ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,249

THE STATE OF FLORIDA,

Petitioner,

versus

RONALD L. MITRO,

Respondent.

ON APPEAL FROM A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. Introduction.

Respondent Ronald Mitro supports the ruling of the appellate court which declared the private "identification card" statute, § 877.18(3), Fla.Stat. (1993), was unconstitutionally void for vagueness. *Mitro v. State*, 681 So.2d 303 (Fla. 3d DCA 1996). In so ruling, the appellate court reversed a trial court ruling which had upheld the constitutionality of the statute.

B. Procedural And Factual History.

Respondent Ronald Mitro and his wife, Patricia Mitro,[1] were charged by an amended information with 16 counts of violating the "identification card" statute, § 877.18(3), Fla. Stat. (1993) (R 10-25). The information alleged that Ronald Mitro and Patricia Mitro sold or issued identification cards containing the age or date of birth of the person to whom the identification card was issued, but did not first obtain from the applicant an authenticated or certified copy of a described document proving the applicant's age as provided in the "compulsory school attendance" statute, § 232.03, Fla. Stat, (1993) (R 504). The information further alleged respondents did not obtain a notarized affidavit from the applicant attesting to the

[1] Patricia Mitro was placed in the pretrial intervention program and ultimately obtained a voluntary dismissal of the charges (R 26-30).

applicant's age.[2]

The information resulted from an undercover investigation conducted by the Florida Department of Law Enforcement with the assistance of the Florida Division of Alcoholic Beverages & Tobacco and other law enforcement agencies. The investigation initially began as an outgrowth of a public corruption investigation of the City of Sweetwater. The investigation included the use of undercover law enforcement **agents** and cooperating sources, some of whom visited a retail store

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[2/]Count 1 of the amended information is representative of all counts. It alleged the following violation:

> DAVID **A.** MAER, Assistant State Attorney of the Eleventh Judicial Circuit, on the authority of **KATHERINE FERNANDEZ RUNDLE,** State **Attorney,** prosecuting for the State of Florida, in **the** County of Dade, under oath, information makes that: RONALD L. MITRO and PATRICIA GUY MITRO, on or about March **8,1994,** in the County and State aforesaid, did unlawfully sell or issue, or offer to sell or **issue,** in Dade County, an identification card or document purporting to contain the age or date of birth of the person in whose name it was, or was to be, issued, to wit: **A** FLORIDA IDENTIFICATION CARD **bearing** the name ANTONIO MIRANDA, in that prior to selling or issuing such card or document defendant did not first obtain from the applicant and retain for a period of three (3) years from **the** date of sale, an authenticated or certified copy of proof of age as provided in Florida statute **232.03, and** a notarized affidavit from the applicant attesting to the applicant's age and that the proof-of-age document required as set forth above is for such applicant, the identification card or document does not contain the business name and street address of the person selling or issuing such card or document, in violation of § **877.18,** Fla.Stat., contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

operated by Ronald Mitro (R 439 72). At the store, known as AAA PhotoFast, the undercover agents purchased photo identification cards. As charged in the information, undercover applicants purchased picture identification cards containing a date of birth. The cost of the identification card was approximately $17.00 plus tax (R 439 ¶2).

Each applicant, upon requesting the purchase of the picture ID card, filled out an application requiring the applicant to complete their name, address, date of birth, social security number, height, weight, and hair and eye color (R 439 ¶3). Each applicant was required to sign the application, representing that the "information used to manufacture this Non-Official Photo Identification Card is represented to be true and correct." (R 439 ¶3). Sample applications were identified in the record as Exhibit B to the motion to dismiss (R 487-497). Each photo ID card was signed by the applicant. All identification cards identified themselves as non-official identification cards (R 499-502).

Only after completing and signing the application form and agreeing to the accuracy of the information was the applicant permitted to obtain an identification card (R 439 73). Each applicant was given an opportunity to look through a book of sample identification cards to select a card style. The sample identification cards were identified variously as "personal" or "not an official Florida I.D. card." Each

card bore the legend that the card was "solely for identification purposes." Some versions of the picture identification cards contained the applicant's thumb print. No identification card purported to be an "official" identification card or official proof of age (R 439-440).

The identification cards which resulted in the 16 charged criminal violations all contained a birth date and photograph of the applicant. No applicant informed either Ronald or Patricia Mitro that any birth date was incorrect or that any information on the card was false (R 440 ¶5). None of the identification cards purported to be official ID cards issued by any government agency. All photo identification cards contained some version of a disclaimer that the card was for personal identification use only (R 499-502).

Ronald Mitro was at the time of the law enforcement investigation and filing of charges a City Councilman for the City of Sweetwater, Florida (R 440 ¶6). The FDLE investigation was part of a larger investigation into allegations of public corruption within Sweetwater. (R 440 ¶6). As a result of the arrest, the Governor suspended Ronald Mitro from office until the disposition of the case (R 440 ¶6). Ronald Mitro claimed during pretial litigation that absent his status as an elected public official, he would never have been charged with a crime; he pointed to the fact that FDLE utilized a sophisticated sting team to gather evidence of a violation

which had never before been prosecuted in Dade County (R 440-441 ¶6).

The sixteen criminal charges brought against Ronald Mitro and Patricia Mitro alleged violations of **§ 877.18,** Fla. Stat, **(1993).** This statute, known as the identification card law, makes it a third degree felony for any person to sell or issue any identification card containing **the** age or date of the person to whom the identification is issued **unless** the issuer has first obtained authenticated and notarized proof of **the** applicant's age, The issuer is required to keep the authenticated or certified proof of age documents for **a** period of three years. The identification card must also contain the seller's business name and address. *Id.*

The statute sets out the identification law as follows:

> **§ 877.18. Identification card or document purporting to contain applicant's age or date of birth; penalties for failure to comply with requirements for sale or issuance. -**
>
> (1) It **is** unlawful for any person, except a governmental agency or instrumentality, to sell or issue, or to offer to sell or issue, in **this** state any identification card or document purporting to contain the age or date of birth of the person in whose name it **was** issued, unless:
>
> (a) Prior to selling or issuing such card or document, **the** person **has** first obtained from the **applicant** and retains for **a** period of 3 years **from the** date of sale:
>
> 1. **An** authenticated or certified copy of proof of age as provided in **§ 232.03;** and

2. A notarized affidavit from the applicant attesting to the applicant's age and that the proof-of-age document required by subparagraph 1 is for such applicant.

(b) Prior to offering to sell such cards in this state, the person has included in any offer for sale of identification cards or documents that such cards cannot be sold or issued without the applicants' first submitting the documents required by paragraph (a),

(c) The identification card or document contains the business name and street address of the person selling or issuing such card or document.

