OA 9-1-92

IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RICHARD STALDER, Respondent.	Case No. 79,924
STATE OF FLORIDA, Petitioner, v. EVAN DEAN LEATHERMAN, Respondent.	Case No. 80,126

BRIEF OF AMICUS CURIAE

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D. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

In *State v. Richard Stalder*, Case No. 79,924, Amicus Curiae Florida Association of Criminal Defense Lawyers (FACDL) accepts the "Statement of the Case and Facts" in the Brief of Appellant, pp. 2-3, and in the Brief of Appellee, p. 1.

In *State v. Evan Dean Leatherman*, Case No. 80,126, Amicus Curiae FACDL accepts the "Statement of the Case and Facts" in the Brief of Appellant, pp. 2-3.

E. SUMMARY OF ARGUMENT

Amicus curiae, the Florida Association of Criminal Defense Lawyers (FACDL), respectfully submits that the Court should uphold the trial court's rulings that § 775.085, Florida Statutes (1989) (amended 1991), commonly referred to as Florida's "hate crime" law, is unconstitutional, both facially and as applied. The statute infringes upon fundamental rights of freedom of expression, due process and equal protection under the Florida and United States Constitutions.

FACDL agrees that the prejudice against "race, color, ancestry, ethnicity, religion, sexual orientation, or national origin" sought to be penalized in § 775.085(1) are repugnant. Nonetheless, legislation intended to curb such societal ills through criminal sanction must be carefully crafted to avoid the destruction of those very liberties upon which a constitutional democracy is founded. The Florida Legislature's effort to punish those prejudices itemized in § 775.085(1) fails to exact the correct balance between a favorable social goal and the fundamental rights of Florida's citizens.

The hate crime law as currently drafted violates freedom of expression under Article I, § 4 of the Florida Constitution and the First and Fourteenth Amendments to the United States Constitution. The statute's penalty enhancement takes effect "if the commission of ... [a] ... felony or misdemeanor *evidences prejudice* ..." (emphasis added). Prejudice will invariably be "evidenced" in the commission of an act through an individual's expression, whether that expression is by speech, association or symbol. When a law criminalizes otherwise protected expression, that law must pass scrutiny under the First Amendment and Article I, § 4. The Florida hate crime law does not survive that scrutiny.

A plain reading of the statute reveals that the law punishes only certain types of prejudice and is not "content neutral." The statute specifies what categories of prejudice are prohibited,

while leaving free from criminal liability other offensive viewpoints. Such criminalization of opinion, or "viewpoint discrimination," violates freedom of speech and equal protection under the United States Constitution, *R.A.V. v. City of St. Paul*, --- U.S. ---, ---; 112 S.Ct. 2538, 2547-48; 60 U.S.L.W. 4667, 4669-71 (1992).

Finally, the Florida hate crime law unconstitutionally restricts, in an overbroad manner, the expression of protected speech. For example, the statute can be applied to enhance criminal liability for one who, during the commission of what is otherwise a crime, makes a statement that exhibits a prohibited bias, regardless of whether the accused's intent to commit the crime is motivated by that specified prejudice. This overbroad reach of the statute cannot be justified.

Florida's hate crime law cannot be salvaged by the argument that this statute is merely a sentencing factor. First, § 775.085(1) operates to reclassify a criminal charge to a greater offense that requires proof of prejudice as an essential element of the new hate crime. Secondly, there is no reasoned authority that justifies sentence enhancement solely on the basis of prejudice expressed by an accused. The United States Supreme Court has only allowed racial hatred to be used as evidence to prove certain aggravating factors in sentencing. The Court has never authorized enhancement based solely on prejudice.

Finally, the Florida Association of Criminal Defense Lawyers urges this Court to find Florida's hate crime law facially unconstitutional under not only the Federal Constitution, but also under Florida's Constitution. The issue in these consolidated appeals is whether Florida's hate crime legislation violates freedom of speech, due process and equal protection of the law. These fundamental liberties are guaranteed to each citizen of this State under the Florida Constitution. By invoking Florida's Declaration of Rights, this Court will insure to the citizens of this State the primacy that these liberties should enjoy in our Federalist system.

