OA 9-1-92 047

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 79,924

STATE OF FLORIDA,

Appellant,

versus

RICHARD STALDER,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY

BRIEF OF AMICUS CURIAE, ANTI-DEFAMATION LEAGUE, AMERICAN JEWISH CONGRESS, AND INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION)

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STATEMENT OF INTEREST[1/]

A. The Anti-Defamation League.

The Anti-Defamation League is one of the country's oldest civil rights organizations, founded in 1913 to advance good will and mutual understanding among all races and religions. As set out in the ADL charter, the organization's objective is

> [t]o stop, by appeals to reason and conscience, and if necessary, by appeals to law, the defamation of the Jewish people. Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination and ridicule of any sect or body of citizens.

The impetus for ADL's founding was the unjust murder conviction of a Jewish man, Leo Frank, in Atlanta, Georgia. When the Governor of Georgia commuted Mr. Frank's sentence to life imprisonment, Mr. Frank was victimized by the ultimate hate crime - he was lynched.

For more than 75 years, ADL has been committed to fighting racial and religious discrimination in employment, housing, education, and public accommodations, and to ensuring that every individual receives equal protection under the law. ADL is equally committed to protecting the basic freedoms set forth in the Bill of Rights and is highly sensitive to the constitutional issues raised in this case.

As part of this commitment, ADL has been actively involved in the formulation of laws designed to protect victims of

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[1/] Pursuant to Fla.R.App.P. 9.370, the Anti-Defamation League was granted permission to appear as amicus curiae. Since that time, additional amici have joined in this brief.

discrimination. ADL has been a participant in the development of the statute at issue in this appeal, Florida's criminal prejudice enhancement law. §775.085, Fla.Stat. (1989). ADL conducts an annual audit of anti-Semitic incidents nationwide, and also monitors hate crimes committed against any person or group as a consequence of intolerance. In the early 1980's, ADL recognized a growing anti-Semitism and intolerance at work around the country. One of ADL's responses to this disturbing trend was the development of model statutes to enhance the penalties for unlawful conduct directed at others because of race, color, religion, national origin, or sexual orientation. A majority of the states and the federal government have enacted some type of legislation to combat this serious societal problem.

ADL is uniquely situated to suggest a balance of the difficult and competing interests presented by this case. ADL recognizes the paramount importance of protecting basic First Amendment freedoms even where such privileges result in the expression of unpalatable ideas. ADL also recognizes that bias-motivated crimes are increasing and that legislators properly may provide a legal basis for punishing behavior which is indisputably criminal and directed by racial, ethnic, or religious hatred.

B. American Jewish Congress.

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. It has long supported the use of the law, including the criminal law, to punish

those who would discriminate against American citizens because of their race, religion, sex, sexual orientation, or national origin. Crimes in which the victim is selected because of these suspect grounds tear at the fabric of our society. Such offenders must be treated and punished with the utmost seriousness.

The Southeast Region of the American Jewish Congress is the regional organization for matters affecting the Southeast United States, including Florida.

Because Florida's ethnic intimidation law is an important weapon in the war against violent bigotry, the AJCongress and the Southeast Region join in this brief.

C. International Association of Jewish Lawyers and Jurists (American Section).

The International Association of Jewish Lawyers and Jurists (IAJLJ) is a membership organization consisting of attorneys and judges in more than 32 countries around the world. The American Section was organized in 1983 to represent the American Jewish legal community and to defend Jewish interests and human rights in the United States and abroad. The IAJLJ has been concerned about increased anti-Semitism around the world and has been intensively studying measures prescribed by law in various democratic societies to combat religious and racial prejudice. The IAJLJ is vitally interested in legislation of the kind that has been challenged in this case. To the extent permitted by the United States Constitution, the IAJLJ encourages the enactment and enforcement of laws that protect racial and religious minorities against acts of prejudice and bigotry.

Amici submit this friend of the court position supporting the constitutionality of §775.085, Florida Statutes (1989).