(2) For the purposes of this section, the term "offer to sell" includes every inducement, solicitation, attempt, or printed or media advertisement to encourage a person to purchase an identification card.

(3) All records required to be maintained by this section shall be available for inspection without warrant upon reasonable demand by any law enforcement officer, including, but not limited to, a state attorney investigator or an investigator for the Division of Alcoholic Beverages and Tobacco.

(4) A person who violates the provisions of this section is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. The failure to produce the documents required by subsection (1), upon lawful request therefor, is prima facie evidence of a violation of this section.

(5) The state attorney for any county in which a violation of this section occurs or the Attorney General may enjoin the sale or offer for sale in violation of this

section by temporary and permanent injunction by application to any court of competent jurisdiction.

The identification card statute incorporates a provision of the Compulsory School Attendance and Child Welfare statutes in defining the proof of age information required to be produced by the applicant and maintained by the issuer. The proof of age necessary to obtain a private identification card is that which is required to enter a child into a prekindergarten or kindergarten public school, notwithstanding the age of the applicant. The corresponding school attendance statute, § 232.03, Fla.Stat. (1993), provides:

> **§ 232.03 Evidence of date of birth required.** Before admitting a child to prekindergarten or kindergarten, the principal shall require evidence that the child has attained the age at which he should be admitted in accordance with the provisions of § 232.01, § 232.04, or § 232.045. The superintendent may require evidence of the age of any child whom he believes to be within the limits of compulsory attendance as provided for by law. If the first prescribed evidence is not available, the next evidence obtainable in the order set forth below shall be accepted:
>
> (1) A duly attested transcript of the child's birth record filed according to law with a public officer charged with the duty of recording births;
>
> (2) A duly attested transcript of a certificate of baptism showing the date of birth and place of baptism of the child, accompanied by an affidavit sworn to by the parent;

(3) An insurance policy on the child's life which has been in force for at least 2 years;

(4) A bona fide contemporary Bible record of the child's birth accompanied by an affidavit sworn to be the parent;

(5) A passport or certificate of arrival in the United States showing the age of the child;

(6) A transcript of record of age shown in the child's school record of at least 4 years prior to application, stating date of birth; or

(7) If none of these evidences can be produced, an affidavit of age sworn to by the parent, accompanied by a certificate of age signed by a public health officer or by a public school physician, or, if neither of these shall be available in the county, by a licensed practicing physician designated by the school board, which certificate shall state that the health officer or physician has examined the child and believes that the age as stated in the affidavit is substantially correct.

This evidence of date of birth statute, § 232.03, applies only to children, incorporating terms which are defined in Chapter 39 and pertain to proceedings involving juveniles. The word "child" is defined in § 39.01(7)(a), Fla.Stat. (1993):

(7)(a) "Child" means any unmarried person under the age of 18 alleged to be dependent, in need of services, or from a family in need of services, or any married or unmarried person who is charged with a violation of law occurring prior to the time that person has reached the age of 18 years.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

IS THE FLORIDA IDENTIFICATION CARD STATUTE, § 877.18, FLA.STAT. (1993), UNCONSTITUTIONAL?

SUMMARY OF THE ARGUMENT

Florida's identification card statute is unconstitutional on its face and as applied. The statute is void for vagueness because it does not give ordinary citizens sufficient knowledge of what conduct is prohibited by the statute. The law is also overbroad and ambiguous. It is capable of arbitrary and capricious enforcement by state authorities. In this case, the statute has been applied in an arbitrary and capricious manner. The Third District Court of Appeal was correct when it struck down the statute as void for vagueness. Judge Nesbitt, in his special concurrence, suggested that a more defective statute would be hard to find, The appellate court correctly deferred to the Legislature the responsibility to rewrite the identification card statute so it withstands constitutional muster.

ARGUMENT

THE FLORIDA IDENTIFICATION CARD STATUTE IS UNCONSTITUTIONAL.

The identification card statute used to prosecute respondent violates the basic principles underlying our justice system: the law is vague; the law is incapable of informing the law abiding citizen of what is required; and the law promotes arbitrary and capricious enforcement. A more troubling statute would be hard to find, because this law, which imposes very serious felony punishment, is so uncertain that no one, not even the State of Florida prosecuting this case, has any reasonable idea who is governed by the law and what conduct is prohibited.

Had the Florida Legislature set out to regulate the conditions under which commercial vendors could issue private identification cards, it is likely a number of simple solutions could have been utilized. Instead, the Legislature created a statute which, on its face, gives the appearance of being restricted to issuers of identification cards to children. Upon closer examination, however, the statute may be thought by some to apply to all identification cards. And even then, the statute leaves huge gaps of uncertainty as to how one goes about complying with statutory requirements. In short, the statute does not give ordinary citizens sufficient knowledge of what conduct is prohibited. The law is overbroad and ambiguous, and

is capable of arbitrary and capricious enforcement by law enforcement authorities. The inevitable result of this statutory mess is uncertainty, suspicion, and unfairness. The Legislature must be instructed to redouble its effort to enact an identification card law which is consistent with our constitutional notions of fairness. The current effort does not *make* the grade.

A. The Statute Is Void For Vagueness.

Ronald Mitro, an honest businessman who had never before been in trouble with the law, was investigated by law enforcement officers for purported violations of the identification card statute. Undercover Florida Department of Law Enforcement ("FDLE") agents came to respondent's business establishment and purchased unofficial identification cards. The agents completed the identification card applications, acknowledging to Mr. Mitro in writing that the information given was true and correct. The agents offered no sinister purpose for wanting the identification. When respondent and his wife sold the identification cards, law enforcement officers arrested them for violating the identification card statute. They were both charged with being involved in the making and selling of sixteen identification cards, because they did not first obtain sufficient evidence of age which would permit a child to be enrolled in a public kindergarten. Undisputably, none of the applicants were of an age to be enrolled in a public kindergarten and

none even appeared to be children.

The identification card statute, in addition to being an offense that had never before been prosecuted in Dade County, fails to give people of ordinary intelligence and reason adequate notice of what conduct is prohibited. The Third District agreed the statute "is void for vagueness." *Mitro v. State*, 681 So.2d 303 (Fla. 3d DCA 1996). That is because the law "is too vague to give [people] of common intelligence sufficient warning of what is corrupt and outlawed." *State v. DeLeo*, 356 So. 2d 306,308 (Fla. 1978). The statute is a prime example of written legerdemain, directing proprietors who sell identification cards to perform acts which are impossible in many cases, even if the statutory instructions could be fairly understood. Given the inherent ambiguity in a statute which requires a prioritized production of grade school admission documents and a notarized affidavit as evidence of age, even if the applicant has not been in grade school for a generation, the statute is too capable of arbitrary and capricious enforcement. This is not a statute which carries a warning or administrative licensing consequences, but sets out a crime punishable as a third degree felony. The statute is defective, as the Third District ruled, and cannot be constitutionally applied in this case.

