IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. Case No. 87,105

THOMAS E. AYERS,

Appellee.

_____/

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

BRIEF OF APPELLANT ON THE MERITS

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PRELIMINARY STATEMENT

This is an appeal filed by the State of Florida pursuant to Rule 9.030(1)(A)(ii), Florida Rules of Appellate Procedure, from the opinion of the Second District Court of Appeal finding §827.05, Florida Statutes (1993) unconstitutional. The record on appeal will be referred by the symbol "R" followed by the appropriate page number.

In this case, the State of Florida is adopting arguments presented by the State in State v. Mincey, Florida Supreme Court Case No. 86,177, which is now pending before this Court. The arguments adopted in this case, State v. Ayers, Case No. 87,105, involve the same issue presented in State v. Traversa, Case No. 87,106, State v. Hammond, 87,107 and State v. Moulton, Case No. 87,108, all of which are presently before this Court and which were consolidated by the Second District in its opinion filed on December 8, 1995 finding §827.05, Florida Statutes (1993) unconstitutional. In addition, as noted by the Second District Court in the instant case, other states have upheld the constitutionality of similar statutes. See, People v. Noble, 635 P.2d 203 (Colo. 1981); State v. Lucero, 531 P.2d 1215 (N.M. Ct. App. 1975), cert. denied, 531 P.2d 1212 (N.M. 1975); State v. Jenkins, 294 S.E.2d 44 (S.C. 1982). (A-1, Op. pp. 7-8).

STATEMENT OF THE CASE AND FACTS

On March 4, 1993, the State of Florida filed a one-count misdemeanor Information in the County Court of the Sixth Judicial Circuit, Pinellas County, Florida, charging the defendant/appellee, Thomas Ayers, with violating 827.05, Florida Statutes (1993). (R 1-2). The Second District Court summarized the facts as outlined by the prosecutor, *to wit*: The state charged Ayers with misdemeanor child abuse as a result of his behavior while babysitting two small children [ages 1 and 2]. The State alleged that while Mr. Ayers was asleep on the couch, the two unsupervised children were playing outside in the rain. A neighbor who observed the children called the police. Mr. Ayers told the officers that he did not feed the children during the two to three hours he had been baby-sitting. The children were wet and soiled. The officers observed that the children's cribs were broken and unsafe, their mattresses were soiled, and there was no food or formula in the apartment. Mr. Ayers' attorney successfully moved to dismiss the charges on the ground that the statute was unconstitutional. (A-1, Opinion at 3-4).

On January 26, 1994, defendant/appellee, Thomas Ayers, filed a motion to dismiss, challenging the constitutionality of 827.05, Florida Statutes. (R 14-16). On August 2, 1994, the trial court entered a written order granting the defendant's motion to dismiss. (R 60-61). The trial court also certified the following question

of great public importance: Is §827.05 (F.S. 1993) unconstitutional in that it fails to set forth clerarly ascertainable standards by which a citizen could reasonably conclude that certain conduct would be a criminal violation of the law? (R 64-65).

The trial court's order of dismissal states, in pertinent part:

> 1. Even where Legislation is specifically enacted in the public interest, there must be clearly ascertainable standards of guilt by which a citizen may gauge her conduct. State v. Hamilton, 388 So.2d 561, 564 (Fla. 1980). This Court finds that 827.05 (F.S. 1993) does not set forth clearly ascertainable standards by which a citizen could reasonably conclude that her conduct would be in criminal violation of the law. As reasons for this conclusion, this Court adopts the "ORDER GRANTING MOTION TO DISMISS" which was published in the case of State of Florida v. Mcbride from the Escambia County Court, Case No. 93-12615 (1 Fla. L. Weekly Supp. 406).
>
> 2. 827.05 (F.S. 1993) purports to criminalize simple negligence. This is an unacceptable standard. State v. Winters, 346 So.2d 991 (Fla. 1977); State v. Joyce, 361 So.2d 406 (Fla. 1978) and Graham v. State, 362 So.2d 924 (Fla. 1978).
>
> 3. The defendant, in the case at the bar is charged with permitting a child to live in an environment which caused the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired. A reading of 827.05 (F.S. 1993) indicates that the adverb "negligently" modifies the verbs "deprives" or "allows" or "permits", a child to live in an environment which impairs or endangers the child, such acts may be accomplished by the statutory definition through acts of simple negligence. This standard is unacceptable. The remedy is to make the standard one of culpability or willfulness. Unfortunately, this was not done when the Legislature revised the statute. See 2 of Chapter 77-429.
>
> 4. Accordingly, this Court finds that 827.05 (F.S. 1993) is

