4-4

IN THE SUPREME COURT OF FLORIDA

RENETHA WYCHE,

Petitioner,

vs.

Case No. 77,440

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 351199

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On February 19, 1988, the Hillsborough County state attorney charged the petitioner, RENETHA C. WYCHE, with two counts of battering a law enforcement officer and one count of resisting an officer with violence. (R146) She was also charged separately with a violation of a Tampa ordinance forbidding loitering for prostitution. (R143) The two cases were consolidated on April 4, 1988. (R143) On April 7, 1988, Judge Bucklew granted a motion for judgment of acquittal on one of the battering charges. (R49) The jury then found Wyche guilty of the remaining charges. (R120)

Wyche was on probation for carrying a concealed weapon and exhibition of a dangerous weapon. (R126) She admitted two technical violations of her probation. (R126) Judge Bucklew revoked her probation. (R127) She was sentenced to five years in prison for battery on a law enforcement officer, two years consecutive for resisting with violence, sixty days concurrent for loitering, five years concurrent for carrying a concealed weapon, and time served for exhibition of a dangerous weapon, (R133-34)

On appeal, the district court ruled on January 18, 1991, that she should be granted a new trial on the battery charge because the trial court refused to instruct the jury on simple battery as a lesser included offense. Wyche v. State, 573 So.2d 953 (Fla. 2d DCA 1991). The court rejected her other claims. On March 6, 1991, the court agreed to certify a question to this court on whether the Tampa prostitution loitering ordinance was constitutional.

An amended notice to invoke discretionary jurisdiction was filed on March 7, 1991. This court issued a briefing schedule on March 11, 1991. Undersigned counsel then discovered that the petitioner was dead. On April 5, 1991, he filed a suggestion of death and asked for permission to continue the appeal, because he believed the issues involved were important. On June 19, 1991, this court postponed a decision on jurisdiction and set a new briefing schedule.

STATEMENT OF THE FACTS

About 9 p.m. on February 1, 1988, officers Mitchell and Sutcoff saw the appellant, RENETHA C. WYCHE, standing near Nebraska and 12th Avenue in Tampa and wearing a black lingerie teddy and brown high-heeled shoes. (R17-18) She waved and yelled at passing cars for twenty to thirty minutes. (R18-19) She talked to the occupants of one car for a few minutes before it drove away. (R19-20) Another car stopped, and she entered it. (R20) The officers followed and stopped it but did not arrest the male driver. (R20, 31) They arrested her for loitering for the purpose of prostitution and gave her an opportunity to explain herself. (R21, 42) They handcuffed her and took her to the station and then to central booking. (R21)

Mitchell testified that, after they removed her handcuffs, she said she had taken twenty valiums. (R22-23) They said they would take her to the hospital to check her condition. (R38) As they handcuffed her, she yelled, kicked, and scratched. (R23-24) Sutcoff wrestled her to the ground before they could handcuff her. (R24) They carried her to the police car. (R24) Mitchell was uninjured, but she kicked at him and used her fingernails to try to claw him. (R25) Mitchell saw her kick at Sutcoff. (R26) A previous injury to Sutcoff's thumb began bleeding again. (R26)

Mitchell testified that the officers immobilized her with a restraining rope and put her in the car. (R27) She was soon free. (R27) They restrained her again with the rope before taking her to the hospital. (R27) Hospital personnel pumped her stomach but

found no Valium. (R28, 35) She told them she had said she had taken valium only because she did not want to go to jail, (R28) They did not remove her clothes or laugh at her. (R79)

Wyche testified she was going to a funeral home to visit an employee friend, (R52–53) The teddy -- similar to a bathing suit -- and high heels were her usual dancing attire. (R52-53, 65) She stopped a friend, because he would buy her food. (R53) The police arrested them at a restaurant for loitering and claimed she had a pending robbery arrest warrant. (R53) They beat her at the station when she would not talk about the robbery and hog–tied her before going to central booking. (R53-56) A booking picture showed that they blackened her eye. (R57) She denied mentioning valiums. (R55) Instead, they said she had taken drugs, and a nurse consequently would not let her in the jail. (R55) Wyche was hysterical but did not fight as they bound her to take her to the hospital. (R58-59, 64) They laughed when hospital staff removed her clothes. (R60)

SUMMARY OF THE ARGUMENT

I. Numerous courts have ruled that prostitution loitering ordinances are unconstitutional. The ordinance is overbroad because it infringes on the first amendment rights of prostitutes. Loitering laws are generally subject to strict constitutional scrutiny, because they necessarily affect the rights of citizens to freedom of movement and association. The ordinance improperly affects the rights of prostitutes to conduct many everyday activities protected under the first amendment. The ordinance is unnecessary because other, substantially less restrictive laws are already available to combat the evil which the ordinance seeks to prevent and deter. Consequently, the claim is irrelevant that speech with intent to solicit prostitution is not constitutionally protected, The less restrictive laws are still preferable because they do not influence prostitutes to give up their first amendment rights. In any event, the ordinance does not require proof of intent, only of circumstances which might lead onlookers to think that the intent exists, even if in fact it does not exist.

II. The ordinance is vague because its focus on the subjective beliefs of officers about the subjective state of mind of prostitutes is too nebulous to allow clear, non-arbitrary enforcement. Officers will not arrest everyone who could be arrested under this ordinance and will make their decisions to arrest based on their personal predilections against prostitutes. If the ordinance requires proof of specific intent, then prostitutes will be improperly forced to curtail their exercise of their first

amendment right to freedom of expression, because they will be uncertain which circumstances will lead an onlooking officer to conclude that they are soliciting for prostitution.

III. The ordinance does not require proof of an evil intent and therefore violates substantive due process because it fails to state a crime. Even if it does require this proof, merely sauntering down the street with the intent to commit prostitution is not a crime. It is instead only preparation to commit a crime. Proof merely of evil intent is insufficient without proof of an overt act that launches the consummation of the offense.

