OA 9-1-92

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 79,924

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STATE OF FLORIDA,
Appellant,

versus

RICHARD STALDER,
Appellee.

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

BRIEF OF APPELLEE RICHARD STALDER

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's statement of the case and the facts as set forth in their brief with the following additional facts.

In paragraph one of Appellant's statement, the crime was enhanced from a first degree misdemeanor charge of battery for allegedly pushing the victim, in the heat of argument, to a third degree felony for allegedly making ethnic remarks relating to the victim's Jewish heritage. (R. 21).

In paragraph two of Appellant's statement, the Motion to Dismiss the Statute was that the Statute was unconstitutional on its face and as applied to the defendant under both the United States Constitution and the Constitution of the State of Florida, *inter alia*. (R. 15-62).

SUMMARY OF THE ARGUMENT

The trial court's finding that Fla. Stat. 775.085 (1989) is unconstitutional is correct. The Statute is unconstitutionally problematic on many levels.

Whether the Statute is referred to as a "hate crime" statute, an "anti-bias" statute, or a "criminal prejudice" statute, it is clear that what the Statute punishes is a person's constitutionally protected thoughts, ideas, viewpoints and beliefs. This is accomplished by taking an act, that already necessarily must be a crime under Florida Statutes in order to trigger the Statute, and making a new "thought-crime" carrying with it increased penalties, when during the commission of that act, the person "evidences prejudice" toward one of the favored statutory topics enumerated in the Statute.

Subsequent to the trial court's ruling the Statute unconstitutional, the United States Supreme Court decided R.A.V. v. City of St. Paul, Minnesota, 1992 WL 135564 (June 22, 1992), striking down an "anti-bias" ordinance and proving the trial court correct. The heart of the Court's ruling in R.A.V. was that a law is unconstitutional where it regulates solely on the basis of the subjects the speech addresses." at p.3.

The First Amendment does not permit imposing penalties on those who express view on disfavored subjects. " Displays containing abusive invective, no matter how vicious or severe are permissible unless they are addressed to one of the specified disfavored topics." pp. 12-13. The Court found this to be impermissibly unconstitutional. Florida's Statute also runs afoul of this constitutional prohibition by criminalizing the "prejudicial" thoughts, ideas, viewpoints and beliefs towards specified topics.

One day after the R.A.V. decision the Wisconsin Supreme Court struck down its "hate crime" statute in a lengthy and reasoned opinion in State of Wisconsin v. Mitchell, case No. 90-2474-CR, decided June 23, 1992. The Wisconsin statute is similar to Florida's Statute.

Also, Florida's Statute is impermissibly overbroad. The Statute, swallows within its ambit, speech and symbolic conduct that standing alone cannot be deemed criminal. The Statute prohibits and punishes a wide range of imaginable and debatable conduct, including intolerant expression whether spoken or symbolized, by upgrading and thus enhancing the penalties for any crime, when that expression is deemed to "evidence prejudice" toward the alleged victim in one of the Statute's specified topics.

Additionally, the Statute is impermissibly vague. To attempt to define what conduct is prohibited where neither the Legislature nor the Courts have provided the most minimal guidance for any word utilized in the Statute is at a minimum, a guessing game. This is just what the vagueness doctrine prohibits. A statute so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. The chilling effect of this Statute is beyond the pale, potentially criminalizing all manner of speech and symbolic conduct that anyone could view as being offensive or "prejudicial".

The Government in its brief in discussing just the word "prejudice" argues that the word is a matter of common understanding. In support of that argument the State supplies one of the definitions found in a dictionary and numerous examples from Florida's rules and statutes. (Appellant's brief, pages 23-25). To suggest that Florida's rules and statutes would be commonly understood or even accessible to the non-lawyer citizenry, is to visit the theater of the absurd. Certainly even among lawyers it is not easy to agree on the meaning of words utilized in the rules and statutes. More often than not , it is an area of extensive litigation.

Lastly, the Government in its brief concedes, as it must, that were the State to attempt to punish pure expression, it would be unconstitutional citing R.A.V., supra. The Government then states,

in a failed effort to avoid the implication of R.A.V., that the facts of this case are irrelevant, basing that premise on the contention that the Trial Court made a facial determination of unconstitutionality. This attempt to circumvent R.A.V. fails as the Trial Court also found that the Statute was unconstitutional as applied by adoption of the statutory defects raised by Appellee, thereby making the facts very relevant. (R. 70). The Government then states: "In fact, were those facts relevant the State would advise the Court that the Information might be read as a prosecution for words spoken and not action committed, and, if so construed, this case would be controlled by R.A.V." (Appellant's brief, p.8).

ARGUMENT

SECTION 775.085, FLA. STAT. (1989) IS UNCONSTITUTIONAL AS WRITTEN AND AS APPLIED IN VIOLATION OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF FLORIDA.

