

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR  
LEE COUNTY, FLORIDA** **CRIMINAL DIVISION**

**STATE OF FLORIDA**

**VS.**

**RICHARD FIGUEROA-SANTIAGO,** **CASE NO: 08-CF-021458**  
**Defendant**

**STATE OF FLORIDA**

**VS.**

**ELVIS ELADIO RODRIGUEZ,** **CASE NO: 08-CF-000169**  
**Defendant**

**STATE OF FLORIDA**

**VS.**

**OBDUELLA DAVID SOTO,** **CASE NO: 08-CF-021455**  
**Defendant**

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**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS ALLEGING  
UNCONSTITUTIONAL STATUTE.**

The Defendants in three separate cases have sought the dismissal of similar charges in each of their cases on the grounds that Florida Statutes section 874.11 (prohibiting the use of electronic communication for criminal gang purposes) is unconstitutional. The court has reviewed the memoranda of law from the parties and has conducted extensive motion hearings in each of the cases. The Defendants' motions present what appear to be issues of first impression as to this particular Florida statutory section. Upon review of the applicable law, the Court hereby denies the Defendants' motions because the Court finds that the statute can be construed in a constitutional manner. However, because there is a substantial potential for the statute to be misapplied to unconstitutionally burden core constitutional freedoms, this Court believes that the judiciary must be very vigilant in regards to any criminal prosecutions brought under this statute to ensure that constitutional standards are met.

**I. INTRODUCTION**

**A. Background of the Nationwide Gang Problem**

A 1995 scholarly article in the Washington University Law Quarterly by David R. Truman provides an excellent summary of the history of the development of criminal gangs in this nation

and the related societal problems that they create.<sup>1</sup> Organized crime in America has progressed through a variety of incarnations, from the outlaw gangs of the wild west to the glorified gangsters of the early half of this century (Al Capone, John Dillinger) to the mafia personified in the 1980's and 1990's by the Gambino crime family and its "Dapper Don," John Gotti.<sup>2</sup> One such article observes that today organized crime in America is increasingly controlled by criminal street gangs and that the gangs are sophisticated, well organized criminal enterprises. These gangs have primarily been involved in drug trafficking and also engage in violent activities, including shooting and random violence. Traditional criminal laws on the state level have been unsuccessful in eliminating or reducing gang activity because of the gangs' organizational structures and their willingness to use violence to achieve their ends.<sup>3</sup>

The history of the growth of criminal street gangs in America indicates that the gangs first appear in the United States in the early 19<sup>th</sup> century. During the 1970's, gangs began to evolve into their present shape, moving away from ritualistic gang violence and towards organized criminal activity committed for financial gain. In the 1980's, gangs were recognized as a major societal problem and an organized criminal force in the Los Angeles, California area. This level of gang activity was exemplified by the legendary Crips and Bloods which were bitter rivals. The Crips and Bloods initial criminal activity consisted of extortion, burglary and robbery but during the drug boom in the United States in the early 1980's they became major players in the growing cocaine market. Turf battles were no longer just about defending the neighborhood but were driven by market forces, such as protecting an established cocaine market or expanding into a new one.<sup>4</sup>

The recent landscape of criminal street gang activity in America is varied and is not easily subject to generalization. Gangs encompass a tremendous variety of ethnic and racial classifications and women are also becoming more involved in gangs. Many gangs adopt distinctive names, colors and hand signals, and often use graffiti as a sophisticated form of communication. Most gangs have some sort of formal organizational structure which may vary greatly from gang to gang. Common characteristics of gang members are intense competitiveness, mistrust of others, a strong sense of self reliance, social isolation, and an air of defiance. Gang members also share qualities attributable to the American entrepreneurial spirit and are especially driven to accumulate money and possessions.<sup>5</sup>

Recruiting strategies vary from gang to gang but primarily fall into three categories. Prospective members may be coerced (physically or psychologically) into joining, they maybe be "sold" on the gang and it's social benefits; or gang membership may be portrayed as a community obligation. Recruiting attempts often start early, sometimes when potential members are only in grade school. Gangs often require prospective members to prove their fighting ability, usually by fighting a current member of the gang.<sup>6</sup>

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<sup>1</sup> See, David R Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 Wash. U.L.Q. 683 (1995).

<sup>2</sup> 73 Wash. U.L.Q. 683

<sup>3</sup> 73 Wash. U.L.Q. 683-685.

<sup>4</sup> 73 Wash. U.L.Q. 683, 691-696.

<sup>5</sup> 73 Wash. U.L.Q. 683, 696-700.

<sup>6</sup> 73 Wash. U.L.Q. 683, 702.

Violence is a prominent activity among gangs and has contributed greatly to their increased visibility. Gang violence is often related to drug activity and is often committed at random. Since the mid 1970's gangs have begun using a sophisticated array of weapons and they have continued to keep pace with weapons technology.<sup>7</sup>

Gangs have become solidly established within the culture of inner cities and the gang members are often revered for their social status and for the trappings of their ill gotten wealth. Gangs often act as surrogate families for their members, many of whom grew up without a strong family unit. Gangs have become part of popular culture but are portrayed more accurately now than in the 1950's. The popular image adds to the mystique of the gang in inner cities and elsewhere.<sup>8</sup>

The Florida Legislature has recognized that gangs are a societal and legal problem in the Sunshine State. Section 874.02(2), Florida Statutes, summarizes the problem as follows:

The Legislature finds, however, that the State is facing a mounting crisis caused by criminal gangs whose members threaten and terrorize peaceful citizens and commit a multitude of crimes. These criminal gang activities, both individually and collectively, present a clear and present danger. Street gangs, terrorist organizations, and hate groups have evolved into increasingly sophisticated and complex organized crime groups in their criminal tactics, schemes, and brutality. The state has a compelling interest in preventing criminal gang activity and halting the real and present danger posed by the proliferation of criminal gangs and the graduation from more primitive forms of criminal gangs to highly sophisticated criminal gangs. For these reasons, the Legislature finds that the provisions of this chapter are essential to maintain public order and safety.

