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IN THE SUPREME COURT OF FLORIDA

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RENETHEA WYCHE,

Petitioner,

vs.

STATE OF FLORIDA,

Respandent.

SUPREME COURT NO. 77,440

DISCRETIONARY REVIEW OF
A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, SECOND DISTRICT

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL), ON BEHALF OF PETITIONER

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PRELIMINARY STATEMENT

On July 16, 1991, this Court granted the Florida Association of Criminal Defense Lawyers (FACDL) permission to file an Amicus Curiae Brief on behalf of Petitioner.

The FACDL is a not for profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership includes lawyers who are daily engaged in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

FACDL will address the issues as framed by Petitioner. FACDL will address the significant constitutional issues of statewide importance and, to avoid unnecessary duplication, FACDL will address the following issues in Petitioner's Initial Brief on the Merits: I. THE ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT OVERBROADLY AND UNNECESSARILY INFRINGES ON THE FIRST AMENDMENT RIGHTS OF PROSTITUTES TO FREEDOM OF SPEECH, MOVEMENT, AND ASSOCIATION: II. THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT GIVES OFFICERS TOO MUCH DISCRETION TO DECIDE WHO SHOULD BE ARRESTED AND IT INHIBITS THE FREE EXERCISE OF FIRST AMENDMENT

RIGHTS; IV. THE ORDINANCE IMPROPERLY ALLOWS FINDERS OF FACT TO CONSIDER A PROSTITUTE'S PREVIOUS CONVICTIONS AND ACTIVITY AS A PROSTITUTE; and V. THE TAMPA ORDINANCE CONTRADICTS THIS COURT'S RULING THAT LOITERING LAWS ARE PERMISSIBLE ONLY IF THEY CRIMINALIZE LOITERING UNDER CIRCUMSTANCES WHICH GIVE RISE TO A JUSTIFIABLE BELIEF THAT THE PUBLIC SAFETY IS THREATENED. A copy of the Second District Court of Appeal's decision in this cause is included as Appendix I.

STATEMENT OF THE CASE AND FACTS

The FACDL accepts the Statement of the Case and Facts in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

Section **24-61** is overbroad and vague because it can prohibit First Amendment activities. The essential problem with 24-61 is that it does not require actual proof of prostitution activities; it permits an arrest for activities which look like or appear to be nascent Prostitution activities: for example, a "known prostitute" talking to individuals or hailing a car. Without the need for specific proof of actual prostitution activities, the police and courts will always have to guess or speculate that the observed conduct was for the purpose of prostitution. Section **24-61** could also ensnare innocent persons in an area known for prostitution activity. If the police get actual proof of prostitution, then 24-61 is superfluous. Consequently, **24-61** is overbroad. It is also vague because a police officer must make an ad hoc decision that otherwise legal conduct is actually illegal, based upon the discretionary criteria in 24-61 (circumstances which allegedly manifest loitering for the purpose of prostitution). Therefore, **24-61** chills and deters the exercise of legitimate First Amendment activities.

As Section **24-61** is overbroad and vague, it gives the police too much discretion. Section 24-61 forces the police to decide, on the street, whether conduct is legal or illegal. The observed conduct will not be inherently, by itself, illegal conduct. **A** person repeatedly talking to passers-by is not intrinsically illegal. However, Section **24-61** forces the police to make a subjective judgment as to whether such conduct is

illegal. This discretion ensures arbitrary and capricious law enforcement.

The known prostitute provision of 24-61 violates due process and equal protection under the laws. The classification punishes individuals for their status and creates an immutable characteristic for one year. The status permits the police to arrest a person for otherwise legal conduct, merely because of status. Section 24-61 perniciously assumes that the prostitute of yesterday will continue to be a prostitute of today. Section 24-61 significantly chills and deters the First Amendment rights of known prostitutes because such persons may forego such rights to avoid an arrest.

Section 24-61 conflicts with the State loitering law, Section 856.021, Florida Statutes and this Court's decisions in State v. Ecker, 311 So.2d 104 (Fla. 1975), cert. den., 423 U.S. 1019, 96 S.Ct. 455, and B.A.A. v. State, 356 So.2d 304 (Fla. 1978). In State v. Ecker, supra, this Court upheld the loitering statutes against First Amendment challenges because it required conduct done in a manner not usual for law-abiding citizens and conduct which threatened public safety. These two requirements eliminate the possibility that such conduct would be mistaken for legitimate First Amendment activities. Section 24-61 does not contain such provisions. The conduct described in 24-61 is most usual for law-abiding citizens, e.g. talking to passers-by. Such conduct also does not threaten public safety. This Court in B.A.A. v. State, supra, specifically held that a person loitering

for **the purposes of prostitution could not be convicted under Section 856.021, Florida Statutes.**

ARGUMENT

ISSUE 1

THE ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT OVERBROADLY AND UNNECESSARILY INFRINGES ON THE FIRST AMENDMENT RIGHTS OF PROSTITUTES TO FREEDOM OF SPEECH, MOVEMENT AND ASSOCIATION.

A. The overbreadth issue in this case.

A law is overbroad if it can prohibit constitutionally protected conduct as well as unprotected conduct. Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982), cert. den., 459 U.S. 859, 103 S.Ct. 132. Overbroad laws are unconstitutional because the First Amendment needs breathing space and statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn. Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

The United States Supreme Court has held that a law will be held overbroad only if a limiting construction cannot be readily placed upon it and the overbreadth of the challenged provision is both real and substantial. See Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). Consequently, this Court must review Tampa ordinance, Section 24-61(A)(10), Loitering for the Purpose of Prostitution (hereafter Section 24-61), to determine: 1) if it can prohibit legal as well as illegal activities; 2) the overbreadth is both

real and substantial; and 3) whether a limiting construction can be placed upon Section 24-61.

FACDL initially notes that Petitioner has framed this issue as an overbreadth question as to the rights of prostitutes. Although even prostitutes (those past convicted of or presently seeking to commit prostitution) have First Amendment rights, FACDL respectfully submits Section 24-61 also affects the First Amendment rights of all citizens, especially those who happen to live or be in an area of "high Prostitution activity."