INTRODUCTION

This case involves a Constitutional challenge to Section 775.085, Fla. Stat. (1989) under the United States Constitution and the Florida State Constitution. The challenge was grounded in the unconstitutionality of the statute on its face as written and as applied.

Appellee's position is that the Statute is infirm on many levels. The gravamen of Appellee's argument is that the Statute is impermissibly overbroad, impermissibly vague and punishes an individual's thoughts, ideas and viewpoints in all forms whether evidenced by verbal (pure speech), symbolic (symbol or object such as a Nazi armband) or written expression (sign, tee shirt or button) that offends others on the basis of "race, color, ancestry, ethnicity, religion, or national origin of the victim" in violation of the Florida and United States Constitutions.

In the Trial Court, after briefing by both sides, Judge Fleet found the Statute to be unconstitutional. (R. 68-70).

Subsequent to the Trial Court's ruling in this case, the United States Supreme Court decided R.A.V. v. City of St. Paul, Minnesota, 1992 WL 135564 (June 22, 1992) proving Judge Fleet's analysis of Florida's Statute to be correct. The Court struck down the City of St. Paul, Minnesota's "anti-bias" ordinance on June 22, 1992. The next day, the Wisconsin Supreme Court in a comprehensive and reasoned analysis authored a twenty-three page opinion striking down that state's "hate crime" statute, in State of Wisconsin v. Mitchell, case No. 90-2474-CR, decided June 23, 1992. As the State of Florida recognized in its brief, the Wisconsin Statute is similar to Florida's Statute. (Appellant's brief, pp. 11-12).

The Government in its brief concedes, as it must, that were the State to attempt to punish pure expression, it would be unconstitutional citing R.A.V., supra. (Appellant's brief, p.8). Likewise, the First Amendment does not permit the state to punish expression even in conjunction with punishable conduct.

The Appellant's attempt to circumvent the constitutional mandates of R.A.V. fails. While it is true that the Trial Court made a determination that the Statute is unconstitutional on its face there was also a finding, by adoption of the Statutory defects raised by the defendant, that the Statute is also unconstitutional as applied, making the allegations very relevant. The Trial Court's Order in pertinent part reads, "This Court is of the opinion there are many more defects in F.S. 775.085(1) which rise to

constitutional proportions. Many of the defects are noted in Defendant's combined Motion to Dismiss and Memorandum of Law filed February 18, 1992. The Court hereby acknowledges each and every issue therein discussed and adopts by reference, as though fully set out herein, each and every conclusion therein contained. ..." (R 70).

THE CONSTITUTIONAL DOCTRINES AND TESTS TO BE APPLIED

Courts do not always distinguish between the doctrines of "overbreadth" and "vagueness" and generally there is an overlapping of the two constitutional concepts.

The "overbreadth" doctrine is an exception to the general constitutional principle that a person cannot argue that a statute is unconstitutional because it can be unconstitutionally applied to a third party not before the court. This exception is allowed to alleviate the "chilling effect" that an overbroad statute has on protected speech. The United States Supreme Court defined the "overbreadth" doctrine in NAACP v. Alabama, 357 U.S. 449 (1958), as follows:

> A governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

The vagueness doctrine prohibits a statute from prohibiting or requiring an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Zwickler v. Koota, 389 U.S. 241 (1967). While both an "overbroad" and "vague" statute deliver a "chilling" effect

to protected expression, a statute that is not "vague" but very specific can be "overbroad".

When any overbroad law attempts to regulate expression on the basis of its content, it is subject to strict constitutional scrutiny. The government must demonstrate a compelling state interest and show that the law was narrowly tailored to achieve that legitimate goal. Boos v. Barry, 485 U.S. 312, 321 (1988).

UNITED STATES CONSTITUTION:

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section One, Fourteenth Amendment To The United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA:

ARTICLE 1

DECLARATION OF RIGHTS

SECTION 4.

Freedom of speech and press.

-Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

FLORIDA STATUTE:

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:

(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.

(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. (History. s 1, ch 89- 133, s. 1. cl, 91- 83).

THE TWO CONSTITUTIONS

Freedom of speech for the citizens of Florida is protected and guaranteed by the First Amendment to the United States Constitution as well as Article 1, Section 4 of the Florida Constitution. The challenges under the two Constitutions will not be addressed separately. As the Government noted in its brief, the Second District Court of Appeal in Florida Canners Ass'n v. State, Dept. of Citrus, 371 So.2d 503 (Fla. 2d DCA 1979), affirmed, 406 So.2d 1079 (Fla. 1981), concluded that the two guarantees are the same (Appellant's brief, page 14, n.5), in the absence of any expression by the Florida Supreme Court. The Court recognized that Florida Courts tend to merge the two to the point that federal and state cases are cited interchangeably. The Second District found no case in Florida answering the question of whether the guarantee in the Florida Constitution is any broader than the guarantee in the United States Constitution. Appellee would urge this Court, if necessary, to find that the Florida Constitution offers more protection to the citizens of Florida, in the area of free speech than the United States Constitution.

