# Chapter 15: Crimes Against Public Order and Morality

**Chapter Overview:**

Some activities are criminalized due to their tendency to disturb the peace, create public nuisance, or threaten a sense of public morality. These crimes include disorderly conduct, rioting, public indecency, vagrancy and loitering, gang activity, prostitution and solicitation, obscenity, and cruelty to animals.

The crime of disorderly conduct punishes the disturbance of peace, public morals, or public decency. Disorderly conduct statutes vary from state to state in what types of activity are considered criminal, but they can each be traced back to a common law goal of punishing a breach of peace. When disorderly conduct is carried out by a group of individuals for the purposes of committing an additional crime, this is known as rioting.

Public indecency is a crime viewed to diminish the quality of life in the area surrounding the crime. The goal of statutes prohibiting such behavior is to maintain or improve the quality of life for the people inhabiting that area. Publicly indecent behavior might include such acts as would cause the deterioration of the physical appearance of a neighborhood, or behavior which would encourage an increase in undesirable societal elements in a given area and in turn affect such things as decrease in property values.

Vagrancy is a crime that punishes an individual for wandering in the streets without any apparent means of making a living to support themselves. Often considered in conjunction with this crime is loitering, which is the act of standing in a public place without any apparent purpose. While some legislation against loitering is aimed at people similar to vagrants and the homeless, authorities also have an interest in punishing loitering to aid in the control of gang activity, which plagues many areas of the country and poses a unique challenge to law enforcement.

Prostitution is the engagement in sexual activity in exchange for monetary or other property gain. To solicit prostitution by making a request that an individual commit the act is also considered a criminal offense. Prostitution is generally punished as a misdemeanor, except in cases where the offender has a history of multiple offenses or knowingly engages in prostitution while infected with HIV.

Obscenity is a form of speech that is not protected by the First Amendment's free speech clause, as it is viewed by the Supreme Court to be without redeeming social value. What constitutes obscenity varies from state to state but will include things such as child pornography.
Also included in the category of crimes against public order and morals is animal cruelty. While the reasoning behind the punishment of animal cruelty has changed over time it continues to be criminalized. In this chapter of the supplement you will see how Florida statutes criminalize animal cruelty, as well as the other crimes against public order and morals discussed here.

**I. Disorderly Conduct**

Section Introduction: An individual engaged in disorderly conduct when they commit such acts to cause a breach of peace and quiet, public morals, or sense of public decency. This crime is defined more specifically by the Florida statute below, which is followed by a criminal case applying the concept of disorderly conduct and its potential relation to other crimes.

**Florida Statutes, sec. 877.03 - Breach of the peace; disorderly conduct**

Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.

**U.S. v. Lyons, 403 F.3d 1248, (C.A.11, Fla., 2005)**

Procedural History: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 02-00103-CR-FTM-29-DNF, John E. Steele, J., of being felon in possession of ammunition, and he appealed.

Issue(s): Whether, at the time Lyons was arrested, based on the totality of the facts and circumstances, there was probable cause to believe Lyons had committed the crime of disorderly conduct.

Facts: The relevant facts are straightforward. On November 13, 2002, Lyons was indicted in one count for possession of ammunition (four Remington .22 caliber bullets), after having been convicted of three or more violent felony or serious drug offenses, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The indictment identified eight prior felony convictions: grand theft, attempted robbery, aggravated assault, two robberies, sale or delivery of cocaine, possession of cocaine, and sale of a substance in lieu of a controlled substance. Lyons moved to dismiss the indictment, arguing that the armed career-criminal charge violated the Eighth Amendment's proscription of cruel and unusual punishment. The district court denied his motion. Lyons then filed a motion to suppress the four bullets found on his person during a search incident to his arrest for disorderly conduct. He argued that the seizure of the bullets was illegal because his conduct did not violate Florida's disorderly conduct statute, Fla. Stat. § 877.03. He maintained that the foregoing argument was supported by the fact that he had been acquitted on the § 877.03 charge in state court.

At an evidentiary hearing on the motion to suppress, the government presented the following evidence. Detective Brian Gederian of the Fort Myers Police Department ("FMPD") testified that, during the early morning hours of September 16, 2001, he was patrolling an area containing a number of bars where "several fights" had occurred that evening. When he arrived, Detective Gederian approximated, 30 to 40 people were present at the scene. This was right around the closing time of the area bars. In the course of breaking up a developing fight, Detective Gederian arrested a friend of Lyons. According to Detective Gederian, after he had arrested Lyons's friend and placed the friend in the back of a patrol car, Lyons began "protesting about his friend's arrest" by "swearing and cussing." Lyons also directed racial epithets at

Detective Gederian. Detective Gederian described Lyons's demeanor as "very aggressive," and indicated that he appeared intoxicated.

For security reasons, Detective Gederian asked Lyons to "step back about ten to fifteen times." Lyons failed to comply with these ten to fifteen requests and kept running toward Detective Gederian, approaching Gederian at a distance he estimated was not closer than "arm's length." At this point, Detective Gederian moved to arrest Lyons. When he was told that he was going to be arrested, Lyons took a "fighting stance," necessitating Gederian's use of pepper spray to subdue him. After Lyons's arrest, police officers found four Remington .22 caliber bullets in Lyons's front pocket.

FMPD Officer Jeffrey Paul Bernice, who was on patrol in the same area on the night of Lyons's arrest, assisted in the arrest of Lyons's friend. Officer Bernice testified that the friend was an Asian male who, it was reported, had slapped a white female. Officer Bernice testified that he had encountered Lyons prior to the evening of September 16, 2001, and that, in these situations, "Lyons was always respectful to me, courteous, kind, always friendly." However, on the evening of his arrest, Bernice described Lyons as "very upset" and "angry." According to Officer Bernice, after Lyons's friend was arrested, Lyons began "screaming obscenities," and gesturing by holding his hands up in the air. At some point, two bottles were thrown at law enforcement officers in the area, but the officers were unable to tell who threw the bottles. There were about five law enforcement officers at the scene of the arrest. Officer Bernice confirmed that Detective Gederian directed Lyons to leave, but that Lyons did not comply with this instruction. Officer Bernice testified that the crowd then consisted of over 100 people.

In support of his suppression motion, Lyons presented the testimony of a friend, Jana K. Minor, who had been at the scene of Lyons's arrest. Minor stated that she, Lyons, and Lyons's then-girlfriend went to a bar in downtown Fort Myers. Outside of the bar, Minor saw a woman named "Tracy" hit an Asian man, at which point, the man had to "restrain her [Tracy] ... so she wouldn't hit him again." Minor further testified that Tracy then falsely reported to law enforcement that the Asian man hit her. After the alleged false report, Minor saw the officers arrest the Asian man. Minor also observed that after a female friend protested the arrest, the police "thr[ew] her to the ground and put [her] in handcuffs." According to Minor, at this point Lyons called the officers "fucking honkeys" while he was walking away from the scene. The police officers then sprayed Lyons with mace and handcuffed him. According to Minor's account, Lyons swore at the police officers only once.

In a Report and Recommendation (R&R), the magistrate judge recommended denying the motion to suppress. The magistrate judge concluded that the police had probable cause to arrest Lyons for a violation of Florida law (disorderly conduct) based on the following facts: (1) "[a]t the time of Mr. Lyons's arrest, Detective Gederian was facing a large crowd of people" and was attempting to disperse the crowd; (2) Lyons yelled obscenities at the officers and was "running up to the officers," for a "reason [that] did not appear to be evident to Officer Detective Gederian"; and (3) bottles were thrown at the officers by unknown persons in the crowd. The magistrate judge denied Lyons's suppression motion, concluding that "Lyons's words along with his non-verbal actions interfered with Officer Detective Gederian's duty to disperse the crowd, and Officer Detective Gederian had probable cause for arresting Mr. Lyons pursuant to [Fla.

Stat.] § 877.03."

Lyons objected to the R&R, arguing, inter alia, that under Florida law, his conduct did not constitute disorderly conduct because it consisted of "mere words." The district court disagreed, observing: (1) "the testimony established that a crowd of a couple hundred people were" assembled at the scene of Lyons's arrest; (2) when police officers arrested Lyons's friend after a fight, Lyons began "swearing and cussing"; (3) Lyons "would stand back for a moment, then run up in an aggressive manner while continuing to yell, scream, and use profanity the entire time"; and (4) Lyons "repeated this conduct between ten and fifteen times over a period of about ten minutes." Based upon these findings, the district court concluded that "the totality of the circumstances in this case establishes that defendant's conduct was more than mere protected speech and was sufficient for the officers to have probable cause to arrest under the Florida disorderly person statute." Accordingly, the district court denied Lyons's objections, adopted the R&R, and denied the motion to suppress.

At the start of Lyons's subsequent trial, the government moved in limine to prevent Lyons from introducing evidence of his state-court acquittal on the disorderly-conduct charges. The government argued that this information was irrelevant to Lyons's charged offense of possessing ammunition while a convicted felon. Lyons conceded this point, but maintained that the evidence was relevant to show Detective Gederian's motive and bias. The district court disagreed and granted the government's motion.

At trial, Detective Gederian presented testimony that was, in all material respects, consistent with the testimony he provided at the suppression hearing. In addition, he testified that after he returned to the police station, Officer Sean Hoover gave him a "property envelope" containing the four bullets. Detective Gederian indicated that he placed the bullets into a plastic bag. He also identified the bullets for the jury. When he submitted the bullets for fingerprinting, about four months after Lyons's arrest, analysis of the bullets yielded no fingerprint evidence. Finally, Detective Gederian explained that he did not mention the bullets on the "booking sheet," which he completed shortly after Lyons's arrest, because Lyons was not facing federal charges at that point, and the bullets were irrelevant to the state charges that Lyons was facing.

During cross-examination, defense counsel showed Detective Gederian a transcript from Lyons's state trial. Detective Gederian admitted that, in this proceeding, he had not testified that Lyons assumed a "fighting stance" when informed of the arrest. Defense counsel then tried to ask Gederian about the charges and state trial, at which point the government objected, arguing that the information was not relevant to the federal charge. Defense counsel responded that he was trying to establish Detective Gederian's "motivation for testifying." The district court sustained the government's objection. FMPD Officer Sean Hoover transported Lyons to the police station after his arrest. Officer Hoover testified at trial that after arriving at the police station, he inventoried Lyons's property. Officer Hoover identified the property envelope in which he placed Lyons's possessions, which included, among other things, four .22-caliber bullets. Hoover said that he removed these bullets from Lyons's pocket on the night Lyons was arrested.

The jury returned a guilty verdict and Lyons proceeded to sentencing. The presentence investigation report ("PSI") indicated that, because Lyons had twice been convicted of a crime

of violence, a base offense level of 24 applied. And because of his multiple prior convictions, Lyons was an "armed career criminal," within the meaning of 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4(a). Thus, based on a criminal history Category VI and a total offense level of 33, his sentencing range was 235 to 293 months' imprisonment. Over Lyons's Eighth Amendment challenge to the constitutionality of § 4B1.4's "armed career criminal" provisions, the district court sentenced Lyons to a 235-month term of imprisonment, followed by a 3-year term of supervised release. This timely appeal followed.

Holding: Affirmed.

Opinion: MARCUS, Circuit Judge:

Daniel L. Lyons appeals his conviction for possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g), and the 235-month sentence the district court imposed based on his status as an "armed career criminal," pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4(b). On appeal, Lyons argues that: (1) the district court erred by denying his pre-trial motion to suppress four bullets found on his person during a search incident to his arrest for disorderly conduct, a violation of Fla. Stat. § 877.03; (2) the district court erred by granting the government's motion in limine to exclude evidence of Lyons's state-court acquittal on the § 877.03 charges; and (3) the imposition of a 235month "armed career criminal" sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment.

We apply a mixed standard of review to the denial of a defendant's motion to suppress, reviewing the district court's findings of fact for clear error and its application of law to those facts de novo. *[United States v. Desir,* 257 F.3d 1233, 1235-36 (11th Cir.2001)] We review a district court's evidentiary rulings for abuse of discretion. [See *United States v. Frazier,* 387 F.3d 1244, 1258 (11th Cir.2004) (en banc), petition for cert. filed, No. 04-8324 (Jan. 13, 2005)] As for Lyons's constitutional challenge to his sentence, our review is de novo. [See *United States v. Reynolds,* 215 F.3d 1210, 1212 (11th Cir.2000)] Upon thorough review of the record, as well as careful consideration of the parties' briefs and oral argument, we find no reversible error and affirm.

Lyons first argues that the district court erred by denying his motion to suppress the bullets because the FMPD officers lacked probable cause to arrest him for violating Fla. Stat. § 877.03, and, thus, that there was no basis for searching him incident to a lawful arrest. More specifically, Lyons says that, because his statements did not inflict injury or tend to incite an immediate breach of the peace, his behavior did not constitute disorderly conduct under Florida law. We disagree.

"Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant[,] search a person validly arrested." *[Michigan v. DeFillippo,* 443 U.S. 31, 35, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)] In turn, "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." [Id. at 36, 99 S.Ct. 2627] "For probable cause to exist, both federal and Florida law say that an arrest must be objectively reasonable based on the totality of the circumstances." *[Lee v. Ferraro,* 284 F.3d 1188, 1195 (11th Cir.2002)] "This standard is met when the facts and

circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." [Id.]

