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STATEMENT OF THE CASE AND FACTS

The state seeks appellate review of a decision of the District Court of Appeal, Fifth District, which expressly declared invalid a portion of the state wiretap statute. §934.07 Fla. Stat (1991). This court has jurisdiction. Art. V, § 3(B)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(ii).

The district court's decision relates the facts<sup>1</sup> as follows:

"This matter arose out of an investigation conducted by Agent William McQue of the Orlando Police Department, who was acting as a special investigator for the Metropolitan Bureau of Investigation. McQue was investigating an alleged prostitution ring operating in Orlando. Through physical surveillance, undercover police investigation and confidential informants, McQue had cause to believe appellees were engaged in prostitution and related crimes. However, McQue believed that he could not obtain the evidence necessary to prosecute these individuals without using wiretap surveillance. As such, pursuant to section 934.09(1)(a) of the Florida Statutes, McQue filed an affidavit and application for an order authorizing the interception of wire, oral and electronic communications. After considering the application, the court issued an order authorizing the State to install and use a wiretap device on certain telephone numbers

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<sup>1</sup> The record on appeal as originally filed had missing pages, and was confusing. A supplemental record at pages 273-334 contains a complete copy of all of the pleadings necessary for resolution of this appeal.

including those listed in the name of appellee Rivers' husband and three escort businesses that Rivers operated.

"As a result of the intercepted communications, the State charged all of the appellees with violations of section 895.03, Florida Statutes (1991) (RICO), a first degree felony, and section 796.07(3)(a), Florida Statutes (1991)(prostitution), a misdemeanor. Additionally, two of the appellees were charged with violations of section 796.07(2)(d), Florida Statutes (1991)(directing or transporting for the purpose of prostitution), a misdemeanor. Rivers was also charged with one violation of section 796.05, Florida Statutes (1991)(deriving support from the proceeds of prostitution), a third degree felony. The appellees filed motions to suppress the evidence obtained through the use of the wiretap surveillance. The court granted the motions and this appeal ensued." State v. Rivers, et al., 19 Fla. L. Weekly D 1728 (Fla. 5th DCA August 12, 1994).

The district court compared the state's wiretap statute to its "federal counterpart", 18 U.S.C. §2516(2), which permits a state to enact a statute authorizing interception for a certain enumerated offenses, "...or any other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year..." The court observed that "the key issue in this case is whether the crime of prostitution is dangerous to life, limb or property and punishable by imprisonment of more than one year." State v. Rivers, 19 Fla. L. Weekly D 1728 (Fla. 5th DCA August 12, 1994). Prostitution "arguably meets the first prong" of dangerousness to life, limb or property, held the court, but

it is misdemeanor and so fails the second prong. The the felony of deriving proceeds from prostitution "meets the second requirement, (but) it fails to meet the first because it is not 'dangerous to life, limb or property.'" Id. Nor could the state rely on the first degree felony of RICO because the application for an order authorizing interception of wire, oral and electronic communications sought permission to intercept acts in violation of Chapter 796.

The district court affirmed the trial court's order which held:

...that to the extent that Florida Statute 934.07 permits the authorization of wiretaps to investigate prostitution not involving the use of force or any danger to life, limb, or property, or interstate commerce, it contravenes the requirements of Title 18 U.S.C. Section 2515(2). Consequently, the wiretaps used in this case are invalid and the evidence gleaned from them is hereby suppressed.

The State of Florida contends that the trial court and the district court's decision are incorrect as a matter of law where, as here, the subject of the investigation is a felony violation of the prostitution statute.

### SUMMARY OF ARGUMENT

The lower courts abused their discretion in holding that the Florida wiretap statute was unconstitutional as exceeding the scope permitted by the applicable federal statute because a prostitution-related felony is not a crime dangerous to life, limb or property. All of the evidence in this case was that prostitution is a high risk activity which increases the likelihood of contracting the AIDS virus. The Florida legislature has recognized the link between sexually transmitted diseases like AIDS and prostitution. §796.08, Fla. Stat. (1991). Additionally, the federal government permits federal law enforcement officers to intercept wire, oral or electronic communication for "prostitution offenses in violation of the laws of the State in which they are committed". This constitutes factual findings by both the state and federal legislatures that prostitution is dangerous to life, limb, or property.