THE STATUTE DIRECTLY VIOLATES THE FIRST AMENDMENT

Florida Statutes 775.085 punishes "evidencing prejudice," in direct violation of the First Amendment and Article 1, sec. 4 of the Florida Constitution. "Evidencing Prejudice" is by its own terms, the expression of a belief, thought, or viewpoint; its punishment, therefore, is prohibited. R.A.V. and Mitchell, supra.

The Florida legislature could hardly have chosen language that would more explicitly demonstrate that the goal and effect of the statute is the direct punishment not only of expression of government disapproved thought, but punishment of the thought itself, either of which alone would violate the First Amendment.

Although the State goes to great lengths in urging this Court to interpret the statute as punishing not thought or expression, but crimes that would not have been committed "but for" the victim's ethnicity, that simply is not the plain meaning of the statute. Moreover the statutory language makes no reference whatever to any conduct in addition to the base offense, or even any particular effects or harms upon the victim or others. Rather, it goes directly toward the punishment of both constitutionally protected thought and the constitutionally protected expression of that thought, based upon its content and even its viewpoint.

The Supreme Court's recent opinion in R.A.V, emphatically reaffirmed that such a law is unconstitutional:

The First Amendment does not permit [government] to

> impose special prohibitions on those speakers who express views on disfavored subjects. . . . [T]he only interest distinctively served by the content limitation is that of displaying the city councils special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

60 U.S.L.W- at 4671, 4672 (footnote omitted).

Furthermore, even if the State's proposed interpretation of sec. 775.085 were possible, it would be unconstitutional. The identical theory was rejected in State v. Mitchell, decided just after R. A. V. , wherein the Wisconsin Supreme Court struck down a law analogous to sec. 775. 085.[1] Said that court: "The hate crimes statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. . . . it is clear that the hate crimes statute creates nothing more than a thought crime." 1992 WL 141888 at 24, n. 21. The court stressed that the content-based distinction created by the law was impermissible, as had the R.A.V. Court: "The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance -- racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and

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[1] Mitchell is the first case decided by any state's supreme court ruling on the constitutionality vel non of an enhancement-type "hate crime" statute as sec. 775.085.

punish that ideological content." Id. at 5.

The Mitchell court further noted that, as all the conduct involved was already punishable, the enhancement was added solely for the defendants motives, his or her thoughts. Although the protection guaranteed the thoughts does not shield otherwise punishable conduct from punishment, neither does the State's power to reach the conduct remove the constitutional shield from the thoughts. Thus, Mr. Stalder has no quarrel with the State's assertion, at page 16 of its brief, that "[r]egardless of the right to hold a personal opinion, actions based upon such prejudice are an evil which the State has. a right, and a duty, to prohibit." (Footnote omitted). The flaw in the State's argument is that the State already does prohibit all illegal actions based upon prejudice, through its content-neutral criminal code. The State has no legitimate interest in going beyond the conduct to punish the thoughts as well.

Both the R.A.V. and Mitchell courts recognized the special harm created by bias-motivated crime, and the State's valid interest in preventing that harm. Nevertheless, both courts concluded that because the additional effects of such crimes are actually the impact of the defendant'S offensive beliefs, they cannot, consistently with the First Amendment, be punished:

> What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.

R.A.V., U.S.L.W. at 4671. See also Mitchell, 1992 WL 141888 at 8.

Likewise, in Texas v. Johnson, 491 U. S. 397 (1989), and United States v. Eichman, ____ U. S. ____, 110 S. Ct. 2404 (1990), the Supreme Court acknowledged that flag burning creates different and, more widespread harm than other punishable public burnings. Nevertheless as that special harm was the impact of the defendant's opinion, the content of his or her message, it could not constitutionally be the basis for additional punishment. If this were not the case then the State of Texas could have circumvented the Constitution by the Simple expedient of criminalizing all public burnings (certainly a legitimate exercise of its police powers), and then enhancing the penalty for anyone who violated that law In a way that "evidences prejudice" toward the government, or who would not have violated it "but for" antigovernment motives. Such a law would obviously fail strict scrutiny.

The words of the Wisconsin Supreme Court in Mitchell apply with equal force to the present case:

> The statute commendably is deigned to punish -- and

> thereby deter -- racism and other objectionable biases, but deplorably unconstitutionally infringes upon free speech. The state would justify its transgression against the constitutional right of freedom of speech and thought because its motive is a good one, but the magnitude of the proposed incursion against the constitutional rights of all of us should no more be diminished for that good motive then should a crime be enhanced by a separate penalty because of a criminal's bad motive.