> unconstitutionally vague and the charges filed in Case No. CTC93-05109MMANO is insufficient to place a reasonable person on notice as what acts constitute criminal violations.
>
> (R 60-61)

The State of Florida appealed the trial court's order of dismissal and order finding the statute unconstitutional. Article V, 4(b)(1), Florida Constitution; Rules 9.030(b)(1)(A), 9.140(c)(1)(A), Florida Rules of Appellate Procedure; §26.02(1), Florida Statutes (1993); State v. Freund, 561 So. 2d 305, 306 (Fla. 3d DCA 1990).

On December 8, 1995, the Second District Court of Appeal held that the legislature's amendment to §827.05, Florida Statutes, did not cure the problems with the 1975 version since the amendment retained the element of simple negligence. (A-1, Op. pp. 6-7). In so doing, however, the Second District noted that other state courts have upheld the constitutionality of similar legislative enactments. See, A-1, Op. at 7-8, citing, People v. Noble, 635 P.2d 203 (Colo. 1981); State v. Lucero, 531 P.2d 1215 (N.M. Ct. App. 1975), cert. denied, 531 P.2d 1212 (N.M. 1975); State v. Jenkins, 294 S.E.2d 44 (S.C. 1982).

ARGUMENT

THE AMENDED SECTION 827.05, FLORIDA STATUTES IS NOT UNCONSTITUTIONAL

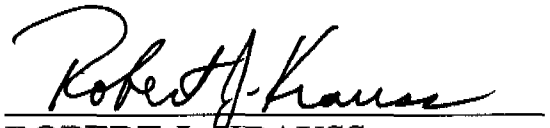
Please see the attached "Petitioner's Brief on the Merits" filed by the State of Florida in State v.Mincey, Case No. 86,177, adopted as Appellant's argument in the instant cause.

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, Appellant respectfully requests this Honorable Court to reverse the decision of the Second District Court of Appeal and uphold the constitutionality of section 827.05, Florida Statutes.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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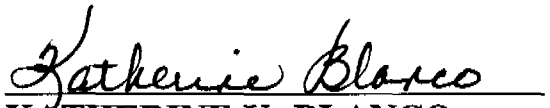

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Brad Permar, Assistant Public Defender, 5100 144th Avenue, North, Clearwater, Florida 34620, this 16th day of January, 1996.

COUNSEL FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. **Case No. 87,105**

THOMAS E. AYERS,

Appellee.

_____/

APPENDIX

A-1 . . . . . Second District Court's Consolidated Opinion, filed December 8, 1995, 2 DCA Cases #94-03263 [Thomas Ayers], 94-03325 [Colleen Traversa], 95-01587 [Kathleen Hammond], and 95-00778 [Alma Moulton].

A-2 . . . . . Petitioner's Brief on the Merits, State v. Mincey, #86,177

ALMA E. MOULTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 95-00778

CONSOLIDATED

Opinion filed December 8, 1995.

Appeals from the County Court for Pinellas County; Karl B. Grube, Judge; Stephen O. Rushing, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and ~~Katherine V. Blanco~~, Assistant Attorney General, Tampa, for Appellant State in Ayers and Traversa cases.

Judith Ellis, St. Petersburg, for Appellant Hammond.

Robert E. Jagger, Public Defender, and Jean M. Higham and Wayne R. Coment, Assistant Public Defenders, Clearwater, for Appellant Moulton.

