IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 87,105

THOMAS AYERS, :

Respondent. :

_____ :

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Appellee (Respondent), Thomas Ayers, accepts the statements of case and fact as set out by the Appellant (Petitioner), except to note the following. The prosecutor said (when reciting the factual basis of the charge that Mr. Ayers was "negligent" in babysitting two children), that:

> Basically, he allowed them to play in the rain while he slept on the couch.

(R82) The Appellee notes (as does Appellant), similar cases involving the same issue and certified question, including State of Florida v. Colleen Traversa, now before this Honorable Court as Case Number 87,106.[1] (Appellant brief, page 1.)

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[1] The consolidated opinion, appealed by the State from the Second District, also included as Appellee-Respondents, Kathleen Ruth Hammond and Alma A. Moulton, who are represented by other counsel. See, State v. Ayers *et al.*, 20 Fla. L. Weekly D2696 (Fla. Second DCA December 8, 1995).

SUMMARY OF ARGUMENT

This Honorable Court previously found Florida Statute 827.05 unconstitutional. Since then the Legislature amended the statute to target "financially able" parents who permit their children to live in an environment, in danger of being significantly impaired. But the statute *still* gives the appearance of criminalizing the "negligent treatment of children," as shown by its very title.

If the statute targets willful or culpable negligence - as the Appellant argued at one point - then it is simply a mirror image or carbon copy of §827.04. As such it is redundant; mere surplusage. As this Honorable Court has previously held, the statute cannot be used to punish "simple" parental negligence. Thus the only viable option for the Legislature - by and through §827.05 - is to create a new "intermediate level" of parental negligence. But *if* the Legislature *is* creating a new class of negligence, it must provide enough guidance, to individual prosecutors, so the statute will not be enforced in an arbitrary, capricious or discriminatory manner.

This it does not do. For one thing, the definition of "willful or culpable negligence" has been worked out over the centuries in the Common Law of England and the case law of this country. There is no such depository of decisional law by which the courts of this state can interpret and implement some new class of negligence, if that is the intent behind §827.05.

Then too, the need for such guidance is *especially* great because the statute will infringe or usurp a right "intimate to the point of being sacred;" the right to beget, bear, raise and teach

one's children as one sees fit. But, "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to *standardize its children...*" Pierce v. Society of Sisters, infra.

However laudable the legislative *ideal*, §827.05 is based on a number of flawed premises. It's based on a presumption that some "parents" - who happen to be legislators - can sit in judgment of the value judgments of other parents. The statute presupposes the *need* to standardize parental choice and responsibility. The statute - at least interpreted by Appellant - reduces the subjective good-faith belief of all parents, making such choices, to the status of "mere-ness." The statute presupposes that parenthood should be licensed and regulated, in the same manner as driving a car. The statute dilutes, diminishes or punishes a "liberal," experience-oriented style of parenting, and promotes a more conservative, more-restrictive - and some would say, more barren - style of parenting. And at bar the statute has been used to prosecute indigents - those represented by public defenders - whose financial status *should* constitute an "affirmative defense." As presently worded, it would appear the statute will have to be interpreted - eventually - so that only those parents who can afford their own attorneys can be prosecuted.

In State v. Joyce, this Court said the inherent infirmity of §827.05 is its providing that "unintentional acts or conduct *which is not the product of culpable negligence* might be proscribed by statute." The Legislature has not corrected that infirmity.

ARGUMENT

ISSUE

THE STATUTE AS AMENDED IS *STILL* UNCONSTITUTIONAL, BECAUSE IT CAN BE USED TO CRIMINALIZE A BABY-SITTER WHO TAKES A NAP, WHILE THE CHILDREN IN HIS CHARGE "PLAY IN THE RAIN."

Under the statute as amended, prosecutors can charge a baby-sitter or other "parent" who lets his children play in the rain, as he naps on a couch.[2] No more eloquent argument could be made against this statute than those simple facts.

In State v. Joyce, 361 So. 2d 406, 407 (Fla. 1978), this Honorable Court said the infirmity of the former Chapter 827.05 was its holding that "unintentional acts or conduct which is *not* the product of culpable negligence might be proscribed by statute.[3]" Based on the facts of the instant case, the same finding is warranted on the amended §827.05; it *still* criminalizes "negligent treatment of children," as shown by its very title.

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[2] The Second District added that Mr. Ayers admitted not feeding the children for the "two or three hours he had been baby-sitting," and that the children were "wet and soiled" (presumably after playing in the rain). See State v. Ayers *et al.*, 20 Fla. L. Weekly D2696 (Fla. Second DCA December 8, 1995). Further, the Court recited that the cribs were broken and unsafe, the mattresses soiled, and no food was in the apartment for the children. Id.