The identification card statute is void for vagueness because it is incapable of a reasonable and ordinary understanding. As a result of its vagueness, the criminal

statute invites arbitrary and capricious enforcement, a consequence which was plainly evident to the Third District. The statute itself does not define the scope of its application. It incorporates other totally separate legislative enactments which are uniquely applicable to "children", even though the statute is written in much broader language. On its face and as applied, the charging statute is void for vagueness.

A statute is unconstitutionally vague if it fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, invites arbitrary and discriminatory enforcement. *Wyche v. State*, *619 So. 2d* 231 (Fla. 1993); *Southeastern Fisheries Ass'n, Inc. v. Dept. of Natural Resources*, 453 So. 2d 1351, 1353 (Fla. 1984). No statute can be left to the capriciousness of state agents in defining its enforcement and scope.

The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. *Papachristou v. City of Jacksonville*, 405 *U.S. 156*, 162, 92 S. Ct. 839 (1972); *Roque v. State*, 664 So. 2d 928 (Fla. 1995). "The language of the statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice.'" *Warren v. State*, 572 So. 2d 1376, 1377 (Fla. 1991).

The *Wyche* opinion provides useful guidance in evaluating the constitutionality of the identification card statute. This Court stated, at **236-237** (citations omitted):

> The principles of **the** vagueness doctrine **address** compliance with **the** concept of due process, **A** statute or ordinance is void for vagueness when, because of its imprecision, it fails to give adequate notice of **what** conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement. Art, I, **§ 9,** Fla. Const.; *Southeastern Fisheries [Association, Inc. v. Department of Natural Resources*, 453 So. 2d **1351** (Fla. 1984)]. **As** the United States Supreme Court has noted:
>
> > Vague laws offend several Important values. First, because **we** assume that **man** is free to steer between lawful and unlawful conduct, **we** insist that laws give the person of ordinary intelligence **a** reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap **the** innocent by not providing fair **warning.** Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. **A** vague law impermissibly delegates basic policy matters to policemen, judges, and **juries** for resolution on an ***ad hoc*** and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," **it** "operates to inhibit **the** exercise of [those] freedoms." Uncertain meanings inevitably

> lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked."

Accord Zachary v. State, 269 So, 2d 669 (Fla. 1972); *State v. Saiez*, 469 So. 2d 927,928 (Fla. 3d DCA 1985), *aff'd*, 489 So. 2d 1125 (Fla. 1986) ("A statute is considered unconstitutionally vague when it fails to give a person of common understanding and intelligence a sufficiently definite warning concerning conduct it seeks to proscribe.").

An unconstitutionally vague statute tears at the very fabric of our system of laws because it results in an otherwise law abiding citizen acting at one's own peril. *State v. Wershow*, 343 So. 2d 605 (Fla. 1977). In *Wershow*, this Court summarized the judicial and constitutional concerns with vague penal statutes in striking down the criminal malpractice statute, at 608-609 (citation omitted; emphasis added):

> When construing a penal statute against an attack of vagueness, where there is doubt, *the doubt should be resolved infavor of the citizen and against the state*. Criminal statutes are to be strictly construed according to the letter thereof, Discussing generally the construction to be given penal statutes, this court, in *Exparte Amos*, 93 Fla. 5, 112 So. 289 (1927), explicated:
>
> > The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly

> and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms; and where there is ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.

The due process requirements of the Florida and United States Constitutions require that every legislative enactment be sufficiently defined so as to apprise those to whom it is applied of the conduct that is prohibited. The use of vague, indefinite, and broad terms that require speculation as to the application and reach of the law is constitutionally offensive. A wrong guess on a citizen's part should not be a basis for criminal punishment, particularly when the state is in a position to decide those who are to be punished. The Supreme Court, in *United States v. Reese*, *92* U.S. 214 (1875), long ago described the dangers inherent in the application of an inexact and vague statute:

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

In the *Wyche* case, this Court declared that the loitering and prowling statute was unconstitutionally vague and overbroad because it failed to adequately define

the conduct proscribed by the statute. The danger was that people could not be sure of the reach or application of the statute, resulting in ordinary law abiding members of the community unintentionally violating the law. Even narrowing the construction of the statute could not save the loitering and prowling law, because the Court would then have been in the untenable position of effectively rewriting the statute.

More recently, this Court found the commercial bribery statute unconstitutionally vague and arbitrary. ***Roque v. State,*** **664** So.2d **928** (Fla. 1995). That statute, § 835.15, Fla.Stat. (Supp. 1990), prohibited any "employee" from accepting a benefit in return for violating a "common law duty." The Court noted that d e f g a common law duty was a difficult enough question for lawyers, at 929:

> By the terms of this act every .. employee ... is required to determine at his peril what specific acts are authorized by law and what are not authorized by law. Honest and intelligent men may reasonably have contrary views as to whether or not a specific act ... is or is not authorized by law and, therefore, the violation or nonviolation of this statute may reasonably depend upon which view the court or a jury may agree with.

The Court also remarked that a statute with so wide a sweep "invite[d] arbitrary application of the law." *Id.* at 930.

The state claims the identification card statute is sufficiently definite that the

public **is** on notice as to what the statute requires. That position just does not *make* sense **in** this case. The vagaries and uncertainty of the identification card statute are readily apparent from an examination of just what the statute does. In order for a shopkeeper to sell an I.D. card containing a date of birth - whether that birth date is correct or incorrect - the seller must first obtain proof of the applicant's age. **The** applicant's word is not enough; the applicant's certification that **a** given age is correct is insufficient. Instead, the seller must obtain and keep an authenticated or certified proof of age that must be used by **a** child to enter kindergarten.[3] Not only that, but the seller must first obtain a specific "age proof' document - a public birth record transcript - and only if that document is "not available" can the seller **ask** for the second preferred proof of **age,** and so on down the list of the only seven acceptable age documents. If the applicant is not a child or does not **have** any of the requited proof of **age** documents: the applicant must produce a parental affidavit and **an age** certificate from a public health **officer** or public school physician. §

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[3]Florida law defines **a** "child" as an unmarried person either under the age of **18,** § 39.01(7)(a), Fla.Stat. (1993), or **a** person under the age of 16. § 232.01(1)(c), Fla.Stat. (1993). The statute does not even tell the seller which **age** definition applies, raising additional vagueness and arbitrary enforcement concerns.

[4]A Florida drivers license is not acceptable proof of age, apparently in keeping with the philosophy of **a** statute applicable **only** to children -- who are not yet old **enough** to drive. Only persons between three and **five** years of age are eligible to attend kmdergarten. §§ **232.04** & 232.045, Fla.Stat. **(1993).**

232.03(7). How many adults would understand that the law requires production of a note from a parent to obtain an unofficial identification card!