IV. The ordinance allows the fact finder to consider that the accused has previously been convicted of prostitution. The ordinance therefore contradicts numerous decisions of this court and two Florida statutes which state that prior crimes cannot be used as substantive evidence unless the collateral crime shares unique characteristics with the charged crime and is strikingly similar to it. A municipality has no authority to create exceptions to statewide statutes and to decisions of this court which interpret these statutes. Evidence of prior convictions for prostitution would undoubtedly have a powerful prejudicial impact on the finder of fact in prostitution loitering cases.

V. This court has held that loitering requires proof of a threat to public safety and that the state cannot use loitering laws as a substitute when its evidence will not satisfy the conventional prostitution laws. A municipality has no authority to overrule decisions of this court by enacting a loitering statute

which does not require proof of a threat to public safety and which can be used as a substitute when the conventional prostitution laws might be unavailing.

VI. The six-month maximum penalty for prostitution loitering exceeds the one-month maximum penalty for regular loitering and for prostitution or solicitation. The municipal ordinance is less serious and therefore cannot have harsher penalties than the state-wide offenses.

VII. The evidence failed to show that Wyche had the specific intent to prostitute herself. Instead, it showed only that she was wearing black clothes similar to a bathing suit and was calling to passers-by. While this conduct was certainly suspicious, it did not prove an improper intent beyond a reasonable doubt, particularly because her conduct was otherwise protected under the first amendment.

VIII. This court should abate all of the petitioner's convictions, because she died while her appeal was pending.

ARGUMENT

ISSUE 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.

This appeal addresses the constitutionality of City of Tampa ordinance 24-61(A)(10), which reads as follows:[1]

> It is unlawful for any person in the city to . . . 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, 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

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[1] The constitutionality of this ordinance was not raised in the trial court. The ordinance, however, is facially overbroad and void on its face. A conviction under a facially void statute is fundamental error which is appealable despite the lack of objection below. State v. Trushin, 425 So.2d 1126 (Fla. 1982); Alexander v. State, 450 So.2d 1212 (Fla. 4th DCA 1984). In addition, because this court has agreed to consider this case despite the intervening death of the petitioner, undersigned counsel assumes that it is interested as a matter of judicial policy and economy in all aspects of the ordinance that are arguably unconstitutional.

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 . . ., "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 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.

(R193-94)

This Tampa ordinance is not significantly different from a Jacksonville ordinance ruled overbroad in violation of the first amendment in Johnson v. Carson, 569 F. Supp. 974 (M.D. Fla. 1983), and a revised version of the ordinance ruled overbroad by Florida

Circuit Judge Lawrence D. Fay in Rivera v. State, 31 Fla. Supp. 2d 128 (Fla. 4th Jud. Cir. 1988). Numerous courts in other jurisdictions have invalidated similar ordinances, including Coleman v. City of Richmond, 364 S.E.2d 239 (Va. App. 1988), on rehearing, 368 S.E.2d 298 (Va. App. 1988); Christian v. City of Kansas City, 710 S.W.2d 11 (Mo. App. 1986); Profit v. City of Tulsa, 617 P.2d 250 (Okla. Crim. App. 1980); Brown v. Municipality of Anchorage, 584 P.2d 35 (Alaska 1978); People v. Gibson, 521 P.2d 774 (Colo. 1974); City of Detroit v. Bowden, 149 N.W.2d 771 (Mich. App. 1967).[2]

Although these cases have somewhat different rationales, the principal rationale is that prostitution loitering laws overbroadly have a chilling effect on behavior protected by the First Amendment. The district court below ignored this argument and instead treated the issue as a due process vagueness question. The court reasoned that the ordinance must be constitutional because it was more specific than Florida's loitering law, which this court had twice upheld against vagueness challenges.

As will be discussed in Issue 11, this reasoning betrayed the district court's misunderstanding of the void for vagueness doctrine. In any event, however, petitioner's primary argument was first amendment overbreadth rather than fourteenth amendment vagueness. Neither of this court's decisions cited by the second

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[2]Undersigned counsel has been told that two Florida circuit courts have also invalidated local ordinances against loitering for the purpose of engaging in drug related activities. State v. Calloway, Case no. 89-4717 (Fla. 18th Jud. Cir. 1989) (Melbourne ordinance 88.62); In the Interest of E.L., Case No. 89-1876 (Fla. 18th Jud. Cir. 1990) (Sanford ordinance 2032). Counsel, however, has not actually seen the written orders filed in these cases.

district that upheld loitering statutes -- State v. Ecker, 311 So.2d 104 (Fla. 1975), and Watts v. State, 463 So.2d 205 (Fla. 1985) -- squarely addressed the first amendment issue, probably because Florida's loitering statute does not implicate the first amendment as clearly and directly as Tampa's prostitution loitering ordinance does.

The second district's incomprehension of petitioner's primary issue was like the third district's analysis of an ordinance forbidding bartenders from fraternizing with customers. Miller v. State, 411 So.2d 299 (Fla. 3d DCA 1982). The majority treated the issue as a vagueness question, but, as Judge Pearson correctly pointed out in dissent,

> [w]hat the majority totally overlooks when it says "that the ordinance in question adequately apprises an employee of an alcoholic beverage establishment of the proscribed conduct" is that while that may meet the objection on vagueness grounds, it does not come close to addressing the objection that included within proscribed conduct is constitutionally protected speech and conduct. Vagueness and overbreadth are not the same things.

Id. at 301-02 n.7 (Pearson, J., dissenting).

Loitering is defined as "to be dilatory; to be slow in movement; to stand around or move slowly about: to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind." Black's Law Dictionary, 5th ed, p. 849 (West 1979) Loitering of this sort is constitutionally protected, because aimless strolling is an aspect of liberty within the "sensitive First Amendment area," Papachristou V. City of Jacksonville, 405 U.S. 156, 165 (1972), and is one of the amenities of

life extolled by Walt Whitman and Henry David Thoreau. "These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence." Id. at 164; Brown v. Municipality of Anchorage, 584 P.2d 35, 37 (Alaska 1978).