F. ARGUMENT AND CITATIONS OF AUTHORITY

Florida's Hate Crime Statute is Unconstitutional in Violation of Article I, §§ 2, 4 and 9 of the Florida Constitution and the First, Fifth and Fourteenth Amendments to the United States Constitution

1. Introduction

The State of Florida has recently joined a number of state and local jurisdictions which, along with the Federal government,[1] have enacted various forms of "hate crime" legislation.[2] These legislative efforts are an apparent response to increased awareness of a long-standing social problem only recently documented by groups such as the Anti-Defamation League.[3] Yet, as suggested by one commentator, the origins of such modern hate crime or "ethnic intimidation" laws can be traced from an analysis of United States Supreme Court precedent. From *Beauharnais v. Illinois*, 343 U.S. 250 (1952), through the United States Supreme Court's recent ruling in *R.A.V. v. City of St. Paul, Minnesota*, --- U.S. ---, 112 S.Ct. 2538, 60 U.S.L.W. 4667 (1992), the Court has addressed an array of statutes and ordinances which, despite laudatory social goals and legislative intent, have violated established First Amendment principles.[4]

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[1]28 U.S.C. § 534, the "Federal Hate Crime Statistics Act."

[2]Much of this legislation is annotated in Professor Susan Gellman's authoritative article on hate crime legislation. *See* Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 339 U.C.L.A. L. Rev. 333, 339-40 & nn. 27-31, 344-45 & nn. 47-51 (1991) [hereinafter *Sticks and Stones*].

[3]As noted by Amicus Curiae Anti-Defamation League, that organization has been instrumental in designing hate crime legislation which has been enacted by various jurisdictions nationwide in the past decade. Brief of Amicus Curiae, Anti-Defamation League, American Jewish Congress, and International Association of Jewish Lawyers and Jurists (American Section) [hereinafter Brief of Amicus Curiae ADL, etc.], *State v. Stalder*, Case No. 79,924, pp. 1-2).

[4]Gellman, *Sticks and Stones*, *supra*, at 335-40.

2. The Legislative History of § 775.085[5]

Florida's hate crime legislation originated in House Bill 1112 and Senate Bill 1210 during the 1989 legislative session. Both Bills, as originally drafted, listed five categories of prejudice which, if evidenced during the commission of any misdemeanor or felony, would reclassify that offense as a more severe substantive crime. Those categories were race, color, ancestry, religion and national original. By amendment in the House Subcommittee on Prosecution and Punishment and the Senate Committee on Judiciary-Criminal, a sixth category of prejudice, "ethnicity" was added to each chamber's proposed bills.[6] That category was accepted. The legislation, which included a civil remedy for treble damages,[7] was passed into law, codified at § 775.085 and became effective October 1, 1989.

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[5]At issue in this consolidated appeal is the constitutionality of § 775.085, Florida Statutes (1989). As discussed in the text, this statute was amended in 1991; accordingly, the full legislative history, to date, is presented.

[6]Another amendment introduced by Representative Burke but later withdrawn from consideration in the House Subcommittee would have changed the language, "evidences prejudice," to "motivated ... by prejudice" and would have replaced the enumeration of prejudices with a content neutral scheme:

> The penalty for any felony or misdemeanor shall be *reclassified as provided in this subsection. If the commission of such felony or misdemeanor was motivated, in whole or in part, by prejudice, bigotry, or bias against any definable, identifiable segment of the population in which the victim is a member or with which the victim was perceived to be identified.*

H.B. 1112, Amend. No. 2 (withdrawn) (emphasis in original), stored as H. 1112.c.

[7]The civil remedy, not at issue herein, provides:

> (2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimated, 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.

In 1991, Senate Bill 1482 was introduced to amend the 1989 Statute by adding "sexual orientation" to the categories listed in § 775.085(1). That seventh category passed. It is noteworthy that during Senate debate on the 1991 amendment, Senator Bruner proposed to add an eighth category, "sex," to the protected categories in § 777.085(1). The latter category failed.[8]

Thus, Chapter 91-83, Laws of Florida, amended § 775.085(1) to add the "sexual orientation" classification, a knowledge provision[9] and a severability clause. The amendment

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[8]Before the Senate rejected that amendment to the Bill, the following exchange took place on the Senate floor:

> SEN. BRUNER: "I think that we probably, in enacting legislation like this, should include sex. We have listed several factors, where if evidence of prejudice exists -- such as race, color, ancestry, ethnicity, religion, sexual orientation -- it just seems logical that we should include sex, because there are crimes out there that are committed against people simply because of their sex. I think it is only a logical extension of this legislation, and I would urge this body's approval of this amendment."
>
> SEN. GIRARDEAU: "Madame President, Senators, I think that we are getting to the place where we are going from the ridiculous to the sublime. Inasmuch as you only have two basic sexes, and that's male and female -- I said basic sex -- as a result, if one person of the opposite sex were to cause a crime against one, you can always be assured that they are going to raise that about knowingly and non-knowingly and all this about commission of the crime. I think we need to leave this Bill clean without this amendment, because if you put this amendment on, I can assure you, you're 'gonna run into very serious trouble and the courts are 'gonna be clogged with trying to defend that it was done because of the person's sex."