STATEMENT OF THE CASE AND FACTS

Amici defer to the procedural and factual recitation contained in the appellant's brief. The essential facts for purposes of the position advanced by the amici are very limited. The defendant in the lower tribunal was charged with battery (R 11). The information alleged that the defendant made comments about the victim's ethnicity, thereby enhancing the crime to a third degree felony pursuant to §775.085(1), Fla.Stat. (1989).

The defendant challenged the constitutionality of the enhancement statute by filing a motion to dismiss (R 15-62). The lower tribunal granted the motion to dismiss, adopting all arguments raised in the motion to dismiss (R 68-70). The only expressly stated component of the court's dismissal order was the conclusion that the enhancement statute was unconstitutionally vague because it did not contain a requirement that the allegation of prejudice be proved beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Florida has recognized that violence prompted by hate and religious intolerance is a national problem. Such criminal activity is increasing. To combat this problem, Florida has promulgated a penalty enhancement statute which increases the penalty for crimes directed at individuals who target victims because of race, color, ethnic origin, or religion.

The penalty concept incorporated in §775.085, Fla.Stat. (1989) is a simple one: No one is punished merely for bigoted thoughts or racist speech. The law provides that the underlying conduct is criminal; the enhancement comes into play only when an individual's demonstrated bigotry prompts that offender to engage in criminal conduct. The prosecution must, as in all criminal cases, prove the essential elements of the crime beyond a reasonable doubt.

Florida has separated out biased thought from discriminatory conduct. In so doing, Florida has not singled out any constitutionally protected interest for criminal prosecution. Instead, only crimes committed against individuals because of their status as a member of a racial, ethnic, or religious group are implicated by the penalty enhancement statute. In this regard, §775.085 is consistent with a myriad of other statutes which additionally punish criminal conduct directed against the elderly, pregnant women, and law enforcement officers. It incorporates the same type of degree escalation found in other criminal statutes which heighten the offense by reason of the severity of conduct.

Florida's statute does not reach constitutionally protected activity, because it can be utilized only when an individual has first committed a crime. Once that occurs, the punishment enhancement falls outside any constitutional protection, since courts have considerable latitute in receiving information used to determine the quantum of punishment necessary for an offender. The statute, additionally, does not penalize protected opinion or thought, since the offender's words, thoughts, or opinions are not

the focus of the crime. Instead, words utilized by an offender are merely evidence which can assist in proving the offender's commission of the act. In this regard, an offender's commission of a crime cannot be deemed protected conduct merely because the offender chooses to act in a manner which expresses that offender's intent to commit the crime.

In summary, §775.085 is constitutional. It is a narrowly tailored statute directed at enhanced punishment of criminal conduct. It is not a law which punishes any constitutionally protected activity.

ARGUMENT

FLORIDA'S HATE CRIMES ENHANCEMENT STATUTE, §775.085, FLA.STAT. (1989), IS CONSTITUTIONAL AND CONSISTENT WITH PROTECTIONS AGAINST VAGUE AND OVERBROAD LAWS.[2/]

A. The Need For Comprehensive Anti-Discrimination Laws.

The United States of America was founded upon the ideal that all people are created equal.[3/] We are also a nation committed to the principle that people have the inherent right to speak out, to express their innermost thoughts, and to associate with others of their own choosing.[4/] But, even in our ordered system of liberty, some people act to take advantage of others because of who they are, because of their family origin, because of their religious

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2/ This brief does not address all constitutional issues involved in this appeal, and seeks only to provide the framework for a constitutional analysis of some of the relevant issues.

3/ The Declaration of Independence.

4/ U.S. Const. amend. I.

preferences. This evil, known as discrimination, is offensive to our society at large and is damaging to our national goal of equality for all.