What does this statute tell the law abiding shopkeeper? One reading, probably the most reasonable, is that the law pertains only to children obtaining age identification. Another reading is that only people of school age are subject to this proof of age requirement. Yet another interpretation is that all applicants, including elder citizens, must locate and bring their elementary school records in order to obtain an identification card. A far different, but equally valid understanding of the law, is that it applies only to underage youths attempting to obtain false ID to show they are of drinking age. See § 562.11, Fla.Stat. (1993)(misdemeanor violation to sell alcoholic beverage to person under age 21, or to misrepresent age in order to induce a sale of alcohol to a person under 21).

Any of these interpretations are reasonable, and well within the expectation of the law abiding person. Who would suspect, from a reading of the statute, that an adult who wants to obtain an identification card bearing the legend "unofficial" could not obtain one from a seller without first producing a certified birth certificate, a baptismal certificate, or an elementary school transcript? How is the seller to know what "not available" means when deciding if an adult can use a secondary form of proof of age? The law is written in a vague and dangerous manner,

purporting to protect the public from the evil of underage drinking but actually prohibiting a wide range of lawful conduct.

Respondent recognizes the well-established precept bandied about by the state that, when reasonably possible, a court should resolve all doubts about a statute in favor of its constitutionality. *Bunnell v. State*, 453 So. 2d 808 (Fla. 1984); *Dept. of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976). That principle does not extend to a statute which is so vague "that it is not amenable to such a saving construction unless the court is willing to invade the province of the legislature and virtually rewrite it." *Wershow*, 343 So. 2d at 607.

As the Third District found, the identification card statute cannot be cured by judicial rewriting. There is no precision of application, since the statute apparently applies to all identification cards manufactured for any purpose, even legitimate ones. But the actual language used in the statute restricts its application to school-age children through the incorporation of the kindergarten registration provisions of § 232.03. By its very definition, § 232.03 is applicable only to children, defined as a person below 16 years of age. § 232.01, Fla. Stat. (1993) (school attendance required for children up to 16 years); § 39.01(7), Fla. Stat. (1993) ("child" defined as unmarried person under the age of 18 who is dependent). The identification card statute's inclusion of a prioritized proof of age requirement for children plainly

seems to restrict application of the law to children, even though the statute itself does not *so* limit its application, thereby creating a vague statute incapable of rational enforcement.

The state complains that the statutory itemization of information needed *to* show proof of age is far more comprehensive than the law regarding driving licenses and voter registration (State's Brief at 10-12). Therefore, the state argues, if a prospective voter can obtain a voter registration card with less specific statutory instructions, then how could the identification card statute be vague? The answer is appallingly simple: the voter registration and driver license statutes examined by the state are not criminal enactments. If the registrar of voters or the drivers license agency is uncertain whether the required proof of identification is sufficient, those statutes leave the decision to the discretion of those state employees. *See* § 97.041, Fla.Stat. (1994); § 322.051, Fla.Stat. (1994). Not so the identification card statute under consideration; the issuer who misunderstands that law is guilty of a third degree felony.

The identification card statute is impermissibly and unconstitutionally vague since it purports to prohibit selling or issuing any form of identification card containing a person's age or date of birth, without first obtaining and retaining certain documentation which may or may not be available. The statute excludes

without reason other legitimate proof of age, including such reasonably available government issued items as a driver's license, an identity card, or an applicant's affirmation as to identity. The statute does not put a citizen on notice that the use of these items is prohibited when issuing identification cards to adults.

As the appellate court acknowledged, the issuer of an unofficial identification card is in a quandary when deciding whether the required identification is "not available" before alternative sources of identification can be utilized. § 232.03(7), Fla.Stat. (1993). The phrase "not available" is ambiguous and subject to the same type of ambiguity and misinterpretation as the phrase "negligently deprives" in the negligent treatment of children statute which was declared unconstitutional in *State v. Winters*, 346 So.2d 991 (Fla. 1977) (§ 827.05, Fla.Stat. (1975), proscribing negligent treatment of children, was unconstitutionally vague because it criminalized the negligent treatment of children without adequate guidelines). Similarly, in *State v. Mincey*, 672 So.2d 524 (Fla. 1996), the current version of the same statute was deemed unconstitutional because the phrase "though financially able" is too

ambiguous to clarify the type of conduct is prohibited under the statute." *Id.* Words which provide too much discretion and contain no guidelines for specific application render criminal statutes unconstitutionally vague. That is one of the fundamental deficiencies of the identification card statute.

The statute, furthermore, is incapable of ordinary understanding and adherence in that it appears to require the issuer (seller) to retain for three years from the date of issuance the original or an authenticated or certified copy of the statutorily enumerated proof of age documents in this prioritized order: (1) a birth certificate, (2) a baptismal certificate, (3) an insurance policy, (4) a Bible record and accompanying parental statement, (5) a passport, (6) a school transcript at least four years old, (7) or a parental certificate. In limiting the proof documents, the statute incorporates a requirement that the original document or certified copy be kept, even though the original or the certified copy of the stated documents may be the only version the applicant has and most surely would not be an item easily given up by the applicant in exchange for obtaining an unofficial picture identification card. For example, the statute refers to a passport, yet a passport constitutes the property of the United States and is to be possessed by the person to whom it is issued. See 22 U.S.C. §§ 211-218. The statute provides no guidance as to how an applicant could even obtain a certified copy of a passport. A certificate of arrival or other

nationality document, valid as a proof for obtaining an ID card, must be kept in the possession of the alien, upon pain of criminal prosecution for a failure to possess the document. 8 U.S.C. § 1305(e). Consequently, the requirement that the identification card issuer retain the actual documentation or a certified copy is impermissibly vague where there are no provisions which demonstrate what documents are actually required or how one obtains an authenticated or certified copy.

Additionally, the required proof documents are, in many respects, impossible or impractical to obtain. For example, many applicants may not have access to birth certificates, passports, school records, alien registration cards, or even parents to certify a person's age. Many adults and even some children are not in possession of these documents, yet the statute makes no provision for such persons to otherwise obtain an ID card. The statute does not tell a seller under what circumstances a defined proof of age is "not available." Many people wanting a photo ID may not even have the funds or the means to obtain certified or authenticated copies of required proof of age documents, The statute provides no guidance as to whether other identification substitutes are permitted in cases not involving children. While a limited number of identification documents may be appropriate when enrolling students in public school -- and it is not a crime to use other documents when

enrolling children in school -- the absence of clear instructions applicable to every applicant for and issuer of an unofficial picture identification card renders the statute constitutionally suspect.