By limiting the ability of prostitutes to loiter, Tampa ordinance 24-61(A)(10) encroaches into their first amendment rights to freedom of association and movement. "[L]aws prohibiting loitering in general suffer constitutional defects because they have an unwarranted chilling effect on a person's freedom of movement and speech." City of Seattle v. Slack, 784 P.2d 494, 497 (Wash. 1989). 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." Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) (quoting Byofsky v. Boroush of Middletown, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975))

Because loitering is constitutionally protected, laws which regulate it are inherently suspect. Consequently, they must have a legitimate governmental purpose to forbid loitering in conjunction with other objectively verifiable improper conduct, in a manner which does not further infringe on citizens' constitutional rights and which takes into consideration substantially less restrictive alternatives. In this case, however, the ordinance does further infringe on citizens' first amendment rights. Speci-

fically, it lists as possible incriminating circumstances that the known prostitute "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 . . ." These circumstances are not criminal in most situations and are not calculated to harm. The ordinance could thus be used to punish conduct by prostitutes which is essentially innocent and which the first amendment protects.

Under this ordinance, a prostitute could not organize a public demonstration to legalize prostitution. Under this ordinance, a prostitute must think twice about waving and calling to a friend, Profit v. City of Tulsa, 617 P.2d 250, 251 (Okla. Crim. App. 1980), talking to passers-by, Johnson v. Carson, 569 F. Supp. 974, 978 (M.D. Fla. 1983), hailing a taxi, City of Detroit v. Bowden, 149 N.W.2d 771, 773 (Mich. App. 1967), seeking charitable donations at street corners from automobile drivers, B. A. A. v. State, 356 So.2d 304 (Fla. 1978), windowshopping or standing on a street corner to hail a bus, Brown, 584 P.2d at 35; Christian v. City of Kansas City, 710 S.W.2d 11, 13 (Mo. App. 1986), hitchhiking or getting in a car with another person, Rivera v. State, 31 Fla. Supp. 2d 128, 131 (Fla. 4th Jud. Cir. 1988); associating with others on a street corner, Sawyer, 615 F.2d at 316, campaigning on street corners for political candidates, Northern Virginia Chaster, American Civil Liberties Union, et al. v. City of Alexandria, 747 F. Supp. 324, 328 (E.D. Vir. 1990), approaching persons to sign petitions, id., handing out phone numbers on business cards, id.,

or organizing community events, id. Each of these activities is protected under the first amendment. Yet, each activity would be suspicious to an onlooking officer who knew the prostitute's reputation. If the undersigned counsel had a known prostitute as a client, he would advise her not to perform any of these activities in Tampa, because an officer could be watching and choose to arrest her for this innocent protected conduct.

Petitioner recognizes that the government may forbid activity related to prostitution. Prostitutes, however, have rights too, and the government may not criminalize the mere status of being a prostitute. In general, a person's status cannot be a crime or an element of a crime. Profit; Robinson v. California, 370 U.S. 660 (1962). Consequently, when governments regulate the conduct of prostitutes, the regulations may not overbroadly and chillingly inhibit their exercise of their rights under the first amendment, merely because they are prostitutes.

"A statute may not sweep unnecessarily broadly into the areas of protected freedoms. An ordinance is impermissibly overbroad if it deters constitutionally protected conduct while purporting to criminalize unprotected activities." Northern Virsinia Chapter, A.C.L.U., 747 F. Supp. at 326 (citation omitted). "Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate applications." City of Houston v. Hill, 482 U.S. 451, 459 (1987) (citation omitted).

Tampa ordinance 24-61(A)(10) may have legitimate applications, but it unnecessarily sweeps into protected areas. Known prostitutes in Tampa who wish to obey the law must curtail their activities, because Tampa police have the authority to arrest them whenever they talk or wave to people on the streets. They can legitimately fear arrest even if they have no criminal intent. The ordinance substantially deters their actions and chillingly affects their ability to express themselves in public.

Whenever a government enacts regulations that enter first amendment territory, the courts must consider whether alternative regulations can achieve the same purpose without affecting first amendment rights.

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose,

Shelton v. Tucker, 364 U.S. 479, 488 (1960). Although a government need not always use the least restrictive means of achieving its purpose, it cannot burden substantially more speech than is necessary. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward v. Rock against Racism, 105 L. Ed. 2d 661, 681 (1989). The ordinance must be "narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the

exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 487 U.S. 474, 485 (1988).

In this case, the evil to be remedied is offering to or soliciting another to commit prostitution. Florida, however, already has a statute on the books on prostitution and solicitation, and it works well without affecting the first amendment. § 796.07, Fla. Stat. (1987). Another law on the same subject is unnecessary. As this court said about a fornication statute, "[i]f the statutory purpose is limited to prevention of prostitution or child abuse, then the statute is redundant, and the classification irrational." Purvis v. State, 377 So.2d 674, 677 (Fla. 1979). The courts in Johnson, 569 F. Supp. at 980, Rivera, 31 Fla. Supp. 2d at 132-33, and Sawyer, 615 F.2d at 317-18, all concluded that the "conduct which the state may punish without running afoul of the first amendment is more than adequately covered" by other provisions of Florida law. Id. at 318. See also Coleman v. City of Richmond, 364 S.E.2d 239, 244 (Va. App. 1988) ("There are already in place statutes and ordinances prohibiting solicitation for prostitution, harassment, disorderly conduct, and breaching the peace").

Ordinance 24-61(A)(10) goes substantially further than is necessary for its purpose. A loitering law is inherently suspect, and, in this case, it unnecessarily targets and eliminates more than the evil it seeks to remedy and is not narrowly tailored to meet its goal. Its limitations on the rights of prostitutes are therefore unwarranted and contrary to the constitutional require-

ment that government regulations not sweep needlessly into the protected freedoms of citizens.

Many courts that have upheld the constitutionality of a prostitution loitering ordinance have not addressed the first amendment issue. Those that have considered it invariably argue that the ordinance requires proof of a specific intent to encourage prostitution. They asset that the constitution does not protect speech uttered with this intent. See, e.g., City of Seattle v. Slack, 784 P.2d 494 (Wash. 1989); People v. Smith, 378 N.E.2d 1032 (N.Y. 1978). The attorney general made this same argument to the district court below. Although these authorities are correct that the constitution does not protect speech of this sort, nevertheless, their arguments miss the mark for three reasons.