Senate Floor Audio Tapes, April 25, 1991, No. 8 regarding Amendment No. 2 to S.B. 1482. *See also* Journal of the Senate (Apr. 25, 1991), p. 1033.

[9]In the Senate Criminal Justice Committee, the proposed Senate Bill 1482 was amended to require that "the defendant knew or had reasonable grounds to know that the victim was within the class delineated herein." S.B. 1482, Amend. No. 1 (reported favorably). This proposed Amendment was defeated on the floor of the Senate, perhaps in response to an accompanying (continued...)

became effective October 1, 1991.[10]

3. Hate Crime Case Law

Florida's hate crime legislation is similar to that of other jurisdictions which reclassify criminal conduct to a more severe offense because of the perpetrator's prejudice. However, unlike those other jurisdictions, Florida's statute does not specifically require that a bias motive be established by the State.[11] Rather, the Florida statute only requires the State to prove that the commission of any felony or misdemeanor "evidences prejudice" based on one of the seven enumerated prejudices.

Amicus Curiae FACDL agrees with the State of Florida that the differences in the statutory language of various hate crime legislation nationwide makes it difficult to draw

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[9](...continued)
Senate Staff Analysis to the Bill which noted that "sexual orientation" as defined by the Federal Hate Crime Statistics Act "... would include a person who is victimized because of the *perception* of homosexuality or heterosexuality." Senate Staff Analysis and Economic Impact Statement for Senate Bill S.B. 1482, revised Mar. 28, 1992, p. 2, *citing* S. Rep. No. 101-21, 1990 U.S. Code Cong. and Admin. News 158 (referring to 28 U.S.C. § 534) (emphasis in original). As a compromise, the Senate Bill was amended with the language found in the current statute:

> (3) It shall be an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated herein.

[10]Senator Gordon moved for the severability amendment to S.B. 1482 on the floor of the Senate, which was adopted. Journal of the Senate (Apr. 26, 1991), p. 1097. *See* Chapter 91-83, § 5, Laws of Florida, which provides:

> Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

[11]Representative Burke's 1989 amendment in the House Subcommittee on Prosecution and Punishment would have done so. *See* footnote 6, *supra*.

conclusions from available state court case law.[12] Brief of Appellant, *State v. Stalder*, Case No. 79,924, p. 9; Brief of Appellant, *State v. Leatherman*, Case No. 80,126, p. 9. As the Appellant suggests, there is one notable exception -- the Wisconsin Supreme Court's decision in *State of Wisconsin v. Mitchell*, --- N.W.2d ---, 61 U.S.L.W. 2035, 1992 W.L. 141888 (Wisc. 1992). In that case, Wisconsin's hate crime law, similar in scheme to that of Florida's, was found unconstitutional by the Wisconsin Supreme Court.

The United States Supreme Court's most recent precedent regarding the constitutionality of hate crime legislation is *R.A.V. v. City of St. Paul, Minnesota*, in which the majority employs a strict "content neutral" First Amendment analysis. The "Bias Motivated Crime Ordinance" at issue in that case, which prohibited the display of a symbol which would arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender," was found unconstitutional because the ordinance prohibited expression based on content. *Id.*, --- U.S., at ---, 112 S.Ct., at 2541, 60 U.S.L.W., at 4671-72. Thus, the United States Supreme Court has defined the Federal constitutional standards under which content-based hate crime legislation must be scrutinized.

4. § 775.085, Fla. Stat., Florida Hate Crimes Statute, is an Unconstitutional Infringement of the First Amendment to the Constitution of the United States as it Proscribes "Thought" and is Therefore an Unlawful "Content Based" Regulation of Free Speech.

In *State v. Mitchell*, --- N.W.2d ---, 61 U.S.L.W. 2035, 1992 W.L. 141888 (Wisc. 1992) [decided 23 June 1992], the Supreme Court of the State of Wisconsin had before it the

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[12]In both of its briefs before this Court, the Appellant has accurately summarized the holdings and status of available precedent in Florida and other state jurisdictions, which need not be repeated. *See* Brief of Appellant in each of these consolidated appeals, pp. 9-12.