Perhaps just as importantly, the statute is vague in that it does not even appear to allow an identification card issuer to utilize a driver's license or official Florida identification card as proof of identity for obtaining an ID card, even though these documents constitute statutorily valid means of identification under Florida law. See §§ 322.03 and 322.051, Fla.Stat. (1993). Statutory requirements to obtain an *official* Florida identification card -- as opposed to a private, non-official picture ID -- are not even as stringent as those imposed by § 877.18. For example, to obtain an official Florida license or identification card, an applicant need only swear or affirm to the truth of the information contained on the application. The applicant is ***not statutorily required*** to produce the type of documentation needed to register a child in a public school or to obtain a private identification card. §§ 322.051(1) & 322.08, Fla.Stat. (1993).

Thus, a person of ordinary intelligence and common sense, when attempting to issue or sell an unofficial picture ID card, is left with too much to wonder when trying to decipher the statutory requirements. Does the law apply only to children or also to adults? Can the applicant verify or affirm the accuracy of the information

provided? Is the issuer bound by the restrictive list of documentation or can the issuer utilize the same type of "proof of identity satisfactory to the [D]epartment [of Highway Safety and Motor Vehicles]" as allowed in § 322.08(2)?

Consider the plight of the proprietor who makes identification cards. Suppose an elderly woman wants to buy an unofficial identification card. She has no birth certificate with her, was never baptized, has no life insurance, no passport, and has not been to school in seventy years. She wants a picture ID right away. She does, however, have a Florida drivers license. The proprietor knows that a drivers license is not valid proof of age under the statute, at least if the applicant is a child. This make sense, because lundergarten children do not yet drive. Does the seller refuse to issue an identification card until the elderly woman returns with a passport or birth certificate? Does the seller unilaterally decide the specified ID is not available, thus justifying the issuance of an unofficial picture identification card? Does the seller even know what proof of age can be relied upon, particularly when there is no indication the woman is ready to commit some heinous crime and the woman affirms her age in a written statement? These questions must be carefully weighed, because a wrong answer will brand the proprietor a felon.

The state claims the proof of age aspect of the statute clearly applies to all applicants for unofficial identification cards - - not just children. The statute, in

reality, is anything but "clear," as the state's convoluted argument convincingly demonstrates. It is inconceivable for the state to argue that an incorporation of a statute which applies only to children (§ 232.03, Fla.Stat. (1993)) can somehow be expanded to apply to the entire world merely by its association with the identification card statute, The state has provided no legal authority for its assertion that a statute designed for children can be expanded beyond its express application to children, and the statute by its plain language does not apply to adults. It is this very uncertainty which renders the identification card statute unconstitutional. If the Legislature had wanted to incorporate certain types of identification, it could have done so. But it did not do that. Instead, it incorporated a statute which is completely limited to children. As a result, persons of ordinary intelligence have no idea what the statute allows them to do or what the law prohibits them from doing.

The statute, moreover, is constitutionally vague in that it appears to be restricted to underage identification and false identification utilized to circumvent Florida's alcohol and tobacco prohibition laws. The statute's incorporation of school age registration requirements and its enforcement by the Division of Alcoholic Beverages and Tobacco make clear the intended reach of the statute. Alcoholic beverages, regulated by the Division of Alcoholic Beverage and Tobacco, cannot be purchased or consumed by persons under the age of 21. § 562.11, Fla.Stat. (1993).

The sale of tobacco products is likewise prohibited to persons under the age of 18. § 859.06, Fla.Stat. (1993). Providing enforcement jurisdiction to the Division of Alcoholic Beverages and Tobacco is strong evidence that the statute is intended to apply to juveniles attempting to obtain false identification to circumvent the alcohol or tobacco laws. Notwithstanding that apparent limited purpose, the statute provides no warning that it goes beyond juveniles by extending to all ID card applicants.

The test of a statute's vagueness is measured by common understanding and practice. In *Brock v. Hardie,* 114 Fla. 670, 154 So. 690 (1934), the Court stated:

> Whether the words of the Florida statutes are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."
>
> Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase "so vague that men of common intelligence must necessarily guess at its meaning," so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.

> We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or not in indicating the legislative purpose, so *that a person who may be liable to the penalties of the act may know that he is within its provisions or not.* (emphasis added),

In *State v. Llopis*, 257 So. 2d 17 (Fla. 1971), this Court gave further guidance when determining what constitutes a vague statute:

> When exercising its power to declare an offense punishable, the Legislature must inform our citizens with reasonable precision what acts are prohibited. There must be provided an ascertainable standard of guilt, a barometer of conduct must be established, so that no person will be forced to act at his peril.... (citations omitted).

No one can dispute the proposition that no person should be held responsible for violating a law which cannot reasonably be understood. That is the precise problem here.

> The vice of vagueness in statutes is the treachery they conceal in determining what persons are included or what acts are prohibited.... No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards must appear expressly in the law or be within the realm of reasonable inference from the language of the law.

Aztec Motel, Inc. v. State ex rel. Faircloth, 251 So. 2d 849 (Fla. 1971).

In *Cuda v. State,* 639 So. 2d 22 (Fla. 1994), the Court declared the "exploitation of the elderly" statute unconstitutionally vague. The statute prohibited abuse of aged persons by exploitation through the "improper or illegal use or management" of the elderly person's assets. § 415.111(5), Fla.Stat. (1991). The court found that the phrase "improper or illegal" created a constitutional vagueness problem because the statute requires a person to whom the law might be applicable "to determine at his peril what specific acts are authorized by law and what are not authorized by law." *Id.* at 23. The court noted that no other statutes supply a backdrop to the law in question?so there could be no reference to other laws which might better define the vague language employed in § 415.111(5). Because "the Florida statute contains no clear explanation of the proscribed conduct, no explicit definition of terms, nor any good faith defense[,]" the law was held to be unconstitutionally vague. *Id.* at 25.

The identification card statute here is similarly deficient. As compiled in Chapter 877, the statute is a part of the "miscellaneous crimes" chapter. Its incorporation of other statutes, none of which contain specific definitions of important terms, provides more questions than answers. The possible reach of the statute is neither defined nor limited in any way, thus leaving business owners who supply identification cards with no direction as to what acts are encompassed by the

statute. This statute raises serious questions as to what type of proof of age documents are required. The statute, by incorporating a law addressing school age children, appears to limit its scope to juveniles or under age persons. Certainly, a reasonable interpretation of the statute is that the records required to be maintained pursuant to subsection 3 are limited to juvenile records. If such is the case, the statute allows for discriminatory and unbridled enforcement of the statute at the arbitrary direction of law enforcement officers, a result which is at the core of a void for vagueness challenge. Because of the serious constitutional deficiencies, this court must declare the statute unconstitutionally vague.