First, to petitioner's knowledge, not one of these courts has ever recognized that the universal existence of laws against prostitution and solicitation make loitering laws on this problem unnecessary. The specific intent element which supposedly saves the loitering laws is the same element as that found in more general prostitution and solicitation laws. Most of the conduct that would prove specific intent would be the same in both cases. The more general laws, however, satisfy the governmental purpose without impacting the first amendment. Consequently, as previously argued, because inherently suspect loitering laws against prostitution are substantially and needlessly more restrictive of first amendment rights than general prostitution laws, they are unconsti-

tutional. No court that has upheld prostitution loitering laws has ever addressed this argument, much less answered it.

Second, like most similar ordinances from other jurisdictions, Tampa ordinance 24-61(A)(10) does not in fact require proof of specific intent, only of circumstances that manifest this purpose. Although the ordinance mentions proof of actual purpose as one circumstance that would manifest this purpose, it is not the only circumstance that would suffice. An alternative circumstance could be that a known prostitute was repeatedly engaging passers-by in conversation. This circumstance could manifest the requisite illegal purpose, even if the prostitute did not in fact have that purpose in mind.

If the drafters of the ordinance had wanted specific intent to be an element of the offense, they certainly knew how to say so clearly. They could have forthrightly said, "It is unlawful to loiter for the purpose of prostitution." Instead, they carefully drafted the ordinance to require proof only of circumstances and then provided a non-exhaustive list of circumstances. The obvious purpose of this careful language was to allow conviction without proof of intent, presumably because intent is difficult to prove in these cases. Difficulty of proof, however, cannot justify an ordinance which violates constitutional rights. City of Detroit v. Bowden, 149 N.W.2d 771, 775 (Mich. App. 1967).

Thus, as in Bowden, 149 N.W.2d at 775 "[o]nce the plaintiff has produced evidence that the defendant was seen repeatedly waving on a public street and that she had been convicted for prostitution

within the last two years, she is more than presumed guilty of violating the Ordinance. She is guilty." Mere proof of circumstances was sufficient to prove guilt. The court in Northern Virginia Chapter, A.C.L.U., 747 F. Supp. at 328, made similar comments about a narcotics loitering ordinance.

> The ordinance does not require engaging in the seven circumstances with unlawful intent to partake in drug-related activities; rather, the ordinance provides that the occurrence of the seven circumstances manifests intent. The separate specific intent requirement is nullified by the provision that deems engaging in the enumerated behaviors as manifesting an unlawful purpose. By equating unlawful purpose with seven innocent activities that may be accomplished by persons lacking unlawful intent, the Alexandria ordinance criminalizes a substantial amount of constitutionally protected activities.

Thus, prostitution loitering ordinances cannot be saved by the claim that they require proof of intent. The ordinances instead were drafted with care to require proof only of circumstances rather than of intent.

Third, in any event, the ordinance violated the first amendment even if it did require proof of specific intent. The focus of the first amendment overbreadth doctrine is to prevent a chilling effect on the exercise of free speech, free association, and the other first amendment rights. This chilling effect will exist regardless of whether specific intent is an element of the offense. Intent is often proved by circumstances, and, if prostitutes seeking to obey the law know that sauntering (loitering) on the streets, calling to passers-by, and entering a friend's car are circumstances which can be used to convict them of an illegal

intent, they will not perform these activities even if their intent is in fact innocent. The chilling effect here is obvious, and interpreting the ordinance to require proof of specific intent will not save it.

Tampa ordinance 24-61(A)(10) overbroadly and unnecessarily inhibits the free exercise of prostitutes' first amendment rights. Accordingly, this court should rule that it is unconstitutional.

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.

The fourteenth amendment void-for-vagueness doctrine has two primary facets.

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender V. Lawson, 461 U.S. 352, 357-58 (1983) (citations omitted). A third related purpose is that, if

> 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."

Grayned V. City of Rockford, 498 U.S. 104, 109 (1972).

Petitioner does not necessarily doubt that Tampa ordinance 24-61(A)(10) satisfies the first prong of this test. As she argued in Issue I, the ordinance only too clearly tells prostitutes what not

to do. Although their actual intent may be innocent, prostitutes familiar with this ordinance know they cannot appear publicly under circumstances that might give an onlooking police officer the impression they are engaging in prostitution-related activities. Prostitutes seeking to obey this ordinance will not organize public demonstrations to legalize prostitution, wave and call to friends, wander aimlessly, talk to passers-by, hail taxis or buses, window-shop, hitchhike, get in cars with other persons, associate with others on street corners, campaign publicly for political candidates, approach persons to sign petitions, hand out phone numbers on business cards, or organize community events. The ordinance gives fair notice to prostitutes that they should not exercise these constitutional rights to walk about and communicate with others on the streets. Prostitutes already believe that the police will harass them merely for walking on the streets, and this ordinance reinforces their belief.

The attorney general, of course, must argue that the ordinance does not notify prostitutes not to exercise their first amendment rights. He will argue instead that the ordinance only tells prostitutes not to intend to commit acts of prostitution. As argued above, petitioner disagrees that the ordinance provides only this limited notice. If it does provide only this limited notice, however, then its boundaries become unclear. Prostitutes will not know which circumstances warrant a conclusion that an unlawful intent exists. They know that some arresting officers might

believe that a prostitute's mere act of walking about and talking to people would justify this conclusion.

Consequently, prostitutes familiar with this ordinance will "steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked." Under the attorney general's interpretation, the first and third purposes of the void-for-vagueness doctrine are violated, because, in their uncertainty, prostitutes will choose not to perform otherwise innocent activities which the first amendment protects. They know that circumstances surrounding the activities might allow an arresting officer to decide that they are sauntering on the streets with an illicit intent, regardless of what their actual intent is.

Furthermore, officers will not choose to arrest everyone who fits these criteria. Many innocent people saunter on the streets and call to friends. The officers' decision to arrest or not to arrest must instead be more arbitrary and based on their "personal predilections" against prostitutes rather than objective guidelines provided by the city. Frequently, officers will improperly decide to arrest a prostitute because her behavior is merely annoying. The ordinance "contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life-style, or their physical appearance is resented by the majority of their fellow citizens." Coates v. City of Cincinatti, 402 U.S. 611, 616 (1971).