To combat the harm caused by discriminatory practices, the governing bodies of our nation have erected a network of laws which regulate or even outlaw practices designed to separate out and classify people on the basis of race, color, ancestry, ethnicity, religion, and national origin. The Supreme Court has recognized that states have a legitimate and compelling interest in shielding its citizens from invidious discrimination. E.g., New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S. Ct. 2225 (1988). More recently, the Supreme Court recognized that legislative efforts to help "ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace..." serve a compelling societal interest. R.A.V. v. City of St. Paul, ___ U.S. ___, 60 U.S.L.W. 4667, _____ (June 22, 1992)(Scalia, J., for the court).

Florida, as has other states, recognizes the harmful effects which result when individuals are victimized because of their status, such as race, ethnicity, or religion. The resulting harm to society can be greater than the harm caused by the injurious conduct alone, since entire classes of people are put at risk. Interracial violence, as recognized by one legal commentator, "generate[s] widespread fear and intimidation within and between communities, affecting many more individuals than the victim and

his immediate acquaintances." Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv.L.Rev. 1270, 1280 (1988). "The impact of a cross-burning or a swastika-daubing is of a magnitude for greater than, for example, spray painting graffiti on a subway car." Foxman & Salberg, Try A Hate Crimes Law That Can Withstand Scalia, Miami Herald, June 28, 1992, at 3C. Such victimization is not only real, it is increasing to the point that numerous legislative bodies have attempted to find solutions to combat criminal behavior which is motivated by racial, religious, or ethnic reasons. The federal government and more than half the states have adopted "hate crimes" statutes,[5/] which are designed to outlaw discrimination in the selection of a crime victim. State v. Mitchell, ___ Wis. ___ (June 23, 1992)(Bablitch, J., dissenting).

By all reports, hate crimes are increasing in number and severity. The President of the United States, before signing into law the Federal Hate Crimes Statistics Act, stated:[6/]

> The faster we can find out about these hideous crimes, the faster we can track down the bigots who commit them.... Enacting this law today helps us move toward our dream of a society blind to prejudice, a society open to all.

There is no question that some form of legislation is necessary to combat hate crimes. Consider that the ADL, through its nationwide annual audit of anti-Semitic incidents, including criminal conduct, monitors the activities of hate groups. In 1991, ADL identified

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5/ E.g., Federal Religious Vandalism Act, 18 U.S.C. §247 (1989); Federal Hate Crimes Statistics Act, Pub.L. No. 101-275 (1990).

6/ President George Bush, April 23, 1990.

1,879 anti-Semitic incidents, and reports from 42 states indicated the highest cumulative total of incidents ever recorded in the thirteen year history of the ADL audits.[7/] That same year saw the highest number of reported serious crimes based on discrimination, including assaults, vandalism, arson, and bombings.[8/]

Florida has experienced more than its share of criminal conduct directed against individuals for religious, ethnic, or racial reasons. Florida's Attorney General, in his annual reporting of hate crimes, observed:

> In 1990, 80 law enforcement agencies reported hate crime data to the Florida Department of Law Enforcement. There were 258 hate crime incidents reported which resulted in 306 criminal offenses. During 1991, 88 law enforcement agencies reported 265 hate crime incidents, resulting in 309 criminal offenses.

Attorney General Bob Butterworth, Hate Crimes in Florida (1991). Other states have noted similarly alarming trends.[9/]

B. §775.085 Is A Penalty Enhancement Statute.

The Florida Legislature has determined that the harms inflicted by criminal conduct because of race, color, creed, religion, or sexual orientation demand a strong public response. Whereas hate-inspired crimes are so damaging to the fabric of society, special statutory treatment is justified by enhancing the

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7/ ADL, 1991 Audit of Anti-Semitic Incidents (1992).

8/ See ADL, Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry (1988 & 1990 Supplement).

9/ See, e.g., Minnesota Board of Peace Officer Standards and Training, Bias Motivated Crimes: A Summary Report of Minnesota's Response (1990); Hernandez, Hate Crimes Rise Sharply, Panel Reports, L.A. Times, Sept. 7, 1990, at B 1, Col. 6.

degree of criminal conduct involved in the underlying criminal act.