The record below does *not* show whether the parent(s) were charged for the situation in question, or why the baby-sitter was charged in addition to or instead of those parent(s). The parent(s) may have been financially "un-able," but that would not explain why a baby-sitter was charged for home-conditions that would not appear to be his responsibility. The fact that a baby-sitter *was* charged for such conduct simply affirms that the statute is vague, and subject to arbitrary and capricious prosecution.

[3] Emphasis added.

Despite some minor changes in language, the statute remains unconstitutional. And, it seems that in producing §827.05, the Legislature is trying to create a new "intermediate" class of negligence: trying to punish something *less* than the willful or culpable negligence already punished by §827.04, yet trying to punish something *more* than the "simple negligence" that cannot - at least according to this Honorable Court - lawfully be made a crime.

In State v. Winters, 346 So. 2d 991 (Fla. 1977), this Court ruled the former §827.05 unconstitutionally vague, indefinite and overbroad. As presently worded, §827.05 is identical to that unconstitutional statute, except for the highlighted words:

> Whoever, *though financially able*, negligently deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment *or permits a child to live in an environment, when such deprivation or environment causes the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired* shall be guilty of a misdemeanor of the second degree...

(Emphasis added.) Thus - among other things - a plain reading of the statute shows it targets "financially able" parents, while leaving unmolested parents who are *not* financially able. The children of those "un-able" parents will still live in environments subjecting them to danger of being "significantly impaired."[4]

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[4] A situation that raises possible equal-protection problems, not to mention problems involving a parent's right to raise his child according to his religious faith, whether financially unable or not. See, e.g., Hermanson v. State, 604 So. 2d 775 (Fla. 1992). As shown by Hermanson, some reasonable people could conclude that the religious beliefs of *some* parents could result in an environment where the child is in danger of "significant impairment."

The problem is, that "environment" is both all around us and inescapable. These days (for example), elementary-school children carry guns and sell drugs, so *some* reasonable people could say the simple act of sending a child to school puts him in an environment "likely to cause significant physical or emotional impairment."

In a recent poll conducted by the St. Petersburg *Times*, sixty-two percent of students agreed with the statement, "I worry about my safety when I'm in school."[5] Thus, a prosecutor who felt no qualms about charging a baby-sitter for napping while "his" children play in the rain, would also feel no qualms about charging any of the sixty-two percent of parents in St. Petersburg who are now (presumably) on notice that letting their children attend a public school violates the "new" §827.05. As this Honorable Court has held, statutes must be construed to *avoid* such absurdities.[6]

In further words, §827.05 sets an impossible standard.

Thus the issue is whether §827.05 - previously found to be

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[5] Page 1-D, St. Petersburg *Times*, Monday, April 17, 1995, "Expressline," sub-titled, "Violence in the schoolyard."

"Last week we asked you if you worry about your physical safety when you go to school. Out of 463 calls, 286 (62 percent) of you said YES, I worry about my safety when I'm in school. While 177 (38 percent) of you said NO not me, I feel safe at school."

The following were some of the responses which accompanied the calls: "I think that schools ... are not safe - not at all." (Ellipses in original) "I don't feel safe. There was a fight where a kid [went] through a window. Fortunately, I haven't heard about any weapon situations." But another student added, "I worry about safety all the time. I am a high school student. They don't just fight - they pull out guns and stuff." Id, at 2-D.

[6] See, Radio Tel. Communications v. Southeastern Tel., 170 So. 2d 577 (Fla. 1964), which held among other things that it is the judicial system's function and duty, if a literal interpretation of a given statute would lead to an unreasonable result, to "examine the matter further."

unconstitutional by this Honorable Court - has been *cured* of its defects through the words "though financially able," and "permits a child to live in an environment ... in danger of being significantly impaired." Put yet another way, the question is whether (contrary to Winters), the statute *still* provides "criminal penalties for acts of simple negligence."

On that note, the weakness of Appellant's "adopted" argument[7] is found the *summary* of that argument. See, "Petitioner's Brief on the Merits" in State v. Mincey (moved to be "adopted" in this appeal), at page 3 of that petition:

> The State Legislature amended Section 827.05 Florida Statutes in 1991 to make *willful* negligent treatment of a child punishable as a misdemeanor in the second degree. The addition of the standard of *willfulness* remedies the earlier disability in the statutory construction and the public is capable of understanding what acts are made criminal are made criminal by the statute.

(Emphasis added.) With all due respect, the Petitioner in Mincey seems to have completely misread the statute. To begin with, the word "willful" is conspicuous by its absence in §827.05. Then too, if the statute *does* punish "willful or culpable negligence" of children, it is simply a mirror image of §827.04. That is, the section would be virtually identical to §827.04, and so "mere surplusage." Third, this summarized argument was expressly contradicted by the Second District Court of Appeal:

> Section 827.05 attempts to create a second-degree misdemeanor punishing a person

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[7] To wit: that the changes in statutory language have cured the defects of a statute previously ruled unconstitutional.