"The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *[DeFillippo,* 443 U.S. at 36, 99 S.Ct. 2627] Thus, the dispositive question in this case is whether, at the time Lyons was arrested, based on the totality of the facts and circumstances within Detective Gederian's knowledge, there was probable cause to believe Lyons had committed the crime of disorderly conduct. On this record, we conclude that probable cause existed.

Lyons was arrested for disorderly conduct in violation of Fla. Stat. § 877.03, which provides that:

> [w]hoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

As a preliminary matter, we note that under Florida law, where the basis for an arrest under § 877.03 is speech only, the statute's application is limited. [W]e now limit the application of Section 877.03 so that it shall hereafter only apply either to words which "by their very utterance ... inflict injury or tend to incite an immediate breach of the peace," *[White v. State,* 330 So.2d at 7; see *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)]; or to words, known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others.... With these two exceptions, Section 877.03 should not be read to proscribe the use of language in any fashion whatsoever. *[State v. Saunders,* 339 So.2d 641, 644 (Fla.1976)] The limitation discussed in *Saunders* concerns arrests for speech only. Since Lyons's conduct did not consist of speech only, the limitation is not relevant to our analysis.

Based on our careful review of Florida law, it is equally clear that challenged conduct that involves something more than "mere speech" remains subject to § 877.03. [See, e.g., *C.L.B. v. State,* 689 So.2d 1171, 1172 (Fla.Dist.Ct.App.1997) (holding that defendant's nonverbal acts, which included repeatedly approaching police officer, in combination with his speech, violated § 877.03); *W.M. v. State,* 491 So.2d 335, 336 (Fla.Dist.Ct.App.1986) (finding that defendant's conduct during a traffic stop, which drew a large hostile crowd to the scene, constituted disorderly conduct); *Delaney v. State,* 489 So.2d 891, 892 (Fla.Dist.Ct.App.1986) (upholding probable cause to arrest and conviction under § 877.03 where "appellant's conduct consisted of more than his arguably 'protected' speech" and such conduct "precluded [the] [o]fficer ... from investigating ... by being loud and abusive, continually interrupting [the officer's] investigation ..., and ignoring [the officer's] request to wait his turn.")]

Here, given the totality of the circumstances facing the officers on the night of Lyons's arrest,

we readily conclude that the facts and circumstances provided an adequate basis for Officer Gederian to reasonably believe that Lyons had committed or was about to commit a violation of § 877.03. In addition to his speech, which consisted of yelling obscenities and a racial epithet, Lyons engaged in non-verbal conduct, which Gederian reasonably perceived as "aggressive." This conduct included running up to Gederian multiple times while Gederian was trying to disperse a large crowd, amounting to no less than 30 or 40 and possibly exceeding 100 people. The magistrate judge found that Lyons's conduct interfered with the officers' dispersal attempts. Although Gederian repeatedly warned Lyons to leave the area between 10 and 15 times, Lyons refused to comply.

It was a busy night in the "entertainment district," where the bars were located, and the police had come to the scene in response to reports of several fights that evening. Indeed, at some point during the officers' dispersal efforts, members of the crowd threw two bottles at the officers (although there is no indication Lyons threw anything at the officers). Again, there were only five officers at the scene compared to a crowd of at least 30 to over 100 people. Simply put, based on the presence of all these factors, which have been considered in various Florida disorderly conduct cases, Gederian reasonably could have believed that Lyons had committed or was about to commit a violation of § 877.03. Accordingly, we can discern no error in the district court's denial of Lyons's motion to suppress the bullets found during a search incident to his arrest.

Critical Thinking Question(s): Where is the line drawn between free speech and interference and annoyance of others constituting disorderly conduct? If a person is loud and obnoxious in public, but is doing so in an attempt to inform those in attendance of important social issues, would s/he be subject to arrest for disorderly conduct?

## II. Rioting

Section Introduction: When disorderly conduct is carried out by a group of individuals for the purpose of committing an illegal act, they are guilty of the crime of rioting. This section includes Florida statutes and case law that further help define and clarify this crime with respect to the laws of the state.

### Florida Statutes, sec. 870.01 - Affrays and riots

> (1) All persons guilty of an affray shall be guilty of a misdemeanor of the first degree, punishable as provided in sec. 775.082 or sec. 775.083.
>
> (2) All persons guilty of a riot, or of inciting or encouraging a riot, shall be guilty of a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

### Florida Statutes, sec. 870.03 - Riots and routs

> If any persons unlawfully assembled demolish, pull down or destroy, or begin to demolish, pull down or destroy, any dwelling house or other building, or any ship or

vessel, each of them shall be guilty of a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

**Bayes v. State, 454 So.2d 703 (App. 1 Dist., 1984)**

Procedural History: Defendant was convicted in the Circuit Court, Jackson County, Robert L. McCrary, Jr., J., of riot and inciting or encouraging a riot, and he appealed. The District Court of Appeal, Booth, J., held that: (1) evidence was sufficient to support defendant's convictions of riot and inciting or encouraging a riot, and (2) although defendant, who was 17 years old at time of proceedings below, failed to object to trial judge's failure to comply with mandatory juvenile sentencing procedure in sentencing defendant as an adult, failure to comply with such procedure would require remand for resentencing pursuant to statute.

Issue(s): Was there sufficient evidence to support a conviction on the charge of riot?

Facts: The charge arose from a disturbance on May 11, 1983 at the Arthur G. Dozier School for Boys due to dissatisfaction on the part of some students with their housing. The evidence shows students were very disruptive at the breakfast meal and, as a result, some nine students, including appellant, were sent to the basketball court, where they started breaking up pieces of the basketball court's asphalt surface, and some of them, including appellant, threw pieces of the asphalt over the basketball court fence. At about 8:30 a.m., an alarm was activated, alerting the Dozier staff to come to the area of the disturbance. The appellant and Vernon Smith, who was charged with the same offenses as appellant, in a confrontation with the staff, stated that they were going to hit anyone who came into the area (the basketball court), that they wanted a housing change, and that they were going to get it regardless. There was testimony that the boys appeared to have the wherewithal to accomplish their threats. One employee testified:

> [Y]es, sir, it was a frightful situation to be in because there wasn't but [sic] three staff on the court and seven or eight boys out there throwing chunks of asphalt the size of saucers.... [I]t is pretty frightening when they're whizzing by your head and missing you by inches.

Appellant and Smith were heard to make encouraging remarks to each other and to another boy who supplied and threw asphalt.

In *State v. Beasley,* [317 So.2d 750, 752 (Fla.1975)], the constitutionality of Florida's riot statute was at issue. The court determined that, in the absence of a statutory definition, the common law applied, and at common law, riot is defined as "a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent, either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner." Beasley further holds the offense of inciting to riot requires that the words spoken by the alleged offender or his actions must be such as "to support a finding that they were said or done with intent to provoke a riot," and in view of all the circumstances, the language used by the alleged offender must tend to incite an immediate breach of the peace. *[State v. Beasley,* 317 So.2d 750, 753 (Fla.1975)]

Holding: Affirmed in part, reversed in part and remanded.

Opinion: BOOTH, Judge.

This cause is before us on appeal from a judgment and sentence entered upon a jury verdict, finding the appellant guilty of the crime of riot, inciting, or encouraging a riot in violation of Section 870.01, Florida Statutes (1981), and sentencing him to five years imprisonment. We find no merit in appellant's contention that the evidence was insufficient to support the conviction.

We find that the trial court properly denied the appellant's motion for judgment of acquittal since the State presented sufficient evidence that the appellant, with at least three other boys, acted in a violent manner, thereby causing a tumultuous disturbance of the peace in throwing pieces of asphalt toward vehicles and staff members. As to the charged offense of inciting or encouraging a riot, there was testimony that the appellant and Smith threatened to hit staff members and encouraged the other boys to join them in throwing pieces of asphalt. This encouragement to the other boys to join in a violent activity, directed toward staff members and their vehicles, supports a finding that such encouragement was done with the intent to provoke a riot and, in view of all the circumstances, clearly tended to incite an immediate breach of the peace. *[Beasley,* supra]

The appellant also argues that the trial court erred by failing to comply with the mandatory juvenile sentencing procedure in Section 39.111, Florida Statutes (1981). The appellant, 17 years old at the time of the proceedings below, was charged, tried, and sentenced as an adult. His attorney did not object to the trial court's failure to proceed under Section 39.111(6). The State claims that, since the appellant's attorney failed to contemporaneously object, the appellant may not raise the issue on appeal. The Florida Supreme Court, in its recent opinion in *State v. Rhoden,* [448 So.2d 1013 (Fla.1984)], held contrarily to the State's position. In *Rhoden,* the juvenile defendant was tried and sentenced as an adult. At sentencing, the trial judge did not follow the mandatory procedures set forth in Section 39.111(6). After the defendant's sentence was imposed, his counsel did not object to the trial judge's failure to comply with Section 39.111(6). The Supreme Court rejected the State's argument that, since no objection has been made, the issue could not be raised for the first time on appeal.

Further, with regard to the respondent's failure to contemporaneously object to the trial judge's failure to follow the statute in sentencing respondent, we agree with the reasoning of Judge Sharp in her dissent in *Glenn v. State* [411 So.2d 1367 (Fla. 5th DCA 1982) ]. Judge Sharp pointed out that it is difficult, if not impossible, for counsel to contemporaneously object to the absence of a written order at the sentencing hearing "since counsel at that stage does not know for sure what the written sentence may be, and a written order pursuant to section 39.111 may indeed be subsequently filed." [411 So.2d at 1368] The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. [See *Simpson v. State,* 418 So.2d 984 (Fla.1982), cert. denied, 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1004 (1983); *State v. Cumbie,* 380 So.2d 1031 (Fla.1980); *Clark v. State,* 363 So.2d 331 (Fla.1978)]

The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

The Supreme Court in Rhoden held that "the provisions of section 39.111(6) must be followed by a trial judge in sentencing a juvenile as an adult, and the failure to do so requires a remand for resentencing." *[Rhoden,* supra at page 1017] Accordingly, we affirm the judgment, and, although we recognize that the trial judge did not have the benefit of *Rhoden,* supra, we must reverse the sentence and remand the case for resentencing pursuant to Section 39.111(6) under the mandate of *Rhoden*.

Critical Thinking Question(s): Does enticement to riot require the participation of those in attendance? If no one participates at the defendant's urging, would a more appropriate charge be that of disorderly conduct? How would you define riot in layman's terms?

**III. Public Indecency**

Section Introduction: Crimes of public indecency are also referred to as crimes against quality of life. Laws against such actions are concerned with maintaining the quality of life in the area surrounding the location of the crime. Florida statutes that are relevant to the idea of public indecency are listed below, along with two cases that apply the statutes to further examine the issues raised by this crime.

**Florida Statutes, sec. 856.011 - Disorderly intoxication**

> (1) No person in the state shall be intoxicated and endanger the safety of another person or property, and no person in the state shall be intoxicated or drink any alcoholic beverage in a public place or in or upon any public conveyance and cause a public disturbance.
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> (2) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.
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> (3) Any person who shall have been convicted or have forfeited collateral under the provisions of subsection (1) three times in the preceding 12 months shall be deemed a habitual offender and may be committed by the court to an appropriate treatment resource for a period of not more than 60 days. Any peace officer, in lieu of incarcerating an intoxicated person for violation of subsection (1), may take or send the intoxicated person

to her or his home or to a public or private health facility, and the law enforcement officer may take reasonable measures to ascertain the commercial transportation used for such purposes is paid for by such person in advance. Any law enforcement officers so acting shall be considered as carrying out their official duty.

**Florida Statutes, sec. 856.015 - Open house parties**

(2) No person having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the person knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the person fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

(3) The provisions of this section shall not apply to the use of alcoholic beverages at legally protected religious observances or activities.

(4) Any person who violates any of the provisions of subsection (2) commits a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.

**Papalas v. State, 645 So.2d 153 (App. 1 Dist., 1994)**

Procedural History: Defendant enter plea of nolo contendere in the Circuit Court, Duval County, Robert Foster, J., to possession of cocaine, and she appealed denial of motion to suppress. The District Court of Appeal held that: (1) search was not valid as incident to arrest because officer lacked probable cause to arrest defendant for disorderly intoxication, and (2) absent any reason for officer to believe defendant was armed at time of arrest, search was not justified as protective frisk for weapon.

Issue(s): Did the officer have probable cause to search the appellant based on suspicion of public intoxication even though he did not charge her with the offense?

Facts: At 6:40 p.m. on April 22, 1993, Officer Van Nelson observed appellant stagger from the rear of a restaurant to First Avenue. As Officer Van Nelson drove by appellant, he noted that appellant was doing "double takes" at his car. Officer Van Nelson followed Appellant for a block or a block and a half. Officer Van Nelson observed that appellant was extremely unsteady and was staggering in and out of the road. Appellant was staggering on a road used by cars. There were no sidewalks in the area. Appellant was not screaming or carrying on, was not boisterous, was not causing a scene and did not cause any traffic jams or accidents. Officer Van Nelson testified that appellant was not committing a crime, except that she might have been a harm to herself. Officer Van Nelson testified that, other than a possible disorderly intoxication, appellant was not committing any other crime.