This case presents an extremely important question to this Court: Whether a city can prevent individuals from exercising their guaranteed rights to be out on the streets when certain conduct by them looks like it might be for the purpose of prostitution. Like most such laws, Section 24-61 will most likely affect the poor or those who live in areas where prostitution would occur. FACDL will demonstrate later how Section 24-61 can chill and deter the First Amendment rights of all citizens, not just prostitutes. Consequently, this Court should not limit its consideration of the overbreadth question merely to the rights of "prostitutes."

B. Section 24-61 can prohibit the exercise of First Amendment rights: free speech, association, movement and assembly.

Section 24-61 attempts to prevent individuals from loitering in such a manner and under such circumstances which manifests a purpose of committing an act or prostitution as

defined in Section 796.07, Florida Statutes (1990). Section 24-61 lists a series of circumstances which *may* be considered to determine if an individual is loitering for the purpose of prostitution. There is no requirement that these circumstances must be considered. These circumstances are not elements of the crime, but merely ways of proving a violation of 24-61. The only elements of 24-61 are: loitering as a pedestrian or while in a car in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act.

The circumstances allegedly manifesting the purpose of prostitution listed in 24-61 are: 1) a known prostitute, pimp, sodomist, performer of fellatio, performer of cunnilingus, masturbator for hire; 2) repeatedly beckons to, stops or attempts to stop, or engages passers-by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving or arms or any bodily gesture for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering or other lewd or indecent act.

Section 24-61 unquestionably could prohibit protected conduct. A known prostitute (convicted of such crimes within the last year) could be simply engaging individuals in conversation on the street and this activity could be mistaken as loitering for the purpose of prostitution. A known prostitute could be trying

to hail a cab and such activity could be mistaken for loitering for the purpose of prostitution.

The United States District Court in Johnson v. Carson, 569 F.Supp. 974 (M.D.Fla. 1983), invalidated a Jacksonville loitering for the purpose of prostitution ordinance which was virtually identical to 24-61. The District Court expressly found that such loitering laws could prohibit First Amendment rights in the following circumstances: a known prostitute merely loitering in a public place; a known prostitute talking to friends in a public place; a known prostitute window-shopping, waiting for a bus, hitchhiking, merely getting into a car with another person or waving at passing vehicles. 569 F.Supp. at 978.

Courts in Alaska and Michigan have also found that loitering for the purpose of prostitution laws can prohibit (because there is no need to prove actual prostitution activities) First Amendment activities. Brown v. Municipality of Anchorage, 584 P.2d 35 (Alaska 1978); City of Detroit v. Bowden, 149 N.W.2d 771 (Mich.Ct.App. 1971); See also Profit v. City of Tulsa, 617 P.2d 250 (Okl.Cr.App. 1980).

A Virginia Court of Appeal in Coleman v. City of Richmond, 364 S.E.2d 239 (Va.Ct.App. 1988), on rehearing, 368 S.E.2d 298, also invalidated a loitering for the purpose of prostitution ordinance on overbreadth grounds because:

> "A person once convicted of prostitution could be arrested and convicted for window-shopping. A hitchhiker could be arrested and convicted because she waved and beckoned to cars though she said not a word regarding solicitation or prostitution. The ordinance may force people to curb their freedom

> of expression and association or risk arrest. See Johnson v. Carson, 569 F.Supp. 974 (M.D.Fla. 1983)." 364 S.E.2d at 243.

The Coleman court then noted the chilling effect such laws would have on First Amendment rights:

> "Even if the hitchhiker or former prostitute were acquitted due to lack of evidence of intent, an arrest would be justified under the statute, and the arrest itself chills First Amendment rights." 364 S.E.2d at 243.

The United States District Court in Johnson v. Carson, supra, also found that such arrests would deter the exercise of First Amendment rights and noted, "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." 569 F.Supp. at 979 citing United States v. Reese, 92 U.S. 215, 23 L.Ed. 563 (1875); Ricks v. District of Columbia, 414 F.2d 1097 (D.C.Cir. 1968). Other courts have also found loitering for the purpose of prostitution laws to be overbroad due to the infringement on First Amendment rights. Christian v. City of Kansas City, 710 S.W.2d 11 (Mo.App. 1986); People v. Gibson, 521 P.2d 774 (Colo. 1974). Federal courts have also found loitering for the purpose of using/buying/selling drugs laws to be overbroad for the same reasons as discussed above. See Northern Virginia Chapter, ACLU v. City of Alexandria, 747 F.Supp. 324 (E.D.Va. 1990); Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980).

Section 24-61 undoubtedly affects the First Amendment rights of free speech, free movement, association and assembly.

See Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). As the District Court in Johnson v. Carson, supra, noted in describing the rights potentially limited by a loitering for the purpose of prostitution law:

> "The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are implicit in the First and Fourteenth Amendments." 569 F.Supp. at 976.

Section 24-61 affects and could prohibit First Amendment activities because there is no certain way, without proof of actual prostitution activities, of knowing whether loitering is for a legitimate purpose or for the purpose of prostitution. Section 24-61 essentially says that if a known prostitute is doing things that could be loitering for an illegal purpose, then that person can be arrested. However, without actual proof of the purpose (no proof of actual words or acts of prostitution), the police and courts will always to have to guess at the purpose.

Loitering for the purpose of prostitution is a unique crime because it involves acts which are not intrinsically unlawful (none of the circumstances listed in 24-61 are illegal by themselves) and it involves future conduct which may or may not occur. The ordinance itself states that it prohibits loitering which manifests but does not prove a purpose of prostitution. This attempt to prohibit activity which may be for an unlawful purpose affects, by definition, the exercise of First Amendment

rights. Legal commentators have resolutely criticized loitering and vagrancy laws because of their impact on First Amendment freedoms. See Comment, 43 Miss.L.J. 403-05 (1972); Vagrancy, A Crime of Status, 2 Suffolk U.L.Rev. 156 (1968); Vagrants, Roques and Vagabonds, Old Concepts in Need of Revision, 48 Calif.L.Rev. 557 (1960); Vagrancy and Other Crimes of Personal Condition, 66 Harv.L.Rev. 1203 (1953).

