vague, but means what it says, then it is overbroad. Numerous commercially recorded videotapes or baby massage, including the widely distributed and wholly unobjectionable Jane Fonda exercise tape for pre- and postpartum

women, as well as many videotapes which proud parents might record of themselves and their offspring would be subject to criminal prosecution, since they uniformly depict both clothed and naked babies (child under 18 years) being "contacted" on their buttocks and, if female, breast, if not "pubic area". Moreover because a "child" is a person under 18 years of age, if a legally married 16 or 17 year old recorded their own sexual activities for whatever pleasure they might derive therefrom, and then kept the tape, they would be committing this third degree felony. Indeed, tapes of teen parties or the high school prom where the participants in dancing bump up or tap each other's buttocks would also render their possession liable to criminal prosecution. Ditto tapes of high school football and basketball games which also uniformly show the participants contacting each other in the prohibited areas. National Geographic would be on the prohibited list as would such widely accepted and distributed movies as Pretty Baby starring a young Brooke Shields, not to mention the Robert Maplethorp exhibit.

Similarly, the prohibition of Section 827.071(5) against the "representation, or other presentation..." of any sexual conduct is also vague and overbroad: Does this prohibition include paintings and drawings? Does it include written descriptions as well as visual depictions? If the statute is not vague, and does prohibit art and written accounts, it is unconstitutionally overboard for that reason as well as the others previously discussed. See New York v. Ferber, 102 S.Ct. at 3358.

Florida Statute 827.071(1)(g) has twice been found to be overbroad by appellate courts of this state. In State v. Tirohn, 556 So.2d 447 (Fla. 5th DCA 1990), the fifth district court found

that portion of section 827.071(1)(g) which prohibited actual physical contact with a person's clothed or unclothed genitals, etc. to be constitutionally overbroad. The fifth district's response was to strike that portion of the statute, finding it to be severable. Id. at 449. The fourth district in its opinion here agreed that the prohibition concerning actual physical contact was overbroad, Schmitt v. State, 563 So.2d at 1099, but, rather than striking that provision, chose to add a scienter requirement to prohibit only lewd or lascivious conduct. Id. at 1100.

Petitioner contends that neither court has gone far enough. Neither court has addressed the problem that section 827.071(5) prohibits "knowing" possession of not only photographs, but "representation(s) or other presentation(s)" which include sexual conduct as defined. Both courts have addressed the definition of sexual conduct but left alone the overbroad and vague prohibition itself. To be constitutional the prohibition of section 827.071(5) must include some element of scienter. New York v. Ferber, 102 S.Ct. at 3359; Osborne v. State, 110 S.Ct. at 1699. There is none here. In addition, the district courts have not addressed the fact that the terms "representation" and "presentation" are also both overinclusive and vague as argued earlier.

If the only problem with the statute in question was the single definitional phrase relating to physical contact then the fifth district court's remedy might be sufficient. But here merely excising a portion of the definition of sexual conduct does nothing to remedy the defects in the prohibition portion of the statute; excising a portion of the definition will not make the statute constitutional. The fifth district's remedy is therefore

inappropriate. Brown v. State, 358 So.2d 16 (Fla. 1978) (striking § 847.04, Fla. Stat. (1975), as overbroad, declining to excise portion instead.)

Similarly, the remedy of the fourth district is insufficient as well, as it only adds a scienter requirement to a single definitional phrase of section 827.071(1)(g) without addressing the same deficiency in section 827.071(5). Further, this addition is an improper attempt to rewrite the statute and attribute a legislative intent to the definition which is clearly missing. See State v. Keaton, 371 So.2d at 89; Brown v. State, 358 So.2d at 20.

SUBSTANTIVE DUE PROCESS

The state's "police power" to enact laws for the protection of its citizens is confined to those acts which may be reasonably construed as expedient for the protection of the public health, safety, welfare, and morals. State v. Saiez, 489 So.2d 1125 (Fla. 1986). Substantive due process if violated, however, when irrational legislative means have been adopted to realize a legislative goal. State v. Walker, 444 So.2d 1137 (Fla. 2d DCA 1984), aff'd. 461 So.2d 108 (Fla. 1984).