> who *negligently* deprives a child of necessary food [etc.]...

See, State v. Ayers *et al.*, 20 Fla. L. Weekly D2696 (Fla. Second DCA December 8, 1995), emphasis added. Finally, the last statement in Appellant's summary-of-argument is belied by plain common sense, and by the facts of this particular case. That is, few members of the public would realize the statute criminalizes a baby-sitter who lets the children in his charge play in the rain while he naps. In the alternative, few members of the public would know that - according to at least one prosecutor - the statute allows a baby-sitter to be penalized for some *transferred* "intermediate negligence" of the parents.

Clearly, if the learned counsel in Mincey doesn't fully understand what the statute criminalizes - as shown by the cited summary of argument - and if that learned counsel's understanding is contrary to that of several district court judges, it can be safely said the statute *is* vague, overbroad and *extremely* difficult to understand, even for trained legal minds.

Returning to Appellant-Petitioner's "adopted" brief, the Appellee agrees with many of its points, though not the dispositive one. For example, the Appellee agrees there is ordinarily a strong presumption in favor of the constitutionality of such statutes.[8] But, the Appellant-Petitioner went on to *concede* the dispositive point on appeal, as shown in the case law cited in his argument; that a statute is vague if it "invite[s] arbitrary and

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[8] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at pages 4-5.

discriminatory enforcement."[9] As noted, no more compelling argument could be made that *this* statute invites such enforcement than the simple facts of this particular case.

The Appellant-Petitioner then argued:

> If the mere subjective good-faith belief of a parent in defendant's situation sufficed, the legislature would not have included the words "or permit" in the statutory scheme.[10]

There lies another "fundamental" flaw in the statute.

Unlike the State, the Appellee suggests that the "subjective good-faith belief" of any parent - in the raising of his or her child - is entitled to *great* deference. Thus, to attach the word "mere" to the honest efforts of any parent - to raise his child the best way he can - is to insult the integrity of *all* parents. So one fundamental flaw in Appellant's argument is the assumption that there are *objective* standards of parenting, and that those objective standards can be handed down by a far-away Legislature, "from on high," and to which all parents in Florida must meekly submit or face criminal prosecution.

Certainly there can be no argument that the Legislative goal of §827.05 was laudatory. No reasonable person would disagree with the *ideal* that all children should have "necessary food, clothing, shelter, or medical treatment." But the statute remains fundamentally flawed because it *presumes* that legislators and

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[9] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at pages 5.

[10] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at page 5.

prosecutors are better able than parents to set out objective standards of child-raising, which will *not* be enforced arbitrarily or capriciously. Further, the statute is flawed because - according to Appellant - it reduces the subjective good-faith belief of all parents to the status of "mere-ness."

Appellant then argued that §827.05, as newly-worded, "imposes an obligation upon a parent to take some affirmative action to prevent danger of significant impairment,"[11] thus implying that the statute sets out some new standard. But Appellee suggests there *already* exists that sense of obligation, in any and every parent, to take those actions in the best interests of his or her child, to prevent "impairment," significant or otherwise. The Appellee further suggests this pre-existing sense of obligation is what most people call *conscience*: "The faculty of recognizing the distinction between right and wrong in regard to one's conduct [or] conformity to one's own sense of right conduct."[12]

Referring to the facts below, some parents would agree that it's irresponsible and possibly "negligent" to allow a child to play in the rain, unsupervised. On the other hand, *many* reasonable parents would say playing in the rain (with or without "proper" supervision) represents the quintessence of "child-ness;" that

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[11] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at page 6.

[12] The American Heritage Dictionary of the English Language, Delta, 1977, page 154. See also, Pierce v. Society of the Sisters, 45 S. Ct. 571, 573 (1924), (infra), referring to "the right, *coupled with the high duty*," of the parents of every child, to "nurture him[,] direct his destiny ... and prepare him for additional obligations" of adulthood.

state of being unfettered and free of the cares of the world; the cares of the world that *will* come later, with adulthood. Thus the flaw in this statute - as presently worded - is that it usurps both the conscience and "subjective good-faith belief" of all parents. In short, the Act fosters the tendency of some to reduce the "joy" of parenting to a single set of barren, objective standards.

Then, despite Appellant's argument at one point that the Act punishes willful or culpable negligence,[13] at another point the Appellant argued that the new §827.05 "raises the degree of negligence to a higher degree..."[14] In other words, in that statement the Appellant seemed to agree with the assertion that the statute is seeking to cure the defect of punishing "simple negligence" - which cannot lawfully be done - while not rising to the level of punishing willful or culpable negligence, which is *already* penalized in §827.04. In further words, the Appellant seems to agree that the new §827.05 is creating a new "intermediate level" of negligence.