Officer Van Nelson eventually stopped his car and asked appellant if she was okay. Appellant responded that she was drunk and had been drinking all afternoon. Officer Van

Nelson observed that appellant had a heavy odor of alcohol on her breath. Appellant also had slurred speech and bloodshot eyes. Officer Van Nelson asked appellant for identification, but appellant did not have any identification. Officer Van Nelson testified that, when he asked appellant for identification, she was not free to leave. Officer Van Nelson noted that he needed to take appellant into custody for her own safety. Officer Van Nelson patted appellant down for weapons. Officer Van Nelson admitted that, prior to the pat-down, appellant was not making assertive movements such as reaching for a gun, reaching behind her back, reaching into her pockets or appearing to conceal evidence. Officer Van Nelson admitted that he had no reason to believe that appellant was armed.

When patting down appellant, Officer Van Nelson did not feel any large objects. Officer Van Nelson noted that appellant's front right pocket contained several items. After Officer Van Nelson asked appellant what was in her pocket, appellant reached into her pocket and dropped a handful of items on the hood of the car. The items included several small packets of cocaine. The state argued that the search of appellant was incident to a valid arrest for disorderly intoxication. Appellant was not arrested for disorderly intoxication. Rather, she was arrested for and charged with possession of cocaine after the unlawful search of her person.

Holding: Reversed.

Opinion: PER CURIAM.

Appellant, Thalia Janet Papalas, pled *nolo contendere* to possession of cocaine, specifically reserving her right to appeal the denial of her motion to suppress the cocaine. Appellant argues on appeal that (1) the trial court erred in denying appellant's motion to suppress and, (2) the seizure of cocaine was beyond the scope of a valid frisk pursuant to section 901.151, Florida Statutes. We hold that the trial court erred in denying appellant's motion to suppress and reverse.

The trial court found that the public safety was endangered by appellant's weaving and stumbling in and out of a public roadway used by motor vehicles. In denying appellant's motion to suppress, the trial court reasoned that, using an objective standard, the arrest and subsequent search of appellant were valid. We hold that the trial court erred in finding that the elements of disorderly intoxication were met. Although appellant may have endangered someone in the future, at the time of her arrest, she had not endangered anyone or created a public disturbance.

We hold that the trial court erred in denying appellant's motion to suppress. Upon stopping appellant, Officer Van Nelson did not seize appellant or place appellant under arrest for disorderly intoxication. Officer Van Nelson had no probable cause to believe that appellant was guilty of disorderly intoxication. The search of appellant therefore cannot be justified as a search incident to a valid arrest. The search of appellant cannot be justified as a search pursuant to an investigatory stop and protective frisk for weapons.

Section 901.151, Florida Statutes, authorizes the temporary stop and detention of an individual based upon a founded suspicion of criminal activity. *[M.A.H. v. State,* 559 So.2d 407 (Fla. 1st DCA 1990)] Section 901.151 further authorizes a pat-down search to the extent necessary to disclose a weapon, if the officer has probable cause to believe that an individual is armed. [L.D.P.

*v. State*, 551 So.2d 1257 (Fla. 1st DCA 1989)] In the present case, Officer Van Nelson was not justified in stopping appellant pursuant to section 901.151. Even if the stop of appellant were valid, Officer Van Nelson lacked probable cause to believe that appellant was armed. Accordingly, we reverse the denial of appellant's motion to suppress.

Critical Thinking Question(s): This is a situation that plagues many college-aged students. What are your rights when it comes to being drunk in public? Are you entitled to be intoxicated as long as you are not posing a threat or causing a disturbance? Does an office have a right to pat you down just because you appear to be intoxicated?

**Newsome v. Haffner, 710 So.2d 184 (App. 1 Dist., 1998)**

Procedural History: Civil action was brought by estate representative of minor injured by self-inflicted gunshot wound against residential social host. The Circuit Court for Alachua County, Chester B. Chance, J., dismissed complaint with prejudice upon determination that it failed to state a cause of action. Personal representative appealed. The District Court of Appeal, Allen, J., held that: (1) open house party statute extending criminal responsibility to social host at a residence with open house party imposed duty of care on social hosts and created civil cause of action for statutory violation, and (2) complaint contained sufficient allegations to support cause of action for social host liability under theory of negligence per se for violation of statute.

Holding: Affirmed in part, reversed in part and remanded.

Opinion: ALLEN, Judge.

The appellant challenges a final judgment by which a complaint was dismissed with prejudice, upon a determination that it failed to state a cause of action. We conclude that the complaint should not have been dismissed in its entirety, as a sufficient claim was made for social host liability under a theory of negligence per se, based on an alleged violation of § 856.015, Florida Statutes.

Commonly known as the "open house party" statute, section 856.015 provides, at subsection (2), that:

> No adult having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the adult knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the adult fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

The statute makes a violation of this provision a criminal offense, and is clearly designed to protect minors from the harm that could result from the consumption of alcohol or drugs by those who are too immature to appreciate the potential consequences. The statute is thus similar to the enactment involved in *Davis v. Shiappacossee,* [155 So.2d 365 (Fla.1963)], wherein a cause of action in negligence per se was predicated on a violation of a statute which made it a

criminal offense to permit a minor to possess or consume alcoholic beverages on certain licensed premises. Section 856.015 extends such criminal responsibility to a social host at a residence with an open house party. Although a corresponding civil liability was not previously recognized at common law, see *Bankston v. Brennan,* [507 So.2d 1385 (Fla.1987)], a cause of action in negligence per se is created when a penal statute is designed to protect a class of persons, of which the plaintiff is a member, against a particular type of harm. [See *Davis; Tamiami Gun Shop v. Klein,* 116 So.2d 421 (Fla.1959), approving *Tamiami Gun Shop v. Klein,* 109 So.2d 189 (Fla. 3d DCA 1959); *Tampa Shipbuilding and Engineering v. Adams,* 132 Fla. 419, 181 So. 403 (Fla.1938); *J. Ray Arnold Lumber Corp. of Olustee v. Richardson,* 105 Fla. 204, 141 So. 133 (1932)] By enacting section 856.015, the legislature has therefore imposed a duty of care on social hosts and created a civil cause of action for a statutory violation.

The appellant's complaint contains sufficient allegations to support such a cause of action, even though the harm which ultimately resulted was occasioned by the minor's self-inflicted gunshot wound. The appellee's contention that this was a freakish and improbable chain of events outside the ambit of probable cause does not justify dismissal of the complaint. In *McCain v. Florida Power Corp.,* [593 So.2d 500 (Fla.1992)], the supreme court acknowledged that the trial court might remove such an issue from the jury if the events are so extraordinary and utterly unpredictable as to be entirely unforeseeable, but the court further cautioned that foreseeability in the proximate cause context depends on the specific and narrow factual details of the case. Because the specific and narrow factual details of the present case are not yet fully revealed, the issue of whether proximate cause may exist as a matter of law should not now be resolved. [See, e.g., *Coker v. Wal-Mart Stores, Inc.,* 642 So.2d 774 (Fla. 1st DCA 1994)] The appealed order is reversed as to the dismissal of the claim for social host liability. The order is otherwise affirmed, and the case is remanded.

Critical Thinking Question(s): What does “open house” mean according to the statute? Does there actually have to be a minor that is drinking or caught with drugs, or just the presence of a minor? Would the host be culpable if someone brought a “friend” and the host did not know that the person was a minor? What if that person did not drink?

## IV. Vagrancy and Loitering

Section Introduction: Loitering is standing in public without any apparent purpose, and vagrancy is wandering in public without any apparent means of support. Florida statute addresses loitering and prowling together and does not address the issue of vagrancy.
The statutes concerning loitering and prowling can be found below, followed by a Florida case addressing both.

### Florida Statutes, sec. 856.021 - Loitering or prowling; penalty

> (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

(3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in sec. 775.082 or sec. 775.083.

**Florida Statutes, sec. 856.031 - Arrest without warrant**

Any sheriff, police officer, or other law enforcement officer may arrest any suspected loiterer or prowler without a warrant in case delay in procuring one would probably enable such suspected loiterer or prowler to escape arrest.

**B.A.O. v. State, 932 So. 2d 321 (Fla. App. 2 Dist., 2006)**

Procedural History: Juvenile was found in the Circuit Court, Hillsborough County, Mark R. Wolfe, J., to have committed delinquent act of loitering and prowling, although adjudication was withheld. He appealed.

Issue(s): Did the appellant’s actions pose an imminent threat to property or people as required in the loitering and prowling statute?

Facts: At 2:45 a.m. on August 30, 2003, a security guard at an apartment complex in Hillsborough County spotted B.A.O. and another male walking towards the entrance of the complex. Later in the morning the security guard noticed the two inside the complex carrying a bicycle. The security guard noticed that a chain around the rear spokes of the rear wheel prevented the wheel from turning. At this point, the security guard stopped B.A.O. and his companion to question the two about the bicycle. The security officer then became suspicious and called the sheriff's office.

A deputy from the Hillsborough County Sheriff's Office responded to the call. When the deputy arrived, she questioned the two young men about the bicycle and their reasons for being at the apartment complex. B.A.O. and the other juvenile stated they did not live in the apartments or know anyone in the area. According to B.A.O., the two youths were "out walking" when they found the bicycle "in a ditch." The deputy did not believe B.A.O. and concluded he was stealing the bike. The deputy then discovered that B.A.O. was carrying a pocket knife and the other youth had a pellet gun with him. Based on this evidence, the trial court found B.A.O. not guilty

of carrying a concealed weapon. On the charge of loitering and prowling, the trial court found B.A.O. guilty but withheld adjudication.

Holding: The District Court of Appeal, Casanueva, J., held that evidence did not show that juvenile's actions indicated an imminent threat to property or people in vicinity, as required for finding. Reversed with directions.

Opinion: CASANUEVA, Judge.

B.A.O. appeals an order withholding adjudication but finding he had committed the delinquent act of loitering and prowling under section 856.021, Florida Statutes (2003). Because the State did not present evidence establishing all the elements necessary for conviction, we reverse.

In order to obtain a conviction for loitering and prowling the State must prove two elements. In *J.S.B. v. State, 729* So.2d 456 (Fla. 2d DCA 1999), this court reiterated the State must establish that the accused was: (1) loitering and prowling in a manner not usual for law abiding citizens (2) under circumstances warranting justifiable and reasonable alarm for the safety of persons or property in the vicinity. [729 So.2d at 457] The former requires the State to show more than a vaguely suspicious presence, while the latter requires the State to prove conduct that is alarming in nature, indicating an imminent threat to public safety. [Id.]

The facts presented by the State failed to prove the second prong of the test for loitering and prowling. Specifically, there is no evidence that B.A.O.'s actions indicated an imminent threat to property or people in the area. Mere suspicion of criminal activity will not support a conviction for loitering and prowling. *[R.M. v. State,* 754 So.2d 849, 850 (Fla. 2d DCA 2000)] The State did not provide evidence as to the owner of the bike or that B.A.O. stole the bike. Therefore, the record does not contain facts sufficient to prove an imminent threat to the safety of persons or property. [Id. at 854] [See also *T.W. v. State,* 675 So.2d 1018, 1019 (Fla. 2d DCA 1996)] Because the record does not contain evidence that satisfies this second element, the State did not meet the burden necessary for a finding that B.A.O. had committed loitering and prowling. Accordingly, we reverse with directions to vacate the withheld adjudication and discharge B.A.O.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Critical Thinking Question(s): According to standard dictionary definitions, what is the difference between loitering and prowling? Do you believe the juvenile would have been arrested if he did not possess the BB gun or pocketknife? How is an officer to discern when such persons pose a threat to property or people in the vicinity?

## V. Gangs

Section Introduction: The presence of gangs poses a particular challenge to the maintenance of law and order. Gang activity is present in virtually all areas of the country. In response,

legislation is passed to specifically address the problems of gangs. Below are Florida statutes that are aimed at the control of gang activity. Following these you will also find a criminal case that addresses these specific concerns.

**Florida Statutes, sec. 874.08 - Criminal gang activity and recruitment; forfeiture**

All profits, proceeds, and instrumentalities of criminal gang activity and all property used or intended or attempted to be used to facilitate the criminal activity of any criminal gang or of any criminal gang member; and all profits, proceeds, and instrumentalities of criminal gang recruitment and all property used or intended or attempted to be used to facilitate criminal gang recruitment are subject to seizure and forfeiture under the Florida Contraband Forfeiture Act, s. 932.704.

**Florida statute, sec. 874.04 - Gang-related offenses; enhanced penalties**

Upon a finding by the fact-finder that the defendant committed the charged offense for the purpose of benefiting, promoting, or furthering the interests of a criminal gang, the penalty for any felony or misdemeanor, or any delinquent act or violation of law which would be a felony or misdemeanor if committed by an adult, may be enhanced. Penalty enhancement affects the applicable statutory maximum penalty only. Each of the findings required as a basis for such sentence shall be found beyond a reasonable doubt. The enhancement will be as follows:

(1) (a) A misdemeanor of the second degree may be punished as if it were a misdemeanor of the first degree.
(b) A misdemeanor of the first degree may be punished as if it were a felony of the third degree. For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, such offense is ranked in level 1 of the offense severity ranking chart. The criminal gang multiplier in s. 921.0024 does not apply to misdemeanors enhanced under this paragraph.

(2) (a) A felony of the third degree may be punished as if it were a felony of the second degree.
(b) A felony of the second degree may be punished as if it were a felony of the first degree.
(c) A felony of the first degree may be punished as if it were a life felony.