Moreover, all of the appellees were charged with RICO. §895.03, Fla. Stat. (1991). Organized crime is dangerous to life, limb, or property. The legislature has included prostitution as a predicate offense of RICO, an implicit finding that when criminals combine to engage in a commercial prostitution network as is alleged in this case, the object of the criminal enterprise is dangerous life, limb, and property.

The decision under review fails to adhere to the well established principle that acts of the legislature are presumed valid and must be interpreted in a manner that upholds it whenever possible.

## ARGUMENT

THE LOWER COURTS IMPROPERLY RULED THAT THE FLORIDA WIRETAP STATUTE WAS UNCONSTITUTIONAL AS EXCEEDING THE AUTHORIZATION CONFERRED BY THE FEDERAL OMNIBUS CRIME CONTROL AND SAFE STREETS ACT.

Section 934.07, Florida Statutes, (1991), permits a court to enter an order allowing law enforcement officers to intercept wire, oral or electronic communications for investigations of

...murder, kidnapping, arson, gambling, robbery, burglary, theft, dealing in stolen property, prostitution, criminal usury, bribery, or extortion; any violation of chapter 893...896...815...847...or any conspiracy to commit any violation of the laws of the state relating to the crimes specifically enumerated above.

This statute must be read in conjunction with the federal wiretap statute, 28 U.S.C. §2516(2), which grants to states power to enact statutes to provide for wiretaps in the investigations of:

...murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses. (emphasis added)

Appellant agrees that states may enact more stringent standards regarding the use of wiretaps within its borders, but may not allow wiretapping which exceeds the boundaries of the federal statute without running afoul of the state and federal constitutions. That portion of a state statute purporting to permit wiretaps for misdemeanors or crimes not dangerous to life, limb or property is invalid and should be severed.



The state's position in this appeal is that the district court erred in holding that the felony crime of deriving proceeds from prostitution is not dangerous to life, limb or property. Cynthia Rivers was charged with the crime of deriving support from the proceeds of prostitution in violation of section 796.05, Florida Statutes (1991), a felony. It was Rivers' telephone that was tapped.

The state contends prostitution and prostitution related felonies are dangerous to life, limb or property due to Acquired Immune Deficiency Syndrome, or AIDS. Leading health organizations all agree that AIDS is a major public health problem. The record contains ample support for the proposition that prostitution is a high risk activity which greatly increases the chance of contracting the AIDS virus. The state contends that in the 1990's, prostitution is a crime which is dangerous to life, limb, and property due to the fact that it is unquestionably a high risk activity which can cause AIDS. Moreover, a traditional reason for retaining prostitution as a criminal offense is that it is associated with other crimes like robbery, extortion and other crimes which are dangerous to life, limb, or property.

The Florida legislature has recognized the link between prostitution and sexually transmitted diseases including AIDS by requiring that anyone convicted of prostitution must be tested. §796.08, Fla. Stat. (1991). This statute constitutes a factual finding by the legislature that prostitution is a dangerous crime.

Moreover, the federal government has made a legislative finding that prostitution is a proper subject of the wiretap statute.<sup>2</sup> Federal law enforcement officers are permitted to use wiretaps to investigate any business enterprise involving prostitution offenses where that business enterprise involves interstate commerce. 28 U.S.C. §2516(1); 28 U.S.C. §1952. Although this federal statute does not support Agent McQue's actions in this case, it does provide support for the state's argument that Congress has determined that prostitution and prostitution related offenses are dangerous to life, limb or property. The lower courts improperly substituted its judgment on the dangerousness of these crimes for that of the state and federal legislatures.

The state contends that the trial court erred as a matter of law in determining in the face of undisputed evidence that prostitution is a crime that is not dangerous to life, limb, or property. The trial court's requirement of a threat or use of violence is not grounded in law or fact. Dangerousness is more than overt violence.

