OA 11-4-94

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JAMES W. COX,
Petitioner,

v. CASE NO: 82,967

STATE OF FLORIDA, DEPARTMENT OF
HEALTH AND REHABILITATIVE SERVICES,
Respondent.
_____/

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

ANTHONY N. DeLUCCIA, JR.
Florida Bar #216569
District Legal Counsel
STATE OF FLORIDA, DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES
Post Office Box 60085
Fort Myers, Florida 33906
(813) 338-1427

ATTORNEY FOR RESPONDENT

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PRELIMINARY STATEMENT

The Petitioner, JAMES W, COX, will be referred to in this answer brief as "Petitioner". The Respondent, State of Florida, Department of Health and Rehabilitative Services, will be referred to as "the Department of Health and Rehabilitative Services (HRS)". All other parties, for purposes of clarity, will be referred to by use of full descriptive titles or names.

SUMMARY OF ARGUMENT

The decision to adopt an unrelated child is distinguishable from those decisions concerning marriage, procreation, contraception or family relationships which are protected by the right to privacy. Adoption is a statutory privilege. The Florida Adoption Act denies eligibility to adopt if an applicant is a homosexual. There is no statutory definition. HRS is the state agency authorized to place minors for adoption. Its position is that it does not place minor children with persons currently engaged in homosexual conduct. HRS maintains that by limiting its decision "current conduct" it can protect the minor's best interests and well-being. This limited definition to the term "homosexual" supplies a statutory construction which is understood by an average person of common intelligence. Therefore, it is not vague.

Petitioner acknowledged that HRS has a compelling state interest to protect the best interests of children and that he was engaged in an intimate relationship with another man. Therefore, since adoption is not a constitutionally protected right, and current homosexual activity is subject to criminal penalty, HRS had a legitimate governmental purpose to deny his adoption application for the best interest of the child.

Petitioner has not met his burden under the rational basis standard to overcome the presumption of constitutionality.

ISSUE I

The District Court Appropriately Applied Federal And State Constitutional Principles To Correctly Determine All Matters At Issue

A. The Right of Privacy

In its analysis of Petitioner's right of privacy under our state constitution, the district court held that privacy is a fundamental right. Governmental intrusion into a person's privacy must serve a compelling state interest.

Acknowledging evolution of the limits of the privacy right, the court enumerated its known application to:

1) protection of a person from public disclosure of personal matters;

2) prohibition of unwarranted governmental inquiry concerning private matters;

3) creation of a zone of autonomy protecting personal decisionmaking.

Department of Health and Rehabilitative Services v. Cox, 627 So2d 1210, 1216 (Fla. 2d DCA 1993).

The Petitioner voluntarily disclosed to HRS on his adoption application that he was homosexual. Because the information was voluntarily disclosed and the files and proceedings involving adoptions are confidential the district court held that this was not a public disclosure case.

Regarding "unwarranted governmental inquiry" the district court found that because Petitioner agreed that inquiry concerning his homosexuality should be considered by HRS, there was no governmental intrusion.

Regarding the "zone of autonomy protecting personal decisionmaking", the Petitioner argues that the statute denies him the privilege to become an adoptive parent because of his intimate relationship with another man. Thus, the statute burdens his right of privacy regarding personal decisionmaking. Further, excluding all homosexuals from

becoming adoptive parents undermines the state's interest in promoting the well-being of children and providing them with a permanent family life.

In this area of social legislation the court must be especially careful of its constitutional duty to interpret the law rather than legislate by judicial fiat. Judicial restraint should be exercised where the legislature engages in a process of line drawing. Only in cases where the statute impinges on a fundamental right should the court declare the statute invalid. **Federal Communications Commission v. Beach Communications, Inc., ___ US___ 113 SCT 2096 at 2102 (1993).**

Adoption is a legal relationship which was unknown at common law. **Matter of Adoption of Robert Paul P. 471 N.E. 2d 424 (Ct. of App. 1984).** It is a statutory privilege and not a right. **Hamilton v. Beard, 490 So2d 1297 (Fla. 2d DCA 1986).** Adoption of an unrelated child inherently cannot be accomplished without the participation and approval of the state or an entity regulated by the state. It is submitted that adoption is distinguished from marriage, procreation, contraception or family relationships, which are protected by the Florida right to privacy. **Winfield v. Division Pari Mutual Wagering; Department of Business Regulation, 477 So2d 544, 546 (Fla. 1985).** "A person who asks the state for the privilege to adopt does not have a fundamental right arising from an existing relationship." **Cox at 1216.** Thus, the privilege to adopt is not protected by the right to privacy concerning personal decisionmaking.