Lee County, Florida, like other parts of the state and nation, continues to deal with violence and mayhem attributed to criminal gangs. A prominent example is the murder, torture and other allegations against members of an alleged criminal gang known as the "Cash Feenz." See, Lee County Circuit Court case numbers 06-CF-19906-(A- I). Some of the members of this group have been convicted at trial and others have entered plea agreements in regard to serious crimes. Still others are pending trial.

Interestingly, articles about increasing usage of the internet by criminal gangs can be found on websites run by news agencies. Specifically, the website for the local NBC network affiliated television station has such an article that can be found at <http://www.nbc-2.com/Global/story.asp?S=10684061>. In this January 18, 2007 Lee County news story, NBC2 investigators say they have discovered that gangs are recruiting kids by using popular social networking sites like YouTube and Myspace. They quote gang experts who say that gang videos are the newest threat on the internet. The article says that videos make gang life seem exciting and cool to lure kids in. The advantage of the internet site is that the gangs can reach out and communicate with potential recruits and vice- versa. The article says that as the social networking sites have taken off so has local recruitment. The gangs, including the Cash Feenz,

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<sup>7</sup> 73 Wash. U.L.Q. 683, 703-704.

<sup>8</sup> 73 Wash. U.L.Q. 683, 704-705.

are supposedly using the websites to advertise a life of luxury, family and camaraderie. The article says that the number of gangs using the websites is increasing.

## **B. Legislative Responses to Gang Problems.**

Beginning in the late 1980's, states began to respond to gangs as a new form of organized crime by enacting criminal statutes specifically aimed at criminal street gangs. California, which was once dubbed as the "street gang capital of the United States," took the lead in the statutory fight against gangs by passing the Street Terrorism Enforcement and Prevention Act (STEP Act) in 1988. That law was patterned after the Racketeer Influence and Corrupt Organization Act (RICO Act), and created a new substantive crime of participation in criminal street gang activity. It also established enhanced sentences for gang related felonies, provided for forfeiture of gang weapons, and allowed buildings used by gangs to be declared public or private nuisances. The forfeiture provisions, which were controversial (and later removed), were designed to directly punish not only those who commit specific gang related acts but also to strike at the gang itself and reduce or eliminate its potential for monetary gain.<sup>9</sup>

Following the California lead, other states, including Florida, enacted antigang legislation and used more expansive definitions of gang membership than the California STEP Act. Commentators have noted that those pieces of legislation are subject to constitutional challenge on due process and First Amendment grounds because they impose additional punishment related to association with others.<sup>10</sup>

Florida has chosen to deal with criminal gangs through the enactment of Chapter 874, Florida Statutes, the "Criminal Gang Prevention Act." Section 874.02(3), Florida Statutes, expresses the Legislature's intent to outlaw certain conduct associated with the existence and proliferation of criminal gangs, provide enhanced criminal penalties, and eliminate the patterns, profits, proceeds, instrumentalities, and property facilitating criminal gang activity, including criminal gang recruitment. In order to carry out that intent, chapter 874, Florida Statutes, sets forth a number of criminal prohibitions in the various sections of the chapter.

Section 874.04, Florida Statutes, provides for enhanced penalties upon a determination by the fact finder that the defendant committed a charged offense for the purposes of benefiting, promoting, or furthering the interest of a criminal gang.

Section 874.05, Florida Statutes, prohibits intentionally causing, encouraging, soliciting, or recruiting another person to become a criminal gang member where a condition of membership or continued membership is the commission of any crime.

Section 874.06, Florida Statutes, creates a civil cause of action for persons or organizations that establish, by clear and convincing evidence, coercion, intimidation, threats or other harm to that person or organization and allows a prevailing plaintiff to recover attorney fees and costs that are reasonably incurred, as well as treble damages and injunctive relief. A State cause of

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<sup>9</sup> 73 Wash. U.L.Q. 683, 686-688.

<sup>10</sup> 73 Wash. U.L.Q. 683, 688-690.

action is also created. If a court finds that a defendant was subjected to vexatious, frivolous or bad faith claims, the defendant is entitled to recover reasonable attorney fees and costs if such a claim was brought by the State.

Section 874.08, Florida Statutes, contains a forfeiture provision that provides that profits, proceeds and instrumentalities of criminal gang activity and all property used or intended or attempted to be used to facilitate criminal activities or criminal gang recruitment are subject to seizure and forfeiture under the Florida Contraband Forfeiture Act, Section 932.704, Florida Statutes.

Section 874.09, Florida Statutes, provides authority for a state-wide criminal gang database to facilitate the exchange of information used to carry out and enforce the provisions of chapter 874.

Section 874.10 criminalizes initiating, organizing, planning, financing, directing, managing or supervising criminal gang related activity.

Section 874.11 prohibits the use of electronic communication to benefit, promote or further the interest of criminal gangs.

Finally, section 874.12, Florida Statutes, prohibits possessing or manufacturing false or altered identification documents for purposes of gang activities.

### **C. The Constitutional Challenges to Section 874.11, Florida Statutes, by the Defendants in the Cases Sub Judice.**

The three Defendants in the cases sub judice are all charged with violating Section 874.11, Florida Statutes. Said statutory section provides as follows:

Any person who, for the purpose of benefiting, promoting, or furthering the interests of a criminal gang, uses electronic communication to intimidate or harass other persons, or to advertise his or her presence in the community, including, but not limited to, such activities as distributing, selling, transmitting, or posting on the Internet any audio, video, or still image of criminal activity, commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084.