But again, the problem with *creating* such a brand-new "intermediate level" of negligence is that there is simply no guidance at hand to enable the courts to interpret and implement that new brand of negligence. There is no body of Common Law to fall back on, and the only guidance from the Legislature is that the statute is applies to "financially able" parents who permit

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[13] Just like §827.04.

[14] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at page 7.

their children to live an environment presenting a danger of some significant impairment.

But that ostensible "guidance" raises far more questions than it answers. How much must parents earn to be "financially able," and so liable under the statute? Is there a separate financial standard for *single* parents; the divorced, the widowed and widowered, the unwed? Is a public school by nature an "impairing" environment, subjecting those parents to criminal liability? And if not, why not, when public-school students carry guns, sell drugs, join gangs? How much violence must occur at a public school before it is classed as a "public nuisance?" Is a private school by nature *less* an "impairing" environment? If so, are "financially able" parents required to send their children to private schools, or be charged under §827.05? Reasonable parents could ponder at length these and other questions raised by the statute, yet still not know when and how they might be prosecuted.

In short, the statute as presently worded does not contain sufficient guidance to individual prosecutors, to prevent the arbitrary, capricious or absurd enforcement best exemplified by the case against Mr. Ayers. As explained below, such guidance is *mandated* because the "right" being tampered with (by The State) is "intimate to the degree of being sacred." That is, the right to beget, bear and raise children is fundamental, guarded by the federal and state Constitutions. "The State" has no business trying to *regulate* that parental right without clear and specific guidelines to prevent prosecutorial over-reaching.

Finally, the Appellant argued that the "simple remedy" to cure §827.05 of its defects was "to make the standard one of culpability or willfulness," and that by doing so the Legislature "has remedied the disability considered in Winters."[15] But as noted, if that's all that's been done with §827.05, the Legislature has simply made it a carbon-copy of §827.04. If *both* sections punish willful or culpable negligence, then §827.05 punishes the same level of culpability as §827.04. As such, §827.05 can be safely consigned to the status of redundance and "mere surplusage."

Then too, in his statement of facts the Appellant noted with approval the Second District's apparent concession that "other state courts have upheld the constitutionality of similar legislative enactments."[16] The Appellant noted that "concession" on the apparent theory that because other states have approved criminalizing simple parental negligence, Florida should do it too. But Appellee suggests the Second District was recognizing, while *rejecting*, the sentiment of some people that parenting should be licensed and regulated, like the driving of a car.

That is, the Appellee agrees that the Second District *did* acknowledge the apparent result in other jurisdictions, that "mere negligence" could be punished as a misdemeanor. But that sentiment was expressed in a paragraph recognizing (but rejecting) the sentiment above, before ending with the statment that "there is

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[15] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at pages 8-9.

[16] "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at page 4.

some support" for a simple-negligence standard:

> As recently as 1973, a person in Florida who repeatedly drove in a careless manner could be convicted and punished by fines and imprisonment similar to those penalties now available for a second degree misdemeanor, even though carelessness is comparable to simple negligence. Thus, there is at least some support for the constitutionality of the negligence standard in this revised child neglect statute.

State v. Ayers *et al.*, 20 Fla. L. Weekly D2696 (Fla. Second DCA December 8, 1995). The Appellee suggests that in this passage the Second District was using the rhetorical device of "irony."

Certainly there is "some support" for the contention that parental negligence should be punished by law, just as there is "some support" for the idea that parenting should be licensed and regulated in the same manner as driving a car, and just as there is some support for host of other ideas that can be safely classified as "off the wall." But simply because an idea has "some support[17]" does not mean it should be given the force of law. Thus the Second District was likely saying that even ideas with "some support" should be carefully examined *before* being given the force of law.

The Second District recognized that while negligent or careless driving can be punished by law, "careless parenting" cannot and probably should not. But since Appellant *seems* to be suggesting the new §827.05 should be recognized as valid as

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[17] Other ideas, all of which have "some support," are ideas for a flat tax, for *no* taxes, for castrating criminals, for assassinating certain objectionable foreign officials, for warehousing *all* criminals, regardless of the severity of their crimes, and for letting police ignore "legal technicalities" in the pursuit and punishment of law-breakers and other disreputables.

§316.030 (Fla. Stat. 1973), the Appellee must risk overstating the obvious; there are significant differences between the two.

First, it is established beyond cavil that driving a car on the public highways is not a right, but a privilege. The same is *not* true (yet) of the right of parents to bear and raise children as they see fit; that right is - as noted - "intimate to the degree of being sacred." Griswold v. Connecticut, infra. Unless and until parenting is licensed and regulated in the same manner as driving, the comparison suggested by the State is inapposite.