C. The overbreadth of Section 24-61 is both real and substantial.

The United States Supreme Court in Broadrick v. Oklahoma, supra, held that a law is unconstitutional if the overbreadth is both real and substantial. The courts in Coleman v. City of Richmond, supra, and Johnson v. Carson, supra, specifically found that the overbreadth from a loitering for the purpose of prostitution ordinance was substantial and real. The undersigned counsel participated in the Johnson v. Carson case. He provided the District Court with numerous arrests of innocent individuals under the Jacksonville ordinance. Consequently, the Johnson v. Carson court recounted specific examples of illegal arrests due to the overbroad Jacksonville ordinance: arrests for mere hitchhiking; getting in a car with another person; waving at passing vehicles. See 569 F.Supp. at 978. Therefore, the overbreadth of Section 24-61 is real and actual examples of illegal arrests under a similar ordinance demonstrate its overbreadth.

The Middle District in Johnson v. Carson, supra, also found that a known prostitute could be arrested for window-shopping, standing on a street corner waiting for a bus, or spending time idly. Consequently, the overbreadth of a loitering for the purposes of prostitution ordinance is not rare or hypothetical. The overbroad sweep of such ordinances permit arrests for innocent conduct.

Section **24-61** is also substantially overbroad because it is not limited to activities by known prostitutes. Nothing in Section **24-61** requires the police to arrest only known prostitutes. It is not hard to imagine an arrest based upon conduct delineated in **24-61** by **a** person who is not a known prostitute, but who is in an area or on a corner known for prostitution activity. See Johnson v. Carson, supra, at *978*. All persons could be subject to an arrest under Section **24-61** if they engaged in conduct similar to the circumstances listed in **24-61** or a person engaged in such conduct in an area known for prostitution.

FACDL does not question the authority of the state or a city to attempt to prohibit prostitution. See Morgan v. Detroit, **389** F.Supp. **922** (D.C.Mich. **1975).** However, mere loitering or hanging out on the streets are constitutionally protected activities. See Aladdin's Castle, Inc. v. Mesquite, **630 F.2d** 1029 (5th Cir.), modified, **455** U.S. **283, 102** S.Ct. **1020, 71 L.Ed.2d** 152 **(1982);** Papachristou v. City of Jacksonville, **405 U.S. 156, 92** S.Ct. **839, 31 L.Ed.2d 110 (1972).** The fact that a city proscribes loitering with an alleged illegal purpose does not automatically make the law constitutional; such laws may have a valid purpose,

but they necessarily affect the exercise of First Amendment rights. The courts which have upheld loitering for the purpose of prostitution laws have either overlooked the effect of such laws on First Amendment activities or have placed limiting constrictions on them. See e.g. City of Akron v. Massey, 381 N.E.2d 1362 (Mun.Ct.,Akron,Ohio 1978); In Re D., 557 P.2d 687 (Or.Ct.App. 1976), app. dismissed, 434 U.S. 914, 98 S.Ct. 395, 54 L.Ed. 271; Lambert v. City of Atlanta, 250 S.E.2d 456 (Ga. 1978); City of Seattle v. Jones, 488 P.2d 750 (Wash. 1971); People v. Smith, 378 N.E.2d 1032 (N.Y.Ct.App. 1978); Short v. City of Birmingham, 393 So.2d 518 (Ala.Ct.Cr.App. 1981). Therefore, the above-cited cases are not persuasive precedents for this cause.

D. The Second District Court of Appeal gave no limiting construction to Section 24-61.

An appellate court can save an overbroad ordinance if it is possible to place a limiting construction upon the ordinance. Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). In this cause, the Second District made no effort to place a limiting construction upon 24-61. Consequently, this Court is free to consider the facial overbreadth of the statute because it is impossible to place a valid limiting instruction upon the ordinance. FACDL submits there is simply no way to cure the overbreadth of a loitering far the purpose of prostitution 'ordinance short of requiring actual proof of acts of prosti-

tution. However, if proof of actual acts of prostitution is necessary, there is no need for such loitering laws. The Virginia court in Coleman v. City of Richmond, supra, considered this exact question and stated: "There are already in place statutes and ordinances prohibiting solicitation for prostitution as well as harassment, disorderly conduct and breaching the peace. In this case and in virtually every case where the city could establish the intent element of the ordinance in question, it is likely the city could establish the elements of solicitation. To establish intent under the ordinance there must be an overt act which demonstrates the intent; that act will generally be sufficient to show solicitation, thus, less restrictive means for addressing the problem already exist." 364 So.2d at 244.

Loitering for the purpose of prostitution laws are mere law enforcement shortcuts which attempt to "nip crime in the bud" without adequate proof that an actual crime has or will occur. The Supreme Court, in reviewing a Jacksonville Vagrancy law, condemned such shortcuts which trampled upon constitutional sights. See Papachristou v. City of Jacksonville, supra; Farber v. Rochford, 407 F.Supp. 529 (N.D.Ill. 1975).

Section 24-61 also cannot be given a valid limiting construction because a law which affects the potential exercise of First Amendment rights must use the least intrusive alternative of achieving the state purpose. Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). The obvious state purpose is stopping prostitution activities. The United States District Court in Johnson v. Carson, supra, found that the least intrusive

means of achieving this purpose was to enforce the State prostitution or breach of the peace laws. **569** F.Supp. at **980.** As Section 24-61 does not provide for such proof, this Court would have to re-write the law to make it constitutional. This Court should not invade the province of the legislative body by judicially re-writing **a** law. ~~**See**~~ Brown v. State, ***358*** So.2d 20 **(Fla. 1978). As it is** impossible to limit Section **24-61** to avoid possible infringement on First Amendment activities and use the least intrusive means of stopping prostitution, this Court must declare Section **24-61** overbroad on its face.

ISSUE II

THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT GIVES OFFICERS TOO MUCH DISCRETION TO DECIDE WHO SHOULD BE ARRESTED AND IT INHIBITS THE FREE EXERCISE OF FIRST AMENDMENT RIGHTS.