Three recent cases have declared various Florida statutes unconstitutional on substantive due process grounds. In State v. Saiez this Court invalidated a statute which prohibited the possession of credit card embossing machines, section 817.63, Florida Statutes (1983). Though the statute had a permissible goal, attempting to curtail credit card fraud, the means chosen, prohibiting possession of the machines, did not bear a rational relationship to that goal. Criminalizing the mere possession of the machines interferes with "the legitimate personal and property

rights of a number of individuals who use (them) for non-criminal activities". State v. Saiez, 489 So.2d at 1129. In other words the statute "criminalizes activity that is otherwise inherently innocent." Id.

In State v. Walker a statute criminalized possession of a prescription drug when not in its original container, section 893.13(2)(a)(7), Florida Statutes (1987). Again, though the goal, controlling the distribution of prescription drugs, was legitimate, the means chosen to achieve the goal was not. "In the final analysis (the statute) criminalizes activity that is otherwise inherently innocent." State v. Walker, 444 So.2d at 1140. The statute was declared unconstitutional.

Finally, in Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd. 526 So.2d 63 (Fla. 1988), the appellate court invalidated a statute which penalized a person for the status of being under indictment, section 790.07(2), Florida Statutes (1985). The statute was facially unconstitutional since the goal, the safety of the public, was not advanced by the means, prohibiting a person under indictment from carrying a weapon. Potts v. State, 526 So.2d at 105.

Florida Statute 827.071(5) suffers the same infirmity. While its goal, elimination of the child pornography industry, is a laudable one, the means, criminalizing the private possession of material which depicts or describes actual physical contact with a child's clothed or unclothed genitals, pubic area, buttocks or female breast (whether or not mature), is not rationally related to the goal. Not only does the statute not promote the goal, it

criminalizes possession of material detailed previously which is otherwise inherently innocent.

RIGHT TO PRIVACY

Not only does 827.071(5), Florida Statutes, affect fundamental First, Fifth, and Fourteenth Amendment rights, it also violates the right of privacy created by Article I, section 23 of the Florida Constitution which provides:

> Every natural person has the right to be let alone from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law.

Fla. Const., Art. I, §23. Section 23 "expressly and succinctly provides for a strong right of privacy not found in the United States Constitution." Winfield v. Division of Pari-Mutuel Wagering, Department of Regulation, 477 So.2d 544, 548 (Fla. 1985). As explained by the Court's opinion in Winfield, the right to be let alone from governmental intrusion was made as strong as possible by excluding words such as "unreasonable" or "unwarranted":

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United

> States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

477 So.2d at 548 (emphasis added). This Court also noted that it is the state's, and not the federal government's, responsibility to protect the personal privacy of its citizens to be let alone by other people:

> However as previously noted, the United States Supreme Court has also made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of a person's right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual states." Katz v. United States, 389 U.S. 347, 350-51, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Id.

Thus it is clear that the state of Florida has opted for even more protection than the United States Constitution provides.

The most obvious "zone of privacy" which a person has is in his own home. See Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). To breach that privacy the state demonstrated that it has an overriding compelling state interest and it must accomplish its goal through the use of the least intrusive means. Winfield.

Florida Statute 827.071(5) clearly interferes with a person's right to privacy in that it makes criminal the private possession in the home of nonobscene materials depicting or describing minors engaged in various conduct. There is no evidence in this record that demonstrates a compelling state interest in that interference. Further, even if a state interest could be found, the statute here,

because of its substantial overbreadth and vague definitions, has not been limited to the least intrusive means to accomplish any interest; the prohibitions here are not limited or well defined. As noted earlier, the statute effectively prohibits the possession of wholly innocent material, of photographs or tapes of oneself as a juvenile regardless of one's status at the time or who took the photograph, and without regard to any proper purpose, i.e. scientific, medical, artistic, etc. Florida Statute 827.071(5) as defined by section 827.071(1)(g) is therefore violative of Florida's constitutional protection provided by Article I section 23.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 27 day of November, 1990.

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