(3) For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, such felony offense is ranked as provided in s. 921.0022 or s. 921.0023, and without regard to the penalty enhancement in this subsection.

**Florida Statutes, sec. 874.05 - Causing, encouraging, soliciting, or recruiting criminal gang membership**

(1) Except as provided in subsection (2), a person who intentionally causes, encourages,

solicits, or recruits another person to become a criminal gang member where a condition of membership or continued membership is the commission of any crime commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) A person who commits a second or subsequent violation commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

**S.P. v. State, 664 So.2d 1064 (App. 2 Dist., 1995)**

Procedural History: Juvenile was adjudicated delinquent by the Circuit Court, Pinellas County, Crockett Farnell and David A. Demers, JJ., based on commission of acts which would have constituted throwing deadly missile at or into occupied vehicle and battery if he was adult and sentenced to Department of Juvenile Justice for indeterminate period of time not to extend beyond his nineteenth birthday or 15 years, whichever occurred first, after he was declared gang member. Juvenile appealed, and the District Court of Appeal, Parker, Acting C.J., held that: (1) juvenile was not subject to enhanced penalties as gang member as acts had been committed prior to amendment to gang statute to include acts committed by juveniles which would be felonies or violent misdemeanors if committed by adult, and (2) indeterminate sentence exceeded maximum penalty allowed for battery.

Issue(s): Was the juvenile engaged in gang activity?

Facts: The state charged S.P. with throwing a deadly missile at or into an occupied vehicle and battery and also filed a Motion to Declare the Child a Gang Member. S.P. filed a Motion to Determine F.S. 874.03 and 874.04 Unconstitutional. The court denied S.P.'s motion and, after an evidentiary hearing, entered an Order Declaring Child a Gang Member. S.P. pleaded no contest, expressly reserving the right to appeal the court's rulings on the constitutionality of the statutes and the finding that he was a gang member. The trial court adjudicated him delinquent and recommitted him to the custody of the Department of Juvenile Justice. S.P. has filed an appeal, challenging the application of sections 874.03 and .04, Florida Statutes (1993), to him, the constitutionality of these statutes, the trial court's finding that he was a gang member, and the disposition of his case. We strike the order declaring S.P. a gang member and remand for modification of the recommitment order.

Holding: Reversed and remanded for modification of recommitment order.

Opinion: PARKER, Acting Chief Judge.

Chapter 874, Florida Statutes (1993), contains the Street Terrorism Enforcement and Prevention Act of 1990. This act provides for enhanced penalties for crimes committed as part of a pattern of youth and street gang activity in an effort "to eradicate the terror" which gangs create. § 874.02(3), Fla.Stat. (1993). The first inquiry is whether S.P. comes within the purview of chapter 874, Florida Statutes (1993). Section 874.04, Florida Statutes (1993), enhances the penalty for any felony or violent misdemeanor if its commission is part of a pattern of youth and street gang activity. Section 874.03(3), Florida Statutes (1993), provides as follows:

> 'Pattern of youth and street gang activity' means the commission, attempted commission, or solicitation, by any member or members of a youth and street gang, of two or more felony or violent misdemeanor offenses on separate occasions within a 3-year period, for the purpose of furthering gang activity.

S.P. does not fall within the purview of this definition because he was adjudicated delinquent for committing delinquent acts, not for a felony or violent misdemeanor. In 1994 the legislature amended section 874.03(3) to include "two or more delinquent acts or violations of law which would be felonies or violent misdemeanors if committed by an adult." The legislature also amended section 874.04 to provide for a penalty enhancement for "any delinquent act or violation of law which would be a felony or violent misdemeanor if committed by an adult." These changes, however, were not effective until October 1, 1994. Because S.P. allegedly committed these delinquent acts on August 12, 1994, the amendments do not apply to this case. Thus, the court erred in declaring S.P. a gang member. Accordingly, we strike the Order Declaring Child a Gang Member. Because of our holding on this issue, we conclude that it is unnecessary for us to review the trial court's ruling that sections 874.03 and .04 are constitutional.

S.P. also challenges his disposition. The court committed him to the Department of Juvenile Justice for an indeterminate period of time that shall not extend beyond his nineteenth birthday or fifteen years whichever occurred first. At the time of disposition, S.P. was fifteen years and ten months old. Thus, he would be nineteen in three years and two months. Section 39.054(4), Florida Statutes (1993), provides:

> Any commitment of a delinquent child to the department shall be for an indeterminate period of time, but the time shall not exceed the maximum term of imprisonment which an adult may serve for the same offense.

Battery is a first-degree misdemeanor, [see § 784.03(2), Fla.Stat. (1993)], which is punishable by a term of imprisonment not exceeding one year. [See § 775.082(4)(a), Fla.Stat. (1993); See also *R.B. v. State,* 633 So.2d 542 (Fla. 5th DCA 1994)] Throwing a deadly missile is a second-degree felony, [see § 790.19, Fla.Stat.(1993)], which is punishable by a term of imprisonment not exceeding fifteen years. [See § 775.082(3)(c), Fla.Stat. (1993)] Thus, the disposition for the battery exceeds the maximum penalty allowed by law.

A review of chapter 39, Florida Statutes (1993), reveals that the statutes do not address whether there must be a separate disposition for each count. This court, however, has held that a court may not impose a general sentence for separate offenses. [See *H.L.L. v. State,* 595 So.2d 223 (Fla. 2d DCA 1992); *C.P. v. State,* 543 So.2d 867 (Fla. 2d DCA 1989); *J.J.S. v. State,* 465 So.2d 621 (Fla. 2d DCA 1985)] We, accordingly, direct the trial court to amend the disposition for the battery count to show a recommitment to no more than one year with credit for any time served. [See *R.B.]* Reversed and remanded for modification of the recommitment order.

Critical Thinking Question(s): Define gang activity. We know what a drive-by shooting is, but what are some of the forms of gang activity that might occur on the streets without guns or

violence? How do you feel about statutes that address “association with gang members”? What if one of the gang members was a sibling or relative? Should the person still be precluded from spending time with that relative to avoid prosecution?

**State v. O.C., 748 So.2d 945 (1999)**

Procedural History: Juvenile was adjudicated delinquent in the Circuit Court, Orange County, Bob Wattles, J., on finding that juvenile was guilty of attempted aggravated battery and misdemeanor battery. Juvenile appealed and the District Court of Appeal, Cobb, J., 722 So.2d 839, declared statute enhancing penalties based on defendant's membership in criminal street gang unconstitutional. The state appealed. The Supreme Court, Pariente, J., held that statute enhancing degree of crime based on membership in a gang punished mere association and violated a defendant's substantive due process rights.

Issue(s): Can mere association with others, albeit gang members, serve as the basis for enhanced punishments in sentencing?

Facts: O.C., a juvenile, was charged by an amended delinquency petition with attempted aggravated battery to cause great bodily harm, a third-degree felony, and battery, a misdemeanor. The Fifth District's opinion details the evidence presented at the adjudicatory hearing.

The victim testified that on January 29, 1997, he was getting off a bus at his stop. According to the victim, O.C. "grabbed me and threw me ... towards Kenny. And then he [Kenny] hit me in the face with his fist." The victim continued that "they [O.C. and Kenny] picked me up and threw me through the fence. They just took my arms and threw me." The fence was wooden and the victim's head went through it. The victim further testified that "then they just started kicking" him "on my head, my whole body." The attack lasted about five or ten minutes and then they left. According to the victim, another youth, Everett, who was present and watching, "screamed that this is a message for your brother or something." Pictures showing the injuries sustained by the victim were introduced into evidence. He suffered no broken bones but could barely open his right eye.

The victim stated on cross examination that Kenny and O.C. "did about the same amount" of kicking and beating on him. The victim reiterated that O.C. started the incident by grabbing him and throwing him towards Kenny. An eyewitness confirmed the victim's account of the incident. At the close of the evidence, O.C. moved for a judgment of acquittal arguing the evidence was insufficient to establish an attempted aggravated battery, that at most O.C. committed a simple battery. The juvenile court denied the motion and found O.C. guilty of attempted aggravated battery and misdemeanor battery. *[O.C.,* 722 So.2d at 840-41]

Subsequent to the finding of guilt, the State moved to have O.C. declared a gang member for penalty enhancement purposes pursuant to section 874.04. O.C. opposed the State's motion, asserting that section 874.04 is unconstitutional "because it omits an intent requirement, violates free speech and freedom of association and imputes guilt by association." *[O.C.,* 722 So.2d at 840] The trial court deferred ruling on O.C.'s constitutional challenge and heard the State's

motion for "gang enhancement." [Id. at 840]

During the hearing, [a] sheriff's deputy involved in gang surveillance testified that O.C. is a member of an Orlando gang known as Universal Mafia Crew (UMC). Additional members were identified. The deputy testified that O.C. told him while on the street that she was a member of UMC and in fact was the leader. Another deputy sheriff who specializes in gangs testified that UMC has a hierarchy consisting of a godfather, godmother, bosses and foot soldiers. O.C. was the godmother. The gang had colors, met monthly and was implicated in other crimes. Several members of the gang had been arrested on felony charges including armed burglary, aggravated battery with a knife, possession of a short barrel shotgun and grand theft auto. At least three of the arrests had occurred within the past year. [Id. at 841]

After the hearing, the trial court denied O.C.'s constitutional challenge to section 874.04, found O.C. to be a criminal street gang member, and stated that O.C.'s third-degree felony and misdemeanor would be enhanced upward by one degree to second- and thirddegree felonies pursuant to the provisions of section 874.04. The court then sentenced O.C. based on the enhanced felony. [See *O.C.,* 722 So.2d at 841] On appeal to the Fifth District, O.C. challenged the constitutionality of the statute. In considering this challenge, the Fifth District framed the inquiry as whether the Legislature, "in accordance with due process principles, [see *State v. Saiez,* 489 So.2d 1125 (Fla.1986)], [can] constitutionally enhance criminal penalties based on a criminal's simple association with others who may be criminals?" *[O.C.,* 722 So.2d at 841-42] The court concluded that such an enhancement punishes "mere association," and is unconstitutional on its face. [Id. at 842] We agree with the Fifth District's conclusion that the statute is unconstitutional as a violation of substantive due process.

Holding: Decision of District Court of Appeal affirmed. Opinion: PARIENTE, J.
We have on appeal the Fifth District's decision in *O.C. v. State,* [722 So.2d 839 (Fla. 5th DCA 1998)], declaring section 874.04, Florida Statutes (Supp.1996), unconstitutional. We have jurisdiction. [See art. V, § 3(b)(1), Fla. Const.] Chapter 874, the Criminal Street Gang Prevention Act of 1996, provides for enhancement of criminal penalties for a defendant who is a member of a "criminal street gang":

> 874.04 Criminal street gang activity; enhanced penalties. - Upon a finding by the court at sentencing that the defendant is a member of a criminal street gang, the penalty for any felony or misdemeanor, or any delinquent act or violation of law which would be a felony or misdemeanor if committed by an adult, may be enhanced if the offender was a member of a criminal street gang at the time of the commission of such offense. Each of the findings required as a basis for such sentence shall be found by a preponderance of the evidence. The enhancement will be as follows:
>
> > (2) "Criminal Street Gang Member" is a person who is a member of a criminal street gang as defined in subsection (1) and who meets two or more of the following criteria:
> >
> > (a) Admits to criminal street gang membership.
> >
> > (b) Is identified as a criminal street gang member by a parent or guardian.

(c) Is identified as a criminal street gang member by a documented reliable informant.
(d) Resides in or frequents a particular criminal street gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.
(e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.
(f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.
(g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.
(h) Has been stopped in the company of known criminal street gang members four or more times.

(2) (a) A felony of the third degree may be punished as if it were a felony of the second degree.
(b) A felony of the second degree may be punished as if it were a felony of the first degree.
(c) A felony of the first degree may be punished as if it were a life felony.

A "criminal street gang" is broadly defined in section 874.03 as a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity.