> The damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes may effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. By making members of minority communities fearful, angry, and suspicious of other groups -- and of the power structure that is supposed to protect them -- these incidents can damage the fabric of our society and fragment communities. For these reasons, hate crimes demand a special response from law enforcement officials and civic leaders.

ADL, Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry (1988 & Supp. 1990).

For these reasons, Florida has chosen to enforce its ideal of a nondiscriminatory society by enacting a statutory scheme in which criminal transgressors are punished more severely because an offender has chosen to commit a crime while practicing bias or discrimination. In contrast to statutes of some other states which have isolated certain discriminatory thoughts or conduct deemed offensive to the community, Florida merely reclassifies already criminal conduct which is perpetrated by reason of the status of the victim. Thus, Florida's hate crimes law, §775.085, Fla.Stat. (1989),[10/] is essentially a punishment statute, providing severe

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10/ §775.085 **Evidencing prejudice while committing offense; enhanced penalties.**

(1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim:

(continued...)

punishment, not for engaging in thought but for engaging in criminal conduct. In so doing, Florida's law is no different from a myriad of enhancement statutes which look to the particularized criminal conduct of the accused or to the special status of the victim.

Florida's criminal justice system is familiar with penalty enhancement statutes, some of which apply to a host of criminal conduct defined by other laws. For example, various Florida statutes enhance the penalties for criminal conduct committed while wearing a mask,[11] while possessing a firearm during the course of

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[10] (...continued)

> (a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.
>
> (b) A misdemeanor of the first degree shall be punishable as if it were a felony of their degree.
>
> (c) A felony of the third degree shall be punishable as if it were a felony of the second degree.
>
> (d) A felony of the second degree shall be punishable as if it were a felony of the first degree.
>
> (2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

[11] §775.0845, Fla.Stat. (1991).

a felony,[12] for committing a crime against law enforcement officers,[13] for engaging in violent crimes against the elderly,[14] or for committing a battery on a pregnant woman.[15] Other statutes punish certain conduct more severely when done with a specific, calculated intent to do harm, as evidenced by the various degrees of homicide, the most serious of which is defined by a defendant's specific intent to kill.[16] It is obvious that our criminal justice system already treats certain criminals more harshly because of the victim chosen. Other crimes are punished more severely because of the potential for harm to a great number of people. That is precisely the civic justification for hate crimes punishment.

Statutes like these do not proscribe criminal conduct, but merely reclassify the punishment scheme based on factors unique to the offense or the offender. Florida courts have routinely approved the use and application of such enhancement statutes. E.g., State v. Whitehead, 472 So.2d 730 (Fla. 1985)(use of firearm during felony); Strickland v. State, 437 So.2d 150 (Fla. 1983)(use of firearm during felony); Jennings v. State, 498 So.2d 1373 (Fla.

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[12] §775.087, Fla.Stat. (1991).

[13] §775.0823, Fla.Stat. (1991).

[14] §784.08, Fla.Stat. (1991).

[15] §784.045(1)(b), Fla.Stat. (1991).

[16] §782.04, Fla.Stat. (1991). Depending on a defendant's motivation or intent, the same physical conduct and consequences can result in a prosecution for a capital offense or a second degree felony.

1st DCA 1986)(wearing mask while committing offense); Fletcher v. State, 472 So.2d 537 (Fla. 5th DCA 1985)(use of firearm during felony). These statutes all have one important similarity: before they apply, the prosecution must prove the elements of the underlying crime beyond a reasonable doubt, and must establish the additional enhancement factors to the same degree. See State v. Rodriguez, 17 FLW S279 (Fla. July 2, 1992)(proof of the defendant's actual physical possession of a firearm during the commission of a crime is condition precedent to reclassifying offense).