The ordinance provides only a non-exhaustive list of a few otherwise innocent circumstances to guide the officers' decision

and leaves everything else to their discretion. This lack of standards means "that a previously convicted prostitute or panderer could stand on a public street corner or walk slowly down a public sidewalk only at the whim of any police officer." Brown V. Municipality of Anchorage, 584 P.2d 35, 37 (Alaska 1978). The ordinance "permits arbitrary and capricious law enforcement because a police officer on the street will have to decide whether the appearance or content of certain conduct manifests the specific intent to commit prostitution." Rivera v. State, 31 Fla. Supp. 2d 128, 132 (Fla. 4th Jud. Cir. 1988). The ordinance therefore fails the second prong of the void-for-vagueness doctrine.

> Where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." It results in a regime in which the poor and the unpopular [and prostitutes] are permitted to "stand on a public sidewalk . . . only at the whim of any police officer."

Papachristou V. City of Jacksonville, 405 U.S. 156, 170 (1972) (citations omitted).

The attorney general may argue that the arresting officers' discretion is reduced because the ordinance requires officers to give suspects the opportunity to explain their conduct. This provision in the ordinance, however, does not substantially limit the officer's options. "[T]he officer is not required to accept any particular type of explanation or to give any one any weight. Only the opportunity to explain is required; once it is afforded,

the person may be arrested regardless of the content of the explanation." Coleman v. City of Richmond, 364 S.E.2d 239, 244 (Va. App. 1988). Consequently, this provision does not save the constitutionality of the ordinance.

The district court below argued that, because the ordinance was more specific than Florida's loitering law, § 856.021, Fla. Stat, (1973), and because this court upheld section 856.021 against a vagueness challenge in State v. Ecker, 311 So.2d 104 (Fla. 1975), the Tampa ordinance likewise was not vague. Petitioner disagrees that the Tampa ordinance is more specific. Like section 856.021, the ordinance merely lists some circumstances which officers can consider to determine whether the loitering law is violated. The circumstances in the ordinance are no more specific than those in the statute.

The critical difference between the ordinance and the statute, however, is the ultimate fact which the listed (and unlisted) circumstances are expected to prove. Florida's loitering statute requires an objective showing of an objective fact, i.e., that the public safety is threatened. This statute "plainly reaches the outer limits of constitutionality and must be applied by the courts with special care so as to avoid unconstitutional applications." D. A. v. State, 471 So.2d 147, 153 (Fla. 3d DCA 1985). It strikes a "delicate balance" between protecting the rights of people walking the streets and protecting the rights of citizens from imminent criminal danger. Ecker, 311 So.2d at 107.

By contrast, the Tampa ordinance requires a subjective showing of a subjective fact, i.e., that the officer subjectively believes that a known prostitute has an illicit state of mind. The ordinance fails to strike a delicate balance between the competing interests and goes over the line of constitutionality. The potential for abusive and arbitrary enforcement in allowing officers to make guesses about the state of mind of prostitutes walking on the streets is evident. When this potential for abuse is made part of a loitering statute, which by its nature is inherently suspect, the ordinance becomes unconstitutional. Loitering laws are unconstitutional unless they are used for objective purposes which substantially limit their application. By referring to Ecker (in which the likelihood of subjective enforcement was substantially less), the district court misapprehended the nature of the void-for-vagueness doctrine, which focuses not only on the clarity of a law's provisions and notice to citizens of its terms but also on the potential for arbitrary enforcement and its affect on the actions that citizens choose to perform.

Tampa ordinance 24-61(A)(10) violates the void-for-vagueness doctrine by permitting arbitrary and discriminatory law enforcement against prostitutes and by persuading prostitutes to curtail activities which the first amendment protects. Accordingly, this court should rule that the ordinance is unconstitutional.

ISSUE III

THE ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE SAUNTERING DOWN THE STREETS UNDER CIRCUMSTANCES MANIFESTING A PURPOSE TO OFFER OR SOLICIT PROSTITUTION IS NOT A CRIME-

As argued in Issue I, Tampa ordinance 24-61(A)(10) was carefully written to require proof only of circumstances and not of an actual evil intent. If the drafters of the ordinance had intended to require proof of an evil intent, they would have said so. The ordinance thus forbids sauntering or idling (loitering) on the street under circumstances which suggest an illicit intent, even though such an intent may not in fact exist. Consequently, it is inconsistent with substantive due process, because it can penalize activity which is not a crime. Under this ordinance, a prostitute is guilty merely for appearing in public under suspicious circumstances, despite a complete lack of evil intent.

The ordinance can thus be applied to "entirely innocent activities." Robinson v. State, 393 So.2d 1077, 1078 (Fla. 1980). The ordinance "causes activities which are otherwise entirely innocent to become criminal violations, Without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose . . . ." State v. Walker, 444 So.2d 1137, 1140 (Fla. 2d DCA 1984), affirmed and lower court opinion adopted, State v. Walker, 461 So.2d 108 (Fla. 1984). "Such an exercise of the police power . . . violates the due process clauses of our federal and state constitutions." State v. Saiez, 489 So.2d 1125, 1129 (Fla. 1986).

Even if the ordinance is interpreted to require proof of an intent to commit prostitution, it still fails to state a crime. Suppose hypothetically that a prostitute was sauntering or idling (loitering) on the street, and the police arrested her for loitering because she told another person earlier that she planned to commit prostitution that day. When arrested, she admitted that she intended to flag down passing motorists for the purpose of soliciting customers for her trade. The circumstances therefore showed that she had the intent to commit prostitution, and she did violate the prostitution loitering ordinance. She had not yet, however, performed any overt act that revealed what she planned to do.

This proof only of a mental state without any accompanying overt act failed to prove a crime.

> One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of an act, or of an omission to act where there is a legal duty to act, is required too. To wish an enemy dead, to contemplate the forcible ravishment of a woman, to think about taking another's wallet -- such thoughts constitute none of the existing crimes (not murder or rape or larceny) so long as the thoughts produce no action to bring about the wished-for results.