In each of these cases it is alleged by the State that subpoenas were issued by the Twentieth Judicial Circuit, Lee County, Florida ordering Myspace.com to produce the content of Myspace.com user accounts believed to be registered to known criminal street gang members or associates. It is further alleged that the Lee County Sheriff's office intelligence and gang unit requested said subpoenas because they believed that the individuals involved were violating section 874.11, Florida Statutes.

In *State v. Rodriguez*, case number 08-CF-000169, it is alleged that Mr. Rodriguez is a documented street gang member of the Latin Kings. The account number pertaining to this defendant on Myspace.com was reviewed by detective David Lebid who is a certified gang

expert with the Lee County Sheriff's office gang unit. The sworn statement of the detective says that the Myspace.com materials for this Defendant revealed images of the defendant, with other documented Latin King gang members, representing the gang through the use of hand signals. It is alleged that the defendant identified himself as "King Kamel." The detective asserts that these images were consistent with the historical methods employed by the Latin Kings to promote their criminal gang and announce their presence to the community.

In *State v. Figueroa-Santiago*, case number 08-CF-021458, it is alleged by detective Jamie Nolen, a certified gang expert with the Lee County Sheriff's office, that the Defendant posted images on the internet that were consistent with historical methods employed by the Latin Kings to promote their criminal gang and announce their presence to the community. Specifically, there is alleged to be an illustration similar in design to a common road sign. However, a vehicle with a person shooting a weapon and the words "King Drive By Area" were depicted. It is further alleged that the Defendant, in a post Miranda interview, admitted that the images promoted and represented the violence associated with the Latin Kings. There were also alleged to be substantial amounts of images with individuals representing "Eastside" which is commonly associated with the Latin Kings. The Defendant allegedly denied being an active member of the Latin Kings but also allegedly admitted that he had many associates who were members.

In *State v. Soto*, case number 08-CF-021455, it is alleged that the Defendant violated Section 874.11, Florida Statutes, by posting images on Myspace.com of the Defendant with other documented Latin King members. Detective David Lebid, a certified gang expert with the Lee County Sheriff's office gang unit, further alleges in a sworn statement that the images showed the Defendant and other Latin King gang members representing the gang through the use of hand signals and colors. The detective adds that there were also illustrations that promoted the Latin Kings and that they represented the gang's colors and logos. The detective also says that the Defendant allegedly identified himself as "King Deebo" and that these materials were determined by the detective to be consistent with historical methods employed by the Latin Kings to promote their criminal gang and announce their presence to the community.

All three Defendants have moved to dismiss the prosecutions brought against them under section 874.11, Florida Statutes, alleging that the statute is unconstitutional on various grounds. The grounds alleged include violations of due process, equal protection, First Amendment freedoms of expression and association and that the statute is overbroad and void for vagueness. At motion hearings in each of these cases, Defendants' counsel indicated that their motions included facial challenges to the constitutionality of the statute.

## **II. ANALYSIS**

### **A. The Florida Supreme Court Decision in *State v. O.C.*, 748 So.2d 945 (Fla. 1999) and Associational Rights.**

Counsel for both sides in all three cases sub judice have told the court that there is no case directly on point regarding the Defendants' challenges to the constitutionality of section 874.11, Florida Statutes. However, this is not the first time that chapter 874, Florida Statutes, the Criminal Gang Prevention Act, has been before the Appellate Courts of Florida. In *State v. O.C.*, 748 So.2d 945 (Fla. 1999), the Florida Supreme Court held that the then existing version of

section 874.04, Florida Statutes, enhancing the degree of crime based on membership in a gang, punished mere association and violated defendants' substantive due process rights. The Supreme Court found that the statute was constitutionally infirm because it subjected defendants to conviction for a higher degree crime than originally charged, resulting in an increased penalty range, based only upon defendants simple association with others, who may or may not be criminals. *O.C.*, at page 949. The Court concluded that because the statute punished gang membership without requiring any nexus between the criminal activity and gang membership it lacked a rational relationship to the legislative goal of reducing gang violence or activity and thus failed to have a reasonable and substantial relationship to a permissible legislative objective. *O.C.*, at page 950.

It appears that, in reaction to the Florida Supreme Court decision in *O.C.*, the Legislature amended section 874.04, Florida Statutes, to require that a defendant commit the charged offense for the purpose "benefiting, promoting or furthering the interest of a criminal gang" in order for the criminal penalty, upon conviction, to be enhanced. This same "benefiting, promoting or furthering the interest of a criminal gang" language is used in section 874.11, Florida Statutes, when criminalizing the use of electronic media in relationship to gang activity. This Court finds that the Legislature has abided by the teaching of *O.C.*, in drafting section 874.11, Florida Statutes, so as to not unconstitutionally burden associational rights.

Associational rights are not absolute. The State is correct that freedom of association does not include the right to gather and conspire to commit criminal acts.<sup>11</sup> *United States v. International Brotherhood of Teamsters*, 708 F. Supp. 1388, 1393 (S.D.N.Y. 1989). By analogy, RICO laws have been upheld as constitutional in both State and Federal Courts. Electronic communication proscribed in section 874.11, Florida Statutes, is linked to criminal gang activity by the wording of the statute and the legislative intent expressed in Chapter 874, Florida Statutes.

## **B. Fundamental Principles of Constitutional Analysis and Statutory Interpretation**

It is helpful to this Court's review of Defendants' motions to keep in mind fundamental principles of constitutional analysis and statutory interpretation when evaluating the Defendants' attacks on the constitutionality of section 874.11, Florida Statutes. When reasonably possible, a court should give a statute a constitutional construction,<sup>12</sup> and statutes should be interpreted so as not to conflict with the constitution.<sup>13</sup> Statutes come to the court clothed with a presumption of constitutionality<sup>14</sup> and the court is required, whenever possible, to resolve a dispute without reaching the constitutional issues.<sup>15</sup> Thus, the Court should resolve all doubts as to the validity of a statute in favor of its constitutionality,<sup>16</sup> provided that the court can give the statute a fair construction that is consistent with the Florida and Federal Constitutions and with legislative

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<sup>11</sup> State Memorandum of Law at page 9.