The placement of §775.085 within Chapter 775 is an additional indication that it is a penalty provision. The Chapter is entitled "Definitions; General Penalties; Registration of Criminals." As an intrinsic aid in statutory construction, the placement of a statute and its title are useful in determining its meaning. Where the title sheds light on the meaning of the law, it is helpful in resolving doubt as to the meaning. See generally Pike v. United States, 340 F.2d 487 (9th Cir. 1965). Here, the chapter designation and statutory title refer to penalties, a persuasive reason to find that the statute determines the degree of crime and does not define the crime.

The lower tribunal determined that the Florida law did not pass constitutional muster, but the court's decision reflects a serious misunderstanding of this statutory scheme to enhance criminal conduct done as a consequence of prejudice against the victim. The lower tribunal declared that because the statute did not require proof of prejudice beyond a reasonable doubt, the

statute is defective. The court's analysis and conclusion are faulty.

Of course all elements of the charged offense, including enhancement factors, must be proved beyond a reasonable doubt. That is one of the immutable constitutional rules of our criminal jurisprudence. Jackson v. Virginia, 443 U.S. 307, 316-317, 99 S. Ct. 2781, 2788 (1979); In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970). See also Wright v. West, ___ U.S. ___ 1992 WL 133888 (June 19, 1992)(in habeas corpus challenge, evidence sufficient to prove crime charged). Just because the statute does not spell out the burden of proof does not undermine the constitutionality of §775.085. Indeed, a cursory examination of criminal statutes reflects that the prosecution's burden of proof is generally not a component of statutory codifications. Moreover, to the extent that any doubt exists, this court should construe the statute as incorporating the constitutionally required burden of proof. See generally State v. Allen, 362 So.2d 10 (Fla. 1978)(elimination of word "unlawful" in statutory codification of theft does not remove element of specific intent).

To the extent that the lower tribunal was concerned with an uncertainty as to the elements required for the enhancement to apply, the court was needlessly cautious. This statute is, after all, a penalty enhancement law. The statute reaches out to concededly criminal conduct which is committed upon individuals because of prejudice or bias. Whether that proof requires specific intent, general intent, or merely that the act be done does not

undermine the constitutionality of the statute. It is within the prerogative of the legislature to include intent as an element of the crime. Wolfram v. State, 568 So.2d 992 (Fla. 5th DCA 1990). This principle was recognized in State v. Dunmann, 427 So.2d 166, 169 (Fla. 1983):

> It is within the power of the legislature to declare an act a crime regardless of the intent or knowledge of the violation thereof. The doing of an act inhibited by the statute makes the crime and the moral turpitude or purity of motive and the knowledge or ignorance of its criminal character are immaterial circumstances in the question of guilt.

In LaRussa v. State, 142 Fla. 504, 509, 196 So. 302, 304 (1940), the court stated:

> [A]cts prohibited by statute (statutory as distinguished from common law crimes) need not be accompanied by a criminal intent, **unless such intent be specifically required by the statute itself**, as the doing of the act furnishes the intent.

The statute in question is valid with or without a specific intent to perpetrate the crime because of the victim's status. An intent may be inferred from the commission of the act itself. State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982). Where an accused batters the victim while uttering racial slurs, the commission of the battery plus the saying of the words, all proved beyond a reasonable doubt, should suffice to justify the enhanced penalty.

With its emphasis on enhancing punishment for offenders who have acted in accordance with a racial or ethnic bias, Florida's statute differs from many hate crimes laws promulgated by other sovereigns. In particular, it is a very different statute from the

Minnesota ordinance recently held unconsitutional by the Supreme Court in R.A.V. v. City of St. Paul. That ordinance defined a new offense which essentially was bias-motivated disorderly conduct. Because the ordinance applied to the expression of certain thoughts and beliefs, it was not directed toward punishing patently criminal conduct.