On that note, some years ago the Oregon Legislature passed a law requiring all children between 8 and 16 to attend public schools, which the Appellee suggests is as laudable a goal as mandating that each child in Florida receive "necessary food, clothing, shelter, or medical treatment." Yet notwithstanding that laudable goal, the United States Supreme Court struck down the statute because it usurped and infringed the fundamental, highly-personal right, duty and obligation of *all* parents to "direct the upbringing and education of children under their control." See, Pierce v. Society of the Sisters of the Holy Name, 45 S. Ct. 571, 573 (1924) (emphasis added):

> [T]he Act of 1922 unreasonably interferes with the *liberty* of parents and guardians to direct the upbringing and education of children under their control... The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to *standardize its children*... The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Contrary to Pierce, §827.05 *does* seek to mandate certain minimal, "standardized" levels of care for all the children in this State. While that is a laudable goal, the problem is the statute as presently worded unreasonably interferes with the right - *not* the privilege - of parents to raise their children as they see fit, without undue interference from "The State."

Certainly the Appellee is not saying parents have a *right* to deny their children a certain minimum level of "necessary care and shelter." But the State's problem is to articulate an objective set of standards from "on high," without infringing on the rights and duties of all parents, *and* without impermissibly trying to "standardize" - on pain of criminal prosecution - this State's children. This Honorable Court made substantially the same point in State v. Winters, 346 So. 2d 991, 993 (Fla. 1977):

> Depending on the standard adopted, any given shelter, whether in the suburbs or the ghetto, could be found to fall short of "necessary shelter." Similarly, each person must ask how much and what quality of food, clothing, shelter and medical treatment he must provide to avoid jeopardy. Nothing in the statute gives us the answer. There are no guidelines.

Just as there were no guidelines in the *former* §827.05, there are no guidelines in the new §827.05, except the added proviso of financial ability and a "requirement" that the offending parent not permit his child to live in an environment subjecting him to the danger of "significant impairment." As noted, the amended language raises far more questions than answers.

Again, the only proof needed that the statute can be abused are the facts in this case: under the statute as presently worded,

some prosecutors believe they can charge baby-sitters for the "sins" of the parents (instead of or in addition to charging the parents), while also believing that parents who let their children play in the rain unsupervised can be charged as well.

In other words, as presently worded the statute cannot accomplish what it seeks to accomplish - creating an "intermediate level" of parental neglect - without infringing on the fundamental right of parents to make necessary "value judgments."

That is, in Griswold v. Connecticut, 381 U. S. 617, 85 S. Ct. 1678 (1965), the U. S. Supreme Court recognized that "the right to educate one's children *as one chooses* is made applicable to the States" through the First and Fourteenth Amendments, and further that that First-Amendment right includes "freedom of inquiry, freedom of thought, and *freedom to teach*." 85 S. Ct., 1680, emphasis added. Simply put, the Legislature cannot regulate such a "sacred" right without providing far more guidance than that given by the present §827.05.

Griswold also said no state may "contract the spectrum of available knowledge," whenever such state regulation results in the rights of parents - "husband and wife" - being "diluted or adversely affected" (85 S. Ct. at 1680), which is precisely the effect of the new §827.05. Finally, Griswold said such an idea ("standardizing" child care) is "repulsive to the notions of privacy surrounding the marriage relationship":

> We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for

> better or for worse, hopefully enduring, and *intimate to the degree of being sacred.* It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

85 S. Ct. at 1682, emphasis added.

Contrary to Griswold, the present §827.05 sacrifices an integral component of the American way of life to the "cause" of some standardized set of rules of child-rearing. The present §827.05 sacrifices social harmony (as by pitting financially able parents against those who are financially "un-able") to the largely-political faith that some group can set standardized rules of child care, then impose those views of child-care on all other parents. The statute does all this while reducing the subjective good-faith belief of any parent to the status of "mere-ness."

Again, the statute seeks to regulate "as noble an institution" as ever existed in the history of the world, yet with such a lack of guidance that even *non*-parents - baby sitters like Mr. Ayers - can be punished for the negligent sins of the parents.

Certainly, if parenting *were* to be licensed and regulated in the same manner as driving a car - as Appellant seems to suggest[18]

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[18] See, "Petitioner's Brief on the Merits" in State v. Mincey, moved to be "adopted" in this appeal, at page 4, where the Appellant noted with approval the Second District's apparent concession, "other state courts have upheld the constitutionality of similar legislative enactments." That statement by the Second District followed its also noting that careless driving (for example) is both punishable by law and "comparable to simple negligence." State v. Ayers, 20 Fla. L. Weekly D2697. Thus, as noted, the State seems to be suggesting that parenthood be licensed and regulated in the same manner as driving a car.