LaFave and Scott, Substantive Criminal Law, § 3.2, p. 273 (West 1986).

Because the law requires an overt act as a prerequisite for the existence of crime, merely walking on the street while entertaining the intent to solicit for prostitution constitutes preparation for crime and is not a crime itself.

> Conceivably, a person could intend to solicit another to commit a crime and could take steps to approach that person in order to effect the solicitation, but be thwarted from actually soliciting. But these would constitute acts of "mere preparation" that may not be criminalized even under the attempt provision.

Brown v. State, 550 So.2d 142, 143 (Fla. 1st DCA 1989). Mere preparation for crime cannot be criminalized until some overt act occurs which begins the consummation of the crime.

> Preparation generally consists of devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after preparations are completed. The act must reach far enough toward accomplishing the desired result to amount to commencement of the consurnmation of the crime. Some appreciable fragment of the crime must be committed. . . .

State v. Coker, 452 So.2d 1135, 1136 (Fla. 2d DCA 1984).

Thus, merely having an unlawful intent is not a crime. The unlawful intent must be coupled with an overt act before it can be criminalized. The prostitute in the above hypothetical did not do anything overt yet, She had only walked or idled (loitered) on the street, but this action was not overt, was no more than mere preparation for the crime, and was in fact constitutionally protected as an important amenity of life. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)' Nevertheless, under the circumstances, this conduct violated Tampa ordinance 24-61(A)(10). The ordinance therefore unconstitutionally prohibits conduct which is not a crime, because it does not require proof of any overt act.

> The [ordinance] fails to require the loitering to be coupled with any other overt conduct. Rather, the loitering need only be coupled

> with the state of mind of having "the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse." We . . . hold that . . . [the ordinance] does not satisfy constitutional due process requirements.

People v. Gibson, 521 P.2d 774, 775 (Colo. 1974).

Loitering laws may not constitutionally be used as a means of nipping crime in the bud before it actually occurs. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972). Otherwise, loitering laws could be used to criminalize all outdoor preparation to commit crime. Loitering laws could easily be written to forbid all sauntering (loitering) on the streets with intent to commit any crime -- robbery, sexual battery, and the like -- even though the person had not yet done anything to commit it. Fortunately, the law requires proof of overt acts as well as intent. Absent overt acts, crime does not exist.

Tampa ordinance 24-61(A)(10) penalizes activity which is not a crime. Accordingly, this court should rule that it violates the substantive due process doctrine.

ISSUE IV

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

According to the Tampa ordinance, one of the circumstances relevant to a determination that a defendant is guilty of prostitution loitering is the arresting officer's knowledge that the defendant was convicted of a prostitution-related offense during the previous year. The ordinance clearly states that the defendant's status as a known prostitute is a circumstance which may be considered. Presumably, if this circumstance may be considered, then evidence of prior convictions can be introduced at trial (although no such evidence was introduced in this case).[3]

The ordinance is therefore inconsistent with section 90.610, Florida Statutes (1987), which allows evidence only of felonies or misdemeanors involving dishonesty. Prostitution is not a felony or misdemeanor involving dishonesty. Moreover, section 90.610 allows evidence only of the number of these prior convictions and not of their nature and only for impeachment purposes rather than as

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[3]The record reflects that the prosecutor was not particularly familiar with the Tampa ordinance and therefore did not ask the officer about the petitioner's prior record. (R47-48) After the officer's testimony at trial, however, he told the prosecutor that he normally did testify in his cases that the defendants he arrested under this ordinance were known prostitutes. (R48) The trial court clearly stated that the defendant's prior record was a fact which the court could consider, but that it was not proven in this case. (R48) Thus, the absence below of evidence about the petitioner's prior record was an unusual prosecutorial error that was fortuitous for the defense; it did not result from a principled decision by the prosecutor and the court to exclude it as evidence.

substantive evidence. Fulton v. State, 335 So.2d 280 (Fla. 1976). Contrary to section 90.610, the Tampa ordinance allows testimony specifically about the nature of the defendant's prior prostitution convictions, and this testimony is substantive evidence of guilt rather than mere impeachment.

The government may use prior criminal activity as substantive evidence of guilt only under the conditions of section 90.404, Florida Statutes (1987). Under this section, evidence of a defendant's character trait is generally inadmissible to prove that she acted in conformity with it on a particular occasion. Similar fact evidence is admissible only when relevant to prove a material fact in issue; it is inadmissible when it is relevant solely to prove bad character or propensity. As this court has interpreted section 90.404,

> [t]o minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.

Heuring V. State, 513 So.2d 122, 124 (Fla. 1987).

Pursuant to Heuring, evidence of a prostitute's former convictions would be admissible in prostitution loitering cases only if the evidence showed that the collateral and charged offenses were strikingly similar and if they shared unique characteristics. The Tampa ordinance, however, allows officers and fact-finders to consider prior offenses regardless of their similarity to the present offense. This license to consider collateral offenses is

particularly egregious because the proof at trial would almost never meet Heuring's strict standard of relevance. Prostitution exists in the streets under circumstances that occur only too frequently. Consequently, it is hard to imagine any circumstances of a prior prostitution conviction that would be so unique that they would inevitably point to the defendant as the perpetrator of the charged crime. Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981).

The real purpose of introducing evidence of a defendant's status as a prostitute in prostitution loitering cases is solely to show her propensity to commit the crime. This evidence would not be otherwise relevant to any material fact in issue. This evidence of propensity would have a forcefully prejudicial impact on the finder of fact.

> [I]nviting for purposes of prostitution is commonly tried . . . by reference to circumstantial evidence. Thus, absent direct evidence of intent embracing all elements of the charged offense, a prior conviction of the same crime will have a powerful effect on the fact-finder. The likely result is a finding of intent as to the unsubstantiated elements of the crime by reference solely to the prior convictions, not to the evidence in the case on trial.

Graves v. United States, 515 A.2d 1136, 1143 (D.C. App. 1986) (citation omitted).

Furthermore, allowing use of prior convictions in prostitution loitering cases would create an unconstitutional status offense.