1992 WL 141888 at *5.

It is respectfully suggested that this Court should similarly take its place among the courageous courts steadfastly adhering, even in the face of well-intentioned popular pressure to do otherwise, to the scrupulous protection of the freedoms of speech and thought.

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought we hate.

United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), overruled, Giroward v. United States, 328 U.S. 61 (1946).

THE STATUTE IS IMPERMISSIBLY OVERBROAD

The Government postulates that the overbreadth challenge must fail as the statute doesn't apply to a substantial amount of protected conduct (Appellant's brief, page 13) and that the Statute does not implicate the First Amendment because it does not seek to regulate words, expressions or thought. It then argues that the Statute creates a new substantive crime carrying a more severe penalty than crimes that occur for reasons other than the defendant's state of mind and once it is shown that the act was committed (Appellant's brief, page 14) because the victim was a member of an enumerated class, the length of punishment should be more severe. (Appellant's brief, page 15).

The Government in support of its position that motive is a proper factor in increasing punishment cites Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed2d 1134 (1983), Dawson v. Delaware, ___ U.S. ___, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) and Grant v. State, 586 So.2d 438 (Fla. 1st DCA 1991). (Appellant's brief, page 14).

The Government misses the point with these cases. Courts have traditionally had wide discretion in the factors that are considered in imposing a sentence. The distinction in these cases is that motive is one factor to be considered in sentencing within an established range of penalties for the crime committed.

This range of penalties is the same for all defendants convicted of that particular crime and a defendant is not punished beyond what anyone similarly situated would face, with or without evil motives against a particular group. Motive isn't utilized as an element of a separate and distinct crime.

In State of Wisconsin v. Mitchell, case No. 90-2474-CR, decided June 23, 1992 by the Wisconsin Supreme Court and submitted in this case by the Government as an appendix brief the Court addressed this very question in holding a statute similar to Florida's unconstitutional. The Wisconsin Supreme Court in its opinion stated: "Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought." In a footnote to that finding the Court finds that, "Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." (Appendix brief of the Wisconsin Supreme Court Opinion, pages 16, 17 and n.17)

The Government next seeks support in the State's favored treatment of the elderly and juveniles with increased penalties for crimes against them. (Appellant's brief, page 15). This is a specious argument. This case is not about constitutional

infirmities in those areas. We do not argue as the Government suggests, that penalties for crimes against the elderly or juveniles cannot carry increased penalties. Indeed, those penalties are there regardless of the motives of the actor.

Contained within the Government's argument that the Statute is not overbroad is the discussion of the social impact of bias related offenses and that the State has a compelling interest in protecting its citizens. We do not argue that the motives of the legislature in enacting the Statute were not good or that crime is not evil. All criminal offenses can be considered evil, some more than others.

It is against this analysis of the State's arguments that the Statute is not impermissibly overbroad that we present our own reasoning as to why the Statue is unconstitutionally overbroad and vague.

> ... Whether he wrote DOWN WITH BIG BROTHER, or whether he refrained from writing it, made no difference. Whether he went on with the diary, or whether he did not go on with it, made no difference. The Thought Police would get him just the same. He had committed--would have committed, even if he had never set pen to paper--the essential crime that contained all others in itself. Thoughtcrime they called it. Thoughtcrime was not a thing that could be concealed forever. You might dodge successfully for a while, even for years, but sooner or later they were bound to get you.
>
> Orwell, 1984 p.19 (Penguin Books 1981).

> [T]he freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Florida Statute 775.085[2] punishes an individual's thoughts, ideas and viewpoints in all forms whether evidenced by verbal (pure speech), symbolic (symbol or object such as a Nazi armband) or written expression (sign, tee shirt or button) that offends others on the basis of "race, color, ancestry, ethnicity, religion, or national origin of the victim:"

In an effort to legislate social tolerance, the State of Florida passed a broad and sweeping statute prohibiting and punishing a wide range of imaginable and debatable conduct, including intolerant expression whether spoken or symbolized, by upgrading and thus enhancing the penalties for any crime, when that expression is deemed to "evidence prejudice" toward the alleged victim.

It is interesting that the statute swallows within its ambit, speech and symbolic conduct that standing alone cannot be deemed a crime. The defendant in this case was originally charged with a

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[2] Subsequent to the defendant's arrest, the statute was amended to include "sexual orientation" of the victim in section one and a new section three as follows: (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.

History. s 1, ch 89- 133, s. 1. cl, 91- 83

misdemeanor which was subsequently upgraded to a felony for allegedly[3] pushing the alleged victim, in the heat of argument, while making ethnic remarks relating to the victim's Jewish heritage.

This content based discrimination issue was raised in the Trial Court (R 22) prior to the United States Supreme Court ruling this term in R.A.V. v. City of St. Paul, Minnesota, 1992 WL 135564 (June 22, 1992). The principal thrust of R.A.V. is that a law does not pass constitutional muster where it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." R.A.V., p.3.