A. Section **24-61** permits arbitrary and capricious law enforcement because its provisions force the police to provide an ad hoc definition of what conduct constitutes loitering for the purpose of prostitution.

The most pernicious aspect of Section **24-61** is that it forces the police to decide on an ad hoc basis whether particular conduct is loitering for the purpose of prostitution. Section **24-61 does** not guide the police - instead, it mandates a subjective judgment on whether conduct is mere loitering or loitering for the purpose of prostitution. By its very terms, Section 24-61 invites arbitrary and capricious law enforcement. **As** Section **24-61** does not require **a** consideration of the circumstances allegedly manifesting the purpose of prostitution, how will a police officer know when mere loitering is for the purpose of prostitution? Even if the police refer to the circumstances delineated in Section 24-61, the police will still have to guess subjectively when the loitering is for the purpose of prostitution.

An examination of each of the circumstances in Section 24-61 will demonstrate this subjectivity. Section 24-61 permits **a** consideration of the fact of the person being a known prostitute.

Does Section 24-61 permit an officer to arrest a known prostitute for merely loitering? If a person was convicted of a prostitution ordinance more than a year ago, may the officer still consider this fact? As was demonstrated in Johnson v. Carson, supra, the police will arrest known prostitutes for merely loitering. Such arrests are patently unconstitutional. See Papachristou v. City of Jacksonville, supra. However, Section 24-61 permits such arbitrary arrests because it does not require proof of any of the circumstances, it only permits a consideration of them.

Section 24-61 also permits a consideration of repeated beckoninq, stoppinq or enqaqinq of passers-by in conversation. How many times is meant by repeatedly? Does Section 24-61 mean repeatedly within the same time frame or does it mean repeatedly day after day or night after night? The lack of definitions within 24-61 force each police officer to decide what repeatedly means.

What does beckoning mean? If the police do not have to hear the contents of a beckoning, each officer will have to decide whether a beckoning is merely an innocent calling/talking to a friend or the hailing of a taxi as opposed to a beckoning for the purpose of prostitution. Without a need to prove the actual content of these actions, any interpretation of such acts will be, by definition, subjective.

How will an officer decide that the engaging of passers-by in conversation is not innocent discussion as opposed to conversation about illegal prostitution activities? No matter how you approach this issue, the controlling issue is that, with-

out proof of the actual conversation, a police officer will always' have to guess at the intention of the person arrested. The necessity that the police guess at the purpose (short of the person confessing to loitering for the purpose of prostitution), makes Section 24-61 vague; this vagueness virtually ensures arbitrary and capricious law enforcement. The United States Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 272 (1972), held that a vague law violated due process if it failed to provide explicit standards so as to prevent arbitrary and capricious law enforcement. ~~See also~~ Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969).

The "opportunity to explain provision" in Section 24-61 does not eliminate the opportunity for arbitrary and capricious law enforcement. If persons stopped refuse to explain their conduct, then the police still have to guess at their conduct. Several courts have directly decided that such a provision does not save a loitering for the purpose of committing an offense law. See Johnson v. Carson, supra, at 980; Ricks v. District of Columbia, 414 F.2d 1097 (D.C.Cir. 1968); ~~See also~~ Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855 (1983); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), (refusal of person to answer questions by police cannot form a basis for arrest).

Florida courts have held that failure to explain one's self is not an element of a loitering charge. See V.E. v. State, 539 So.2d 1170 (Fla. 3d DCA 1989); E.B. v. State, 537 So.2d 148 (Fla. 2d DCA 1989). Therefore, the opportunity to explain provision does not prevent arbitrary police action. The provision

encourages arbitrary police action because it asks the police officer to judge whether the explanation given proves/dispels the officer's initial suspicion. This provision makes the police officer an ad hoc judge and jury.

B. Section 24-61 is vague.

For the reasons discussed above, Section 24-61 is vague. Although the language of 24-61 is relatively clear, the meaning of the language does not adequately apprise the public and the police of what conduct is proscribed. The Virginia Court of Appeals reached this conclusion in Coleman v. City of Richmond, supra, at 243-44. The Coleman court noted:

> "Though the language of this ordinance is clear, the public is not adequately apprised of the behavior that is proscribed. Indeed, the statute essentially proscribes loitering with an unlawful intent; since loitering is not unlawful the statute proscribes no illegal conduct. If no particular act is proscribed, those wishing to conform to the ordinance do not know what conduct to avoid."

Citizens and the police have to guess at the meaning of Section 24-61 and whether particular conduct, legal by itself, secretly manifests an illegal purpose. The United States Supreme Court in Grayned v. City of Rockford, supra, discussed the evils of such vague laws which affected the exercise of First Amendment rights:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that 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 them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut{s} upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of {those} freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." (Footnotes omitted.)

408 U.S. at 108-09, 92 S.Ct. at **2298-2299.**

Section **24-61** does not give fair warning of the conduct it seeks to prohibit. A citizen reading the law would know that it is unlawful to loiter for the purpose of prostitution. If a person lacked the intent of loitering for the purpose of prostitution, then would that person also know that certain innocent activities could lead to arrest? Would a known prostitute know that repeatedly hailing a cab would lead to arrest? Would an innocent person in an area known for prostitution know that repeatedly engaging passers-by in conversation (for example, for political seasons) could lead to arrest? Section **24-61** is vague because citizens and the police alike must necessarily guess at its meaning in a particular context.

C. Section **24-61** chills and deters the exercise of First Amendment rights.

An overbroad and vague law chills and deters the exercise of legitimate First Amendment sights. The mere possibility of an arrest could force some individuals to forego the exercise of First Amendment rights to avoid entanglement with the police. See Grayned v. City of Rockford, supra. The United States District Court in Johnson v. Carson, supra, specifically held that the Jacksonville loitering for the purpose of prostitution ordinance chilled and deterred the exercise of First Amendment rights. The Virginia Court in Coleman v. City of Richmond, supra, also found that a loitering for the purpose of prostitution ordinance could inhibit the exercise of basic First Amendment freedoms. 364 S.E.2d at 243.