The Fourteenth Amendment to the United States Constitution, and article I, section 9 of the Florida Constitution, protect a citizen's right to "due process of law." In delineating the scope of a citizen's substantive due process protections, this Court explained in *Saiez:*

> The due process clauses of our federal and state constitutions do not prevent the legitimate interference with individual rights under the police power, but do place limits on such interference. ... [T]he guarantee of due process requires that the means selected [by the Legislature to achieve its legitimate police-power objectives] shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary or capricious. [489 So.2d at 1127-28]

*Saiez* further quotes with approval then-Judge Grimes' observation in *State v. Walker,* [444 So.2d 1137, 1140 (Fla. 2d DCA), aff'd, 461 So.2d 108 (Fla.1984)], that the statute at issue in Walker was unconstitutional because, " 'without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose' and 'criminalizes activity that is otherwise inherently innocent.' " *[Saiez,* 489 So.2d at 1129] In *Saiez,* we found section 817.63,

which prohibited the possession of machinery designed to reproduce credit cards, to be unconstitutional because it violated substantive due process. [Id. at 1127] While we agreed with the State that the curtailment of credit card fraud was a legitimate goal within the scope of the state's police power, we found that the statute did not bear a "rational relationship " to this proper goal because "it fail[ed] to require proof of the intent essential to any crime such as a showing that the equipment was possessed with an intent to put in to unlawful use. Instead the law penalize[d] the mere possession of equipment which in itself is wholly innocent.... " [Id. at 1128 (quoting *Delmonico v. State,* 155 So.2d 368, 369-70 (Fla.1963), which held unconstitutional a statute prohibiting the mere possession of otherwise legal spearfishing equipment)]

More recently, in *Wyche v. State,* [619 So.2d 231, 237-38 (Fla.1993)], this Court invalidated a Tampa ordinance making it illegal to loiter in a manner manifesting the purpose of procuring sex for hire. Under the ordinance, a person who was a "known prostitute" could be convicted for beckoning to motor vehicle operators to stop. [See id. at 235] The Court found that not only was the statute vague and overbroad, but it also violated a citizen's substantive due process rights because it " 'unjustifiably transgress[ed] the fundamental restrictions on the power of government to intrude upon individual rights and liberties' " by "punish[ing] entirely innocent activities" such as hailing a cab or signaling to a friend in an automobile. [Id. at 237 (quoting *Walker,* 444 So.2d at 1138)] Applying the reasoning of these cases, we conclude that section 874.04 violates a defendant's substantive due process rights because the statute subjects the defendant to conviction for a higher degree crime than originally charged, resulting in an increased penalty range, based only upon a defendant's "simple association" with others, who may or may not be criminals. *[O.C.,* 722 So.2d at 842] As explained by the Fifth District:

> The statute does not require any relationship between the criminal act, here attempted aggravated battery, and gang membership. Under the statute, the defendant's punishment is enhanced for the substantive offense plus gang membership without the need for any nexus between the particular criminal act and such membership. ... [Thus,] [t]his enhancement statute increases criminal penalties based on non-criminal acts. In effect, the increased punishment is based on association with other people, who may or may not have committed unrelated criminal acts. [Id.]

For example, without a required nexus between the crime and the enhancement, an individual charged with a nonviolent crime, such as shoplifting, could be subject to the enhanced penalty range for a higher degree crime simply because the State establishes that the defendant is a gang member. The enhancement provided for by statute is extremely significant in that each crime is enhanced by one degree so that a felony of the third degree is punished as if it were a penalty of the second degree, a felony of the second degree punished as if it were a felony of the first degree, and a felony of the first degree punished as if it were a life felony. [See § 874.04(2)(a)-(c)] In this case, O.C. was sentenced based on a second-degree felony, although the crime with which she was originally charged, attempted aggravated battery to cause great bodily harm, is a third degree felony.

In reaching the conclusion that section 874.04 is unconstitutional, the Fifth District distinguished *People v. Gardeley,* [14 Cal.4th 605, 59 Cal.Rptr.2d 356, 927 P.2d 713 (1996), cert. denied, 522 U.S. 854, 118 S.Ct. 148, 139 L.Ed.2d 94 (1997)], a decision from the

California Supreme Court rejecting constitutional challenges to California's version of a gang enhancement statute. [See *O.C.,* 722 So.2d at 842] The California statute, unlike the statute in this case, provided that the defendant's sentence could be enhanced if the defendant committed the crime "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." *[Gardeley,* 927 P.2d at 720] The California Supreme Court concluded that this statute "fully comport[ed] with due process" because it did not impose criminal penalties for "mere gang membership," but only when the criminal conduct at issue was committed for the gang's benefit and with the specific intent to assist in criminal conduct by gang members. [Id. at 725]

Unlike the statute in *Gardeley,* section 874.04 punishes mere association by providing for an enhancement of the degree of a crime based on membership in a criminal gang, even where the membership had no connection with the crime for which the defendant had been found guilty. We conclude that because the statute punishes gang membership without requiring any nexus between the criminal activity and gang membership, it lacks a rational relationship to the legislative goal of reducing gang violence or activity and thus fails to have a "reasonable and substantial relation" to a permissible legislative objective. *[Saiez,* 489 So.2d at 1128]

Because we agree that section 874.04 is unconstitutional as a violation of substantive due process, we find it unnecessary to reach O.C.'s challenge to the statute based on First Amendment grounds. Accordingly, we affirm the decision of the Fifth District for the reasons stated in this opinion.

Critical Thinking Question(s): sentencing enhancement penalties are a relatively new concept in modern criminal law. Do you believe there should be sentencing enhancements based on a person's association (e.g., gangs) or motive (e.g., hate)? Is it a form of double jeopardy to punish someone for his/her "status" or chosen conditions? Should enhancements be written right into the underlying statute, (e.g., assault vs. assault with a firearm)?

## VI. Prostitution & Solicitation

Section Introduction: Prostitution is the crime of engaging in sexual acts for the procurement of money or other valuable property. Solicitation of prostitution, carried out by a request that another person engage in prostitution, is also a crime. In Florida these crimes are in violation of various state statutes, such as those listed below. Individuals found to be guilty of violating one or more of these statutes can be subject to criminal trial such as that discussed in the Florida case that follows.

### Florida Statutes, sec. 796.03 - Procuring person under age of 18 for prostitution

A person who procures for prostitution, or causes to be prostituted, any person who is under the age of 18 years commits a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

**Florida Statutes, sec. 796.035 - Selling or buying of minors into sex trafficking or prostitution; penalties**

Any parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody of such minor, with knowledge that, as a consequence of the sale or transfer, the minor will engage in prostitution, perform naked for compensation, or otherwise participate in the trade of sex trafficking, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

**Florida Statutes, sec. 796.045 - Sex trafficking; penalties**

Any person who knowingly recruits, entices, harbors, transports, provides, or obtains by any means a person, knowing that force, fraud, or coercion will be used to cause that person to engage in prostitution, commits the offense of sex trafficking, a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084. A person commits a felony of the first degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084, if the offense of sex trafficking is committed against a person who is under the age of 14 or if such offense results in death.

***Register v. State, 715*** **So.2d 274 (App. 1 Dist.,1998)**

Procedural History: Defendant was convicted in the Circuit Court for Columbia County, Thomas J. Kennon, Jr., J., of unlawfully procuring for prostitution a person under the age of 18 and misdemeanor possession of marijuana. Defendant appealed. The District Court of Appeal, Mickle, J., held that mere offer of money to a person under 18 to have sex with offeror is solicitation, rather than procurement for prostitution, and concluded that State failed to make prima facie case of charge.

Issue(s): To substantiate the element of “procurement” for the charge of prostitution, does there have to be actual activity? Or is it merely solicitation?

Facts: In the case at bar, the young victim testified that while she was babysitting at a friend's house, the 65-year-old appellant visited the residence, offered the victim "a joint," and asked her to walk over to his camper, which was situated on the same property. When the victim walked inside Register's dwelling, Register asked her to "spend the night" with him. The victim understood this offer to refer to sex. When the victim refused the offer, Register offered her $50 and then $100 to sleep with him. She told him "No" and immediately left and reported the incident to her mother. The victim's 12-year-old friend testified that she had remained discreetly outside the appellant's camper and overheard Register offering the victim various amounts of money to "stay over" at his place. She agreed that the victim had answered "No" and that the two girls immediately had reported what happened. The victim's mother testified that after speaking to her daughter, she confronted Register, who initially denied making the offer but subsequently admitted propositioning the girl and offering her drugs.

Holding: Reversed in part, affirmed in part.

Opinion: MICKLE, Judge.

Johnny Register appeals a conviction for unlawfully procuring for prostitution a person under the age of 18, a felony of the second degree pursuant to section 796.03, Florida Statutes (1995). The appellant contends that the trial court should have granted his motion for judgment of acquittal on this charge because, viewed in a light most favorable to the State, the evidence established, at most, that Register offered money to a 12-yearold girl to have sex with him. She refused his offer and immediately reported the incident to her mother, who notified authorities. Having determined that the mere offer of money to a person under 18 to have sex with the offeror is solicitation, rather than procurement for prostitution, we conclude that the State failed to make a prima facie case of the crime charged. Accordingly, we reverse Register's conviction of procurement for prostitution (Count One). We affirm his conviction and sentence for misdemeanor possession of marijuana (Count Two) pursuant to section 893.13, Florida Statutes (1995).

Section 796.03 states:

> Procuring person under age 18 for prostitution. - A person who procures for prostitution, or causes to be prostituted, any person who is under the age of 18 commits a felony of the second degree, punishable as provided in [Chapter 775, Florida Statutes].

Section 796.07, Florida Statutes (1995), defines "prostitution":

> (1) (a) "Prostitution" means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

The act of prostitution "involves a financial element." *[Gonzales v. State,* 107 Fla. 121, 144 So. 311 (1932)] Another subsection of this statute outlaws certain related activities:

> (2) It is unlawful:
>
> (f) To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation.
>
> (4) A person who violates any provision of this section commits:
>
> (a) A misdemeanor of the second degree for a first violation, punishable as provided in [Chapter 775].

The pertinent statutes do not define either "procure" or "solicit." The appellant argued at trial and on appeal that "solicitation" and "procurement" constitute different acts. According to the appellant's reasoning, the two terms are related only insofar as an initial act of solicitation, i.e., seeking "to obtain by persuasion, entreaty, or formal application," or approaching a person "with an offer of sexual services" according to The American Heritage Dictionary of the English Language at 1229 (1973), might lead to an act of procurement, i.e., obtaining, acquiring, or bringing about a result such as "obtain[ing] (a woman) to serve as a prostitute" according to The

American Heritage Dictionary of the English Language at 1044 (1973). [See *Ford v. City of Caldwell,* 79 Idaho 499, 321 P.2d 589, 593 (1958) (" 'Procure' means to cause, acquire, gain, get, obtain, bring about, cause to be done; it connotes action. 'Procurement' is the act of obtaining, attainment, acquisition, bringing about, effecting.")] To show solicitation in the context of sexual activity:

> [I]t is only necessary that the actor, with intent that another person commit a crime, have enticed, advised, incited, ordered, or otherwise encouraged that person to commit a crime. The crime solicited need not be committed. [Black's Law Dictionary at 1249 (5th ed.1979)]

That is, solicitation is the attempt to induce one to have sex. On the other hand, procurement contemplates the attaining, bringing about, or effecting of the result sought by the initial solicitation, such as obtaining someone as a prostitute for a third party. [See id. at 1087] The Supreme Court of Washington effectively described what constitutes "procurement" in *State v. Carter,* [89 Wash.2d 236, 570 P.2d 1218 (1977)] The Washington State statute provided for the imprisonment of "[e]very person who ... [s]hall give, offer, or promise any compensation, gratuity or reward, to procure any person for the purpose of placing such person for immoral purposes in any house of prostitution, or elsewhere ...." [Wash. Rev.Code § 9.79.060(3) (1973)] A jury convicted Carter of the crime of pimping under that statute. At the trial, a female Seattle Police Department "decoy prostitute" testified that as she was "walking" a certain area, Carter and another man (Campbell) asked whether she had a "man" for security. The decoy took this to mean whether she had a pimp. After the other man left, Carter offered to furnish the decoy with security, a bail bondsman, a corner on which to work, and good customers in exchange for one-half of her earnings.

During a subsequent encounter in a hotel lobby, the decoy told Carter and Campbell that she "was not playing games," whereupon the three individuals further discussed the proposed arrangement. Both men offered the plan that Carter originally had suggested, but Campbell was not present for all of the negotiations in the lobby. Carter and Campbell eventually accompanied the decoy to her hotel room, where the vice unit arrested both men. *[Carter,* 570 P.2d at 1219-20] Carter and Campbell were tried jointly, and the jury acquitted the latter.

On appeal, Carter argued, first, that the procurement statute was directed only at the third party who offers to reward the procurer, not at the procurer himself. Determining that "[t]he statute was broadly written to prohibit the acts of both the procurer and the person who rewards the procurer," the supreme court rejected this argument. [Id. at 1220-21; *State v. Basden,* 31 Wash.2d 63, 196 P.2d 308 (1948)] Second, Carter argued that the State had failed to prove "a complete crime" because no showing was made that Carter actually "procured" the decoy. The State, on the other hand, contended that procurement was shown where the offer of compensation was accompanied by Carter's intent to procure. The supreme court rejected both positions and said:

> Strictly interpreting this subsection, more than an attempt was needed. There must have been some agreement to procure or be procured, i.e., some acceptance of the offer to provide compensation. Appellant's conduct here, as testified to by Myra Boyd [the

> decoy's pseudonym], did come within the purview of subsection (3). The crime was completed when Ms. Boyd agreed to the offer for the purpose of making the arrest. At the point her objective manifestation of assent was communicated to appellant, an agreement was completed sufficient to come under the terms of the statute. The trial court correctly denied appellant's motion to dismiss at the end of the State's case-in-chief. [Carter, 570 P.2d at 1221]

Carter's conviction was affirmed. Id. at 1222.