Wisconsin sentencing enhancement statute[13] similar to § 775.085, Florida Statutes (1991). Before the court was the sole issue of the constitutionality of the "hate crime" statute.

The Supreme Court of Wisconsin began with the analysis that the hate crimes statute violated the First Amendment directly by punishing "what the legislature has deemed to be offensive thought" and therefore violates the First Amendment by chilling free speech. *State v. Mitchell, supra*, 1992 W.L. 141888, p. 7. The analysis of the court was that the hate crime statute sought to punish bigoted thought. While the argument may be made that the statute only

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[13]§ 939.645, [Wisconsin] Stats. (1989-90) provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

punishes "conduct" or intentional selection of a victim, the "selection of a victim is an element of the underlying offense, part of the defendant's 'intent' in committing the crime." *State v. Mitchell, supra,* 1992 W.L. 141888, p. 8. In any assault upon an individual there is a selection of a victim. The Wisconsin statute sought to punish the "because of" aspect of the defendant's selection of the victim, which was the reason (thought) the defendant selected the victim and the motive behind the selection.[14] Therefore the hate crimes statute merely punishes bigoted thought. The Supreme Court of Wisconsin held that "The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights." *Id.*, 1992 W.L. 141888, at p. 9.

The Florida hate crime statute[15] is subject to the same analysis. The statute seeks to

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[14]*Cf.* Florida Statute § 775.085(1), evidences prejudice "based on" the race, color, ancestry, ethnicity, religion, or national origin of the victim.

[15]§ 775.085(1), Fla. Stat. (1991), provides:

> **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, sexual orientation, or national origin of the victim:
>
> (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 the third 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.

(continued...)

proscribe thought. Although drafted in the words "evidences prejudice," § 775.085(1), Fla. Stat., punishes the reason, "based on" the thought, behind the selection of the victim. The Court is not being asked to condone bigotry. But in the United States people are allowed to think the bigoted thoughts of a white supremist or a Black Panther. Bigoted thought is "not socially acceptable" and is offensive and is repugnant to moral decency, but a person has the right to think bigoted thoughts.[16]

The Florida Statute lacks certain saving language found in the Wisconsin statute. The Supreme Court of Wisconsin noted, "While the statute does not specifically phrase the 'because of ... race, religion, color, [etc.]' element in terms of bias or prejudice, it is clear from the history of anti-bias statutes ... that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor." The Florida statute does phrase the element of intent as "evidences prejudice based on." The Wisconsin hate crimes statute which sought to enhance the punishment of bigoted criminals because they are bigoted was held specifically to infringe unconstitutionally on the individual's First Amendment rights. "A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute." *Id.*, 1992 W.L. 141888, at p. 11. The Florida statute, like the Wisconsin statute, is directed solely at the subjective motivation of the actor, his or her prejudice. Punishment of thought, regardless of how repugnant the thought, is unconstitutional. The precept is made clear by the Supreme Court of the United States in *R.A.V.*

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[15](...continued)

> (3) It shall be an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated herein.

[16]Interestingly the Florida reclassification scheme does not address capital cases. *See Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983), and discussion, page 16 following.

v. City of St. Paul, --- U.S. ---, 112 S.Ct. 2538, 60 U.S.L.W. 4667 (1992).

The majority in *R.A.V.* began with the concept that the First Amendment generally prevents the government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. *Cantwell v. Connecticut*, 310 U.S. 296, 309-311 (1940); *Texas v. Johnson*, 491 U.S. 397, 406 (1989). Therefore content based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. ---, --- (1991) (slip op. at 8-9); *Id.*, at --- (Kennedy, J., concurring in judgment) (slip op. at 3-4); *Consolidated Edison Co. of N.Y. v. Public Service Commission of N.Y.*, 447 U.S. 530, 536 (1980); *Police Department of Chicago v. Mosely*, 408 U.S. 92, 95 (1992); *R.A.V. v. City of St. Paul*, *supra*, 112 S.Ct., at 2542. The *R.A.V.* majority noted therefore that the government may for instance proscribe libel, but it may not make any further content discrimination of proscribing only libel critical of the government. *R.A.V.*, *supra*, 112 S.Ct., at 2543. In particular, it was the view of the majority that, "the First Amendment imposes not an 'underinclusiveness' limitation, but a 'content discrimination' limitation on a State's prohibition of proscribable speech." *R.A.V.*, *supra*, 112 S.Ct., at 2545. The court found then there was no problem with a state's prohibiting obscenity in certain media or markets for although the prohibition would be "underinclusive" it would not discriminate on the basis of content. *R.A.V.*, *supra*, 112 S.Ct., at 2545, *citing Sable Communications*, 492 U.S., at 124-126 (obscene telephone communications).