Section 24-61 manifestly chills and deters the exercise of First Amendment rights because individuals convicted of past prostitution crimes or individuals in an area of prostitution may forego First Amendment activities to avoid an arrest under Section 24-61, due to a police officer's opinion that such activities look like loitering for the purpose of prostitution. The fact that an innocent person may be exonerated at trial does not remove the chilling affect of Section 24-61. Such a person would have to run the gauntlet of arrest, possible incarceration and the anxiety of a trial all to exercise supposedly guaranteed rights. The First Amendment needs breathing space to prevent individuals from refraining from First Amendment activities to avoid arrest. See Broadrick v. Oklahoma, supra. Section 24-61 does not provide that space and is not narrowly drawn to prohibit only illegal activities.

ISSUE IV

THE ORDINANCE IMPROPERLY ALLOWS FINDERS OF FACT TO CONSIDER A PROSTITUTE'S PREVIOUS CONVICTIONS AND ACTIVITY AS A PROSTITUTE.

Petitioner argues that Section **24-61** conflicts with Section **90.610,** Florida Statutes, because it permits the trier of fact to consider past convictions for prostitution. FACDL agrees with this position. Section **24-61** also violates due process because it allows the police to consider the status of an individual to decide whether otherwise legal First Amendment activities are illegal. Section **24-61** directly permits the use of the status of individuals to decide if certain conduct is illegal. This status classification is repugnant to due process and creates a suspect classification prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections **2** and 9, of the Florida Constitution.

The United States Supreme Court has resolutely condemned such criminal status classifications. In Lanzetta v. New Jersey, 306 U.S. **451, 59 S.Ct. 618** (1939), the court invalidated a law which created the status offense of being **a** gangster. The criminal status of being a narcotic addict was found to be unconstitutional in Robinson v. California, **370 U.S.** 661, **82** S.Ct. **1417 (1962).** In Papachristou v. City of Jacksonville, supra, the Supreme Court invalidated an ordinance which punished the status of being a common gambler, drunkard, thief, pilferer, pick pocket or night wanderer. All those cases hold that under the American

system of jurisprudence one should be punished for what one does, not for what one is or was.

Section **24-61** does not directly punish an individual for being a known prostitute. However, the ordinance creates a pernicious suspect classification for at least one year: the police and courts can take into account the fact of a prior prostitution conviction to infer that otherwise legal conduct is illegal. The problem with **24-61** is that a person who was **a** prostitute yesterday may not be a prostitute today or tomorrow. Section **24-61** brands a person with the equivalent of a scarlet letter for at least one year. **A** person who has been previously convicted of prostitution may now attempt to engage in lawful activities, but would be arrested because the police think the now lawful activities were for the purpose of prostitution.

Known prostitutes may not be able to engage in lawful activities, which other citizens can enjoy, without fear that their activities will be considered loitering for the purpose of prostitution. Consequently, for one year **such** a person will have an immutable, unalterable status and will be denied equal protection under the laws. See Levy v. Louisiana, 391 U.S. 68, **88** S.Ct. 1509 **(1968).**

The Supreme Court in In Re Griffiths, 413 U.S. **717, 93 S.Ct. 2851, 37 L.Ed. 910** (1973), enunciated the standard of review where suspect classifications are present:

> "In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary ... to the

> accomplishment of its purpose on the safeguarding of its interest." 93 S.Ct. at 2855.

Florida courts have followed a similar test for equal protection - "for a statutory classification not to deny equal protection, it must rest on some difference bearing a just and reasonable relation to the statute in respect to which the classification is proposed." Carroll v. State, 361 So.2d 144 (Fla. 1978); Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); See also Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

The City of Tampa certainly has a constitutionally permissible and substantial interest in stopping prostitution. However, under the methods used in 24-61 to achieve that purpose, the methods are not substantially and reasonably related to the goal. The methods lack a substantial relation because 24-61 simply creates a presumption that a person who was once a prostitute will still be a prostitute up to one year later. Section 24-61 also creates a presumption that a known prostitute engaging in certain otherwise legal activities will actually be engaging in them for the purpose of prostitution. This irrebuttable presumption is simply not substantially related to its purpose; it also is simply not substantially true.

The United States Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), held that where there is a possibility of an inference of innocence arising from a circumstance that involves the exercise of a fundamental right, then the inference (of guilt) lacks the substantial

connection to the government interest. See also Turner v. United States, 396 U.S. 398, 90 S.Ct. 642 (1970); Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1968). All of the circumstances delineated in 24-61 carry a strong inference of innocence - for example - two people talking on a corner are simply talking about the weather or the time of day, not about prostitution activities.

The Michigan Court of Appeals in City of Detroit v. Bowden, 149 N.W.2d 771 (Mich.Ct.App. 1967), considered this precise question. The Bowden court held a known prostitute provision (convicted within the last two years) invalid because:

> "The ultimate issue in a violation of the ordinance is whether the accused was, in fact, soliciting when she waved. The plaintiff argues that it is difficult to produce evidence of street solicitation without the language which amended this ordinance. This difficulty of proof without the 'conclusive presumption' that one who has been convicted of such a crime within the last two years is a 'known prostitute,' will not justify the amendment. Neither will calling the proof of this conviction an element of the crime cure the constitutional infirmity. As it is not permissible to shift the burden of proof to the defendant, so it is also not permissible to strip her of all defense because of her prior conviction." 149 N.W.2d 776.

Therefore, the known prostitute provision of 24-61 violates due process and equal protection because it permits proof of bad character before the trier of fact and permits the police to infer illegal conduct from otherwise legal activities, based solely upon the status of the actor.

ISSUE V

THE TAMPA ORDINANCE CONTRADICTS THIS COURT'S RULING THAT LOITERING LAWS ARE PERMISSIBLE ONLY IF THEY CRIMINALXZE LOITERING UNDER CIRCUMSTANCES WHICH GIVE RISE TO A JUSTIFIABLE BELIEF THAT THE PUBLIC SAFETY IS THREATENED.