James Marion Moorman, Public Defender, Bartow, and Brad Permar, Assistant Public Defender, Clearwater, for Appellees Ayers and Traversa.

Robert A. Butterworth, Attorney General, Tallahassee, and ~~Helene S. Parnes~~, Assistant Attorney General, Tampa, for Appellee State in Hammond and Moulton cases.

ALTENBERND, Judge.

The four cases we have consolidated for purposes of this opinion all involve the constitutionality of section 827.05, Florida Statutes (1993). That statute attempts to create a misdemeanor criminal offense proscribing negligent treatment of children. With the same misgivings recently expressed by the Fourth District in State v. Mincey, 658 So. 2d 597 (Fla. 4th DCA 1995), appeal pending, No. 86,177 (Fla. July 31, 1995), we conclude that the statute is unconstitutional.

Colleen Traversa, Thomas E. Ayers, Kathleen Hammond, and Alma E. Moulton were each charged with child abuse under this statute. Judge Karl B. Grube dismissed the charges against Ms. Traversa and Mr. Ayers because he found the statute unconstitutional. Ms. Hammond and Ms. Moulton were convicted by courts that upheld the constitutionality of the statute.[1]

In case number 94-03263, the state charged Mr. Ayers with child abuse as a result of his behavior while baby-

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[1] We have jurisdiction to review the county court orders of dismissal because they declared section 827.05, Florida Statutes (1993), unconstitutional. Art. V, § 4(b)(1), Fla. Const.; § 26.012(1), Fla. Stat. (1993); Fla. R. App. P. 9.030(a)(1) and (b)(1)(A). We have jurisdiction to review Ms. Hammond's and Ms. Moulton's convictions because the county court certified the question of the statute's constitutionality to this court as a question of great public importance. See §§ 26.012(1), 35.065, Fla. Stat. (1993).

sitting two small children. The state alleged that while Mr. Ayers was asleep on the couch, the two unsupervised children were playing outside in the rain. A neighbor who observed the children called the police. Mr. Ayers told the officers that he did not feed the children during the two to three hours he had been baby-sitting. The children were wet and soiled. The officers observed that the children's cribs were broken and unsafe, their mattresses were soiled, and there was no food or formula in the apartment. Mr. Ayers' attorney successfully moved to dismiss the charges on the ground that the statute was unconstitutional.

In case number 94-03325, Ms. Traversa was charged with illegally neglecting her two small children. The police officer and the HRS official who investigated her apartment observed that the home was dirty and in disarray. Upon entering the apartment, they observed a strong, foul smell emanating from a cat litter box. Throughout the apartment they smelled urine. The officials also observed that one child's hair contained lice eggs. Ms. Traversa's attorney also successfully moved to dismiss the charges.

In case number 95-01587, the state charged Ms. Hammond with abusing her three-year-old daughter. The child was observed unsupervised for an hour, wandering in a park wearing only her underwear. A neighbor called the police, who

located Ms. Hammond. Ms. Hammond appeared intoxicated and did not know that her child had been missing. Ms. Hammond pleaded nolo contendere to the charge and reserved her right to appeal the constitutionality of the statute. The court withheld adjudication, placed her on six months' probation, and ordered her to pay $150 in court costs.

In case number 95-00778, Ms. Moulton was charged with abusing her two children. At trial, an HRS investigator and a police officer testified that they conducted an investigation of Ms. Moulton's home. They observed that the apartment was infested with roaches, trash flowed out of the garbage cans, and the home was dirty and in disarray. The mattresses and pillows were also soiled. Ms. Moulton's three-year-old child was wearing a soiled diaper filled with fecal matter. The jury found Ms. Moulton guilty of child abuse. The trial court adjudicated her and placed her on six months' probation. She was ordered to pay $150 in court costs.