In the case of the St. Paul ordinance, the Supreme Court of the United States looked at "it's a practical operation," *R.A.V.*, *supra*, 112 S.Ct., at 2547, and observed that, "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination." § 775.085(1), Florida Statutes, suffers under the same analysis.

It is obvious that symbols which will arouse anger, alarm or resentment in others on the

basis of race, color, creed, religion or gender are symbols that communicate a message of hostility based on one of these characteristics. But the content based discrimination reflected in Florida Statute § 775.085 comes within no specific exception to the First Amendment prohibition nor within a more general exception for content discrimination that does not threaten censorship of ideas and freedom of thought. The only interest distinctively served by the content limitation of § 775.085 is the legislature's special hostility toward the particular biases singled out in the statute. *Cf. R.A.V. v. City of St. Paul, supra*, 112 S.Ct., at 2549-50. In spite of the fact that the Minnesota Supreme Court repeatedly emphasized that the St. Paul ordinance was directed to messages of bias motivated hatred and in particular, as applied to messages "based on virulent notions of racial supremity" the manner of confrontation could not consist of selected limitations upon speech. *R.A.V., supra*, 112 S.Ct., at 2548. The Supreme Court of the United States noted that the First Amendment could not be so easily evaded.

Whether considered a technical overbreadth claim, a claim that the statute violates the rights of too many third parties, or the statute is overbroad in the sense of restricting more speech than the Constitution permits, Florida's hate crime statute picks out an opinion, a disfavored message, and seeks to make that a crime. The statute is therefore facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses. *R.A.V. v. City of St. Paul, supra*, 112 S.Ct., at 2542. State government may not proscribe speech because of disapproval of the ideas expressed. Thus while the government may proscribe libel, it may not make the further content discrimination proscribing only libel critical of the government. Under the current status of the law, the First Amendment imposes not an "underinclusiveness" limitation, but a "content discrimination" limitation on a state's prohibition of proscribable speech. *R.A.V., supra*, 112 S.Ct., at 2545. Where, as here, the state targets conduct on the basis of its expressive content, the acts are shielded from

regulation merely based on an expression of a discriminatory idea or philosophy. *R.A.V. v. City of St. Paul, supra*, 112 S.Ct., at 2546-47.

The First Amendment does not permit the State of Florida to impose special prohibitions on those persons who think discriminatory thoughts. In the practical operation of Florida Statutes § 775.085, the law goes beyond mere content discrimination to actual viewpoint discrimination. The whole point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content. *R.A.V. v. City of St. Paul, supra*, 112 S.Ct., at 2548. What the Legislature has impermissibly done in a piecemeal fashion is to select favored topics. The list has grown over the years. Such content based discrimination is not reasonably necessary to achieve the state's compelling interest. The First Amendment to the Constitution of the United States does not permit the piecemeal content based selectivity which § 775.085, Florida Statutes, allows, and upon which it is based.

5. § 775.085 and Sentencing

FACDL agrees with the State of Florida that § 775.085(1) creates a new substantive crime and that evidence of prejudice must be proved beyond a reasonable doubt.[17] However, the FACDL must disagree with the argument advanced by the State and its amici that § 775.085(1) is constitutional because it uses evidence of prejudice merely as a sentencing factor.[18] This argument would relegate the language "evidences prejudice" in § 775.085(1) to a sentencing consideration that does not invoke constitutional protection.

Analysis of § 775.085(1) reveals that the statute operates in a similar manner to some of Florida's "enhancement" statutes. Specifically, the hate crime law employs a reclassification

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[17]Brief of Appellant, *State v. Stalder*, Case No. 79,924, pp. 13-14, 22; Brief of Appellant, *State v. Leatherman*, pp. 13-14, 22. *See also* Brief of Amicus Curiae ADL, etc., *supra*, pp. 9-20.