This Court in State v. Ecker, 311 So.2d 114 (Fla. 1975), cert. den., 423 U.S. 1019, 96 S.Ct. 455, upheld the state loitering law against First Amendment attacks of vagueness and overbreadth. The Court upheld the state loitering law against such attacks primarily because the state loitering law requires two elements: 1) loitering or prowling in a place at a time and in a manner not usual for law-abiding individuals; and 2) such loitering and prowling were under circumstances that threaten the public safety. These two elements eliminate First Amendment problems because they decrease the possibility that legitimate First Amendment activities would be mistaken for illegal conduct.

The "time, place and manner not usual for law-abiding citizens" provision is significantly different than Section 24-61. In Section 856.021, Florida Statutes, the loitering must not be in a manner for law-abiding individuals: for example, hiding in the bushes next to a house at 3:00 a.m. with a screen removed from the window. There is simply no First Amendment activity involved in such a situation. However, 24-61 does not limit its scope to activity done in a manner not usual for law-abiding citizens. The conduct outlined in 24-61 is most usual for law-abiding citizens and such conduct is at the core of

legitimate First Amendment activities: for example, standing on a street, engaging people in conversation, beckoning or waving to others. Therefore, unlike Section **856.021,** Florida Statutes, Section 24-61 does not limit its scope to conduct which is not within the ambit of the First Amendment. Section 856.021 also requires **proof** of conduct which threatens the public safety; this requirement prevents unnecessary intrusion upon First Amendment activity. Conduct which, by itself, threatens the public safety cannot be easily mistaken for First Amendment activities. Section 24-61 lacks such a public safety requirement and, therefore, conflicts with State v. Ecker, supra.

This Court in B.A.A. v. State, 356 So.2d 304 (Fla. 1978), specifically held that a person loitering for the purpose of prostitution could not be charged under Section 856.021 because there was no alarm for the safety of persons or property. Consequently, Section 24-61 also conflicts with B.A.A. v. State, supra.

CONCLUSION

This Court should declare Ordinance 24-61(A)(10), City of Tampa, unconstitutional on its face.

Respectfully submitted,

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
407 Duval County Courthouse
Jacksonville, Florida 32202
(904) 630-1548

ATTORNEY FOR AMICUS CURIAE ON BEHALF OF PETITIONER

FLORIDA BAR NO. 0293679

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Assistant Attorney General Peggy Quince, at the Office of the Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607, Counsel for Respondent, and Assistant Public Defender Stephen Krosschell, Office of the Public Defender, Polk County Courthouse, Post Office Box 9000, Drawer P.D., Bartow, FL 33830, Counsel for Petitioner, and this 17th day of July, A.D. 1991.

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN THE SUPREME COURT OF FLORIDA

RENETHEA WYCHE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPREME COURT NO. 77,440

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL), ON BEHALF OF PETITIONER

A P P E N D I X

y to explain her conduct, the de-
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The police arrested her for loi-
the purpose of prostitution in
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uct resulted in the charges of
n officer with violence and bat-
law enforcement officer.

the defendant requested a jury
on simple battery, as a lesser
battery on a law enforcement
he trial court denied the request-
tion. The jury found the defen-
y of loitering for the purpose of
n, battery of a law enforcement
d resisting an officer with vio-
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ffense, two years' imprisonment
sisting offense, and five years'
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ences were consecutive to each
concurrent to the ordinance sen-
us, the total sentence fell within
mended guidelines range of five
lf to seven years' imprisonment.

appeal, the defendant argues
ty ordinance prohibiting loitering
rpose of prostitution is facially
tional.[1] Although a federal dis-
has held a similar Jacksonville
unconstitutional, the Florida Su-
rt has repeatedly upheld a less
ate loitering statute. § 856.021,
1989); *compare Johnson v. Car-*
F.Supp. 974 (M.D.Fla.1983) *with*
State, 473 So.2d 205 (Fla.1985)
v. Ecker, 311 So.2d 104 (Fla.),

the public in a manner and under
stances manifesting the purpose of in-
enticing, soliciting, or procuring an-
commit an act of prostitution, sod-

cert. denied sub. nom., Bell v. Florida, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975). Even if we are not constrained to follow the supreme court's decision, we agree with the supreme court's analysis and uphold the facial constitutionality of this ordinance.

[2] The defendant next argues that her conviction for battery of a law enforcement officer must be reversed because the trial court failed to instruct the jury on the necessarily lesser-included offense of battery. *State v. Wimberly*, 498 So.2d 929 (Fla.1986); *Ferrell v. State*, 544 So.2d 336 (Fla. 1st DCA 1989). The defendant correctly maintains that these precedents warrant a reversal of this conviction. If we had the option, we would find this error to be harmless because the evidence without dispute establishes that the battery victim was a law enforcement officer, and this jury expressly found the victim to be a law enforcement officer in its valid guilty verdict on resisting an officer with violence. *Cf. State v. Barritt*, 531 So.2d 338 (Fla. 1988) (no requirement in a vehicular homicide case to instruct on the lesser offense of reckless driving when death is not an issue). We cannot, however, distinguish this case from *Wimberly*, which was not overruled in *Barritt*.

Affirmed in part, reversed in part, and remanded.

ON REQUEST FOR CERTIFICATION

The defendant has filed a motion for rehearing and a request for certification. We deny rehearing. Concerning certification, the defendant observes that *Johnson v. Carson*, 569 F.Supp. 974 (M.D.Fla.1983), as a federal decision, provides no basis for conflict jurisdiction in the Supreme Court of Florida. The defendant is likewise concerned that a decision expressly upholding the validity of a municipal ordinance, as compared to a state statute, may not be subject to further review. *See* Fla.R. App.P. 9.030(a)(2)(A)(i). Since this decision may affect many similar ordinances in other Florida communities, in order to give the supreme court discretion to review this decision, we certify the following question of great public importance to the Supreme Court of Florida:

IS SECTION 24-61, CITY OF TAMPA CODE (1987), FACIALLY CONSTITUTIONAL?