<sup>12</sup> *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006) and 48A Fla. Jur 2d Statutes, Section 116.

<sup>13</sup> *Russo v. Akers*, 724 So.2d 1151 (Fla. 1998).

<sup>14</sup> *Fulmore v. Charlotte Co.*, 928 So.2d 1281 (Fla. 2nd DCA 2006), *review dismissed*, 936 So.2d 565 (Fla 2006).

<sup>15</sup> *Sarasota Herald-Tribune v. State*, 924 So.2d 8 (Fla. 2nd DCA 2005), *review denied*, 918 So.2d 293 (Fla. 2005) and *cert. dismissed*, 126 S. Ct. 1139 (2006).

<sup>16</sup> *Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986).

intent.<sup>17</sup>

A Court's guiding purpose in construing a statute is to give effect to the Legislature's intent.<sup>18</sup> Courts are tasked with giving statutory language effect without resort to any canon of construction, if possible.<sup>19</sup> Accordingly, courts first look at the statute's plain language and consider the plain meaning of the language used.<sup>20</sup> In order to arrive at the proper construction of a statute, the Court must look at various factors, including legislative intent and the statutory scheme as a whole.<sup>21</sup> It is not the province of the court to vary the clear legislative intent expressed in a statute merely because of a court's belief of the lack of wisdom of the enactment.<sup>22</sup> Courts cannot judicially alter the wording of statutes where the Legislature has clearly not done so.<sup>23</sup> Courts must construe the law given by the Legislature and may not substitute judicial cerebration for the law or require the enforcement of what the court thinks the law should be.<sup>24</sup>

Owing to the complexities and limitations of language and the frequent difficulty in communicating legal concepts in writing, statutory construction often presents problems of no little difficulty.<sup>25</sup> It is the function of the judiciary to interpret the law and not to legislate.<sup>26</sup> Most of the rules or principals of the construction of statutes are designed to sub-serve one important object, namely, to ascertain the legislative will.<sup>27</sup> Statutory language should be read from the perspective of the average reader, but the Court need not be concerned with odd scenarios that might test the limits of the statutes or leave questions about exactly what a certain term might cover.<sup>28</sup>

The Court is required to look for a reason to uphold the acts of the Legislature and to adopt any reasonable view that will do so.<sup>29</sup> The function of the Courts is to find ways within the terms of the statute wherein the legislative purpose can be effected rather than to search out ways to strike down an act or defeat its purpose.<sup>30</sup>

The principles favoring liberal construction in favor of constitutionality<sup>31</sup> are not without limit, since no court, in its effort to save a law, can properly pervert or destroy a statute's plain meaning and so make it express that which the Legislature itself did not declare.<sup>32</sup> Thus, courts may not limit an act by judicial construction so as to confine its operations within the

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<sup>17</sup> *State v. Globe Communications Corp.*, 648 So.2d 110 (Fla. 1994).

<sup>18</sup> *Goble v. Frohman*, 901 So.2d 830 (Fla. 2005).

<sup>19</sup> *Batur v. Signature Properties of North West Florida Inc.*, 903 So.2d 985 (Fla. 1<sup>st</sup> DCA 2005).

<sup>20</sup> *McLean v. State*, 934 So.2d 1248 (Fla. 2006); and *Tillman v. State*, 934 So.2d 1263 (Fla. 2006).

<sup>21</sup> *State v. Mounce*, 866 So.2d 132 (Fla. 5<sup>th</sup> DCA 2004).

<sup>22</sup> *Tatzel v. State*, 356 So.2d 787 (Fla. 1978).

<sup>23</sup> *Florida Department of Revenue v. Florida Municipal Power Agency*, 789 So.2d 320 (Fla. 2001).

<sup>24</sup> *Florida Real Estate Commission v. McGregor*, 268 So.2d 529 (Fla. 1972).

<sup>25</sup> *Aboud v. City of Jacksonville*, 80 So.2d 443 (Fla. 1955).

<sup>26</sup> *Hancock v. Board of Public Construction Charlotte County*, 158 So.2d 519 (Fla. 1963).

<sup>27</sup> 48A Fla. Jur. 2<sup>nd</sup> Statutes Section 111.

<sup>28</sup> *State v. Darynani*, 774 So.2d 855 (Fla. 4<sup>th</sup> DCA 2000).

<sup>29</sup> *Tyson v. Lanier*, 156 So.2d 833 (Fla. 1963).

<sup>30</sup> *Overman v. State Board of Control*, 62 So.2d 696 (Fla. 1952).

<sup>31</sup> 10 Fla. Jur. 2d Constitutional Law Sections 120-124.

<sup>32</sup> Am. Jur. 2d Constitutional Law Section 173.



constitutional limits of the legislative power if the statute plainly requires a broader interpretation.<sup>33</sup> A Court must not abandon judicial restraint and effectively rewrite a challenged statute. The Florida Constitution requires a certain precision defined by the Legislature, and not legislation articulated by the judiciary.<sup>34</sup> However, the Court should adopt narrowing or saving constructions of statutes when to do so will not effectively rewrite an enactment.<sup>35</sup>

A final principle of statutory construction that is relevant to the present inquiry is that a statute must be considered in its entirety.<sup>36</sup> Thus, once legislative intent is established,<sup>37</sup> all parts of a statute must be read together in order to achieve a consistent whole.<sup>38</sup> The court looks to the provisions of the whole law, and to its object and policy.<sup>39</sup> The provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.<sup>40</sup>

### C. Chapter 874, Florida Statutes, Legislative Findings and Intent

This Court has previously mentioned sections 874.02 (2) and (3), Florida Statutes, legislative findings and intent in regard to the State's asserted compelling interest in preventing criminal gang activity and proliferation of criminal gangs. Subsection (1) provides the following as to the Legislature's intent regarding the methods chosen to combat criminal gangs and how those methods might affect constitutional freedoms :

The Legislature finds that it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, sexual orientation, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of criminal gangs and their members. **It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association** (emphasis added). The Legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for the redress of perceived grievances, and to participate in the electoral process.