[18]*Id.*

scheme, similar to the "mask" enhancement statute (§ 775.0845, Florida Statutes (1991)).[19] The reclassification statutes upgrade an offense to the next higher degree based on proof of an essential element beyond a reasonable doubt. *See, e.g., Strickland v. State*, 437 So. 2d 150, 151-52 (Fla. 1983) (§ 775.087); *Jennings v. State*, 498 So. 2d 1373, 1374 (Fla. 1st DCA 1986) (§ 775.0845).

By contrast, under the plain language of sentence enhancement statutes such as § 775.084(4) (the habitual felony offender statute), the degree of offense remains the same and the sentence is enhanced in terms of years. The trial court decides whether a defendant is a habitual felony offender or a habitual violent offender in a separate proceeding. *See* § 775.084(3).[20] This is purely a sentencing consideration that follows conviction of the defendant. *See generally Ross v. State*, 17 F.L.W. 5367 (Fla. June 18, 1992).

Thus, under Florida's hate crime reclassification statute, a jury (or judge if jury trial is waived) must directly consider evidence of a defendant's prejudice. In order to convict, the jury must find that evidence sufficient beyond a reasonable doubt to satisfy the essential element, "evidenced prejudiced." *See, e.g., Fletcher v. State*, 472 So. 2d 537, 539-40 (Fla. 5th DCA 1985) (special jury verdict form upheld in a § 775.0845 prosecution). That evidence of prejudice is used for conviction, not sentencing.

This statute runs afoul of the Florida and Federal Constitutions because "... proof of that discrimination may involve evidence of speech or association."[21] As in the two prosecutions before this Court, in a hate crime prosecution the State invariably will use evidence of the

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[19]*See also* § 775.087(1), Florida Statutes (1991) (possession or use of a weapon during the commission of a felony) and § 784.08(2), Florida Statutes (1991) (assault or battery on a person sixty-five (65) years of age or older).

[20]*Jennings v. State*, 498 So. 2d 1373, 1374 (Fla. 1st DCA 1986).

[21]Brief of Amicus Curiae ADL, etc., *supra*, at p. 17.

defendant's speech or association to prove prejudice. It will be the rare case, if not the nonexistent one, in which evidence of the defendant's conduct alone will suffice.

It is the direct use of a defendant's speech, association or symbolic expression for conviction that renders Florida's hate crime statute unconstitutional, both facially and as applied. No other enhancement statute in Florida operates in a similar fashion. Each either prohibits certain *conduct* [for example, wearing a hood, mask or other device that conceals identity under § 775.0845; possessing or using a weapon or firearm during the commission of a felony under § 775.087(1)], or punishes the offender because of the *victim's status* [for example, the victim was a police officer under §§ 775.0823 and 784.07; elderly under § 784.08; pregnant under § 784.045(1)(b)]. None of these enhancement provisions punish expression.

Under Florida's hate crime statute, neither the defendant's overt conduct nor the victim's status, alone or together, suffice for conviction. The defendant must evidence prejudice, and that evidence will necessarily be in the form of verbal, associational or symbolic expression, which is protected under both the Federal and Florida constitutions.

Finally, neither *Dawson v. Delaware*, 503 U.S. ---, 112 S.Ct. ---, 117 L.Ed.2d 309 (1992), nor *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983), command a different result. In those decisions, the United States Supreme Court addressed the limited use of racial hatred evidence during capital sentencing. Indeed, the *Dawson* majority noted 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." *Dawson v. Delaware*, 117 L.Ed.2d, at 317.

The evidence of racial hatred permitted in *Barclay* was "relevant to several statutory aggravating factors." *Barclay v. Florida*, 463 U.S., at 949. The *Dawson* Court merely reconfirmed *Barclay* by holding that evidence of prejudice can be used in capital sentencing if

an evidentiary connection can be made between that prejudice and aggravating factors otherwise relevant to capital sentencing. *Dawson v. Delaware*, 117 L.Ed.2d, at 317-318. These decisions do not justify the direct use of evidence of prejudice as a distinct aggravating factor at sentencing, whether in the capital context or otherwise.[22]

In summary, no principle of constitutional or criminal law justifies the criminalization of expression. Yet § 775.085(1) does just that by reclassifying a criminal charge on the basis of prejudice expressed by a defendant.