The Court noted that, "[T]he First Amendment generally prevents government from proscribing speech, see, e.g., Cantwell v. Connecticut, 310 U.S. 296, 309-311 (1940), or even expressive conduct, see, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989), because of the disapproval of the ideas expressed. Content-based regulations are presumptively invalid. ..." [citations omitted]. R.A.V., p.4.

The Court in analyzing the law before it found that although the wording of the law, "arouses anger, alarm or resentment in

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[3] The defendant has always denied the alleged conduct and making the ethnic remarks that formed the basis for transforming the simple misdemeanor battery charge of an alleged push to a third degree felony.

others," was limited by the State Supreme Court to a "fighting words" construction, that the remaining terms made it clear that the law applied "only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas-to express hostility, for example, on the basis of political affiliation, union membership or homosexuality-are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. ..." [citations omitted]. R.A.V., pp. 12-13.

The Court also noted that the law goes even beyond content discrimination to encompass actual viewpoint discrimination. "Displays containing some words--odious racial epithets, for example--would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender-would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents." R.A.V., p.13.

Florida's Statute is similarly flawed. As stated in R.A.V.: "One could hold up a sign saying, for example, that all 'anti-

Catholic bigots'are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." R.A.V., at 13. Applying this analysis to the Florida's Statute, the display of one of those signs could be claimed to fall within the reach of the Statute as "evidencing prejudice" by offending one of the favored statutory groups, "religion". If during a heated discussion, the proponents of each view were to touch each other, then that touching, a simple battery can be prosecuted as a felony hate crime under our Statute by one side but not the other.

Florida's Statute, permits "displays containing abusive invective, no matter how vicious or severe", without enhanced penalties, as long at that display doesn't "evidence prejudice" toward one of the six topics chosen by the Statute. The statute does not enhance penalties for many other arguably "disfavored" topics. One can "evidence prejudice" freely, without falling within the scope of the "hate crime" Statute, toward the handicapped, the disabled, the deformed, the sick or diseased (person with aids), the mentally ill, the unfortunate or poor (homeless), the overweight, the elderly, a person's creed, gender or sexual preference (see footnote two), and any of the class of less fortunates that, due to political preference, remain "disfavored" and unenumerated in the statute. This includes many

of our citizens, that because of one's life experiences and environment, may be perceived to be different from the majority and because of this perceived difference, unfortunately, have been throughout history, the subject of ridicule, scorn and hate, from the streets and schoolyards to the most educated among us. This is exactly the statutory treatment that was condemned by the Supreme Court in R.A.V.. at p. 13.

Any evil activity Florida seeks to prevent, outside of expression in the form of thought, ideas and viewpoints, must necessarily already be a violation of law, carrying its own penalties, in order to trigger the statute. The State has no legitimate objective in punishing politically unpopular or upsetting expressive conduct. To the extent such expression merely causes discomfort or is unsettling to its audience, it is fully protected by the First Amendment. Where the expression involves illegal conduct, general penal laws directly address and punish such activity.

As a broadly drafted law which sweeps within it for punishment, speech and expression, Florida Statute 775.085 is subject to a constitutional challenge as written even though a more narrowly drawn statute would be valid as applied to the conduct of the person before the Court. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). Further, the overbreadth of this statute is "not only . . . real, but substantial." Broadrick v. Oklahoma, 413 U.S. 601,

615 (1973). The likelihood of impermissible application of the statute is great and, as the chilling effect on conduct is also significant, defendant challenges section 775.085 on its face. In doing so, he also asserts his right to be judged in accordance with a constitutionally sound law. Monaghan, Overbreadth, 1981 S.Ct. Rev. 1, 37.

When any overbroad law attempts to regulate expression on the basis of its content, it is subject to strict constitutional scrutiny. The government must demonstrate a compelling state interest and show that the law was narrowly tailored to achieve that legitimate goal. Boos v. Barry, 485 U.S. 312, 321 (1988). The challenged statute reaches substantial areas of protected speech and expression. In doing so, it does not serve any compelling state interest and is not narrowly drawn to reach only those areas of expressive conduct that may be legitimately regulated by the government. The primary effect of Florida's Statute is to restrict protected expression in an overbroad manner.