The above mentioned statutory subsection makes it clear that the Legislature has attempted to balance the State's police powers regarding criminal gang related activities with constitutional freedoms of expression and association. The challenge posed by the Defendants' motions is whether the Legislature has achieved this balance in a constitutional manner with respect to 874.11, Florida Statutes, (prohibiting electronic communication in relation to gang activities.) The remaining analysis will focus on the specific areas of constitutional challenge raised by the Defendants.

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<sup>33</sup> *Locklin v. Pridgeon*, 30 So.2d 102 (Fla. 1947).

<sup>34</sup> *Brown v. State*, 358 So.2d 16 (Fla. 1978).

<sup>35</sup> *State v. Mitchell*, 652 So.2d 473 (Fla. 2<sup>nd</sup> DCA 1995); and *Florida Department of Children and Families v. F.L.*, 880 So.2d 602 (Fla. 2004).

<sup>36</sup> *Koile v. State*, 934 So.2d 1226 (Fla. 2006).

<sup>37</sup> *Montgomery v. State*, 897 So.2d 1282 (Fla. 2005).

<sup>38</sup> *Borden v. East European Insurance Company*, 921 So.2d 587 (Fla. 2006).

<sup>39</sup> *Klonis v. State Department of Revenue*, 766 So.2d 1186 (Fla. 1<sup>st</sup> DCA 2000).

<sup>40</sup> *Jones v. ETS of New Orleans Inc.*, 793 So.2d 912 (Fla. 2001)

#### **D. Defendants' Specific Constitutional Challenges to Section 874.11, Florida Statutes.**

##### **1. Due Process under the 14<sup>th</sup> Amendment of the United States Constitution and Article 1, Section 9 of the Florida Constitution**

All three Defendants argue that the statute violates substantive due process.<sup>41</sup> Soto argues that the Defendant could be prosecuted under section 847.11, Florida Statutes, by posting images of hand gestures which resemble gang signs without the intent to display gang signs. *Soto* Memorandum at page 18. Figueroa-Santiago argues that there is no requirement that anyone in the community be in fact intimidated or harassed by the activities distributed through electronic communication. *Figueroa-Santiago* Memorandum at page 2-3.

In analyzing the Defendants' substantive Due Process violation claims, *State v. O.C.*, 748 So.2d 945 (Fla. 1999), cited above, and *Sult v. State*, 906 So.2d 1013 (Fla. 2005), are instructive. In contrast to the statute that was found unconstitutional in *O.C.*, section 874.11 is crafted to require a nexus between criminal gang activities and images and messages communicated by a Defendant through an electronic communication. Electronic communication has to be used for the purposes of benefiting, promoting, or furthering the interest of a criminal gang **and** to intimidate or harass, or to advertise the person's presence in the community. The statute specifically mentions that images and audio of criminal activity are specifically within the statute's reach. Section 874.03, Florida Statutes, defines "criminal gangs" and "criminal gang-related activity." By considering these provisions in pari materia, it appears that the statute satisfies the substantive due process requirement recognized in *O.C.*, to have a rational relationship between the legislative goal of reducing gang violence and activities and the prohibitions in section 874.11.

In *Sult v. State*, 906 So.2d 1013 (Fla. 2005), a statute criminalizing the unauthorized use of police badges or other indicia of authority was found to be unconstitutional, in part, as violative of substantive due process. The Supreme Court found that the statute contained no intent to deceive element and thus made no distinction between the innocent wearing and display of law enforcement indicia from that designed to deceive reasonable public into believing such display was official, and that there was no logical way to read a specific intent element into the statute as written. By contrast, section 874.11, Florida Statutes, can be properly construed as only prohibiting displays and messages that are for the specific purpose of benefiting, promoting or furthering the interest of a criminal gang by intimidating or harassing, or advertising the person's presence in the community. All of this is directly linked to criminal activities of gangs and excludes from prosecution innocent messages or displays which do not have those characteristics. The State must prove at trial that the Defendant had the specific intent of benefiting, promoting or furthering the interests of the gang. The Court further construes the statute to require that the State must prove that either a person was in fact intimidated or harassed or that a reasonable person would be intimidated or harassed by the Defendant's communication. This greatly reduces any potential for arbitrary and discriminatory enforcement.

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<sup>41</sup> Rodriguez Memorandum at Page 1, Figueroa-Santiago Memorandum at Pages 2 & 3, Soto Memorandum at Pages 17-19.

## 2. Vagueness

The Defendants' motions alleged that section 874.11, Florida Statutes, is unconstitutional because it is vague. The Defendants assert that the following words used in the statute are not defined: "benefiting, promoting, or furthering the interest," "intimidate", "harass," or "advertise his or her presence in the community."<sup>42</sup> The Defendants' further assert that failure to define these critical terms could lead to arbitrary and discriminatory enforcement of the statute.

The State argues that the undefined terms mentioned by the Defendants have commonly understood meanings that can be referenced by dictionary definitions and that the terms used in the statute relate to the activities of criminal gangs and that "criminal gang" is defined in section 874.03(1), Florida Statutes.<sup>43</sup> The State also points out that the Georgia Supreme Court recently upheld criminal gang legislation and commented that vagueness challenges to anti-gang legislation have consistently failed where the statute, as properly construed, requires active participation in the gang with knowledge of it's criminal behavior, imposes a specific intent requirement, or specifically defines critical terms. *Rodriguez v. State*, 671 S.E. 2d 497 (Ga. 2009) at page 808.