Section 827.05 attempts to create a second-degree misdemeanor punishing a person who negligently deprives a child of necessary food, clothing, shelter, or medical treatment when financially able to provide this necessary care, if such deprivation causes the child's physical or emotional health either to be significantly impaired or to be in danger

of such impairment.[2] This crime is distinct from section 827.04(2), Florida Statutes (1993), a first-degree misdemeanor punishing culpable negligence that causes similar deprivations.[3]

The supreme court declared the 1975 version of section 827.05 unconstitutional in State v. Winters, 346 So. 2d 991 (Fla. 1977). Thereafter, the legislature amended the statute to add two new elements--financial ability and resulting significant impairment or risk of significant impairment. The amendment, however, retained the element of simple negli-

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[2] The statute provides:

> 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, punishable as provided in s. 775.082 or s. 775.083.

§ 827.05, Fla. Stat. (1993).

[3] That statute provides:

> Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

§ 827.04(2), Fla. Stat. (1993).

gence. See ch. 77-429, Laws of Fla. We agree with the Fourth District that Winters held the statute unconstitutional on the basis of this standard. See Mincey, 658 So. 2d at 598. Thus, the legislature's amendment did not cure the problem.

Although we follow Winters in this context, we note that other state courts have upheld the constitutionality of similar legislative enactments. See People v. Noble, 635 P.2d 203 (Colo. 1981);[4] State v. Lucero, 531 P.2d 1215 (N.M. Ct. App. 1975), cert. denied, 531 P.2d 1212 (N.M. 1975);[5] State v.

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[4] Colorado's statute provided:

> A person commits child abuse if he knowingly, intentionally, or negligently, and without justifiable excuse, causes or permits a child to be: (a) Placed in a situation that may endanger the child's life or health; or (b) Exposed to the inclemency of the weather; or (c) Abandoned, tortured, cruelly confined, or cruelly punished; or (d) Deprived of necessary food, clothing, or shelter.

Colo. Rev. Stat. § 18-6-401(1) (1978). Colorado's legislature revised the statute in 1980, replacing the word "negligently" with "criminal negligence." Colo. Rev. Stat. § 18-6-401(7) (1995).

[5] New Mexico's statute provided:

> Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child's life or health; (2) tortured, cruelly confined or cruelly punished; or (3) exposed to the inclemency of the weather.

N.M. Stat. Ann. § 40A--6--1 (Michie 1973) (now codified at N.M. Stat. Ann. § 30-6-1(C) (Michie 1995)).

Jenkins, 294 S.E.2d 44 (S.C. 1982).[6] The common law required mens rea as an element of a criminal offense, but state legislatures have elected to create crimes that omit traditional concepts of criminal intent. 22 C.J.S. Criminal Law, § 31 (1989). 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. See § 316.030, Fla. Stat. (1973). Thus, there is at least some support for the constitutionality of the negligence standard in this revised child neglect statute.

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[6] South Carolina's statute provided:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the court.

S.C. Code Ann. § 16-3-1030 (Law. Co-op. 1976) (now codified at S.C. Code Ann. § 20-7-50 (Law Co-op. 1994)).

South Carolina's statutes also state that harm to a child's health or welfare can occur when "the parent, guardian or other person responsible for [the child's] welfare . . . [fails to supply the child with adequate food, clothing, shelter, education . . . or health care though financially able to do so or offered financial or other reasonable means to do so." S.C. Code Ann. § 20-7-490(C)(3) (Law Co-op. 1994).

We affirm the dismissals in Ayers and Traversa, and reverse the convictions and sentences in Hammond and Moulton.

PARKER, A.C.J., and QUINCE, J., Concur.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,177

STATE OF FLORIDA,

Petitioner,

vs.

JOHN T. MINCEY,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The defendant was charged by Notice to Appear with violating section 827.05 Florida Statutes (1991) (R 35-38). The defendant's five year old stepson, Clemmiet, was found wandering the streets of Riviera Beach at 10:00 P.M. in pajamas and bare feet.

A motion to dismiss was filed by the defendant challenging the statute twofold. The statute was challenged on its face in that it was "unconstitutionally vague, indefinite and overbroad," and additionally objectionable because it provides criminal penalties for acts of simple negligence. After hearing (R 3-30), the lower court granted the motion based upon the rulings in State v. McBride, 1 FLW Supp. 406 (June 1, 1993, Escambia County) and State v. Winters, 346 So.2d 91 (Fla. 1977). The lower court further certified the issue as a matter of great public interest (R 55-57).