In Boos v. Barry, 485 U.S. 312 (1988), the U.S. Supreme Court subjected, to the most exacting scrutiny, a content-based restriction on political speech in a public forum. Striking down the first part of that law containing a "display" clause prohibiting signs with political messages, the Court noted that the clause "operates at the core of the First Amendment by prohibiting (picketers) from engag-

ing in classically political speech". Id. at 318. The stated interest in that case, the need to protect "the dignity of foreign diplomatic personnel" by shielding them from the display of signs with insulting messages, id. at 322, was rejected as an impermissible attempt to protect an audience. The Court stated:

> As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment . . . [A] 'dignity' standard, like the 'outrageousness' standard that we rejected in Hustler, is so inherently subjective that it would be inconsistent with our long standing refusal to (punish speech) because the speech in question may have an adverse emotional impact on the audience.
>
> Id. at 322; Cf. Hustler v. Falwell, 485 U.S. 46, 55-56 (1988).

The Court further rejected the contention that the real concern of the display clause was not the suppression of speech but rather the "secondary effect" of shielding diplomats from speech that offended their "dignity." Boos v. Barry, 485 U.S. at 320-321. In citing Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), the Court made it clear that "secondary effects":

> refer[s] to secondary features that happen to be associated with a particular type of speech that have nothing to do with its content, whereas, here, the asserted justification for the display clause focuses only on the content of picket signs and their primary and direct emotive impact on the audience.
>
> Id. at 320.

The Supreme Court in R.A.V., specifically rejected the application of the "secondary effects" analysis to the harms engendered by bias crimes. 60 US LW at 4672.

"Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

The Statute clearly addresses expression that attempts to "convey a particularized message," and such expression likely "would be understood by those who viewed it". Spence v. Washington, 418 U.S. 405, 410-11 (1974). Consequently, the government: "[C]annot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is expressive, as it is here." Texas v. Johnson, 491 U.S. 397, 416 (1989).

More significantly, this statute addresses the communicative impact of that expressive conduct. By impliedly including symbols that could arguably evidence prejudice (Nazi swastika, Klan uniform) the statute not only regulates the content of the message but is a "censorial statute" directed at particular groups and viewpoints. Broadrick v. Oklahoma, 413 U.S. 601, 616 (1973); Cf. Keyishian v. Board of Regents, 385 U.S. 589 (1967). The statute compounds its impermissible reach not only by addressing the content of the expression but by censoring expression associated with unpopular minorities. "[T]he First Amendment forbids the

government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). By focusing on the content and viewpoint of the offensive expression, the statute attempts impermissibly to protect and shield its audience. "Any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." Id- at 797.

The display of symbols has long been recognized as expressive conduct and the U.S. Supreme Court has held that laws which proscribe the display of symbols, precisely because of the message they convey, are unconstitutional. See United States v. Eichman, 496 U.S. ---, 110 S.Ct. 2404, 2409 (1990) (burning flag); Spence v. Washington, supra (defacing flag); Schacht v. United States, 398 U.S. 58 (1970) (military uniforms worn in presentation critical of American involvement in Viet Nam); Tinker v. Des Moines Indep.School Dist., 393 U.S. 503 (1969) (anti-war black arm bands); Stromberg v. California, 283 U.S. 359 (1931) (displaying a red flag).

THE STATUTE IS IMPERMISSIBLY VAGUE

Florida Statutes sec. 775.085 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of Article 1, Section 9 of the Florida Constitution, in that it is impermissibly vague. When laws are vague, they are held invalid for two reasons. First, they give insufficient notice of the conduct prohibited to allow people to know exactly what they are not permitted to do. Second, they invite arbitrary and discriminatory enforcement by giving too much discretion to enforcing officials. Section 775.085 contains ambiguities that require this Court to hold the statute void for vagueness.

The term "prejudice" is inherently ambiguous. In addition to the facial vagueness, in application the word "prejudice" requires the resolution of impossible questions. How venomous must the prejudice be? How irrational? How unshakable? Was this defendant "prejudiced, " or was it really resentment, fear, or jealousy? Furthermore, what constitutes "prejudice" is open to an unlimited number of interpretations, and the statute will yield wildly inconsistent and discriminatory applications.

The term "evidences," too, is fatally vague. It does not specify whether it punishes only conduct specifically

intended by the offender to evidence prejudice, behavior perceived by the victim to do so, or behavior that the finder of fact, employing some unknown standard, would find to evidence prejudice, irrespective of what the offender intended or the victim perceived.

The statute also gives no guidance as to how prevalent the prejudice message must be: need it be the overall import of the conduct, or will a single message among many such as a racist epithet included in a stream of general abuse suffice?

Finally, the statute states that this prejudice must be "based on" one of a list of characteristics. This gives no guidance as to its application in mixed motive situations, which are by far the most prevalent. The State would have this Court read the statute to apply only to "but-for" situations, but the statute offers no basis for such a reading. Thus, the State invites not proper judicial construction, but wholesale rewriting of the statute.

The Government next argues that the Statute is shielded from a vagueness attack under the due process clause of the Fourteenth Amendment to the United States Constitution and the corresponding guarantees under the Constitution of the State of Florida. The State reasons that although the Statute does not specifically

require scienter, that scienter should be read into the Statute. The Government sees this as a reasonable interpretation relying on the Legislature's 1991 amendment to the Statute which explicit requires knowledge as an element of the offense. (Appellant's brief, page 20).