6. Application and Use of Article I, §§ 2, 4 and 9 of the Florida Constitution

Finally, the Florida Association of Criminal Defense Lawyers urges this Court to uphold the lower Court under the authority of Article I, §§ 2, 4, and 9 of the Constitution of the State of Florida. Those provisions provide at least equal, if not broader, protection for the civil liberties of the citizens of this State than the Federal Constitution. Indeed, those liberties are entitled to primacy under both Florida's Constitution and principles of Federalism. *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992).

In recent years this Court has recognized the broader protections afforded Floridians by the Declaration of Rights in such areas as substantive and procedural due process, self-incrimination, equal protection, the right to counsel, and privacy. *See, e.g., Traylor v. State*, 596 So. 2d, at 961-70 (self-incrimination under Article I, § 9, right to choose representation

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[22]Similarly, *Grant v. State*, 586 So. 2d 438 (Fla. 1st DCA 1991), does not support the argument that evidence of racial prejudice can be used directly to enhance a sentence, let alone as proof for conviction. *Grant* would appear to be consistent with the rationale of *Barclay* and *Dawson* to the following: The First District Court of Appeal affirmed an upward departure under the Florida Sentencing Guidelines based on evidence of racial prejudice that, in turn, supported recognized bases for departure. This conclusion must be reached by reading *Grant in pari materia* with *Harris v. State*, 580 So. 2d 804 (Fla. 1st DCA 1991), which is cited at the conclusion of the *Grant* opinion. *Grant v. State*, 586 So. 2d, at 440.

It should be noted that *Harris* apparently did not address the use of racial prejudice for upward departure. *Harris v. State*, 580 So. 2d, at 805. Further, *Grant* does not address the constitutional considerations raised in *Barclay* and *Dawson*.

under Article I, § 16 and equal protection under Article I, § 2); *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 959-60, 968 (Fla. 1991) (substantive and procedural due process); *In re T.W.*, 551 So. 2d 1186, 1190-93 (Fla. 1989) (right to privacy under Article I, § 23).

Similarly, in *Schmitt v. State*, 590 So. 2d 404, 411-13 (Fla. 1991), this Court held unconstitutional § 827.071, Florida Statutes (1987), by conducting an overbreadth analysis under Article I, § 4. In *Schmitt*, the defendant challenged his arrest for possession of child pornography on the grounds that § 827.071 was unconstitutionally overbroad. This Court applied the overbreadth doctrine and "hypothetical consequences" analysis to find the Statute unconstitutional. *Id.*, 590 So. 2d, at 411. This Court recognized that the overbreadth doctrine was a necessary approach to provide real meaning to the free speech rights of Article I, § 4 of the Florida Constitution. *Id.*, 590 So. 2d, at 412.

Florida's hate crime statute is flawed under an overbreadth analysis, and should be stricken under the Florida Constitution's free speech provision. Similarly, equal protection and due process afforded under our State Constitution should render the hate crime statute unconstitutional on both content neutral and vagueness grounds. The right to express one's political beliefs freely, without the chilling effect of an unjust governmental intrusion or loss of liberty, is one of the distinct freedoms guaranteed to all Floridians. *Id.* Use of the Florida Constitution to preserve this liberty is fully justified.

G. CONCLUSION

Under the United States Supreme Court standards announced in *R.A.V.*, content based regulations are presumptively invalid. The legislative history of the Florida hate crime statute reflects an attempt to regulate conduct "based on" the hostility of the actor's thought. The Constitution of the United States and the State of Florida protect thought, and the state may not prohibit or regulate thought, no matter how offensive the thought may be. The Florida hate crime statute is therefore fatally unconstitutional as the act seeks to punish thought simply because the majority find the thought disagreeable.

When the state's regulatory scheme is "based on" hostility or favoritism toward nonproscribable speech the First Amendment is violated. The heart of the First Amendment is one should be free to believe as he or she will. In a free society one's beliefs should be shaped by his or her mind and conscience rather than being coerced by the state. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35; 97 S.Ct. 1782, 1799; 52 L.Ed.2d 261 (1977).

H. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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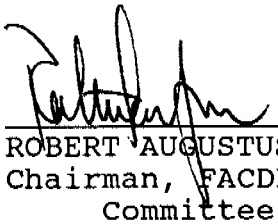

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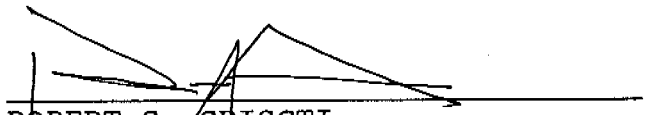

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