In *State v. Saiez*, 469 So. 2d 927 (Fla. 3d DCA 1985), the Third District found the statute prohibiting the mere possession of embossing machinery designed to produce credit cards was unconstitutionally vague because the law "does not denote a particular type of embossing machine, and thus includes in its prohibition machinery that is possessed and used for lawful purposes." *Id.* at 929. The statute was declared void for vagueness because it failed "to set forth a standard by which the possessor of the machinery may know what acts are proscribed..." *Id.*

This Court, in reviewing that decision, agreed the embossing statute was unconstitutional, but did so for a different reason. *State* v. *Saiez*, 489 So. 2d 1125 (Fla. 1986). The Court ruled the state's police power could not extend to prohibit

the possession of embossing machines, an act which was otherwise innocent, without a demonstration the law bore a reasonable relationship to a legitimate state objective. Because the statute was capable of being applied to entirely innocent activities, it was beyond the purview of the criminal laws. *Id*. at 1128-1129. In the case of the identification card statute, a similar deficiency is present, where the law bears no relationship to a legitimate state objective in the absence of a requirement that the identification card be intended for an improper purpose.

The requirement in the identification card statute that an applicant produce a "notarized affidavit" attesting to the applicant's age and documentation creates another significant constitutional hurdle. Although a Notary Public is authorized to administer oaths "when it is necessary for the execution of any writing or document to be attested, protested, or published under the seal of a Notary Public[,]" § 117.03, Fla.Stat. (1993), that requirement unfairly penalizes an individual from obtaining an identification card or distributing an identification card. The statute has the effect of requiring the issuer or the applicant to access a Notary Public when exercising the constitutional right to commercial speech and association, often at a prohibitive cost in view of the insignificant price of an identification card.[5] As the notarial

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[5]/A Notary Public is permitted to charge up to $10.00 for any one notarial act. § 117.05(2), Fla.Stat. (1993). The defendant charged $17.00 for a picture ID card.

requirement unreasonably limits access to permissible forms of identification and is not reasonably related to the statutory goal, the statute is unconstitutional for this additional reason.

The state claims the Legislature **can** properly limit the age and identification requirements for obtaining unofficial identification cards. This case is not about the ability of the legislative branch to spell out the conditions precedent to obtaining a picture ID card. The Legislature has **limited** the preconditions, but has done so in a way that ordinary, law abiding citizens will unintentionally run afoul of the law. One need **only look** at a host of identification cards currently in use. Many businesses issue employee picture IDs containing birth dates. Medical **and** health insurance plans issue membership cards to members for identification, containing photo and age information. How many businesses issuing those cards in good faith even consider **the** potential violation of the identification card statute? Yet, the state's uncompromisingly broad construction of the statute qualifies these businesses as felons, a preposterous result given **the** varying interpretations of the statute.

In ***summary,*** the statute is unconstitutionally **vague** because it **gives** no clear definition of its scope. All types of private business establishments, from hospitals to **private schools** to **health** clubs, all of which **produce** identification cards, **may be**

unwittingly violating the law because the statute is incapable of ordinary understanding, That is not a just or fair situation. This court must restrict its unconstitutional application by striking down the statute.

B. The Statute Is Overbroad.

The identification card statute is unconstitutionally overbroad in that it applies to protected conduct which is not otherwise illegal. The overbreadth doctrine is available in the case of constitutional challenges to statutes that infringe on First Amendment protections. *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294,2302 (1972); *Southeastern Fisheries Ass'n, Inc. v. Dept. of Natural Resources*, 453 So. 2d 1351 (Fla. 1984). The court noted in *State v. T.D.B.*, 656 So. 2d 479,481 (Fla. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1014 (1996), that the overbreadth doctrine, when applied to conduct that is expressive, looks to see if the regulation of the conduct otherwise represents a valid interest in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

The United States Supreme Court, in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,800-801,104 S. Ct. 2118,2126 (1984), stated this with regard to the overbreadth doctrine:

> The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself -- the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the court.... In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds.

That is precisely the concern involved with application of the identification card statute in this case. The statute itself, regulating a means of obtaining personal and unofficial identification, is at the core of an individual's First Amendment protections. The statute infringes upon both the issuer's and the applicant's rights of freedom of expression, freedom of association, and privacy. After all, the name which a person uses is not subject to law enforcement limitation except insofar as the person acts with some wrongful intent. It was for this reason this Court declared the "wearing a mask" statute unconstitutional in *Robinson v. State*, 393 So. 2d 1076 (Fla. 1980). The statute at issue in that appeal, § 876.13, Fla.Stat. (1977), proscribed the wearing of a mask which concealed the identity of the wearer. The Court found the statute unconstitutionally overbroad for the following reason, at

1077:

> Without speculating on whether the statute is intended to apply to any core activities which the legislature has an interest in preventing, we find that this law is susceptible of application to entirely innocent activities. It is susceptible of being applied so as to create prohibitions that completely lack any rational basis. The exceptions provided by § 876.16, Fla. Stat. (1977), are not sufficient to cure this fatal overbreadth,
>
> The state points out rational bases which the statute serves and asks that we provide a limiting construction, restricting the law's application to conduct the statute may prohibit. We find, however, that although the law is overbroad in its sweep and lacks a rational basis, its language is very specific. The statutory words are not susceptible of any limiting construction. (citations omitted).

In this case, respondent was charged with violating a law which impermissibly restricts his and his customers' First Amendment guarantees. The issuance of an identification card bearing an individual's true picture and a name provided by the applicant[6] is wholly legitimate activity in the absence of a showing the issuer is acting with knowledge or intent that the identification card will be used for an improper or unlawful reason.

6/ In some of the situations charged in the information, the name used by the applicant was the applicant's true birth name. In other situations, the name used was a stage name, as in the case of Counts 7 and 8, in which the undercover officers claimed to be adult entertainment actresses who did not want their true names to be utilized ® 460-461 n. 5).

The mere use of a **false** name or different birth date is not a crime, unless it is done with the intent and purpose to mislead or obstruct a law enforcement officer. *D.G. v. State*, **375 So. 2d 868** (Fla. **2d DCA** 1979)(giving **false** name **to** police does not constitute obstruction by a disguised person); *Hartley v. State*, 372 **So.** 2d 1180 **(Fla. 2d DCA 1979).** *Leland v. State*, **386 So. 2d** 622 (Fla. **3d DCA** 1980), **held** a person does not commit the offense of obstruction **by** a disguised person through the act of **giving a** false name to a police officer upon being stopped by the officer. Rather, it is only where the giving of a **false name** is done "with intent to hinder, obstruct or interrupt a law enforcement officer" that the conduct becomes criminal. *E.g., Z.P.* **v.** *State*, **440 So, 2d 601, 602 n.** 1 **(Fla. 3d DCA 1983);** *Steele v. State*, **537 So.** 2d **711** (Fla. 5th **DCA** 1989)(giving of false name must, in some manner, impede **a law** enforcement investigation).