To the contrary, a more plausible argument is that the Legislature recognized this flaw within the problematic Statute and in an effort to correct it, enacted the amendment.

The Government next argues that the term "evidencing prejudice" is capable of being understood by persons of ordinary intelligence and is not vague. The Government states that the use of the verb "evidences", makes it clear that one is not held accountable for merely holding an opinion. (Appellant's brief, page 22).

The Government then turns to the Statutory term "prejudice" and argues that the meaning of that word is a matter of common understanding. In support of this argument the State supplies one of the definitions found in a dictionary and numerous examples from Florida's rules and statutes. (Appellant's brief, pages 23-25).

Neither the "fighting words" exception under Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) nor the "imminent lawless action" under Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) clarify the permissible reach of section 775.085. By its very nature, verbal, symbolic and written expression may stir some to anger by reason of its content. Yet, narrowing the ordinance to reach "fighting words" or "imminent lawless action" is ineffective due to the breadth of the language used in drafting the statute. Even beyond that, the Court in R.A.V., supra, stated that as to the "fighting words" exception, "[T]he government may not regulate use based on hostility--or favoritism--towards the underlying message expressed." at p.8.

"[A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application. ...[T]his course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty." Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964). Selective or arbitrary enforcement of this law would be based on the political persuasion of those in power. It is likely that such a substantially overbroad statute would be violated frequently since section 775.085 proscribes so much expressive conduct. It is this potential for violation, not the likelihood of prosecution, which must be addressed.

"It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and overbroad statute lends itself to selective enforcement against unpopular causes." NAACP v. Button, 371 U.S. 415, 435 (1963).

The failure or success of such prosecutions is also irrelevant. "So long as the statute remains available to the state the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of the ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

Expression, whether verbal, written, or symbolic, will be chilled, as various viewpoints remain subject to prosecution if they differ from views of the majority.

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in Court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth". Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988)(quoting Garrison v. Louisiana, 379 U.S. 64,73(1964)).

The arrests and prosecutions that flow from such an overbroad and vague statute, as recognized in Aptheker, Button, and Dombrowski, supra, is amply illustrated by the arrest and prosecution of a fifty seven year old black female, under Florida's

"hate crime" statute, in Pompano Beach, Florida, for allegedly utilizing a racial slur by calling a white police officer a "cracker". The underlying triggering criminal conduct was disorderly conduct for yelling at the police officers and elevated to a hate crime for her "racial slurs" directed to the officers. She was accused of "screaming insults" such as "You white cracker. Get off my property", "You white haired thang [sic]", "Get out of here", "You got no right, You're making us sick, Let him alone", "I'll get your badges", including yelling to her husband, "Don't dance for them, don't give them nothing, it's my car." State v. Holloway , case no. 91-027603MM10A, July 26, 1991, Broward County, Florida.

The broad range of objectionable expressions combined with the increasing number of protected groups could lead to a general climate of repressed expression. An unanticipated result may be enforcement against the very groups targeted for protection. The direction of the winds of political acceptability may change and such laws could be used to reduce their freedom of expression.

Forcing intolerant opinions and ideas underground may result in the glorification of racist, sexist, or anti-semitic activity.

"The efforts of the administration at Michigan and other schools to regulate and enforce a social etiquette have created an enormous artificiality of discourse among peers, and thus have become an obstacle to that true openness that seems to be the only

sure footing for equality. For when sentiments are outlawed, they tend to go beneath the surface . . [t]he consequence of such policies, therefore, is to promote rebellion in the name of harmony, to exacerbate bigotry while claiming to fight it ... ." D'Souza, The Illiberal Education 156 (The Free Press, 1991).

"Thus, the record of the actual implementation of the fighting words doctrine demonstrates that ... such a speech restriction will be applied discriminatorily and disproportionately against the very minority group members whom it is intended to protect." Strossen, Regulating Racist Speech On Campus: A Modest Proposal, 1990 Duke L.J. 484, 512.

Certainly these concerns are valid. Holloway, supra, is illustrative of the white majority applying the "hate crimes" statute to the black minority. The ultimate irony may be that the proponents for regulating expression in the manner of Florida statute section 775.085 may find that they too will suffer from its sweeping parameters.

Those expressions which rise to the level of "fighting words" or "imminent lawless action" as narrowly interpreted by the decisions of the Supreme Court constitute only a small portion of expression addressed by this statute. Any reduction in the chilling effect of the statute is equally negligible. The First Amendment will not permit such a violation of traditionally protected areas by a regulation of such questionable utility.