In *State v. Brake*, 796 So.2d 522, 526-528 (Fla. 2001), our Supreme Court has commented that a person to whom a statute may constitutionally be applied lacks standing to raise a facial vagueness challenge on the ground that the statute may conceivably be applied unconstitutionally to others in situations not before the court. If the record demonstrates that a defendant has engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute, then he cannot successfully challenge it for vagueness or complain of its vagueness as applied to the hypothetical conduct of others. The conduct attributed to the Defendants in the cases before this court in each of the Defendants' booking sheets has been previously described in Section I C of this order. The hand signals, colors, statements of the defendants and images posted are all described as classical and historical methods employed by gangs to promote the gang and announce the presence of the gang or members of the gang in the community. The alleged conduct appears to fall within the clear parameters of what is covered by section 874.11, Florida Statutes. Based on these facts and the holdings in *Brake*, the court need not further address Defendants' vagueness claims.

*Brake* recognizes that the doctrines of overbreadth and vagueness are separate and distinct and that the overbreadth doctrine must be considered if legislation is susceptible of application to conduct protected by the First Amendment. In such circumstances, where the asserted overbreadth of the law may have a chilling effect on the exercise of First Amendment freedoms, a facial challenge to the constitutionality of the statute is allowed based on hypothetical situations even though such a challenge would not be allowed on vagueness grounds. *Brake* at page 527. First Amendment and overbreadth concerns regarding section 874.11, Florida Statutes, are addressed in the analysis in the next section of this order.

## 3. First Amendment and Overbreadth Challenges

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<sup>42</sup> See, Soto Memorandum at page 15; Rodriguez Memorandum at page 3; and Figueroa-Santiago Memorandum at page 2

<sup>43</sup> State Memorandum of Law at pages 9 & 10

Federal and State Courts recognize the “transcendent” value of constitutionally protected expression. *State v. Elder*, 382 So.2d. 687, 689 (Fla. 1980). The protections given free speech impressed by the Federal Constitution were fashioned to assure the unfettered exchange of ideas for the bringing about of political and social changes desired by the people. *New York Times Company v. Sullivan*, 376 US 254 (1964).

Recognizing the sanctity of First Amendment expression, this Court must first ask whether section 874.11, Florida Statutes, is a content based regulation. It appears that the statute attempts to regulate conduct mixed with speech. Specifically, the statute prohibits use of internet and electronic technology to intimidate or harass, or to advertise a person’s presence in the community with respect to communications that relate to gang activities. As such, the regulation is based, at least in part, on the content of the speech as distinguished from non-content type regulations such as time, place and manner restrictions on certain expression.

The legislative intent of section 874.02, Florida Statutes, reflects that the Legislature has recognized that in this area of regulation it is attempting to balance between freedom of expression and the legitimate police powers of the state to prohibit criminal activities of gang members. See, section 874.02 (1), Florida Statutes (“It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association.”) In subsection (2) of said statute, the legislature states that criminal gang activities, both individually and collectively, present a clear and present danger.

The next step in the analysis is to ask whether the reach of section 874.11, Florida Statutes, extends to protected or unprotected speech. This is significant because the Supreme Court’s free speech jurisprudence regarding content based restrictions on expression shows that if the speech is unprotected, then the Legislature can regulate fairly easily. If the speech is protected, the statute being reviewed must survive strict scrutiny analysis. In practice, strict scrutiny often results in the statute being invalidated. *United States v. Stevens*, 533 F.3rd 218, 233 (3rd Cir. 2008). It appears to this Court that the Florida Legislature has attempted to declare that expression prohibited by section 874.11, Florida Statutes, is unprotected expression because it constitutes “a clear and present danger.” See, *Schenck v. United States*, 249 US 47 (1919). However, the clear and present danger category of unprotected speech is limited to that expression which is directed to inciting or producing imminent lawless action and which is likely to incite or produce such action. *Brandenburg v. Ohio*, 395 US 444 (1969), and *Healy v. James*, 408 US 169 (1972). Section 874.11, Florida Statutes, encompasses expression which does not meet this test. The three cases subjudice involve prosecutions where the alleged facts are that the Defendants flashed gang colors and signs, identified themselves by certain colorful names, and at least one Defendant displayed a menacing sign. None of these facts indicate that imminent, lawless action is likely to occur.

The next question regarding section 874.11, Florida Statutes, is whether through its enactment the Florida Legislature has attempted to create a new category of unprotected speech. However, the United States Supreme Court has not recognized a new category of speech that is unprotected by the First Amendment in over 25 years. *United States v. Stevens*, 533 F. 3rd 218, 220 (3rd Cir. 2008). The existing United State Supreme Court recognized categories of

unprotected speech are: child pornography depicting actual children, *New York v. Ferber*, 458 US 747 (1982); fighting words, *Chaplinsky v. New Hampshire*, 315 US 568 (1942); threats, *Watts v. United States*, 394 US 705 (1969); and obscenity, *Miller v. California*, 413 US 15 (1973); and speech that incites imminent illegal activity, *Brendenburg v. Ohio*, 395 U.S. 444 (1969). This trial Court is unwilling to rule that the Florida Legislature can create a new category of unprotected speech (i.e., gang activity related expression) without review and approval by the Florida or United States Supreme Courts. This Court also finds that the Legislature's attempt to "boot strap" the language of 874.11, Florida Statutes, to encompass only "clear and present danger" unprotected speech contradicts the established test for such category of unprotected speech (inciting imminent lawless action and likely to do so) as established in United States Supreme Court precedents. This Court finds that the reach of the section 874.11, Florida Statutes, prohibitions on expression affect protected speech.