- there would be fewer problems for "The State" in creating standardized criteria by which to judge all parents. But if such a "social project" were to be advanced (as Appellant suggests), without *far* more guidance than found in the present statute, it can only be done at the cost of losing something precious in the "fundamental theory of liberty upon which all governments in this Union repose." 45 S. Ct. 573.

Simply put, we as a society will pay too high a price to implement the present §827.05, because the statute fails to give fair warning, and it also unacceptably demeans and diminishes "parents" as a class, to the status of "other criminals."

> The modern reason for the rule of strict construction is said to be that criminals should be given fair warning, before they engage in a course of conduct, as to what conduct is punishable and how severe the punishment is. [A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

LaFave and Scott, Handbook on Criminal Law, Hornbook Series, 1972, p. 72. In other words, the question is whether a person in "the common world" can read §827.05 and understand what conduct is punishable as a second-degree misdemeanor.

Clearly the answer to that question is "no." The learned counsel in Mincey didn't fully understand what the statute criminalizes, arguing that §827.05 punishes "willful" negligence, just as §827.04 does. Contrary to that argument, numerous circuit and district court judges have held the statute is aimed at the parent "who *negligently* deprives a child of necessary food," etc.

(See, State v. Ayers, 20 Fla. L. Weekly D2697). In other words, those jurists said the statute still seeks to punish simple negligence. In view of this disagreement, even between trained and distinguished legal minds, it can be safely said the statute is vague, overbroad and *extremely* difficult to understand for those not trained in the law; the "common world." Thus it can be safely said the statute fails to give "fair warning."

And as noted, the statute demeans and diminishes "parents" as a class, reducing them to the status of "other criminals."

That is, the word "criminals" - first noted by LaFave and Scott[19] but now "expanded" by §827.05 - has been redefined by the Legislature to include "parents." In other words, §827.05 now equates "parents" with "criminals." In further words, in order to pass constitutional muster, §827.05 must provide adequate warning to both parents and "other criminals," so that the passage from LaFave and Scott could be rewritten:

> *Parents* should be given fair warning, before they engage in a course of conduct, as to what conduct is punishable and how severe the punishment is.

That is, to punish parents, child-custodians and "other criminals," §827.05 must give fair warning of a seemingly new class of criminal conduct; something beyond "simple negligence," yet not as serious as willful deprivation or culpable neglect. As interpreted by the Appellant, the new §827.05 *presumes* that parents will fail to

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[19] "...*criminals* should be given fair warning, before they engage in a course of conduct, as to what conduct is punishable and how severe the punishment is."

follow their "higher duty," by presuming that the subjective good-faith belief of any parent is reduced to the status of "mere-ness."

For all these reasons and more, the new §827.05 remains unconstitutional. But beyond all that, the statute remains unconstitutional according to the standards this Honorable Court set out in State v. Winters, 346 So. 2d 991 (Fla. 1977).

Winters began by pointing out that penal statutes must be strictly construed in favor of the accused if there is *any* doubt as to their meaning, and further that such statutes must be explicit enough so persons of common intelligence may determine whether a contemplated act is "within or without the law." 346 So. 2d 993. That is, the statute must be explicit enough that the ordinary person "may determine what conduct is proscribed by the statute." 346 So. 2d 993. The Court went on to explain *why* the earlier statute was unconstitutional, as worded:

> Section 827.05 provides criminal penalties for acts of simple negligence. Under the statute, a person with no intent to do wrong may be punished. His action need not be willful or culpably negligent.

346 So. 2d 993. In light of the case-law and other authority cited herein, the Legislature has yet to solve the dilemma of punishing something less than willful or culpable negligence, yet something more than "simple negligence."

Put another way, despite the existence of §827.04, the children of this state *still* suffer from willfully or culpably negligent parents. So some reasonable people could conclude that until *that* problem is eradicated, the Legislature should not waste

this State's resources in trying to find, address and eradicate some new "intermediate" level of child neglect.[20]

Then too, the present statute has so little guidance that it can and will be used to usurp the right of parents to make fundamental value judgments in the raising of their children.

For example, an old Latin maxim holds that experience is the best teacher. But under the facts below, a "parent" who allowed a child to *experience* playing in the rain - unsupervised - was subject to criminal prosecution. But was that conduct truly criminal, or was it rather - could it be - a simple parental choice to let a child learn from "the best possible teacher?"