Unlike the focus of the Minnesota ordinance, Florida has recognized the harmful consequences to society when individuals choose to commit crimes in certain ways or against certain victims. Certain criminal conduct is more dangerous and worthy of greater punishment when it affects certain people or when it is intended to affect certain classes of people. Thus, we punish offenses against law enforcement officers with a heightened degree of protection, not because the defendant has purposely selected a law enforcement officer as a victim, but because of the harmful effects to society caused by placing our police in jeopardy. So, too, has society determined that crimes committed against the aged or pregnant women require greater societal retribution because of the impact such conduct has on our communities. Crimes committed against individuals because of their status as a member of a racial, ethnic, or religious group are no less harmful to society, and call for increasing the quantum of punishment.

Because §775.085 is a penalty enhancement statute, it is not subject to the same scrutiny involved in a criminal statute defining a crime. Courts have considerable "latitude in the information [a trial judge] uses to determine the sentence."

United States v. Perez, 858 F.2d 1272, 1275 (7th Cir. 1988). See Payne v. Tennessee, 501 U.S. ___, 111 S. Ct. 2597, 2606 (1991). A trial judge may "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [the judge] may consider, or the source from which it might come." United States v. Tucker, 404 U.S. 443, 446, 92 S. Ct. 589, 591 (1972). As part of this broad inquiry, a trial judge is permitted to consider a wide variety of factors, including hearsay evidence, see United States v. Mealy, 851 F.2d 890, 907 (7th Cir. 1988), a defendant's refusal to recognize the proven offense conduct, see United States v. Marquardt, 786 F.2d 771, 782 (7th Cir. 1986), and even a defendant's threats to others. United States v. Marshall, 719 F.2d 887 (7th Cir. 1983). As recognized by the Seventh Circuit in Marshall, at 891 (emphasis added):

> Information concerning a defendant's life and characteristics is "[h]ighly relevant - if not essential - to [the court's] selection of an appropriate sentence." Williams [v. New York], 337 U.S. [241] at 247, 69 S. Ct. [1079] at 1083 (1949). Whether Marshall is a murderer, or has planned murder, or has threatened murder are all relevant to the sentencing court's determination of Marshall's chances for rehabilitation.

As a component of an enhancement statute, proof that a defendant directed the crime against a particular victim because of discrimination or bias is not offensive merely because proof of that discrimination may involve evidence of speech or association. That is merely an acceptable use of evidence. The United States Court of Appeals for the Eleventh Circuit has previously recognized that a defendant's associational activity with the Aryan

Brotherhood white supremacist prison gang was properly admitted into evidence to establish "a chain of events forming the context, motive, and set-up of the crime," notwithstanding that it was an associational right of the defendant to join such a group. United States v. Mills, 704 F.2d 1553, 1559 (11th Cir. 1983), cert. denied, 467 U.S. 1243, 104 S. Ct. 3517 (1984).

Speech is very often a part of the evidence of a crime. For instance, evidence that a defendant slashed the victim with a knife while screaming "I hope you die" is certainly a relevant and admissible fact in a murder prosecution. Why, then, would a defendant's statement that the victim was a "dirty Jew" or a "black mother" be entitled to more protection when said in the context of punching the victim in the face. The defendant has committed a crime, and in doing so has shown a victim selection for discriminatory reasons. The words used are merely evidence of the defendant's commission of the act.

The Supreme Court, in a different context, recognized that evidence of racial hatred has a place in the criminal justice system. In Dawson v. Delaware, 112 S. Ct. 1093 (1992), the Court held that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." In Dawson, the Court concluded that the defendant's membership in the Aryan Brotherhood should not have been used in a capital sentencing proceeding, because it was simply irrelevant.

> Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In Barclay, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker. See 463 U.S. at 942-944, 103 S. Ct. at 3420-3421 (plurality opinion). We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder." Id. at 949, 103 S. Ct. at 3424. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing.

Id. at 1098.

The Dawson court reaffirmed that, at least for punishment purposes, "the sentencing authority has always been free to consider a wide range of relevant material." Payne v. Tennessee, 111 S. Ct. at 2606. The Supreme Court previously upheld the consideration, at a capital sentencing, of evidence of racial intolerance and subversive advocacy, where the evidence was relevant to the issues involved in the case. In Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418 (1983), a sentencing judge was allowed to consider "the elements of racial hatred" in Barclay's crime and "Barclay's desire to start a race war." Id. at 949, 103 S. Ct. at 3424.