DANAHY, A.C.J., and FRANK, J., concur.

omy, fellatio, cunnilingus, masturbation for hire, pandering, or other lewd or indecent act. Among the circumstances which may be considered in determining whether this purpose is manifested are: that such person is a known prostitute, pimp, sodomist, performer of fellatio, performer of cunnilingus, masturbator for hire or panderer and repeatedly beckons to, stops or attempts to stop, or engages passers-by in conversation, or repeatedly stops, or attempts to stop motor vehicle operators by hailing, waving of arms or any bodily gesture for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering, or other lewd or indecent act. No arrest shall be made for a violation of this subsection unless the arresting officer first affords such person the opportunity to explain this conduct, and no one shall be convicted of violating this subsection if it appears at trial that the explanation given was true and disclosed a lawful purpose.

a. For the purpose of this subsection 10, a "known prostitute, pimp, sodomist, performer of fellatio, performer of cunnilingus, masturbator for hire or panderer" is a person who, within one (1) year previous to the date of arrest for violation of this subsection, had within the knowledge of the arresting officer been convicted of violating any ordinance of the city or law of any state defining and punishing acts of soliciting, committing, or offering or agreeing to commit prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering, or other lewd or indecent act.

b. For the purpose of this subsection 10 and section 24-63, "any person" shall also include panderers or solicitors of sexual acts, commonly referred to as "johns" or "tricks," who loiter in a manner and under circumstances manifesting the purpose of participating in, procuring, purchasing or soliciting any sexual act for hire made illegal by state law. Among the circumstances which may be considered in determining whether this purpose is manifested are: that such person, while pedestrian or in a motor vehicle, repeatedly

AMERICAN FAMILY PIZZA, d/b/a Godfather's Pizza, and St. Paul Fire and Marine Insurance Company, Appellants,

v.

Glenn TAYLOR, Appellee.

No. 90-1454.

District Court of Appeal of Florida, First District.

Jan. 18, 1991.

Rehearing Denied Feb. 20, 1991.

Pizzeria employee injured in automobile accident filed action against his employer and workers' compensation carrier to recover for injuries sustained in accident. The Judge of Compensation Claims, Melanie Jacobson, awarded benefits to employee, and employer and carrier appealed. The District Court of Appeal, Allen, J., held that finding that injury occurred within the course and scope of claimant's employment was supported by competent substantial evidence.

Affirmed.

See also 525 So.2d 455.

1. Workers' Compensation ⇐664

Trip to theme park in which pizzeria employees were awarded tickets as a reward for their participation in a promotional contest was an activity "within the course of employment," testimony from upper level management demonstrated that purpose of contest was to promote sales and there was evidence that management considered trip to be a company activity.

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation ⇐770

Automobile accident which occurred while pizzeria employee was traveling from pizzeria to park and back again to retrieve vehicle, following company trip to theme park, was within the course of employment where, although employee attended Christmas party at manager's home after trip, employee had resumed his trip back to his employer's place of business when accident took place.

John M. Kelley of Adams, Kelley, Kronenberg & Kelley, Ft. Lauderdale, for appellants.

J.J. Goodmark of Goodmark & Goodmark, P.A., West Palm Beach, for appellee.

ALLEN, Judge.

In this workers' compensation appeal, the employer and carrier appeal the order of the judge of compensation claims awarding benefits to the claimant for injuries sustained in an automobile accident. We reject the arguments of the employer and carrier that the claimant was not in the course and scope of his employment at the time of the accident, and we affirm the order under review.

The claimant was an employee of American Family Pizza, d/b/a Godfather's Pizza. In October of 1983, Godfather's upper level management planned a promotional contest in conjunction with Six Flags Atlantis Water Theme Park. In this contest, the patrons of the various Godfather's locations took part in raffles and drawings. As part of the promotion, a competition was run between the employees of the various Godfather's pizzerias. Employees of each pizzeria were encouraged to decorate the contest boxes and exhibit enthusiasm for customer participation. The pizzeria which employed claimant was one of the winners, and its employees were awarded tickets to the theme park.

On December 20, 1983, claimant and his fellow employees met at their pizzeria to begin the trip. The manager and the assistant manager of the pizzeria drove the employees to the park. Arrangements had been made for their shifts to be covered by

beckons to, attempts to stop, engages or attempts to engage in conversation with any person by hailing, waving of arms or any bodily gesture for the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering, or other lewd or indecent act.

Andrew L. Siegel of Andrew L. Siegel, P.A., Plantation, for appellant.

Bruce G. Shaffner of Bruce G. Shaffner, P.A., Fort Lauderdale, for appellee.

PER CURIAM.

The appellant wife challenges an order by the trial court awarding her husband fees incurred in the husband's efforts to challenge the wife's chapter 13 bankruptcy plan. We reverse.

The trial court had previously awarded fees to the husband in connection with what the trial court termed a completely meritless petition to modify custody. Instead of paying the fees as required in the order, the wife filed a chapter 13 proceeding in Federal Bankruptcy court. The husband then filed a motion in Bankruptcy court for relief from the automatic stay of bankruptcy. That motion was denied. Furthermore, the bankruptcy judge ruled that the fee order could be considered part of the plan. In further proceedings the plan was approved in the Bankruptcy court, over the husband's objection.

Subsequently, the husband filed a motion in the trial court to assess against the wife the fees he incurred in his unsuccessful efforts in bankruptcy court. The trial court found that the wife's motives in filing the Bankruptcy were to avoid the previous orders of payment and were a further extension of her non-meritorious litigation with the husband. The court thereupon awarded the husband the fees.

Section 61.16, Florida Statutes (1987) provides that the court may award attorney's fees and costs of "maintaining or defending any proceeding under this chapter after considering the financial resources of the parties." Clearly, the bankruptcy proceeding was not a proceeding under chapter 61. Therefore, the trial court was without authority to award fees to the husband for his unsuccessful efforts in the bankruptcy court. *See In re Estate of Donner*, 364 So.2d 742 (Fla. 3d DCA 1978). While we can appreciate the trial court's and the husband's frustration with some of the tactics of the wife, the trial court is nevertheless bound by the limitations of its statutory authority to award fees.