Unlike the facts in Carter, the State's evidence in the present case showed no "agreement" or "acceptance" on the offeree's part. The victim emphatically rejected Register's attempt or offer, whereas the decoy officer in Carter "accepted" the offer for purposes of preparing to arrest the men. After the State rested its case, the defense moved for judgment of acquittal on the grounds that section 796.03 does not proscribe someone's soliciting another person for the solicitor's own sexual benefit (rather than for a third party), and that the State had not proved a prima facie case of guilt of the charged offense. In support of its position, the defense cited *Barber v. State*, [397 So.2d 741, 742 (Fla. 5th DCA 1981)], for the proposition that "the underlying purpose of section 796.03 ... appears to be to protect children from sexual exploitation for commercial purposes." [See *Grady v. State*, 701 So.2d 1181, 1182 (Fla. 5th DCA 1997) (affirming conviction of procurement for prostitution, despite defense of lack of knowledge that victim was under age 18, because the state's "compelling interest in protecting underage persons from being sexually abused or exploited" renders certain acts upon children punishable under section 796.03 despite the offender's ignorance of the victim's age)]

Defense counsel asserted that the "procurement" statute is directed toward persons (such as pimps) who seek to profit financially from engaging minors in prostitution with third parties. The State offered no evidence to suggest that Register sought to exploit the victim sexually for his own financial gain or sought to involve a third party in sexual activity with the victim. The State, on the other hand, construed section 796.03 so broadly that the mere request and attempt to have sexual activity with a minor, without any resulting sexual activity, would constitute the completed act of procurement. That is, the prosecutor argued that the mere offer of money for sex, even where the child refused to oblige, was sufficient to bring Register's act within the proscriptions of section 796.03. The trial court denied the motion for judgment of acquittal. The court subsequently gave the jury the following instruction governing prostitution and procurement:

> Prostitution means the giving or receiving of the body for sexual activity for hire, but excludes sexual activity between spouses. It is not necessary that such sexual activity take place for the crime to be completed. Procure means to cause, acquire, gain, get, obtain, bring about, cause to be done; to instigate, to contrive, bring about, effect or cause; to persuade, induce, prevail upon, or cause a person to do something.

The record clearly demonstrates that the jury was concerned and very much confused regarding the meaning of the procurement charge. Fifteen minutes after starting deliberations, the jury asked the court for a dictionary definition of "procure." The trial judge denied the request but repeated the jury instruction on procurement. Less than an hour later, the jury requested a

written definition of "procure," which the court sent to them over a defense objection. A third time, the jury returned with additional questions and was reinstructed on procuring a person under age 18. Within thirty minutes, the jury found Register guilty as charged.

To the extent that penal statutory language is indefinite or "is susceptible of differing constructions," due process requires a strict construction of the language in the defendant's favor under the rule of lenity. [§ 775.021(1), Fla. Stat. (1995); *Perkins v. State*, 576 So.2d 1310, 1312 (Fla.1991); *Logan v. State*, 666 So.2d 260, 261 (Fla. 4th DCA 1996)] Construing sections 796.03 and 796.07 together, we conclude that the trial court should have granted the motion for judgment of acquittal. Section 796.03 addresses only procurement for prostitution, not solicitation. Section 796.07(2)(f) makes it unlawful "[t]o solicit ... or procure another to commit prostitution ...."

Although neither statute defines either "solicit" or "procure," the context in which the two terms are used in section 796.07 indicates a legislative intent to distinguish between the two acts. Section 796.03 applies only to acts of procurement for prostitution of persons under the age of 18, whereas subsection 796.07(2)(f) outlaws soliciting or procuring "another" (without express regard to the age of the victim) for prostitution. Determining the scope of the two statutes is of material importance to the appellant, who was convicted of a second-degree felony and was sentenced to 150 months in prison. In contrast, a first offense of unlawfully soliciting or procuring another person pursuant to section 796.07(2)(f) is only a second-degree misdemeanor, for which a defendant can be incarcerated "not exceeding 60 days." [§§ 775.082(4)(b), 796.07(4)(a), Fla. Stat. (1995)]

The Florida Legislature has classified as a felony the act of procuring for prostitution anyone under age 18. This designation is consistent with the intent to proscribe the commercial exploitation of children induced to engage in sexual activity with others for the financial benefit of the procurer pimp. Given the absence of a third party in the present case, we need not decide whether successfully inducing a person under age 18 to have sexual activity with the offeror himself falls within section 796.03 or 796.07. Procuring for prostitution anyone 18 years of age or older is a misdemeanor under section 796.07. Soliciting anyone (irrespective of age) for prostitution likewise is a misdemeanor under section 796.07. The appellant tried to induce the minor victim to have sex with him, but she refused his offer. This was mere solicitation, not procurement. [See *Stevens v. State,* 380 So.2d 495 (Fla. 2d DCA 1980) (reversing conviction of procurement for prostitution under section 796.03 and remanding for discharge, where evidence showed that a man known to be a pimp had merely offered 15-year-old victim money and clothes, which she refused to accept, and that victim had refused to work for him)]

We find nothing in either statute that would support the State's argument that offering money while soliciting someone to have sex with the offeror was intended to have the same criminal consequences as inducing a victim to engage in sexual activity with a third party to the financial benefit of the pimp. A person who offers money to a minor to have sex with him commits a crime. The Florida Legislature has designated such an act of solicitation as a less severe crime than exploiting a minor to engage in sexual activity with a third party, to the procurer's financial advantage. This distinction is a matter within the exclusive prerogative of the legislative branch. If it had intended to classify the act of solicitation of a minor as a felony, the Florida Legislature

easily could have done so.

Critical Thinking Question(s): What is the significance of the difference between the actions of procurement and solicitation? Should a suspect receive more lenient treatment just because his/her efforts were not successful? Can you think of other statutes that might apply to the case at hand?

### *Roe v. Butterworth,* 958 F.Supp. 1569 (S.D., Fla.,1997)

Procedural History: Petitioner, a former call girl for escort service, brought action challenging constitutionality of state statute prohibiting prostitution and seeking declaratory and injunctive relief against state through its attorney general. Petitioner moved for summary judgment, and state filed cross-motion for summary judgment. The District Court, Gonzalez, J., held that: (1) petitioner failed to establish existence of fundamental right to engage in prostitution; (2) statute did not interfere with any right of adults to engage in consensual sexual relations; and (3) statute did not discriminate against women or unmarried persons in violation of equal protection clause.

Issue(s): Does the petitioner have a fundamental right to engage in prostitution such that Florida Statute, section 796.07 is unconstitutional?

Facts: In a simple two page complaint, Petitioner challenges the constitutionality of Chapter 796, Florida Statutes, and seeks declaratory and injunctive relief against Robert Butterworth, acting as Attorney General of the State of Florida. Petitioner brings her claims under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner is a former employee of the "most prestigious and famous escort service in south Florida and the United States...." [Petitioner's Affidavit (DE 10), ¶ 4] According to Petitioner, during her employment as a call girl, she "dated and engaged in sexual activity for hire with some of the most powerful and well known businessmen in the United States and the World as well as numerous diverse professionals such as doctors, lawyers, reverends and ministers, professors and even State Circuit Court and Federal Judges," most of whom were married. [Id., ¶ 5] Petitioner is interested in returning to her career as a prostitute, but has refrained from doing so at the prompting of her attorney, and out of fear of prosecution. [Id., ¶ 13]

Holding: State's motion granted.

Opinion: GONZALEZ, District Judge.

This Cause has come before the Court upon Petitioner's Motion for Summary Judgment, filed on April 16, 1996, and Respondent's Cross-Motion for Summary Judgment, filed on July 19, 1996. Both motions have been fully briefed and are ripe for review. Additionally, the parties agree that no material factual disputes exist in this case, that the issues presented are entirely questions of law, and that the case is ripe for adjudication.

Florida defines prostitution as "the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses." [Fla.Stat. § 796.07(1)(a)] "Sexual activity" is

defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation...."

[Fla.Stat. § 796.07(1)(d] Section 796.07 also makes it unlawful for any person to "purchase the services of any person engaged in prostitution." [Fla.Stat. § 796(2)(h)(i)] Violation of Section 796.07 constitutes the commission of a misdemeanor. [Fla.Stat. § 796.07(4)] The remainder of Chapter 796 deals with other offenses that are related to prostitution.

In her Complaint, Petitioner alleges that sections 796.02 through 796.08 "to the extent they prohibit and make criminal prostitution and acts related thereto criminal, are unconstitutional because they directly violate the Petitioner's Fifth and Fourteenth Amendment rights to due process and equal protection and her fundamental right of privacy, and pursuant to that right [, the right] to control her own reproductive organs whether in a private or commercial transaction." [Petitioner's Complaint, ¶¶ 2, 7] Following this Court's denial of Respondent's Motion to Dismiss, and subsequent Motion for Reconsideration, Petitioner filed its Motion for Summary Judgment. Respondent responded with its Cross-Motion for Summary Judgment shortly thereafter.

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Fed.R.Civ.P. 56(c)] The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *[Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)] The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *[Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986)], and any doubts in this regard should be resolved against the moving party, *[Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970)].

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *[Celotex Corp.,* 477 U.S. at 323, 106 S.Ct. at 2553] To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *[Celotex Corp., 477* U.S. at 325, 106 S.Ct. at 2553]

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *[Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)] According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." [Fed.R.Civ.P. 56(e); *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356]

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim.

*[Anderson,* 477 U.S. at 257, 106 S.Ct. at 2514] "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *[Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir.1990)] If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *[Anderson, 477* U.S. 242, 249-50, 106 S.Ct. 2505, 2511]

Before this Court may address the constitutional issues raised by Petitioner, it must determine whether a sufficient case or controversy exists to satisfy Article III, § 2 of the United States Constitution, and whether Petitioner has standing to challenge the enforcement of Fla. Stat. § 769.07 (1995). A federal court may only "adjudge the legal rights of litigants in actual controversies." *[Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)] "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *[Younger v. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971]. As stated by the Supreme Court:

> The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. [See *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941) The basic inquiry is whether the "conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *[Railway Mail Assn. v. Corsi,* 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed.
> 2072 (1945); see *Evers v. Dwyer,* 358 U.S. 202, 203, 79 S.Ct. 178, 179, 3 L.Ed.2d 222 (1958); *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* supra.] *[Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 297-98, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)]

Petitioner has not been prosecuted, nor is she in immediate threat of prosecution for violating the statute she challenges. However, "it is not necessary that petitioner first expose [herself] to actual arrest or prosecution to be entitled to challenge a statute that [s]he claims deters the exercise of [her] constitutional rights." *[Stefel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974), citing Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)] Instead, she may maintain an action so long as she has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder...." *[Athens Lumber Co., Inc. v. Federal Election Commission,* 689 F.2d 1006 (11th Cir.1982) (citations omitted), aff'd on reh'g, 718 F.2d 363 (1983), cert. denied, 465 U.S. 1092, 104 S.Ct. 1580, 80 L.Ed.2d 114 (1984)]

In this case, Petitioner alleges that she desires to engage in conduct prohibited by § 769.07, and that she currently refrains from doing so out of fear of prosecution. Respondent has indicated that it will continue to enforce the challenged ordinance. Thus, Petitioner is being forced to

chose between complying with § 769.07 and suffering economic injury, or facing the risk of prosecution. [See *American Booksellers Association, Inc. v. Virginia,* 792 F.2d 1261, 1264 (4th Cir.1986), superseded, 802 F.2d 691 (4th Cir.1986)] In this posture, Petitioner's injury and fear of prosecution is more than "chimeral," *[Poe v. Ullman,* 367 U.S. 497, 508, 81 S.Ct. 1752, 1758, 6 L.Ed.2d 989 (1961)], and satisfies the Constitution's requirement that she have "such a personal stake in the outcome of the controversy to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *[Baker,* 369 U.S. at 204, 82 S.Ct. at 703]

Petitioner has shown the existence of a "threatened injury as a result of the putatively illegal conduct of the defendant" which can "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision." *[Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), quoting *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979), and *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976); *GTE Directories Publishing Corp. v. Trimen America, Inc.,* 67 F.3d 1563, 1567 (11th Cir.1995)] Therefore, the Court concludes both that an actual controversy exits in this case, and that Petitioner has standing to bring the present action. Accord *Doe v. Gonzalez,* [723 F.Supp. 690, (S.D.Fla.1988), aff'd, 886 F.2d 1323 (11th Cir.1989)].

As an initial matter, the Court must determine the proper standard for reviewing Petitioner's claims. If, as Petitioner asserts, the conduct in which she wishes to engage falls within the zone of privacy protected by the Fifth and Fourteenth Amendments to the United States Constitution, the Court must engage in a two part analysis. Initially, the Court must determine whether the challenged legislation burdens the exercise of Petitioner's right of privacy. If the Court answers this question in the affirmative, it must strictly scrutinize the legislation to determine if it is narrowly tailored to achieve a compelling state interest. *[San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 37, 93 S.Ct. 1278, 1299, 36 L.Ed.2d 16 (1973); *Griswold v. Connecticut,* 381 U.S. 479, 498, 85 S.Ct. 1678, 1689, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 2233, 124 L.Ed.2d 472 (1993)] If the Court concludes that the activity in which Petitioner seeks to engage does not fall within the ambit of her fundamental right of privacy, or that the legislation does not burden any fundamental right, the Court must determine whether the statute is rationally related to a legitimate governmental interest. *[Bowers v. Hardwick,* 478 U.S. 186, 193, 106 S.Ct. 2841, 2845, 92 L.Ed.2d 140 (1986); *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Tarter v. James,* 667 F.2d 964, 969 (11th Cir.1982); John E. Nowak & Ronald D. Rotunda, Constitutional Law § 14.3 (5th ed.1995)]

Even before it determines what level of review to apply, however, the Court must identify the exact nature of the right Petitioner asserts. In large part, the Court's conclusion will turn upon the level of specificity with which it views Petitioner's claim; the Court must determine whether to view Petitioner's claim at a very general level - as a unitary whole - or at a more specific level. In other words, is the issue in this case whether Petitioner has a constitutional right to engage in prostitution? Or should that activity be broken down into its constituent parts? Frequently, as a claim is viewed more generally, its nature becomes more consistent with a

fundamental right. This problem was recognized by Justice Scalia in *Michael H. v. Gerald D.,* when he wrote:

> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice BRENNAN would choose to focus instead upon "parenthood." Why should the relevant category not be even more general - perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent. [491 U.S. 110, 126 n. 6, 109 S.Ct. 2333, 2344 n. 6, 105 L.Ed.2d 91 (1989)] [See also, Id., at 137-38, 109 S.Ct. at 2349-50 (Brennan, J., dissenting)]

Justice Scalia's formulation was not adopted by the majority of the Court in *Gerald D.,* and was later rejected in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* [505 U.S. 833, 847, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992)]. Yet there remains a strong precedent in favor of selecting the most specific level of tradition possible for adjudicating this case - *Bowers v. Hardwick*, [478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)].