In United States v. Abel, 469 U.S. 45, 105 S. Ct. 465 (1984), the government was permitted to impeach a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, whose members were sworn to lie on behalf of one

another. Evidence admissible to show bias, even if that organizational association was protected by the First Amendment, is nonetheless admissible.

C. §775.085 Does Not Penalize Protected Opinion, Speech, Or Thought.

The Supreme Court only recently visited the constitutionality of the Minnesota Bias-Motivated Crime Ordinance, which prohibited the display of a symbol which a person knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." R.A.V. v. City of St. Paul. The ordinance was, by language and intent, applicable "only to 'racial, religious or gender-specific symbols' such as 'a burning cross, Nazi swastika or other instrumentality of like import.'" Id. at ___. While conceding that the municipality had a compelling interest in eliminating discrimination, the Supreme Court determined that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses." Id. at ___. Justice Scalia, writing for the divided majority, based his decision on the principle that the First Amendment prohibits content discrimination.

Far from approving the concept of "thought police" restricting one's freedom of expression, Justice Scalia distinguished a statute which punishes conduct from one which proscribes distasteful ideas. See Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 2544 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the

expression of an idea simply because society finds the idea itself offensive or disagreeable."). By these constitutional standards, Florida's law is directed against conduct, and does not merely look to words that communicate messages of racial, gender, or religious intolerance. In Justice Scalia's analysis, §775.085 does not offend the First Amendment.

The principal concurring opinion in R.A.V., authored by Justice White, found the ordinance to be facially overbroad because it not only criminalizes categories of speech which are constitutionally unprotected, but also proscribes a substantial amount of expression that, even if repugnant or distasteful, is nevertheless shielded by the First Amendment. That concern is not applicable to the Florida law, which comes into play only when a defendant has first engaged in criminal activity. Only if criminal conduct is found will the defendant's act of practicing victimization become an issue. In that limited context, what a person says, wears, or believes can certainly be used as evidence of a crime. While bigots and racists are free to think and express themselves as they wish, they simply must not engage in criminal conduct in furtherance of their beliefs. Thus, Florida's enhancement statute is not concerned with what a person thinks, but with how a person acts if that person is engaged in the commission of a crime.

The nature of the harm and the narrow application of the law warrant the use of the police power to punish the offender. Not only is the enhancement statute directed at criminal conduct which

causes physical harm, and thus satisfies one of the basic principles of constitutional adjudication, but it also does not deprive the offenders of any legitimate right to freedom, autonomy, or privacy. From the viewpoint of constitutional adjudication, the statute is valid. Moreover, the law is consistent with an individual victim's constitutional right of privacy. See Art. I, §23, Fla.Const. ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.").

In Florida, no offender can be punished because of harboring thoughts or conveying an expression regarding the race, religion, or other status of a person. The focus of §775.085 is on criminal conduct plus purposeful selection. By enhancing the penalty, the enhancement statute punishes more severely those offenders who act with a discriminatory intent, an intent not just to do the crime but to choose the victim of a protected status. While the conduct prohibited by the penalty enhancement statute may be proved by a combination of words and action, neither the words nor the expression are on trial. The expression, then, is merely relevant evidence and does not constitute the crime itself.

Other courts are grappling with the same issues now confronting this court. The Wisconsin Supreme Court recently examined its "hate crimes" statute in light of claims that it offended the First Amendment, due process, and equal protection. The Wisconsin law, which is similar but not identical to Florida's statute, provides for an increased penalty if a defendant commits

a crime "because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property." The majority found the statute unconstitutional on First Amendment grounds, essentially adopting the Supreme Court's approach in R.A.V. The Wisconsin court construed the statute as providing for "punishment of offensive motive or thought." Wisconsin v. Mitchell, slip op. at 11. The court's view was that the "selecting" of a victim for discriminatory reasons "necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime." Id. at 12-13.