Reversed.

ANSTEAD, GUNTHER and WARNER, JJ., concur.

ON MOTION FOR CLARIFICATION

ORDERED that Appellant's January 25, 1991 motion for clarification is granted, and appellant's motion for attorney's fees filed December 29, 1989, is provisionally granted and remanded to the trial court to determine both need and the ability to pay and reasonable attorney's fees.

Renetha C. WYCHE, Appellant,

v.

STATE of Florida, Appellee.

No. 88-01141.

District Court of Appeal of Florida, Second District.

Jan. 18, 1991.

Question Certified on Denial of Rehearing March 6, 1991.

Defendant was convicted in the Circuit Court, Hillsborough County, Susan C. Bucklew, J., of loitering for purpose of prostitution and battery of law enforcement officer. On appeal, the District Court of Appeal, Altenbernd, J., held that failure to instruct on necessarily lesser-included offense of simple battery was reversible error.

Affirmed in part, reversed in part and remanded.

1. Prostitution ⇐1

Municipal ordinance prohibiting loitering for purpose of prostitution was facially constitutional; state Supreme Court had repeatedly upheld less specific state loitering statute. West's F.S.A. § 856.021.

2. Assault and Battery ⇐96(1)

Criminal Law ⇐1173.2(4)

Failure to instruct on necessarily lesser-included offense of simple battery, in

prosecution of defendant for battery of law enforcement officer, was reversible error even though evidence without dispute established that battery victim was law enforcement officer.

James Marion Moorman, Public Defender, and Stephen Krosschell, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Candance M. Sunderland, Asst. Atty. Gen., Tampa, for appellee.

ALTENBERND, Judge.

Renetha C. Wyche appeals her convictions and sentences of loitering for the purpose of prostitution and battery of a law enforcement officer. § 24–61, City of Tampa Code (1987); § 784.07, Fla.Stat. (1987). She does not contest her concurrent conviction and sentence for resisting an officer with violence. § 843.01, Fla. Stat. (1987). We affirm the defendant's loitering conviction and sentence, rejecting her argument that the Tampa ordinance is facially unconstitutional. We reverse her battery of a law enforcement officer conviction and sentence because the trial court refused to instruct the jury on the necessarily lesser-included offense of simple battery. Any error in the sentencing scoresheet which might affect the remaining sentence may be corrected in the trial court.

On February 1, 1988, two police officers observed the defendant for approximately thirty minutes at about 9 p.m. in Tampa, Florida. She was standing on the corner of Nebraska Avenue and East 12th Avenue, an area known for prostitution activity. While dressed in a black teddy negligee and a pair of brown high heel shoes, the defendant yelled and waved at passing cars. The officers observed her wave down a car, talk to the driver for a few minutes, and then enter the car. As the car was leaving, the officers stopped it and questioned the defendant. When given an opportunity to explain her conduct, the defendant stated that she was on her way to a funeral. The police arrested her for loitering for the purpose of prostitution in violation of a Tampa ordinance.

After she was arrested and taken to central booking, the defendant appeared to have health problems. The two officers told the defendant that they were going to take her to a hospital. As they began to handcuff her for the trip, she became violent, and kicked and scratched the officers. This conduct resulted in the charges of resisting an officer with violence and battery on a law enforcement officer.

At trial, the defendant requested a jury instruction on simple battery, as a lesser offense of battery on a law enforcement officer. The trial court denied the requested instruction. The jury found the defendant guilty of loitering for the purpose of prostitution, battery of a law enforcement officer, and resisting an officer with violence. The trial court sentenced the defendant to sixty days' imprisonment on the loitering offense, two years' imprisonment on the resisting offense, and five years' imprisonment on the battery offense. The latter sentences were consecutive to each other and concurrent to the ordinance sentence. Thus, the total sentence fell within the recommended guidelines range of five and one-half to seven years' imprisonment.

[1] On appeal, the defendant argues that the city ordinance prohibiting loitering for the purpose of prostitution is facially unconstitutional.[1] Although a federal district court has held a similar Jacksonville ordinance unconstitutional, the Florida Supreme Court has repeatedly upheld a less specific state loitering statute. § 856.021, Fla.Stat. (1989); *compare Johnson v. Carson*, 569 F.Supp. 974 (M.D.Fla.1983) *with Watts v. State*, 463 So.2d 205 (Fla.1985) *and State v. Ecker*, 311 So.2d 104 (Fla.), *cert. denied sub. nom.*, E 423 U.S. 1019, 96 S.Ct. 455, (1975). Even if we are no follow the supreme court agree with the supreme and uphold the facial con this ordinance.

[2] The defendant next conviction for battery of a l officer must be reversed b court failed to instruct t necessarily lesser-included tery. *State v. Wimberly*, (Fla.1986); *Ferrell v. Stat* (Fla. 1st DCA 1989). The rectly maintains that these rant a reversal of this co had the option, we would f be harmless because the e dispute establishes that th was a law enforcement o jury expressly found the vi enforcement officer in its dict on resisting an office *Cf. State v. Barritt*, 531 1988) (no requirement in a cide case to instruct on th of reckless driving when issue). We cannot, howe this case from *Wimberly*, overruled in *Barritt*.

Affirmed in part, revers remanded.

1. Sec. 24–61. Prohibited actions.
A. It is unlawful for any person in the city to:
....
10. Loiter, while a pedestrian or in a motor vehicle, in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, hire, pandering, or other le Among the circumstances sidered in determining wh is manifested are: that known prostitute, pimp, s of fellatio, performer of c bator for hire or pander beckons to, stops or attem gages passers-by in conver ly stops, or attempts to s operators by hailing, wavi bodily gesture for the pu enticing, soliciting or pro commit an act of prostitut tio, cunnilingus, masturba dering, or other lewd or arrest shall be made for subsection unless the arr affords such person the plain this conduct, and n victed of violating this subs at trial that the explanati and disclosed a lawful pu
a. For the purpose of t "known prostitute, pimp, s