In order to properly analyze how an adoption is effected, the roles of the parties must be scrutinized. Because it is purely statutory the legislative purposes and mandates must be strictly observed. In Florida adoption of an unrelated child involves three parties: (1) the prospective parent, or applicant, (2) the placement agency which may be an intermediary, a state-licensed child placing agency, or the department (HRS), and (3) the child. Because the Petitioner applied to HRS, this argument will refer to HRS only. However, these principles should be equally applicable to the other state regulated entities.

A brief recitation of the facts must be resorted to elucidate the issues which confronted HRS in this matter. In 1991, the Petitioner and another male individually applied to adopt a special needs child from HRS. At registration to attend pre-adoption parenting classes, each disclosed his homosexuality voluntarily and that both lived together. HRS then denied each application based upon the applicant's homosexuality.

At the district court HRS argued that it interpreted the term "homosexual" in the statute to be limited to voluntary homosexual activity or conduct by an applicant as causing ineligibility to adopt. The district court applied the principle that a court must construe a statute to uphold its constitutionality, **Corn v. State, 332 So2d 4 (Fla. 1976)**, and held that the HRS reasonably construed the statute. **Cox at 1214.** Therefore, the lack of legislative definition did not render the statute unconstitutionally vague.

The denial of Petitioner's adoption application was consistent with the legislative purpose when viewed from the child's perspective: The children who are placed into HRS custody by the juvenile court have been mistreated or neglected. **Sec. 39.469(2)(b), Fla. Stat. (1993).** The legislative purpose of Chapter 39 is to "assure to all neglected or mistreated children [are provided] the care, guidance and control... which would best serve the moral, emotional, mental and physical welfare of the child and the best interests of the state." **Sec. 39.001(2)(d), Fla. Stat. (1993).** It is submitted that the legislative intent of Chapter 39 further defines the intent language of the Florida Adoption Act, concerning the promotion and protection of well-being of children being adopted. **Sec. 63.022(1), Fla. Stat. (1993).** Support for this argument is evidenced by the statutory guardianship created between HRS and a child permanently committed for subsequent adoption. **Sec. 63.052(2), Fla.. Stat. (1993).** By creating this surrogate relationship, the legislature invested HRS with the authority to protect the best interest of the child awaiting adoption in accordance with the legislative purpose. It is clear in Florida that a minor possesses constitutional rights as well as an adult. **In Re T.W. 551 So2d 1186, 1193 (Fla. 1989).** However the state "may exercise control over... children beyond the scope of its authority to control adults."

Concerning the child's right to privacy, the legislature maintains the authority to protect minors from the conduct of others. **Jones v. State, 19 Fla. L. Weekly S 280, at S 281 (Fla. May 27, 1994).** It is submitted that these principles of restraint and caution are exemplified in the exercise of judgment to place a child into a new family relationship.

At trial in this matter, the evidence submitted related to studies of parenting of natural children by declared homosexuals. One of the authors stated that there has been no systematic research regarding foster parenting and adoption by gay or lesbian parents. **Charlotte J. Patterson, Children of Lesbian and Gay Parents, Vol. 63 No. 5, Child Development P. 1029.** The author further stated that "almost no research has studied families in which gay men and lesbians have or had adopted children after coming out." **Id. at 1038.**

With such questions left unanswered, it is submitted that the legislature through the statutory guardianship granted HRS the authority and responsibility to protect the child's best interest and decline adoptive placement with parents who engage in current homosexual activity.

The Petitioner having agreed that the state interest in protecting the best interest of children is compelling, **Petitioner's brief at P. 21,** coupled with the fact that he voluntarily informed HRS of his current homosexual conduct, provides a rational relationship between protecting and promoting the child's well-being and providing a child with a permanent stable family life.