> [M]any of the actions used, circumstantially, to prove a case . . . are actions which many persons engage in every day without criminal implications: waving at cars, stopping pedes-

> trians, yelling various pat phrases at passers-by. Therefore a judicial gloss . . . permitting other crimes evidence to help prove intent would create a substantial danger that acts which apparently would be innocent if performed by citizens without a record of commercialized sex would become criminal acts if performed by citizens previously convicted of that crime. As a consequence, this use of a prior record of inviting for purposes of prostitution very likely would [create] an unconstitutional status offense.

Id.

A long and distinguished line of Florida cases holds that, in sexual offense cases, evidence of collateral sexual offenses is generally inadmissible. Heuring; Peek v. State, 488 So.2d 52 (Fla. 1986); Coler v. State, 418 So.2d 238 (Fla. 1982); Drake; Williams v. State, 110 So.2d 654 (Fla. 1959). Allowing an exception in prostitution loitering cases would be entirely anomalous. Petitioner doubts that even the legislature could create an exception to this court's interpretation of sections 90.404 and 90.610. The Williams rule doctrine has been in existence so long that, if put to the test, this court could properly rule that it is part of Florida's due process of law and is constitutionally protected. "Over the last three centuries this policy of exclusion of bad character evidence has received judicial sanction more emphatic with time and experience." Hodges v. State, 403 So.2d 1375, 1377 (Fla. 5th DCA 1981).

In any event, a municipality certainly cannot create an exception to sections 90.404 and 90.610. "A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly

forbidden." Rinzler v. Carson, 262 So.2d 661, 668 (Fla. 1972). Yet an exception to sections 90.404 and 90.610 is exactly what the Tampa ordinance creates. It authorizes finders of fact to consider a prostitute's prior record, in direct contravention to this court's interpretation of the two statutes. Florida's statutes have preemptive control over municipal ordinances on this subject, and a municipal law like Tampa ordinance 24-61(A)(10), which allows evidence at trial of a defendant's prior record and thereby usurps the legislative prerogative, is unconstitutional.

The attorney general may argue here that, according to the Tampa ordinance, a prostitute's prior record is only relevant to an officer's decision to arrest and need not be admissible at trial. This argument, however, raises the specter that officers could arrest a prostitute based primarily on their knowledge of her status as a prostitute, even though they know that the case can never *go* to trial because her actions will appear innocent to the fact-finder absent proof of her prior record. Officers could then use the ordinance as a means of harassing prostitutes and removing them temporarily from the streets, regardless of the likelihood of conviction. Temporary removal of prostitutes from the streets (for example, when the Super Bowl comes to Tampa) may be the actual purpose of the ordinance in any event. If, however, the ordinance allows officers, without hope or desire of eventual conviction, to treat prostitutes differently from other suspects and to arrest them primarily on the basis of their status as prostitutes, the ordinance is patently unconstitutional. Robinson v. California, 370

U.S. 660 (1962) (persons may not be punished solely because of their status as drug addicts).

The Florida legislature has preempted local ordinances that allow evidence of prior convictions to be used at trial. Accordingly, this court should rule that Tampa ordinance 24-61(A)(10), which does allow evidence of prior convictions, unconstitutionally authorizes what the legislature forbids.

ISSUE 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.

In State V. Ecker, 311 So.2d 104, 109 (Fla. 1975), this court held that an arrest for loitering under section 856.021, Florida Statutes (1987) is permissible only when "a breach of the peace is imminent or the public safety is threatened." In B. A. A. V. State, 356 So.2d 304, 306 (Fla. 1978), which had facts similar to the instant case, this court said that section 856.021 is a "specific prohibition against specific conduct." It could not be used as a catchall provision to detain citizens when the evidence was insufficient "to sustain a conviction on some other charge." Id. This court then said in a footnote that

> the arresting officer believed the juvenile was offering to commit prostitution, a misdemeanor. If there was evidence of such solicitation, it should have been charged against her. But the record here does not establish that there was a reasonable alarm for the safety of persons or property in the vicinity, the second element necessary to sustain a charge of loitering.

Id. at 306 n.*.

In other words, this court said that when the police think the defendant is prostituting herself, they should charge her with prostitution rather than loitering. Loitering requires proof of a reasonable alarm for the safety of others. Offers to commit prostitution, however, do not create this reasonable alarm. This

court's argument therefore supported petitioner's point in Issue I that existing prostitution laws adequately address the evil which the Tampa prostitution loitering ordinance seeks to prevent. As petitioner argued in Issue I, Tampa's ordinance is therefore unnecessary, and, because it also unnecessarily affects first amendment rights, it is unconstitutionally overbroad.

Furthermore, by holding that loitering requires proof that the public safety is threatened and holding that loitering should not be charged as a substitute when the evidence is insufficient to prove actual prostitution or solicitation, this court preempted municipal ordinances -- like Tampa ordinance 24-61(A)(10) -- which allow convictions for prostitution loitering even when the evidence does not show actual prostitution or solicitation and does not show that the public safety is threatened. A loitering "enactment can be upheld only if it proscribes conduct which threatens the public safety or constitutes a breach of the peace." Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980).

Because the Tampa ordinance does not require proof that the public safety is threatened and allows conviction for loitering under circumstances in which this court has said that prostitution should be charged instead, this court should rule that the ordinance is unconstitutional. A municipality lacks the power to contradict clear rulings of this court.

ISSUE VI

THE MAXIMUM SIX MONTH PENALTY FOR PROSTITUTION LOITERING IS ILLEGAL.

According to the Tampa city attorney, a complete copy of the municipal ordinance is in the record. (R196) The penalty provision chosen by the city attorney for inclusion in the record was Tampa ordinance 1-6, which is a general penalty that applies when no specific penalty is provided. (R195) This penalty allows imprisonment for a term of six months or less.

Loitering for the purpose of prostitution is less serious than actual prostitution, because the latter requires proof of actual prostitution or solicitation while the former requires proof only that the person is sauntering around town with the mere intention of committing one of these crimes. Nevertheless, the latter is only a second degree misdemeanor punishable by a maximum of *sixty* days in jail, § 796.07(5), Fla. Stat. (1987); § 775.082(4)(b), Fla. Stat. (1987), while the former is punishable by a maximum of six months in jail. A similar conclusion applies to loitering that threatens public safety under section 856.021, Florida Statutes (1987), which is also a second degree misdemeanor. Loitering that threatens public safety is seemingly more serious than loitering for the purpose of prostitution, and yet it has a less serious penalty.