All appellees were charged with one RICO count where the predicate offenses were prostitution. Organized crime is dangerous to life, limb, or property. It is immaterial that the predicate acts are prostitution. RICO charges can be predicated on misdemeanor crimes. State v. Adkins, 553 So. 2d 294 (Fla. 1st DCA 1989). The legislature has already determined that

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<sup>2</sup> As noted in the motion for rehearing, the district court misinterpreted the state's reliance upon this federal statute.

prostitution is a dangerous crime when criminals combine in an enterprise to further this illegal activity. §895.02(1)(a)17, Fla. Stat. (1991). Once again, the lower courts erred in substituting its judgment for the legislature on a matter of policy.

The application for the wiretap order detailed a pattern of racketeering activity involving organized prostitution as defined by this chapter such that the court abused its discretion in ruling that the wiretap application did not allege a felony crime dangerous to life, limb, or property. This case involves an organized criminal network and not a casual, one-time, consensual encounter between two adults. As the state argued below, the inclusion of some misdemeanor crimes with the valid felony offenses permitted under the wiretap statute did not invalidate the wiretap order. United States v. Savaiano, 848 F. 2d 1280 (10th Cir. 1988). The misdemeanors were mere surplusage.

The district court rejected this argument on the ground that the authorization for wiretap order stated that the object of the investigation was violations of Chapter 796. However, this places an additional requirement not present in the statute or decisional authority. The person or place to be searched or seized must be described with particularity, and there must be sufficient facts to describe a criminal offense, but no requirement that the specific criminal statute be referenced. Section 934.09(1)(b)(1), Florida Statutes (1991), requires the application to provide details as to the particular offense, and this application and supporting documentation satisfies that

requirement.<sup>3</sup> The application detailed how the businesses were set up to advance the criminal enterprise. The absence of a statutory reference to Chapter 895 does not preclude reliance upon this admittedly dangerous first degree felony crime to support the wiretap order in this case.

Appellant recognizes that the state's wiretap law cannot exceed the authority conferred by the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2516. State v. McGillicuddy, 342 So. 2d 567 (Fla. 2d DCA 1977). However, the trial court ignored the well-established legal principle that acts of the legislature are presumed valid and must be interpreted in a manner that upholds it whenever possible. Tal Mason v. State, 515 So.2d 738 (Fla. 1987) "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." Solem v. Helm, 463 U.S. 277, 290; 103 S.Ct 3001, 3009; 77 L.Ed.2d 637 (1983) A statute will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. State v. Kinner, 398 So.2d 1360 (Fla. 1981).

The legislature has recognized the connection between prostitution and sexually transmitted diseases including AIDS. §796.08 Fla. Stat. (1991) The only evidence in this case is that prostitution endangers life. Moreover, organized crime, whatever its purpose, is dangerous to life, limb, and property. The

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<sup>3</sup> The Affidavit and Application alleges that the subjects "are violating Chapter 796 of the Florida Statutes concerning prostitution and the unknown persons who are their conspirators, confederates or who are above, below, or on the same level of the criminal activity as them....(R 275)

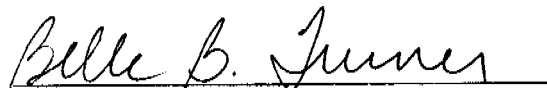
legislature has included prostitution within the predicate offenses for RICO, an implicit if not explicit finding that when organized, prostitution is dangerous. The courts below erred as a matter of law in striking the Florida wiretap statute as an unconstitutional exercise of the power conferred to the Florida Legislature.

CONCLUSION

Based upon the argument and authority presented, appellant respectfully requests this honorable court to reverse the order granting the appellees' motion to suppress and remand for further proceedings.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing initial brief has been furnished, by U.S. MAIL to Ed Leinster counsel for Appellees Rivers, Pinhal and Webster at 1302 E. Robinson Street, Orlando, FL 32802, and to Adam B. Reiss, counsel for Appellees Wiggins and Bloom, at 203 E. Hillcrest St. Orlando, FL 32801, this 31st day of October, 1994.

  
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