Content based prohibitions that affect protected speech must survive a heightened form of scrutiny. The regulation must serve a compelling government interest and be narrowly tailored to achieve said interest through the least restrictive means. *Stevens*, at page 232. Indeed, such content based restrictions on expression are presumed invalid and the government bears the burden of showing its constitutionality. *Ashcroft v. ACLU*, 542 US 656, 660 (2004). This Court does not have any great difficulty in finding that the Florida Legislature has identified a compelling state interest prompting the enactment of section 874.11, Florida Statutes. See, legislative findings at section 874.02 (1)-(3). The crisis caused by criminal gangs' activities are well known and documented. See, David R Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 Wash. U.L.Q. 683-685 (1995). This Court's finding of a compelling governmental interest is also consistent with Federal and State case law. The United States Supreme Court has approved content based speech restrictions involving the compelling state interest of the well being of human beings. *Stevens* at page 227. Examples of important human interests at issue in constitutionally valid statutes are cases involving fighting words, threats, speech that imminently incites illegal activity, and obscenity. Section 874.02 (2), Florida Statutes, sets forth that the State of Florida has a compelling interest in preventing criminal gang activity and halting the real and present danger posed by the proliferation of criminal gangs and the graduation from more primitive forms of criminal gangs to highly sophisticated criminal gangs. This Court finds that a compelling State interest in public safety exists in support of section 874.11, Florida Statutes.

The second prong of the protected speech analysis in regard to the statute sub judice is whether the statute is narrowly tailored. This is by far the most difficult aspect of this analysis. A simple example will illustrate the concern. A person with no gang affiliation of any kind sends an email or blogs on a media website stating where said person lives and expressing support for an organization that law enforcement considers to be a criminal gang. Assume further that this person's message does not contain language which could reasonably be construed to intimidate or harass other citizens. Is this person now exposed to criminal prosecution for expressing an opinion favorable to a group which law enforcement considers to be a criminal gang? The question exists because section 874.11, Florida Statutes, provides that a person who advertises his or her presence in the community and benefits, promotes, or furthers the interest of a criminal gang through electronic communication has committed a crime. Is the simple act of identifying oneself in the blog or email such advertising? If the statute can be construed to criminalize this

behavior then this Court would find the statute to be unconstitutional because it would be punishing quintessential opinion on civic matters which is protected speech under the Constitution. However, this Court's close review of the wording and punctuation of section 874.11, Florida Statutes, indicates that the person in the example would not be subject to criminal liability under the statute.

Section 874.11, Florida Statutes, criminalizes expression by electronic communication provided that two criteria are met. First, the communication must have the specific purpose (intent) to benefit, promote or further the interest of a criminal gang. Second, the expression must be made "to intimidate or harass other persons, or to advertise his or her presence in the community." The phrase "advertising his or her presence in the community" is set off from intimidating or harassing by a comma and an "or." Given the legislative intent to regulate the activities of gangs and their members, the Court can reasonably and constitutionally construe that the advertising his or her presence in the community phrase relates only to individuals who are criminal gang members or associates as defined in section 874.03(2),(3), Florida Statutes, and not to citizens unaffiliated with a criminal gang and merely expressing an opinion through an email, blog or other electronic communication. The "intimidate or harass other persons," phrasing of the statute extends to any person, whether or not affiliated with a criminal gang.

Case law has upheld statutes which criminalize mixtures of speech and conduct involved in conveying threats and harassment. See, *Watts v. United States*, 394 US 705 (1969), (threats); *State v. Elder*, 382 So.2d 687 (Fla. 1980), (making of anonymous phone calls with intent to annoy, abuse, threaten, or harass). It is the responsibility of this Court to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided that the statute may be given a fair construction consistent with the Federal and State Constitutions as well as with legislative intent. *Elder* at page 690. In construing section 874.11, Florida Statutes, in a limiting constitutional manner, this Court has looked at the wording and punctuation of the statute as well as the legislative intent. The Court has not abandoned judicial restraint and invaded the province of the Legislature by adding or rewriting the terms of the statute. *Elder* at page 690, citing *Brown v. State*, 358 So.2d 16 (Fla. 1978).

With regard to overbreadth, the Florida Supreme Court has directed that said doctrine should be used sparingly by the Courts because it is "strong medicine." *Sult v. State*, 906 So.2d 1013, 1022 (Fla. 2005). Additionally, facial overbreadth should not be invoked when a limiting construction has been or could be placed on a challenged statute. *Broadrick v. Oklahoma*, 413 US 601, 615 (1973). The Court has found such a limiting construction of section 874.11, Florida Statutes. Only those individuals who use electronic communication to intimidate or harass combined with the purpose and specific intent of furthering, promoting, or benefiting the interest of a criminal gang; or those gang members or associates who advertise their presence in the community through electronic communication and do so with the specific intent of benefiting, promoting, or furthering the interest of a criminal gang are subject to criminal prosecution. It is this Court's opinion that this limiting construction allows for the compelling state interest in preventing criminal gang activity to be enforced with narrow tailoring as to the reach of the law so as to avoid unconstitutionally impacting opinion or other forms of protected expression.

#### 4. Equal Protection Challenge.

The Defendants challenge the constitutional validity of section 874.11, Florida Statutes with regard to the Equal Protection Clauses of the Florida and US Constitutions. Their arguments fall into two categories. First, that that statute only criminalizes the use of electronic forms of gang related communications. *Rodriguez* memorandum at page 3. The second argument is that the statute singles out persons with gang affiliations who use electronic means to communicate in the manner prescribed by the statute. *Soto* memorandum at page 20 and *Figueroa-Santiago* memorandum at page 4.