In *Bowers,* the Court rejected Hardwick's challenge to Georgia's anti-sodomy law. Hardwick, who had been arrested for committing an act of sodomy with another adult male in the privacy of his own bedroom, argued that the statute violated his constitutional right to privacy. [Id., at 187, 106 S.Ct. at 2842] In his dissent, Justice Blackmun argued that Hardwick's claim should be viewed at a very general level as "'the right to be let alone.' " [Id., at 199, 106 S.Ct. at 2848, quoting *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, (1928) (Brandeis, J., dissenting)] The Court, however, rejected Justice Blackmun's formulation, and instead framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy...." [Id., at 190, 106 S.Ct. at 2843] Thus, the Court viewed Hardwick's claim at a very specific level, taking into consideration all of the relevant facts of which the State complained. Thus, it is clear that the Court does not inevitably limit its inquiry to general, overriding principles of privacy.

Initially, Petitioner presented her claim as a coherent activity. Later, perhaps in response to this Court's recognition that Petitioner's claim could be based upon "some smaller subset of personal rights," she directed greater attention to this alternative theory.

Petitioner has, however, included arguments supporting each approach in her memoranda. Because the Court believes that it would be helpful to explore both of Petitioner's approaches, it will consider each in turn.

It is never easy for a court to determine whether a particular activity, previously unaddressed by

the Supreme Court, falls within one of the "unenumerated rights" created by the Constitution. Some restrictions on the state were made unmistakably clear by the framers. [See United States Constitution, Art. I, § 10] As for other restrictions upon state legislation, the Constitution has at times appeared miserly, only begrudgingly revealing her mysteries.

The unenumerated rights upon which the states are forbidden from intruding are most often found as stemming from the Due Process Clauses of the Fourteenth Amendment. [But see *Griswold v. Connecticut,* supra] The confusion over the scope of rights protected by the imprecise language of this provision has caused more than a few disagreements in the Supreme Court over the years. [See *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Olsen v. State of Nebraska ex rel. Western Ref. & Bond Ass'n,* 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.,* 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949); *Williamson v. Lee Optical of Oklahoma Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949); *Adamson v. California,* 332 U.S. 46, 68-92, 67 S.Ct. 1672, 1683-97, 91 L.Ed. 1903 (1947) (Black, J., dissenting); *Michael H. v. Gerald D.,* 491 U.S. at 126 n. 6, 109 S.Ct. at 2344 n. 6 (Scalia, J.)]

Read literally, the Due Process Clause seems to be a procedural provision, merely limiting the manner in which a state may deprive a person of "life, liberty, or property". For at least 109 years, however, "the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.' " *[Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), quoted in *Planned Parenthood v. Casey,* 505 U.S. at 846, 112 S.Ct. at 2804, citing *Mugler v. Kansas,* 123 U.S. 623, 660-661, 8 S.Ct. 273, 296-297, 31 L.Ed. 205 (1887)] The due process clause of the Fourteenth Amendment "affords not only a procedural guarantee against deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *[Kelley v. Johnson,* 425 U.S. 238, 244, 96 S.Ct. 1440, 1444, 47 L.Ed.2d 708 (1976)]

In evaluating Petitioner's claim, the Court must ask whether the liberty she asserts is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *[Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) (Cardozo, J.), quoted in, *Michael H. v. Gerald D.,* 491 U.S. at 122, 109 S.Ct. at 2342] Only if the right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " will it be deemed fundamental. *[Powell v. State of Alabama,* 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932), quoted in *Griswold v. Connecticut,* 381 U.S. at 493, 85 S.Ct. at 1686-87 (Goldberg, J., concurring)] In determining whether a right is so "implicit in the concept of ordered liberty" as to warrant constitutional protection, the Court should refer to this Nation's history, and basic underlying values. *[Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937); *Griswold v. Connecticut,* at 501, 85 S.Ct. at 1690 (Harlan, J., concurring); *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973)]

Also, the Court must maintain a "wise appreciation of the great roles that the doctrines of

federalism and separation of powers have played in establishing and preserving American freedoms." [Id.] After referring to these sources of guidance, a fundamental right will only be found if the Court concludes that the liberty asserted is of such importance that "neither liberty nor justice would exist if [it] were sacrificed." *[Palko v. Connecticut,* 302 U.S. at 326, 58 S.Ct. at 152] As stated by Justice Harlan:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
>
> ... [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *[Poe v. Ullman,* 367 U.S. at 542-43, 81 S.Ct. at 1776-77, (Harlan, J., dissenting), quoted in *Planned Parenthood v. Casey,* 505 U.S. at 849-50, 112 S.Ct. at 2805]

At issue in this case is the Due Process Clause's substantive guarantee of liberty, which has been interpreted as including a right of privacy protecting "the personal intimacies of the home, the family, marriage, motherhood, procreation,.. child rearing", and education. *[Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 65, 93 S.Ct. 2628, 2639, 37 L.Ed.2d 446 (1973)] These protected intimacies were, for a long time, limited to the marital relationship. [See e.g., *Skinner v. Oklahoma,* 316 U.S. at 541, 62 S.Ct. at 1113 (1942); *Griswold v. Connecticut,* 381 U.S. at 486, 495, 85 S.Ct. at 1682, 1687] The Court's opinion in *Eisenstadt v. Baird,* however, made clear that this right "to be let alone" means more: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *[Eisenstadt v. Baird,* 405 U.S. at 453, 92 S.Ct. at 1038, citing *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Jacobson v. Massachusetts,* 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643 (1905)]

Recognizing that the interpretation of the Due Process Clause is not a precise science, the Supreme Court has admonished lower courts to exercise extreme caution before extending that Clause's reach. Such circumspection is dictated by the nature of the government the Constitution established. Under our representative democracy, courts must be particularly careful to leave important political decisions in the hands of the majority. [See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review,* 100-01 (1980)] Thus, the Court has warned:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. *[Bowers v. Hardwick,* 478 U.S. at 194-195, 106 S.Ct. at 2846]

[See also *Michael H. v. Victoria D.,* 491 U.S. at 121-22, 109 S.Ct. at 2341-42; *Moore v. City of East Cleveland,* 431 U.S. 494, 544, 97 S.Ct. 1932, 1958, 52 L.Ed.2d 531 (1977) (White, J., dissenting)] Bearing this warning in mind, the Court shall now consider Petitioner's claims.

Petitioner argues that prostitution is so well established in the traditions and history of this society as to come within the protection of Due Process Clause's guarantee of privacy. Her supporting references to "evidence" reach back millions of years to the development of Homo Erectus. She also refers to ancient Greek history, Roman Mythology, the Bible, biblical scholars such as St. Thomas Aquinas and St. Augustine, and the history of the old American West. Petitioner has submitted ample evidence to establish that prostitution has an extensive and lengthy history; this is no surprise. Yet she has utterly failed to show either that the act of engaging in prostitution is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed," or that it is so "deeply rooted in this Nations's history and tradition" as to be deemed fundamental. *[Palko, Moore,* supra] Indeed, such an argument "is, at best, facetious." *[Bowers v. Hardwick,* 478 U.S. at 194, 106 S.Ct. at 2846]

Longevity alone does not bring an activity within the protection of the Constitution. If it did, every activity that has long been denounced by civilized societies - and they are myriad - would gain constitutional protection from state interference. Murder, robbery, extortion, bigamy, incest, theft, and many other crimes have been committed since before histories were recorded. Yet, because societies considered them destructive, immoral, indecent, or generally evil, they have all been prohibited at one time or another. The same is undoubtedly true of prostitution.

Petitioner does not contest the long standing history of state and criminal laws prohibiting prostitution in this country. Today, every state in the Union, as well as the federal government, has some form of penal statute prohibiting prostitution. Such a well established history of prohibition strongly supports the conclusion that this society has not traditionally valued the practice of prostitution. Petitioner's references to the Bible are also completely unavailing. The

Bible is replete with negative references to "harlots," "prostitutes" and "whores," both in the Old and New Testament. The mere fact that "harlots" may not have been "systematically repressed," or that particular prostitutes, such as Rehab, were even revered, falls far short of establishing that the institution of prostitution is "implicit in the concept of ordered liberty." [See Petitioner's Brief, at 84]

Petitioner's own exhibits demonstrate the public opprobrium that has been leveled towards prostitution throughout history. Indeed, the main thrust of Petitioner's argument is that such malevolent judgments, so common throughout history, stem from antiquated and hypocritical attitudes and ethics. While such an argument shows that societal norms do not mesh with Petitioner's liberalized ideals, it does nothing to advance her claim that the right to engage in prostitution is constitutionally protected. Petitioner's reliance on the privacy of the home or other closed quarters also fails to persuade this Court that prostitution is constitutionally protected. While the Supreme Court has given a more expansive reading to the right of privacy when a challenged ordinance seeks to reach within an individual's home, [see *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969)], the Court has also made clear that the privacy of one's home does not render an individual immune from prosecution. *[Bowers v. Hardwick,* 478 U.S. at 193, 106 S.Ct. at 2845] Even "[v]ictimless crimes ... do not escape the law where they are committed at home." [Id.; See also, *Employment Div., Dept. Of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (recognizing the state's legitimate interest in preventing the use of illegal drugs even in the home)]

Other Supreme Court cases give further support for rejecting Petitioner's claim. Various Justices of the Supreme Court, both in separate opinions and on behalf of the Court, have stated that the states may appropriately criminalize prostitution. [See e.g. *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 594, 111 S.Ct. 2456, 2475, 115 L.Ed.2d 504 (1991) (White, J., dissenting) ("the State clearly has the authority to criminalize prostitution and obscene behavior"); Id., 501 U.S. at 575, 111 S.Ct. at 2465 (Scalia, J., concurring); Id., 501 U.S. at 584, 111 S.Ct. at 2469 (Souter, J., concurring); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 68 n. 15, 93 S.Ct. 2628, 2641 n. 15, 37 L.Ed.2d 446 (1973) ("The state statute books are replete with constitutionally unchallenged laws against prostitution, ... although [this] crime[ ] may only directly involve 'consenting adults.' "); *Hoke v. United States,* 227 U.S. 308, 321, 33 S.Ct. 281, 283, 57 L.Ed. 523 (1913) ("There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime.")] [See also *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986); *United States v. Bitty,* 208 U.S. 393, 401, 28 S.Ct. 396, 398, 52 L.Ed. 543 (1908); *Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

Various justices have also expressed the view that other extra-marital sexual crimes are valid and enforceable. [See *Carey v. Population Services, Int'l,* 431 U.S. 678, 702, 97 S.Ct. 2010, 2025, 52 L.Ed.2d 675 (1977) (White, J., concurring) ("I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual relations."); *Paris Adult Theatre I,* 413 U.S. at 68 n. 15, 93 S.Ct. at 2641 n. 15 ("Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision."); *Griswold v. Connecticut,* 381 U.S. at 498, 85 S.Ct. at 1689 (Goldberg, J., concurring) ("The State of Connecticut does have statutes, the

constitutionality of which is beyond doubt, which prohibit adultery and fornication."); Id., at 505, 85 S.Ct. at 1693 (White, J., concurring) ("the State's policy against all forms of promiscuous or illicit sexual relationships ... [is] concededly a permissible and legitimate legislative goal."); *Poe v. Ullman*, 367 U.S. at 552, 81 S.Ct. at 1782 (Harlan, J., dissenting) ("I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."), quoted in Catherine D. Perry, "Right of Privacy Challenges to Prostitution Statutes," 58 Wash.U.Law.Quarterly 439, 456 n. 120] Even Justice Blackmun, dissenting in *Bowers v. Hardwick,* suggested that a state could legitimately enforce such laws. [478 U.S. at 209 n. 4, 106 S.Ct. at 2853 n. 4.]

Petitioner has utterly failed to show that this society has ever recognized a right to engage in prostitution; instead, she has painted a picture of consistent and long standing denunciation. While she has shown that the roots of prostitution reach well back into ancient history, she has failed to shown that "neither liberty nor justice would exist if [it] were sacrificed." Therefore, following the reasoning and analysis of the Supreme Court in *Bowers v. Hardwick,* the Court concludes that Petitioner has failed to show that the right of privacy, as delineated by the Supreme Court, includes the right to engage in prostitution.