For example, Sir Francis Bacon in his work "Of Studies," noted that such studies, "perfect nature and are perfected by *experience*."[21] John Keats wrote, "Nothing ever becomes real until it is *experienced* - even a proverb is no proverb to you until your life has illustrated it."[22] Benjamin Disraeli wrote, "*Experience* is the child of Thought, and Thought is the child of Action. We cannot learn men from books."[23] Froude (sic) wrote that,

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[20] Senator Sam Ervin once told a story about an ardent young man, courting a young woman, who told her that he wished he was an octopus, so he could have *eight* arms with which to hold her close. Whereupon the young woman asked why he needed eight arms, when he wasn't using the two arms he already had.

[21] The Oxford Dictionary of Quotations, Third Edition, Oxford University Press, 1980, at page 27.

[22] Id, at 294.

[23] Id, at 186.

"*Experience* teaches slowly, and at the cost of mistakes."[24] John Locke wrote, "No man's knowledge here can go beyond his *experience*."[25] Finally, an Anonymous Scotsman "once summed it all up very neatly in the remark, 'You should make a point of trying every *experience* once, excepting incest and folk-dancing.'"[26]

As applied below, the question is whether - had they been parents today - Messers Locke, Bacon or Disraeli would be criminally liable under §827.05 because of their "liberal" philosophy of parenting, and notwithstanding their subjective good-faith belief, "mere" or otherwise. Clearly, under the Appellant's interpretation, they could be prosecuted.

Thus the present statute permits - if not invites - the state to usurp the making of key value judgments, better left to the choice of individual parents. Who is a more neglectful parent, punishable under §827.05: one who shelters a child from every imaginable danger, or the parent who gives his or her child the freedom[27] to explore the world and learn at his or her own pace? The answer, for our purposes, is that there is no satisfactory answer. The only way to answer such personal, individual value judgments - the only way to implement the present §827.05 - is for either the Legislature or the courts of this state to engage in

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[24] Id, at 219.

[25] Id, at 315.

[26] Id, at 4.

[27] Subject to the pre-existing, reasonable limitations of such statutes as §827.04, for example, and the parents' sense of conscience.

wholesale metaphysical sophistry.

There would be no other way to judge the line at which a "loose," "liberal," or "experience-oriented" style of parenting crosses the line into criminal misconduct. To put this statute into effect, someone in the Legislature or judicial system must pass judgment on someone *else's* parenting skills. That in turn will require inevitably-subjective judgments on someone *else's* philosophy of parenting. As this Honorable Court indicated in Winters, neither the courts nor the Legislature of this state have any business usurping such highly-personal decisions:

> Failure to provide *any* food, clothing, shelter or medical treatment would be a clear violation of this duty. But if there is not a total deprivation, then how much of each must be provided to meet the test of the statute?

346 So. 2d 991, emphasis in original. In the same way, when Winters is applied to the present §827.05, how much "danger" is punishable by law, and how much is simply part of that knowledge - taught by experience, and enabling *any* person to struggle for a rich, fruitful and rewarding life - that all responsible parents "should" provide for their children? And how much physical or emotional danger[28] - looming forever on the horizon -

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[28] While recognizing that "danger" is itself, according to some reasonable people, an integral part - the "spice" - of any rich and fruitful life. For example, Robert Louis Stevenson wrote of "The bright face of danger," (Oxford Dictionary of Quotations, Third Edition, Oxford University Press, 1980, at page 520), and George Chapman wrote of, "Danger, the spur of all great minds." Id, at 140. As interpreted by Chapman and Stevenson, the *lack* of such danger leads to a drab life and an under-developed mind. So presuming all children must learn how to deal with "danger" later on in their lives, at what point should children be first exposed - in the manner of vaccination - to dealing with those "dangers?"

is simply part of the *milieu* in which all normal human beings, "live and move and have their being"?

When faced with the question in Winters - "how much of each must be provided to meet the test of the statute?"[29] - the new and improved §827.05 seeks to provide an answer with the words, "though financially able." As applied, these new words add nothing but an equal-protection problem to the statute.

That is, a less-than-total deprivation by *poor* parents will be judged by a different standard than a less-than-total deprivation by "financially able" parents. Being "*not* financially able" would amount to an affirmative defense. But the question would then be, how "financially able" must parents be to be punished under §827.05? More importantly, where would courts draw the "bright line" of income or financial ability that separates parents who may be punished under §827.05, and those who may not?

Nor is the Winters question answered by the words, "permits a child to live in an environment, when such ... environment causes the child's physical or emotional health to be significantly impaired or to be *in danger* of being significantly impaired."

Again, as worded the statute criminalizes "permitting a child to live in an environment, where that environment causes the child to be in danger of significant physical or emotional impairment." But if a student - known or unknown - at a particular school commits a series of rapes or other assaults, at what point does it become "criminal" to send one's children to that school, given that

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[29] 346 So. 2d 991.

known danger? It is just such metaphysical sophistry that is invited if not mandated by the present statute. In short, it remains unconstitutional for the same reasons that it was previously ruled unconstitutional.