ADL disagrees with the Mitchell analysis, and suggests that the Wisconsin Supreme Court's wooden approach to the statutory analysis could well doom all criminal laws which involve intentional conduct directed at a particular person. Under the Mitchell analysis, a defendant who singles out a police officer as a victim of an intended assault is engaged in a clearly permitted thought process. But that right to harbor negative thoughts and opinions about law enforcement officers does not shield the actor from enhanced punishment because of the selection of an officer as a victim. Because criminal conduct involves an act coupled with a culpable mental process, the court's effort to shield the mental process from being implicated in criminal prosecution reaches too far.

ADL suggests that a more valid analytical structure for examination of an enhancement statute is found in the dissenting opinions of Justices Abrahamson and Bablitch in the Mitchell case. Justice Abrahamson expressed the view that a narrow construction of the Wisconsin statute adequately protects against unconstitutional application.

> The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime.

State v. Mitchell, slip op. at 3 (Abrahamson, J., dissenting). By narrowing the focus of the statute and by requiring a clear nexus between the criminal conduct and the discrimination, Justice Abrahamson has removed any possibility that a defendant might be punished for pure thought.

Justice Bablitch, approaching the constitutional analysis from another direction, stated that "criminal conduct plus purposeful selection" is properly punished under the Wisconsin statute. Id., slip op. at 7 (Bablitch, J., dissenting). People remain free to think whatever they choose; acting out those beliefs in a manner which results in otherwise criminal conduct is simply not protected. Justice Bablitch analyzed the commission of such a crime to that involved in many other offenses, where a defendant's conduct coupled with the defendant's words prove the penal nature of the actions. The dissent also saw no reason to distinguish

between a discrimination enhancement statute and laws which prohibit discrmination.

ADL finds substantial promise in the Mitchell dissenting opinions. Both recognize that people must be free to express their thoughts, opinions, and beliefs, no matter how offensive or frightening. The ability to think and speak out is an essential component of our free society. But, people cannot engage in criminal conduct and then claim that the process of choosing a victim for discriminatory reasons is somehow protected thought or speech. The individual's right to be let alone, to be free to think and express, does not alter society's vested interest in protecting the public from the criminal conduct of the few. Society can, and should, punish the transgressor for the harm resulting from the transgressor's conduct. When that conduct selects out a crime victim for discriminatory or biased reasons, then society has a right to inflict greater punishment because of the greater societal harm. Florida has developed that careful balance between protected thought and prohibited conduct. This court should give its approval to that balance by upholding the constitutionality of §775.085.

CONCLUSION

The Florida Legislature promulgated a carefully crafted and narrowly tailored statute to enhance the punishment meted out to criminals who select their targets because of discriminatory intent. Florida has seen fit to aid the fight against discrimination and racial intolerance by declaring that criminals

who target victims because of a protected status will be punished severely. Section 775.085 does not prohibit speech or thought, and is not capable of being applied to First Amendment expressions. It is a constitutionally acceptable way of punishing criminal conduct. The statute should be declared constitutional and the decision of the lower tribunal should be reversed.

Respectfully submitted,

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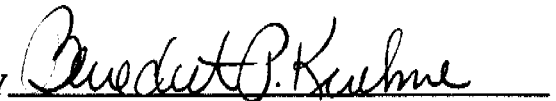
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 17th day of July 1992 to Michael J. Neimand, Esq., Assistant Attorney General, 401 N.W. 2d Avenue, Suite N-921, Miami, Florida 33128; D. Robert Silber, Esq., 6278 North Federal Highway, Suite 253, Fort Lauderdale, Florida 33308; Jeanne Baker, Baker & Moscowitz, 3130 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-5306; and to Robert Griscti, Turner & Griscti, 204 West University Avenue, Gainesville,

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