The Fourth District Court of Appeal affirmed the lower court and certified the question to this Court. State v. Mincey, 20 Fla.L.Weekly D1597 (Fla. 4th DCA, July 12, 1995).

This appeal follows.

SUMMARY OF ARGUMENT

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 by the statute.

ARGUMENT

THE AMENDED SECTION 827.05 FLORIDA STATUTES (1991) IS NOT UNCONSTITUTIONAL.

The defendant claimed and the trial court agreed, that Section 827.05 Florida Statutes (1991) violates his state and federal constitutional rights to due process of law because it is allegedly "vague."

This Section provides:

> 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, punishable as provided in § 775.082 or § 775.083.

In State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981), the Florida Supreme Court articulated the following general principle for judicial examination of allegedly unconstitutional statutes:

> [There is a] strong presumption in favor of the constitutionality of statutes. It is well established that all doubt will be resolved in favor of the constitutionality of a statute...., and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.

Accord, Falco v. State, 407 So. 2d 203, 206 (Fla. 1981) and State v. Burch, 545 So. 2d 279, 280 (Fla. 4th DCA 1989), approved, Burch v. State, 558 So. 2d 1, 3 (Fla. 1990). In the particular context of claimed due process violations, "it is well settled

the language of a statute or ordinance must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." Marrs v. State, 413 So. 2d 774, 775 (Fla. 1st DCA 1981). "A vague statute is one that fails to give adequate notice of what conduct is prohibited and which because of its imprecision, may also invite arbitrary and discriminatory enforcement." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353-1354 (Fla. 1984). Accord, State v. Burch, 545 So. 2d 279, 282. "When people of ordinary intelligence must necessarily guess at its meaning and differ as to its application, the statute or ordinance violates the due process clause[s]." Marrs v. State, 413 So. 2d 774, 775. However, "courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353.

As noted, section 827.05 now provides that whoever negligently deprives a child... or permits a child to live in an environment...to be in danger of being a significantly impaired shall be guilty of a misdemeanor of the second degree. The State submits that this legislative declaration clearly put this defendant on adequate notice that his alleged lack of knowledge of the whereabouts of his stepson did not shield him from guilt. If the mere subjective good-faith belief of a parent in the defendant's situation sufficed, the legislature would not have included the words "or permit" in the statutory scheme. See

Donovan v. Kaszychi & Sons Contractors, Inc., 599 F. Supp. 860, 871 (S.D. N.Y. 1984).

Properly read in pari materia, see e.g. Ferguson v. State, 377 So. 2d 709, 710 (Fla. 1979), it is clear that section 827.05 imposes an obligation upon a parent to take some affirmative action to prevent danger of significant impairment. Therefore, the negligence standard does not render the instant statute "vague." Furthermore, the courts have upheld statutes which are less precisely worded than §825.05 against challenges that they were void for vagueness. In Powell v. State, 508 So. 2d 1307, 1308-1311 (Fla. 1st DCA 1987), review denied, 518 So. 2d 1277 (Fla. 1987), the First District held that section 950.09 Florida Statutes which proscribes "malpractice by a jailer" through "willful inhumanity and oppression to any prisoner," was not unconstitutionally vague. In Campbell v. State, 240 So. 2d 298 (Fla. 1970) the Supreme Court found that men of common understanding could comprehend the meaning of the words "unnecessarily or excessively chastise" when read in conjunction with the entire statute (§828.04 F.S.A.). See also State v. Raffield, 515 So. 2d 283 (Fla. 1st DCA 1987), affirmed, Raffield v. State, 565 So. 2d 704, 706 (Fla. 1990), cert. denied 498 U.S. 1025 (1991) and Schmidt v. State, 590 So. 2d 404, 413 (Fla. 1991) cert. denied ____ U.S. ____, 118 L.Ed.2d 216 (1992).