That assertion is supported by this Honorable Court's holding in Hermanson v. State, 604 So. 2d 775 (Fla. 1992), in which two parents were convicted under Florida Statutes 415.503(7)(f) and 827.04(1), when their child died after they refused to provide her with "conventional medical treatment."

The two parents were Christian Scientists, who believed in healing by spiritual means such as prayer, rather than conventional medical treatment, for their daughter's juvenile diabetes. 604 So. 2d 775-9. At trial the parents were convicted of felony child-abuse and third-degree murder. 604 So. 2d 780. On appeal, the defendants argued that the statutes in question:

> [D]id not give them fair warning of the consequences of practicing their religious belief and their conviction was, therefore, a denial of due process.

604 So. 2d 780. This Honorable Court found that argument dispositive, and reversed on it alone. 604 So. 2d 781.

The defendants said they were denied due process of law because the statutes "failed to give them sufficient notice of when their treatment of their child in accordance with their religious beliefs became criminal." 604 So. 2d 781. (In the same way, §827.05 fails to give sufficient notice of when a "liberal" or "experience-oriented" style of parenting becomes criminal, as opposed to an overly-protective style seemingly promoted by law.)

This Court began its analysis by noting that due process is lacking if a person "of common intelligence cannot be expected to discern what activity the statute is seeking to proscribe." 604 So. 2d 781. When the state said the choice of "spiritual treatment" could be made a felony, "simply because of the outcome" of that parental choice, this Honorable Court indicated that such an doctrine would be "unacceptably arbitrary, and a violation of due process." 604 So. 2d 781. This Court then noted that one of the *purposes* of due process is:

> [T]o insure that no individual is convicted unless "a fair warning [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

604 So. 2d 782 (brackets supplied by Supreme Court). See also, LaFave and Scott, supra. After further review this Court reversed the two parents' criminal convictions:

> In this instance, we conclude that the legislature has failed to clearly indicate the point at which a parent's reliance on his or her religious beliefs in the treatment of his or her children becomes criminal conduct.

604 So. 2d 782. In the same way, in §827.05 the Florida Legislature fails to clearly indicate the point at which one's "style of parenting" becomes criminal conduct.

But this Honorable Court said essentially the same thing in Joyce, when it commented on the "infirmity" in Winters:

> The requirement of willfulness (scienter) or culpable negligence in Section 827.04(2), therefore, *avoids the infirmity* found in Winters with respect to §827.05 - that unintentional acts or conduct which is not the product of culpable negligence might be

proscribed by statute.

State v. Joyce, 361 So. 2d, at 407, emphasis added. In other words, in Joyce this Court seemed to specifically rule out any possibility of an "intermediate level of negligence."

It should also be noted that in Winters, as in the case against Mr. Ayers, there were allegations that the "environment" was unfit for children. In Winters "there was shelter of some type, but it was alleged to have had garbage on the floor, beds with unclean mattresses and no sheets, a bathroom with feces in the toilet and insect infestation." 346 So. 2d 993. At bar, "The mattresses on which the children were sleeping were stained with urine. There was no baby formula [n]or was there any food in the apartment with which to feed the children, and both the children were extremely wet and soiled." (R83) It was further shown that Mr. Ayers had charge of the children for "two to three hours," and the children had not been fed in those two to three hours. (R83) In Winters the Court said that "while such conditions are deplorable," it could not lawfully be said that because the care-giver kept the children "in a dirty house," he should be punished as a criminal. 346 So. 2d 993.

As noted above, this Honorable Court has already held the former §827.05 unconstitutional, so that the strong presumption in favor of the constitutionality of statutes, ordinarily attaching to statutory pronouncements, does not apply as it normally would. So the question is whether §827.05 - already ruled unconstitutional - has been *cured* of its infirmities by Legislative amendment; by

words which, to some state attorneys, allow the prosecution of a baby-sitter caring for someone else's children.

Further, the question is whether the Legislature can properly create an "intermediate level of negligence," without further carefully-crafting the words in the statute, and notwithstanding the Court's clear assertion in Joyce that the *inherent* infirmity of §827.05 is that it provides that "unintentional acts or conduct *which is not the product of culpable negligence* might be proscribed by statute." 361 So. 2d, at 407.

In light of the foregoing, this Honorable Court should hold that the present §827.05 is as unconstitutionally vague, indefinite and overbroad as its predecessor.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Appellee respectfully requests that this Honorable Court find the present §827.05 unconstitutional.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine Blanco, Suite 700, 2002 North Lois Avenue, Tampa, FL 33607, on this 2nd day of February, 1996.

Respectfully submitted,

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