For a statutory classification to satisfy the Equal Protection Clause it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed. *State v. North Fla. Women's Health and Counseling Services*, 852 So.2d 254 (Fla. 1<sup>st</sup> DCA 2001), quashed on other grounds, 866 So.2d 612 (Fla. 2003). This requirement is met in this case because section 874.02, Florida Statutes, finds that criminal gangs have evolved into increasingly sophisticated and complex organized crime groups and are graduating from more primitive forms to highly sophisticated forms. The use of the internet and other electronic communication is integrally related to the metamorphosis of these organizations into increasingly dangerous and sophisticated criminal enterprises. It makes logical sense that special provisions be made in the law to enact criminal prohibitions regarding the use of electronic communications by persons affiliated with criminal gangs when such usage is related to promoting, benefiting or furthering the interest of the criminal gangs. Focusing the law on electronic communication methods used to engage in illegal activities is consistent with the legislative intent of protecting society from such conduct. In addition, limiting the reach of the criminal prohibition in section 874.11, Florida Statutes, to only electronic communications, and not other forms of communication, proves that the Legislature has chosen to limit its regulatory efforts to where they are most needed and not unnecessarily impact other communication methods used by the citizenry.

In considering an equal protection challenge to a legislative classification, the Court must initially determine the appropriate level of judicial scrutiny to apply. Strict scrutiny applies when the legislation affects a fundamental right or a suspect class. *B.S. v. State*, 862 So.2d 15 (Fla. 2<sup>nd</sup> DCA 2003), and 10A Fla. Jur 2d Constitutional Law Section 466. This strict scrutiny test means that the legislative classification must promote a compelling governmental interest and be narrowly tailored to advance that interest. *State v. JP*, 907 So.2d 1101 (Fla. 2004). The Court has previously discussed in the First Amendment analysis above that section 874.11, Florida Statutes, serves a compelling governmental interest. The Court has also construed the wording of the statute and found narrow tailoring. The Court finds that the compelling governmental interests are the same with respect to equal protection analysis as they were for the First Amendment discussion. With regard to the narrow tailoring, the Court finds that section 874.11, Florida Statutes, also meets this requirement for equal protection purposes. Specifically, the classification made is to criminalize the use of electronic communication by persons who use that medium to intimidate or harass or advertise gang member presence in the community with the specific intent of promoting, benefiting, or furthering a criminal gang. By definition in section 874.03(1), Florida Statutes, a "criminal gang" must have as a primary activity the commission of criminal or delinquent acts. The people covered by the statutory classification are only those who are involved in

criminal activity and not the general citizenry. This is sufficiently narrow tailoring to pass constitutional muster.

### III. Conclusion

The people of the State of Florida, through their elected representatives in the Legislature, have stated in chapter 874, Florida Statutes, that the State is facing a mounting crisis caused by criminal gangs whose members threaten and terrorize peaceful citizens and commit a multitude of crimes. The Legislature has also found that street gangs, terrorist organizations, and hate groups have evolved into increasingly sophisticated and complex organized crime groups in their criminal tactics, schemes and brutality. In order to maintain public order and safety the Legislature has enacted a number of criminal prohibitions regarding gang activities in Chapter 874, Florida Statutes. Specifically, the Legislature enacted section 874.11, Florida Statutes, to address the growing problem of the use of the internet and other electronic communications by criminal gangs and their members and associates for the purpose of conducting criminal activities and recruitment. This statutory section raises constitutional questions because it goes beyond criminalizing conduct related to gang activities and reaches protected categories of expression made in the context of gang activities.

Accepted and fundamental principles of constitutional and statutory interpretation require the court to presume that the Legislature's enactments are constitutional and to construe legislation in a constitutional manner if that is reasonably possible. Juxtaposed against these considerations are the recognized "transcendent values" of constitutionally protected expression and other individual freedoms under the Bill of Rights of the United States Constitution as well as under the Florida Constitution. These vitally important considerations and tensions that exist between the will of the majority, as expressed in legislation, and the rights of the individual under the Constitution can be best summed up in the words of one of the great framers of our constitutional scheme of ordered liberty, Thomas Jefferson:

All too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.<sup>44</sup>

This Court has undertaken an extensive review of the authorities cited in the memoranda of law submitted by the parties as well as in the Court's own research. Although there is no case law directly on point which has been brought to the Court's attention, the decision of the Florida Supreme Court in *State v. O.C.*, 748 So2d 945 (Fla. 1999), and other state and federal case law cited in this order have lead the Court to the conclusion that the statute can reasonably be construed in a constitutional manner. Specifically, the Court finds that section 874.11, Florida Statutes, serves the compelling governmental interest of protecting society from criminal gangs. It is narrowly tailored because it contains a specific intent element that the prohibited expression be done for the purpose of promoting, benefiting, or furthering the interest of criminal gangs and that it be done in a manner to harass or intimidate, or advertise a gang member's or associate's presence in the community. Although the Court has found the statute constitutional, extra vigilance will be required from the judiciary in this constitutionally sensitive area to make sure

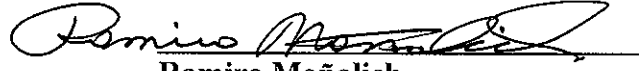
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<sup>44</sup> Quotations of Thomas Jefferson, copyright 2003, Applewood Books, Inc., at page 15.



that the statute is not misapplied to constitutionally protected expression beyond the Court's limiting construction as to the proper reach of this law.

**DONE AND ORDERED** at Fort Myers, Lee County, Florida, this 8<sup>th</sup> day of January, 2010.

  
**Ramiro Mañalich**  
**Circuit Judge**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to Marilla Shoemaker Pauly, Assistant State Attorney, Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901, to Joseph Cerino Esq., Lee County Justice Center, Court House Box, to Robert Hines Esq., Lee County Justice Center, Court House Box and to Samuel Fisher Esq., Lee County Justice Center, Court House Box, Fort Myers, Florida, this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

**CHARLIE GREEN**  
**CLERK OF COURT**

By: \_\_\_\_\_,  
Deputy Clerk