The lower court's finding was specifically predicated on the standard of simple negligence recited in section 827.05 Florida Statutes. The court found that simple negligence is an unconstitutional standard to proscribe and punish conduct in

criminal cases, relying on State v. Winters, 346 So. 2d 991 (Fla. 1977) and State v. Joyce, 361 So. 2d 406 (Fla. 1978). Both of these cases deal solely with the statute prior to its amendment in 1991. Although the first clause of the new version of section 827.05 Florida Statutes is similar to the previous version cited in these cases in that the term "negligently" is specifically mentioned, neither of the cases deal with the amendment. The State was proceeding against the defendant under the amended portion of the statute which states:

> ...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 shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Fla. Stat. 827.05 (1991).

The State would contend that the amendment of the statute raises the degree of negligence to a higher degree than that established to cure liability. The burden of proof authorizing a recovery of exemplary or punitive damages by a plaintiff for negligence must show a gross and flagrant character, evincing reckless disregard for human life or the safety of the child exposed to its dangerous effects; or that the entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless indifference to the rights of others, which is an intentional violation of them. Graham v. State, 362 So. 2d 924 (Fla. 1978) quoting from Rusor v. State, 140 Fla. 217, 191 So. 296 (1939); State v. Greene, 348 So. 2d 3 (Fla. 1977); State v.

Winters, 346 So. 2d 991 (Fla. 1977). A conviction of the defendant would have been predicated on a finding of willfulness rather than negligence and therefore sufficient to warrant criminal responsibility. Graham at 926.

Generally, words in a statute should be given their plain and ordinary meaning. Pederson v. Green, 105 So. 2d 1 (Fla. 1958); American Bankers Life Assurance Co. of Florida v. Williams, 212 So. 2d 777 (Fla. 1st DCA 1968). The State would argue that the defendant's acts could have been found to be willful when the statute dictates "or permits." Permit is defined as an express assent, agreement or allowance. Black's Law Dictionary (5th Edition 1979); West's Legal Thesaurus/Dictionary (1985). The requirement of willfulness (scienter) in the amended statute, therefore, avoids the infirmity found in Winters with respect to the pre-amended section 827.05 (unintentional acts or conduct which is not the product of willfulness might be proscribed by the statute). State v. Joyce, 361 So. 2d 406, 407 (Fla. 1978).

The State disagrees with the county court's finding in State v. McBride, ____ Fl.Supp. ____, Fla.L.Weekly Supp. 406 (June 1, 1993). The county clerk ruled that the amendment does not deal with the disability pointed out in Winters and discussed in Joyce. McBride does acknowledge that the problem for which the statute was struck in Winters was because criminal penalties could be inflicted on someone for an act of simple negligence. The McBride court went on to say, as in Winters, the simple remedy to that disability would be to make the standard one of

culpability or willfulness. The State, as previously discussed, argues that the amendment, making the standard one of willfulness, has remedied the disability considered in Winters.

Further, this Court has previously noted that, "even where the statute is reasonably susceptible of two interpretations, one which would render it invalid and the other valid, we must adopt the constitutional construction." State v. Lick, 390 So. 2d 52, 53 (Fla. 1980).

CONCLUSION

WHEREFORE, for the foregoing argument and authority, the State of Florida requests that this Court reverse the Fourth District Court of Appeal and unhold the constitutionality of Section 827.05 (1991).

Respectfully submitted,

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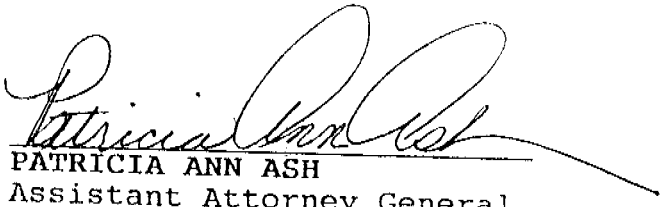

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF ON THE MERITS** has been furnished by Courier to: **ANTHONY CALVELLO, ESQUIRE,** Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, Florida, 33401, this 28th day of August, 1995.

Patricia Ann Ash
of Counsel