In his concurring opinion Justice Grimes succinctly focused the duties of the legislature and the judiciary in privacy issues. That synopsis is equally applicable to the instant case:

> Practically any law interferes in some manner with someone's right of privacy. The difficulty lies in deciding the proper balance between this right and the legitimate interest of the state. As the representative of the people, the legislature is charged with the responsibility of deciding where to draw the line. Only when that decision clearly transgresses private rights should the court interfere. **T.W. at 1204.**

Alternatively the Petitioner argues that a privilege may not be conditioned upon relinquishment of a constitutional right. He cites **Kurtz v. City of North Miami, 625 So2d 899 (Fla. 3d DCA 1993) rev. pend.** for this principle. It is submitted the **Kurtz** is distinguishable because the regulation infringed on lawful conduct (smoking) unrelated to job function in which the applicant could engage away from the job. *Cf.* **Grusendorf v. City of Oklahoma City, 816 F2d 539 (10th Cir. 1987), Kelly v. Johnson, 425 U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976).** In the instant appeal, intimate conduct with another man which is argued as protected by privacy, is subject to criminal prosecution. **Sec. 800.02, Fla. Stat. (1993).** Homosexual activity is not a fundamental right. **Bowers v. Hardwick, 478 U.S. 186 at 192, 106 S. Ct. 2841 at 2844, 92 L. Ed. 2d 140, at 148 (1986).**

Further, this appeal is distinguishable because it involves the protection of the best interest of the child to be balanced against the desire to become an adoptive parent.

Petitioner next argues that a nexus approach should be used to determine suitability to adopt. This approach mandates individualized determination in order to determine whether a prospective adoption placement will be suitable for a child. The nexus approach invites intrusion into the privacy of both the adult prospective parent and the child. It is the position of HRS that by permitting adoption by only those adults who are not currently engaging in homosexual activity, is a lesser intrusive method than the nexus approach in its surrogate exercise of the state's interest to protect the child. Moreover, it is reasonable and prudent when viewed to protect the child.

Lastly, the Petitioner asserts that the statute is vague and based upon prejudice. With regard to the vagueness argument, the limitation of the definition of the term "homosexual" to current homosexual activity or conduct, it is submitted, can be understood by a person of average common intelligence.

Homosexual conduct has been subject to criminal penalty and is firmly rooted in Judeao-Christian morals and ethical standards. At first homosexual conduct was under the jurisdiction of the ecclesiastical court. Later it was transferred to the King's Courts in

England at the time of the English Reformation. Thereafter, the common law punished homosexual conduct as a crime. **See concurring opinion of C.J. Burger in Bowers v, Hardwick.** The common law has been made part of the law of Florida by statute. **Sec. 2.01, Fla. Stat. (1993).** Today homosexual conduct is still a crime in Florida. **Sec. 800.02, Fla. Stat. (1993).**

Therefore, to hold that the Florida Adoption Statute as interpreted and applied by HRS is prejudiced would require ignorance of the common law and a current criminal statute based thereon. It is submitted that this decision is more appropriately within the province of the legislature.

B. Due Process

The Petitioner argues that the statute violates his liberty under due process. The narrow liberty interest claimed to be deprived to homosexuals is the right to apply for adoption. The procedure which denies due process is by creation of an irrebuttable presumption.

At first blush Petitioner's argument is cogent. However, when scrutinized under constitutional principles, its strength is sapped. Key to this analysis is the definition of the term "homosexual". The statute lacks a definition. HRS has maintained a position that the term "homosexual" should encompass only current homosexual activity or conduct, in other words "currently practicing homosexuals". The district court applied two principles enunciated by this Court: 1) a reasonable construction of a statue by an agency charged with its administration is entitled to great weight, and 2) if possible, a court must construe a statute in a manner which upholds its constitutionality. By limiting the definition of the term "homosexual" to current conduct there is no absolute prohibition to adoption by all homosexuals. The district court recognized a distinction between homosexual orientation and homosexual conduct. **Cox at 1214, 1215.**

It is submitted that this interpretation of the statute does not presumptively forbid adoption by all homosexuals, and therefore is not violative of constitutional due process.

C. **Equal Protection**

The appropriate standard of review for equal protection analysis is dependent upon whether it discriminates against a suspect class of persons or violates a fundamental right. Strict scrutiny review is applied to these violations. The district court held that neither the statutory privilege to adopt nor the choice to engage in homosexual activities involves a fundamental right. **Cox at 1218.** Federal cases have been persuasive concerning equal protection analysis. **Ostendorf v. Turner, 426 So2d 539 (Fla. 1982).** Neither homosexual orientation nor homosexual conduct has been determined by federal courts to be a class requiring strict scrutiny review. **(Citations omitted, See Cox at 1219).**

In order to establish strict scrutiny review, Petitioner claims the statute infringes on his fundamental right of privacy.