The deleterious result of the overbroad statute utilized in this case presents a "chilling effect" on otherwise innocent conduct. ***New York v. Ferber*, 458 U.S. 747, 772 n. 27, 102 S.** Ct. **3348,3362 n. 27 (1982). As** the Court stated in *State v. Keaton*, 371 *So.* 2d 86, 91-92 (Fla. **1979):**

> [T]he **mere** existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of **the** rights of free expression, **and** deters most effectively the prudent, the cautious **and the** circumspect, **the very persons** whose advice we seem

generally to be most in need of.

The overbreadth doctrine is intended to eliminate this chilling effect and thus allow for the free, **unhindered** exercise of constitutional rights. *Art.* I, §4, Fla.Const.

In this case, there has been no suggestion respondent acted with any wrongful intent. Moreover, there **is** no contention respondent provided an identification card for any improper or illegal purpose. To the contrary, on every charged occasion on which respondent issued identification cards, **the** applicant informed respondent of the name, date of birth, **and** other biographical information which was to **be** included on the identification card. Each applicant signed a document **affirming** that the information on the unofficial identification card was true and **correct**.[7]

In *summary,* the statute at issue reaches to conduct which is protected **by** the First Amendment. The statute reaches too **far,** and includes protected and legal conduct. Not only is the statute overbroad on its face, it is unconstitutionally overbroad **as** applied to **the** particular circumstances involving respondent. For **these** dual reasons, the statute must be stricken as unconstitutionally overbroad.

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[7] The compilation of identification card applications attached to **the** motion to dismiss reflects the numerous versions of the applicants' affirmation or representation that **were** used at various times. In every case, **the** applicant agreed the information on the card **was** correct. Each card bore a legend such **as:** "The individual whose name and signature **appear** on this form, swears that the information used in the manufacture of this non-official ID card is **true** and correct." ® 487-497).

C. The Statute Is Ambiguous And Subject To Arbitrary Enforcement.

Penal statutes must be strictly construed. *E.g.*, *City of Miami Beach v. Galbut*, 626 So. 2d 192 (Fla. 1993). Statutes susceptible of differing meanings, interpretations, and constructions must be construed in favor of the defendant. *Scates v. State,* 603 So. 2d 504 (Fla. 1992). The charging statute in this case is unequivocally ambiguous. It appears to penalize all conduct associated with the distribution of identification cards without obtaining or keeping proper documentation. The particular documentation deemed necessary by the statute concerns proof of age for children entering public schools. Further ambiguity occurs as a result of the statutory reference to enforcement by the Division of Alcoholic Beverages and Tobacco. The context of this incorporation seems clear: The statute is directed toward preventing under age persons from purchasing alcoholic beverages or tobacco, both of which violate the law, §§ 562.11 & 859.06, Fla.Stat. (1993). Thus, it appears the evil sought to be remedied by the statute is preventing juveniles from utilizing false identification to obtain alcohol or tobacco products.

Rather than restrict application of the statute to what is the apparent legislative intention, the statute utilizes language which is unnecessarily broad. The result is that the statute, because of its imprecision, invites arbitrary and

discriminatory enforcement, which is the same **reason** this Court struck down **the** "public housing" enhancement statute in ***Brown*** *v. State, 629* So. **2d 841** (Fla. 1994). For this additional **reason,** respondent and all similarly situated distributors of identification cards who did not act with any wrongful intent, are subjected to an unfairly ambiguous statute.

D. The Statute Constitutes An Improper Exercise Of The Police Power.

The identification card statute is also unconstitutional in violation of substantive **due** process under the Fourteenth Amendment to the United States Constitution **and** Art. I, §9 of the Florida Constitution. These due **process** clauses establish a "**sphere** of personal liberty" for every individual, subject **only** to reasonable intrusion by the state in furtherance of legitimate state interests. *City of Daytona Beach* ***v.*** *Del Percio,* 476 ***So.*** 2d 197,202 (Fla. 1985). **A penal** statute derives from **the** state's "police power," which is dependent on **the** right of **the** sovereign to **enact** laws for **the** protection of **its citizens.** *See Carroll* ***v.*** *State,* **361 So.** 2d 144, **146** (Fla. 1978).

The police **power** is not boundless. It is, instead, confined to those acts **which** may **be** reasonably construed as expedient for the protection of the public health, safety, **welfare,** or morals. *Hamilton* v. *State, 366* **So.** 2d 8, 10 (Fla. **1978);**

Newman v. Carson, 280 **So.** 2d **426,428** (Fla. 1973). Thus, while the due process clauses of **the** federal and state constitutions do not prevent the legitimate interference with individual rights under the police **power,** they do **place** limits on such interference. *State v. Leone,* 118 **So.** 2d 781,784 (Fla. 1960).

In addition to **the** requirement that a statute's **purpose** must be for the general welfare, the guarantee of due process requires that **the** means selected shall have a reasonable and substantial relationship to the object sought to be attained **and** shall not be unreasonable, arbitrary, or capricious. *State v. Saiez,* 489 **So.** 2d at 1128 **(Fla. 1986);** see *also Nebbia v. New York,* **291** U.S. 502, 525, 54 **S.** Ct. 505,510 (1**934);** *Lasky v. State Farm* ***Insurance*** Co,, **296 So.** 2d 9, 15 (Fla. 1974).

Section 877.18 **was** a legislative attempt to prevent under age persons from having access to the means of obtaining alcohol and tobacco products. There is no question that **the** curtailment of illegal drinking and smoking is a legitimate goal within the **scope** of **the** state's police power. **The** means chosen by the Florida **Legislature** to **pursue** that goal **are** not rationally related to the attainment of **the objective.**

In ***State*** *v. Saiez,* the Court declared the possession of credit card embossing machines unconstitutional because the criminalizing of possession of a certain type of machinery **was** not legitimately related to the goal of curtailing credit card fraud.

There, the Court found "the legislature has chosen a means which is not reasonably related to achieving its legitimate legislative purpose. It is unreasonable to criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their businesses and for other non-criminal activities." *State v. Saiez*, 489 So. 2d at 1129.

In *Delmonico v. State,* 155 So. 2d 368 (Fla. 1963), the Court declared a statute that prohibited the possession of spear fishing equipment in an area of Monroe County to be unconstitutional. The Court explained, at 369-370 (footnotes omitted):

> Fundamental to much of appellants' argument is the contention that the particular section of the statute here involved ... is improper because it fails to require proof of the intent essential to any crime such as a showing that the equipment was possessed with an intent to put it to unlawful use, Instead the law penalizes the mere possession of equipment which in itself is wholly innocent and virtually indispensable to the enjoyment of the presently lawful and unrestricted right of appellants in common with the public at large to engage in spearfishing in waters on all sides of the *area* covered by the statute....
>
> In order to meet constitutional limitations on police regulation, this prohibition, i.e. against possession of objects having a common and widespread lawful use, must under our previous decisions be reasonably "required as incidental to the accomplishment of the primary

> purpose of the Act." There is little doubt that the penalty against possession of such equipment will simplify the problem of enforcing the primary prohibition against spearfishing in the area covered by the statute. Expediency, however, is not the test, and we conclude that convenience of enforcement does not warrant the broad restriction imposed by § 370.172(3).