An ordinance penalty cannot exceed that of state law. Edwards v. State, 422 So.2d 84 (Fla. 2d DCA 1982); Rivera v. State, 31 Fla. Supp. 2d 128, 133 (Fla. 4th Jud. Cir. 1988). Accordingly, this

court should rule that the penalty for violations of Tampa's prostitution loitering ordinance is unconstitutional, because it exceeds that which state law provides for similar or more serious offenses.

ISSUE VII

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONCLUSION THAT THE PETITIONER WAS LOITERING FOR THE PURPOSE OF PROSTITUTION.

According to State v. Law, **559 So.2d 187, 188-89 (Fla. 1989),**

> [a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. . . . The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

This court in Law considered each hypothesis of innocence presented by the defense to determine whether the state had presented evidence inconsistent with it. This court should apply the same procedure to the defense hypothesis presented in this case.

The state's evidence showed that, about 9 p.m., the petitioner was standing near Nebraska and 12th Avenue in Tampa and wearing a black lingerie teddy and brown high-heeled shoes. (R17-18) She waved and yelled at passing cars for twenty to thirty minutes. **(R18-19)** She talked to the occupants of one car for a few minutes before it drove away. (R19-20) Another car with a male driver stopped, and she entered the car. **(R20)** When arrested, she was given an opportunity to explain her conduct. **(R42)** She testified that her teddy -- similar to a bathing suit -- and high heels were her usual dancing attire. **(R52-53,** 65) She stopped a friend, because he would buy her food, **(R53)** Defense counsel argued at the motion for judgment of acquittal that the state's evidence failed

to show that any sex or prostitution was intended. (R46, 81) The court ruled, however, that walking up and down the streets in a black teddy and high heels, waving at cars, and entering a car that stopped was sufficient evidence to make the issue a jury question. (R48, 81)

If, as argued in Issue I of this brief, Tampa ordinance 24-61(A)(10) does not require proof of intent and requires proof only of suspicious circumstances, then the trial court correctly denied the motion for judgment of acquittal. Petitioner cannot argue that the circumstances of this case were not suspicious. If this court rules, however, that the ordinance requires proof of specific intent, then the trial court should have granted the motion for acquittal, because the evidence failed to prove intent beyond a reasonable doubt.

The defense hypothesis of innocence in effect was that the petitioner was a free spirit. The constitution protects the rights of "nonconformists" and encourages "lives of high spirits rather than hushed, suffocating silence." Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). Same nonconformists do in fact wear attire similar to bathing suits to go dancing and might call to passers-by on the streets without the intent to prostitute themselves.

This hypothesis of innocence was not unreasonable, particularly because the conduct in question was facially protected by the first amendment. The first amendment allows people to yell and wave at passing cars as much as they want. See Brown v. State, 358

So.2d 16 (Fla. 1978) (government cannot constitutionally prohibit vulgar and indecent language). Conduct subject to constitutional protection must be carefully scrutinized before the courts can call it a criminal act. Wearing black lingerie similar to a bathing suit in public also was not a crime, absent more evidence than was presented in this case. (Those who think otherwise should go to the Clearwater beach on a Saturday afternoon.)

The evidence in this case was not substantially different from the evidence in B. A. A. v. State, 356 So.2d 304 (Fla. 1978). In B. A. A., an officer warned a juvenile to leave the streets, but she did not do so. The officer saw her approach cars approximately forty times and talk to the drivers, This court found that this evidence was not enough to sustain a conviction under Florida's loitering statute. It should likewise not be enough to sustain a conviction under Tampa's loitering for prostitution ordinance. Accordingly, this court should rule that the evidence failed to prove the charged offense.

ISSUE VIII

BECAUSE THE PETITIONER IS DEAD, THIS COURT SHOULD ABATE ALL OF THE PETITIONER'S CONVICTIONS.

This court decided to consider this case despite the fact that the petitioner is now dead. This decision was consistent with Nelson v. State, 490 So.2d 32, 33 n.1 (Fla. 1986) and State v. Suarez, 485 So.2d 1283, 1283 n.* (Fla. 1986), in which this court ruled on the issues because they were interesting and important, even though the appellant in those cases was dead or facing a death sentence in another case. Undersigned counsel agrees that the issues in this case are interesting and important and should be decided. Because the petitioner is dead and her appeal is still pending, however, this court should also issue an order permanently abating all of her convictions in the trial court ab initio. Kearns v. State, 536 So.2d 1187 (Fla. 5th DCA 1987).

CONCLUSION

Petitioner asks that Tampa ordinance 24-61(A)(10) be ruled unconstitutional and that her convictions be vacated.

APPENDIX

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.

KEY NUMBER SYSTEM

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

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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.),

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, sod-

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ion.. The jury found the defen-
of loitering for the purpose of
, battery of a law enforcement
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trial court sentenced the defen-
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fense, two years' imprisonment
sting offense, and five years'
nt on the battery offense. The
nces were consecutive to each
oncurrent to the ordinance sen-
, the total sentence fell within
ended guidelines range of five
to seven years' imprisonment.

ppeal, the defendant argues
ordinance prohibiting loitering
ose of prostitution is facially
nal.[1] Although a federal dis-
as held a similar Jacksonville
constitutional, the Florida Su-
has repeatedly upheld a less
loitering statute. § 856.021,
9); *compare Johnson v. Car-*
pp. 974 (M.D.Fla.1983) *with*
te, 463 So.2d 205 (Fla.1985)
Ecker, 311 So.2d 104 (Fla.),

public in a manner and under
es manifesting the purpose of in-
cing, soliciting, or procuring an-
mmit 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

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Peggy Quince, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of July, 1991.

Respectfully submitted,

Steve Krosschell

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

STEPHEN KROSSCHELL
Assistant Public Defender
Florida Bar Number 351199
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

SK/mlm