As discussed earlier, adoption of children is an especially sensitive subject. On the one hand, the state has the responsibility to protect the minor from the conduct of others. **Jones v. State** *supra.* The statutory privilege to adopt, **Hamilton v. Beard, 490 So2d 1297 (Fla. 2d DCA 1986)** is not equivalent to marriage, procreation, contraception, family relationship and child rearing, and education, all of which are protected by the right of privacy. **Winfield at 546.** The United States Supreme Court distinguished acts of homosexual conduct because it has no connection between family, marriage or procreation. Not all private sexual conduct between adults is constitutionally protected. Therefore, the decision to engage in homosexual activity is not a fundamental right. **Bowers v. Hardwick, 478 U.S. 186 at 192, 106 S. Ct. 2841 at 2844, 92 L. Ed. 2d 140, at 148 (1986).**

In order to carry out its competing duties of maximization of placement of children awaiting adoption, and protecting the minor's right to privacy, HRS limits the term "homosexual" in the statute to current conduct. Such activity by the adult would conflict with the compelling interest of the state to promote the child's well-being. It should be noted that the net result of the HRS definition does not target persons who are homosexually oriented but do not engage in current homosexual conduct, nor does it

establish an irrebuttable presumption that all person who are homosexually oriented are unfit parents. It merely permits HRS to place children for adoption with persons who do not engage in current homosexual conduct.

> Even though a connection between [parental fitness and current homosexual conduct] is not proved, a legislature can determine such connection exists and act on it to protect the social interest in order and morality. Moreover, even if a legislative enactment reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions that is not sufficient reason to find that statute unconsitutional. **Stall v. State, 570 So2d 257 at 260, 261 (Fla. 1990).**

It is submitted that the Petitioner has not borne the burden of showing that the legislative intent is either irrational or unconstitutional. Therefore the state is not obligated to produce evidence to provide a rational basis for its classification. "[E]qual protection does not demand for purpose of rational basis review that a legislature... articulate at any time the purpose or rationale supporting its classification." A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. **Federal Communications Commission v. Beach Communications, Inc., ___ US ___ 113 SCT 2096 at 2102 (1993).**

ISSUE II

The First District Court of Appeal Discussed The Appropriate Scope Of Proceedings On Remand Where a Case Is Reversed For Lack Of Evidence.

When a cause is reversed for lack of evidence, a new trial cannot be awarded on the theory that some additional evidence might have been available at the former trial and will be presented on retrial, or that some such evidence may be found and will be presented on retrial, and that in either event there may be a different result upon retrial. Absent very limited exceptions which do not appear in this case, we indulge a conclusive presumption that the litigants have presented all available, competent and material evidence supporting their cause; and failure to do so is at their election and risk. Any other rule would only lead to chaos. **Anderson v. Anderson, 617 So2d 1109 at 1112 (Fla. 1st DCA 1993).**

CONCLUSION

For the above reasons it is submitted that the desicion of Jthe District Court of Appeal should be affirmed.

Respectfully submitted,

ANTHONY N. DeLUCCIA, JR.
Attorney for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this _____ day of July, 1994, to: **DORIS A. BUNNELL, ESQUIRE,** 608 15th St. W., Bradenton, Florida 34205; **NINA E. VINIK,** American Civil Liberties Union Foundation of Florida, 225 N.E. 34th Street, Suite 102, Miami, Florida 33137; **MARC E. ELOVITZ, ESQUIRE, & WILLIAM B. RUBENSTEIN, ESQUIRE,** American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York 10036; **MARIA RODRIGUEZ, ESQUIRE,** Farella, Braun & Martel, 235 Montgomery Street, 30th Floor, San Francisco, CA 94104; **JOHN M. RATLIFF, ESQUIRE,** Children First Project, Legal Services of Greater Miami, Inc. Post Office Box 871189, Miami, Florida 33137; **WILLIAM E. ADAMS, JR., ESQUIRE,** NOVA Southeastern University, Shepard Broad Law Center, Civil Law Clinic, 3305 College Ave., Fort Lauderdale, Florida 33314.

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

ANTHONY N. DeLUCCIA, JR.
Florida Bar #216569
District Legal Counsel
Post Office Box 60085
Fort Myers, Florida 33906
(813) 338-1427
Attorney for Respondent