See also Foster v. State, 286 So, 2d 549, 551 (Fla. 1973)("It would be an unconstitutional act -- in excess of the State's police power -- to criminalize the simple possession of a screwdriver.").

The same rationale was employed by the Court in *Robinson v. State*, 393 So. 2d 1076 (Fla. 1980), which held unconstitutional a statute that prohibited the wearing of any mask or covering "whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer..." The Court explained the statute violated due process because it was "susceptible of application to entirely innocent activities" and created "prohibitions that completely lack any rational basis." *Id.* at 1077.

The statutes reviewed in *Saeiz, Delmonico,* and *Robinson* are no different from the identification card statute involved in this case. The law purports to criminalize conduct which is not otherwise unlawful and which is related to a fair exercise of one's freedoms of association and expression. The statute requiring issuance of an identification card only upon proof of a limited list of identification

documents, and then only after the issuer retains those identification documents for three years, is similar to the record keeping statute deemed unconstitutional in *Mid-Fla Coin Exchange, Inc. v. Griffin*, 529 F.Supp. 1006 (M.D.Fla. 1981). In that case, the federal court found that § 812.051, Fla.Stat. (1981), which imposed record keeping requirements in an effort to regulate secondhand precious metal businesses, was unconstitutional. The court found that because the statute contained no element of scienter or requirement of culpable intent, and contained no requirement of a knowing violation in order for the perpetrator to be guilty of committing a crime, the statute imposed burdensome restrictions in violation of constitutional protections.

Following the *Mid-Fla* decision, the precious metals dealer statute was amended and subsequently found to be constitutional in *State v. Moo Young*, 566 So. 2d 1380 (Fla. 1st DCA 1990). That statute, like its predecessor, required precious metals dealers to make records and reports of purchases of precious metals. The changed statute, however, clearly defined its scope and the persons to whom the statute was applicable. In requiring dealers to include a record of a seller's identification, the statute did not limit the proof to a specific means such as a "driver's license," but incorporated any other "form of identification issued by a government agency..." *Id.* at 1382.

The identification card statute before the court does not contain the protections included in the constitutional version of the precious metals dealer law, but instead is more akin to the predecessor law found unconstitutional in *Mid-Flu Coin Exchange*. This statute constitutes an improper exercise of the police power. The means chosen to pursue what is an otherwise valid legislative goal -- preventing under age drinking -- are not rationally related to the objective. For this reason, the statute is unconstitutional.

E. Fatal Failure To Require Proof Of Criminal Intent.

The identification card statute at issue does not purport to include a criminal intent element. Thus, it penalizes conduct which is not ordinarily criminal and which was not done with any wrongful intent.

A legislative body has the power to declare conduct criminal and attach criminal sanctions to such conduct. *State v. Wershow*, 343 So. 2d 605, 610 (Fla. 1977); *State v. Gray*, 435 So. 2d 816 (Fla. 1993). In *Smith v. State*, 71 Fla. 639, 642, 71 So. 915, 916 (1916), the court stated:

> While all common law crimes consist of two elements -- the criminal act or omission, and the mental element, commonly called criminal intent, it is within the power of the Legislature to dispense with the necessity for a criminal intent, and to punish particular acts without regard to the mental attitude of the doer.

The legislative power is limited, however, by the nature of the proscribed conduct. ***State*** *v. Oxx*, **417 So.** 2d 287, **189** (Fla. 5th **DCA** 1982), explained the distinction between statutes codifying crimes recognized at common law **and** statutes that proscribe conduct not prohibited at common law. In common law crimes, known as **crimes** *mala* ***in*** se, the intent for the offense is deemed inherent in the offense, **even** if the statute fails to specify intent as **an** element. *Id.* at **289.** But **crimes** proscribing conduct not prohibited at common law or **crimes** *mala* ***prohibita,*** which usually result from neglect, do not require criminal intent. *Id.*

In **the** instant case, respondent **was** charged with violating an identification card statute prohibiting him from issuing identification cards without obtaining and then retaining certain documentary information. This is not a violation which arises **from an** accused's neglect. The crime is aimed at **an** effort to prevent others from violating **the** law **--** such as the law prohibiting juvenile alcohol consumption **-- and thus** must **require** proof of criminal intent before an individual can **be** found guilty of a felony. This is because "constitutional restriction[s] may come into **play** where the statute imposes an affirmative duty to act and then penalizes the failure to comply. In such **an** instance, **if** the failure to act otherwise amounts to essentially innocent conduct, the failure of the penal statute **to** require some specific intent may violate due process." ***Id.*** **at** 290. ***See*** *also* ***Lambert*** *v. California,* **355 U.S.** 225, 78 **S.** Ct.

240 (1957)(court struck down ordinance which required convicted felons to register with police, since ordinance punished a failure to act without requiring a showing of knowledge of the duty to act).

The statute in this case punishes passive conduct totally unrelated to the statutory goal of preventing under age persons from attempting to purchase alcohol or tobacco. It proscribes the failure to maintain specified records, even though an issuer retains similar records and takes precautions to assure that the applicant swears to the truth of the information contained on a picture identification card. The statute itself is the equivalent of "a law enforcement technique designed for the convenience of law enforcement agencies." *See Lambert*, 355 U.S. at 229, 78 S. Ct. at 243. The statute thus cannot constitutionally dispense with the criminal intent element. The elimination of this element renders the statute constitutionally defective.

Morissette v. United States, 342 U.S. 246, 271, 72 S. Ct. 240 (1952), instructs courts that the standard presumption in favor of a scienter requirement applies to every statutory element which criminalizes otherwise innocent conduct. Because the statute does not attempt to impose criminal sanctions for offenses which are against the public health, safety, or welfare, the elimination of a criminal intent element is not permissible.

CONCLUSION

The identification card statute is unconstitutional. The statute suffers from so many constitutional deficiencies that it is difficult to enumerate them all. At a minimum, the statute is vague, overbroad, and an improper exercise of police power. It promotes arbitrary and capricious enforcement. Its failure to require proof of criminal intent is also unconstituional. The Third District correctly found the statute was constitutionally defective and beyond judicial resurrection. The judgment of the appellate court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing was delivered by mail this 18th day of March 1997, to Michael Neimand and Keith S. Kormash,

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