Critical Thinking Question(s): The Court went on to discuss the potential that making prostitution a crime might violate the Equal Protection clause; it does not. While the petitioner was shot down in this case, and many think of prostitution as deplorable, she does raise a relevant issue. Do you believe that persons should have the right to choose how they use their bodies? Should persons be prosecuted for trying to make money for engaging in a practice (sex) that is otherwise generally permitted? Why do you think the Court is so adamant about this “victimless” crime?

## VII. Obscenity

Section Introduction: According to the U.S. Supreme Court, obscene material lacks redeeming social value and is therefore not protected by the First Amendment. The following statutes and criminal case demonstrate how obscenity is viewed in the state of Florida.

### Florida Statutes, sec. 847.011 - Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) Except as provided in paragraph (c), any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for

obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(b) The knowing possession by any person of three or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is prima facie evidence of the violation of the paragraph.
(c) A person who commits a violation of paragraph (a) or subsection (2) which is based on materials that depict a minor engaged in any act or conduct that is harmful to minors commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) A person's ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in a prosecution for one or more violations of paragraph (a) or subsection (2).

(2) Except as provided in paragraph (1)(c), a person who knowingly has in his or her possession, custody, or control any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, film, any sticker, decal, emblem or other device attached to a motor vehicle containing obscene descriptions, photographs, or depictions, any figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of violating this subsection, thereafter violates any of its provisions commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. In any prosecution for such possession, it is not necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser

or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who knowingly promotes, conducts, performs, or participates in an obscene show, exhibition, or performance by live persons or a live person before an audience is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who, after having been convicted of violating this subsection, thereafter violates any of its provisions and is convicted thereof is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in the defendant had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, by showing facts and circumstances from which it may fairly be inferred that he or she had such knowledge, or by showing that he or she had knowledge of such facts and circumstances as would put a person of ordinary intelligence and caution on inquiry as to such contents or character.

**Florida Statutes, sec. 847.012 - Prohibition of sale or other distribution of harmful materials to persons under 18 years of age; penalty**

(1) As used in this section, "knowingly" means having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(a) The character and content of any material described in this section which is reasonably susceptible of examination by the defendant, and
(b) The age of the minor.

(2) A person's ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in a prosecution for a violation of this section.

(3) A person may not knowingly sell, rent, or loan for monetary consideration to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement,

sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors, or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording that contains any matter defined in s. 847.001, explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and that is harmful to minors.

(4) A person may not knowingly use a minor in the production of any material described in subsection (3), regardless of whether the material is intended for distribution to minors or is actually distributed to minors.

(5) Any person violating any provision of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(6) Every act, thing, or transaction forbidden by this section constitutes a separate offense and is punishable as such.

(7) (a) The circuit court has jurisdiction to enjoin a violation of this section upon complaint filed by the state attorney in the name of the state upon the relation of such state attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney requests a judge of such court to set a hearing upon an application for a restraining order, the judge shall set the hearing for a time within 3 days after the making of the request. The order may not be made unless the judge is satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for the restraining order is to be made.

(c) The person sought to be enjoined is entitled to a trial of the issues within 1 day after joinder of issue, and a decision shall be rendered by the court within 2 days after the conclusion of the trial.

(d) If a final decree of injunction is entered, it must contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of her or his compliance.

(e) In any action brought as provided in this section, a bond or undertaking may not be required of the state or the state attorney before the issuance of a restraining order provided for by paragraph (b), and the state or the state attorney may not be held liable for costs or for damages sustained by reason of the restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with, any of the materials, matters, articles, or things described in this section, after the service upon her or him of a summons and complaint in an action for

injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs and state attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section does not apply to the exhibition of motion pictures, shows, presentations, or other representations regulated under s. 847.013.

**Fontana v. State, 316 So.2d 543 (1975)**

Procedural History: Defendants were convicted before the Magistrate's Court, Hillsborough County, of sale of obscene magazines, and they appealed. On motion by State to dismiss appeal, the Circuit Court, Hillsborough County, I. C. Spoto, J., transferred cause to the Supreme Court. The Supreme Court, Boyd, J., remanded proceedings to allow application of standards whether: (1) average person applying contemporary community standards would find that when taken as whole magazines appealed to prurient interest; (2) magazines depicted or described in patently offensive way sexual conduct specifically defined by applicable state law as written or construed; and (3) magazines each taken as a whole lacked serious literary, artistic, political or scientific value.

Issue(s): What are the standards by which the 'obscenity' of material is measured?

Facts: An information was filed against Appellants on March 18, 1970, and they were each convicted by a jury in the Magistrate's Court of Hillsborough County on six counts of violation of Section 847.011, Florida Statutes, in the sale of obscene magazines.

Appellants were each fined $1,000.00 and sentenced to serve three months in the Hillsborough County jail. Appellants appealed to the Hillsborough County Circuit Court from an order denying both a motion in arrest of judgment and a motion for new trial. Thereafter, the Appellee moved to dismiss the appeal on several grounds, one of which was lack of jurisdiction because the trial court passed on the constitutionality of Section 847.011, Florida Statutes. The Hillsborough County Circuit Court denied the motion to dismiss on three grounds but treated the jurisdictional ground as a motion to transfer under Rule 2.1 subd. a(5)(d), Florida Appellate Rules; the court then granted the motion and transferred the cause to this Court.

Holding: Reversed and remanded for further proceedings.

Opinion: BOYD, Justice.

We recognize that the federal Supreme Court in *Hamling v. United States,* [418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)] once again applied retrospectively the standards established in *Miller v. California,* [413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] to federal statutes, while in *Jenkins v. Georgia,* [418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974)] that Court announced the rule that defendants whose convictions were on direct appeal at the time of the *Miller* decision should receive any benefit available to them thereunder, making no distinction

between federal and state convictions for distributing obscenity.

The first *Miller* standard was initially enunciated in *Roth v. United States* [354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1959)] and was reaffirmed in the *'Memoirs'* opinion,[ A Book Named *'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966)], that standard is whether the average person, applying contemporary community standards, would find that, when taken as a whole, the magazines appeal to the prurient interest. The second standard of obscenity as required in *Miller* and previously established in *'Memoirs'* is whether the magazines depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or construed (in the instant case Section 847.011, Florida Statutes). The third and final standard established by *Miller* is whether the magazines, each taken as a whole, lack serious literary, artistic, political or scientific value. In passing, we note that *Miller* has rejected as a constitutional standard the *'Memoirs'* test of 'utterly without redeeming social value.'

Accordingly, in view of the recent opinions of the United States Supreme Court in Hamling and in Jenkins, supra, the judgment of the trial court is reversed and remanded for further proceedings in which the *Miller* standards, as reviewed briefly above, may be applied.

Critical Thinking Question(s): Over time, society has loosened its standards regarding "obscene" material as even the movies and television shows have become more graphic. Should we continue to have this debate over obscenity? Is it enough to prohibit the sale of such material to minors? How has the proliferation of the internet served to broaden what is acceptable by today's standards? What legislation is there for dispensing such materials on the internet and, more importantly, how will law enforcement deal with it?

**VIII. Cruelty to Animals**

Section Introduction: Cruelty to animals is classified as a crime against public order and decency. It is prohibited by the following Florida statute, which is examined further in the criminal case that follows.

**Florida Statutes, sec. 828.12 - Cruelty to animals**

> (1) A person who unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first degree, punishable as provided in sec. 775.082 or by a fine of not more than $5,000, or both.
>
> (2) A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree, punishable as provided in sec. 775.082 or by a fine of not more than $10,000, or both.
>
> (a) A person convicted of a violation of this subsection, where the finder of fact determines that the violation includes the knowing and intentional

torture or torment of an animal that injures, mutilates, or kills the animal, shall be ordered to pay a minimum mandatory fine of $2,500 and undergo psychological counseling or complete an anger management treatment program.

(b) Any person convicted of a second or subsequent violation of this subsection shall be required to pay a minimum mandatory fine of $5,000 and serve a minimum mandatory period of incarceration of 6 months. In addition, the person shall be released only upon expiration of sentence, shall not be eligible for parole, control release, or any form of early release, and must serve 100 percent of the court-imposed sentence. Any plea of nolo contendere shall be considered a conviction for purposes of this subsection.

(3) A veterinarian licensed to practice in the state shall be held harmless from either criminal or civil liability for any decisions made or services rendered under the provisions of this section. Such a veterinarian is, therefore, under this subsection, immune from a lawsuit for his or her part in an investigation of cruelty to animals.

(4) A person who intentionally trips, fells, ropes, or lassos the legs of a horse by any means for the purpose of entertainment or sport shall be guilty of a third degree felony, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084. As used in this subsection, "trip" means any act that consists of the use of any wire, pole, stick, rope, or other apparatus to cause a horse to fall or lose its balance, and "horse" means any animal of any registered breed of the genus Equus, or any recognized hybrid thereof. The provisions of this subsection shall not apply when tripping is used:

(a) To control a horse that is posing an immediate threat to other livestock or human beings;

(b) For the purpose of identifying ownership of the horse when its ownership is unknown; or

(c) For the purpose of administering veterinary care to the horse.

**Reynolds v. State, 784 So.2d 509 (App. 1 Dist., 2001)**

Procedural History: Defendant was convicted in the Circuit Court, Leon County, Janet E. Ferris, J., of intentionally committing act to animal which resulted in excessive or repeated infliction of unnecessary pain or suffering. Defendant appealed. The District Court of Appeal, Webster, J., held that: (1) statute prohibiting cruel death or excessive or repeated infliction of unnecessary pain or suffering on animal defined general intent crime, and (2) fact that statute defined general intent crime did not render it unconstitutional.

Issue(s): Is Section 828.12(2), Florida Statutes (1997), Cruelty to Animals, unconstitutional since it does not require specific intent?

Facts: Appellant seeks review of his conviction for "intentionally commit[ting] an act to an animal which result[ed] in the ... excessive or repeated infliction of unnecessary pain or suffering" in violation of section 828.12(2), Florida Statutes (1997). He claims that (1) section 828.12(2) is facially unconstitutional because it does not include a specific intent element. In the

alternative, he claims that, assuming specific intent is an element of the offense, (2) his motion for a judgment of acquittal should have been granted because the state failed to present a prima facie case as to intent; (3) the information is fundamentally defective because it does not allege that he acted with specific intent; and (4) the trial court committed fundamental error when it gave a jury instruction on the elements of the offense that did not include a specific intent element.

Holding: Affirmed.

Opinion: WEBSTER, J.

We conclude that (1) section 828.12(2) requires only general intent; and (2) the lack of a specific intent element does not render the statute facially unconstitutional. Accordingly, we affirm.

Section 828.12(2), Florida Statutes (1997), reads:

> (2) A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or by a fine of not more than $10,000, or both.

As appellant correctly notes, the clear language of the statute requires only that one "intentionally commit an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering" to be guilty of the offense. It does not require that one commit an act intending to cause a cruel death or excessive or repeated unnecessary pain or suffering. Historically, the former has been called a "general intent" crime, and the latter has been called a "specific intent" crime. The distinction has been explained as follows:

> A "general intent" statute is one that prohibits either a specific voluntary act or something that is substantially certain to result from the act.... A person's subjective intent to cause the particular result is irrelevant to general intent crimes because the law ascribes to him a presumption that he intended such a result....
>
> Specific intent statutes, on the other hand, prohibit an act when accompanied by some intent other than the intent to do the act itself or the intent (or presumed intent) to cause the natural and necessary consequences of the act.... The existence of a subjective intent to accomplish a particular prohibited result, as an element of a "specific intent" crime, is perhaps most clearly evident in the crime of first degree, premeditated murder.

*[Linehan v. State*, 442 So.2d 244, 247-48 (Fla. 2d DCA 1983) (en banc), approved as to result only, 476 So.2d 1262 (Fla.1985)] [See also *Frey v. State*, 708 So.2d 918 (Fla.1998) (discussing the distinctions between general and specific intent crimes)]

The fact that section 828.12(2), Florida Statutes (1997), requires only general, rather than specific, intent does not, as appellant argues, necessitate the conclusion that the statute is

unconstitutional. (We note that appellant fails to identify any particular provisions of either the state or the federal constitution that are supposedly violated by this statute.) Our supreme court has held:

> It is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise to a presumption of intent to achieve the criminal result....
>
> The question of whether conviction of a crime should require proof of a specific, as opposed to a general, criminal intent is a matter for the legislature to determine in defining the crime. The elements of a crime are derived from the statutory definition. *[State v. Gray,* 435 So.2d 816, 819-20 (Fla.1983)]

The legislature has, by plain language, declared that one is guilty of the crime proscribed by section 828.12(2) regardless of whether he or she acted with the specific intent to inflict upon an animal a cruel death or excessive or repeated unnecessary pain or suffering. We hold that section 828.12(2) is not unconstitutional because it lacks a specific intent element. Our resolution of appellant's first claim of error moots his remaining claims. Accordingly, we affirm.

Critical Thinking Question(s): Although the appellant argues that the statute is unconstitutional on its face, do you believe he possessed specific intent when charged with this crime? As a general intent crime, what is the Court attempting to measure in terms of the defendant's *mens rea* for such an act? Distinguish this from specific intent.

Essay Questions:

1. Discuss the broken windows theory and provide examples. What has the research shown about the validity of the theory?

2. What are victimless crimes, and why are they controversial? Be sure to provide examples.

3. What types of criminal and civil laws have been used to try to deal with gang problems?