To construe this statute narrowly, as applying to only those areas unprotected by the First Amendment, results in an

additional problem of constitutional dimension, for persons "of common intelligence must necessarily guess at its meaning." Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). The ordinance fails to provide any certainty in guiding citizens in their conduct or police in their enforcement of the law. "[T]he more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement.' " Kolender v. Lawson, 461 U.S. 352, 358 (1983); Cf. Smith v. Goguen, 415 U.S. 566, 574 (1974). See Fallon, Making Sense of Overbreadth, 100 Yale L.J. 853, 904 (1991).

The vagueness of the narrowly construed statute is similar to the vagueness of a law which merely states that "non-First Amendment expression is prohibited." No guidance is provided regarding the boundary between permissible and impermissible expression. No narrowing construction is possible because there is no precise category of protected expression which can be clearly delineated from the permissible reach of the statute.

CHILL OF PROTECTED EXPRESSION

The First Amendment protects unpleasant and unpopular expression, including expression which the majority of citizens may consider intolerant. If such expression goes unprotected, the "legislatures, courts, or dominant political or community groups," would become the arbiters of what ideas are acceptable and may be expressed. Terminiello v. Chicago, 337 U.S. 1, 4 (1949). The United States Supreme Court has held that the First Amendment protects expression which reflects unpopular minority opinion. The State undeniably transgresses constitutional boundaries when it seeks to punish and thereby regulate expression premised solely on the majority's view of the political acceptability of the expression. With no core of constitutionally proscribable conduct, this ordinance does not fall within any exception to the freedom of speech clause of the First Amendment.

The State is attempting to punish pure expression. As the Court in Wisconsin v. Mitchell, supra, recognized:

> The criminal conduct involved in any crime giving rise to the hate crimes penalty enhancer is already punishable. Yet there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as "nigger," "honkey," "jew," "mick," "kraut," "spic," or "queer," the crime

> becomes a felony, and A will be punished not for his conduct alone--a misdemeanor--but for using the spoken word. Obviously, the state would respond that the speech is merely an indication that A intentionally selected B because of his particular race or ethnicity, but the fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state. at pp. 18-19.

This example, condemned by the Mitchell Court as being constitutionally impermissible, is exactly the set of allegations before this Court. The defendant below was arrested and charged with the misdemeanor crime of battery for allegedly pushing the victim, in the heat of argument. The State subsequently rearrested the defendant and recharged him with a felony "hate crime" for allegedly making ethnic remarks relating to the victim's Jewish heritage at the time of the misdemeanor battery. (R. 21).

The Mitchell Court went on to say:

> And of course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because of the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech.

The Mitchell Court quotes Professor Gellman as follows:

> In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of a

> lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever on fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations.
>
> . . . .
>
> It is no answer that one need to only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs before any offense is committed, and even if no offense is ever committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Susan Gellman, 39 UCLA L. Rev. at 360-61 (emphasis in original)

It is doubtful that the laudable goal of eliminating bias in our society can be obtained by legislation. Free and open discussions accomplish more than government attempts to legislate opinions by punishing those with whom we disagree as criminals. As one commentator noted, "The real surprise is that this Act, far from meeting the high expectations of its proponents, may actually harm those social groups it was designed to protect." Fleischauer, Teeth For A Paper Tiger: A Proposal To Add Enforceability To Florida's Hate Crimes Act, 17 Florida State University Law Review 697, 698 (1990).

As Professor Gellman states:

> Those who oppose ethnic intimidation laws, or at least who question them most vigorously, do not disagree that bigotry (and certainly bigotry-related crime) is a serious problem. On the contrary, they are also from the ranks of the most civil rights-conscious thinkers and activists. These critics focus on threats to constitutional liberties under the First and Fourteenth

> Amendments. Their concerns are that these laws tread dangerously close to criminalization of speech and thought, that they impermissibly distinguish among people based on their beliefs, and that they are frequently too vaguely drafted to provide adequate notice of prohibited conduct. In addition, these critics question the wisdom of enacting such laws; even if they can be drafted in a way that does not offend the Constitution, they may ultimately undercut their own goals more than they serve them.
>
> In addition to an analysis of the constitutionality of criminal ethnic intimidation statutes, this Article questions whether 'super-criminalization' of bias-motivated offenses is a wise and effective approach to the elimination of either the offenses or the bias motives. Criminal sanction is the last resort of government to control actions and beliefs that are not effectively shaped by education and social evolution; resort to special criminalization of bigotry-motivated behavior in fact indicates that as a society we have become so frustrated and cynical that we are ready to give up on the true elimination of bigoted belief, a position we may not be willing to adopt.
>
> Gellman, Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional And Policy Dilemmas Of Ethnic Intimidation Laws, 39 U.C.L.A. 333, 334 (1991).

As noted by Fleischauer, supra, Representative Jim King at the signing of the surprisingly controversial "hate crimes" bill he co-authored stated, "[I] thought it would be 'motherhood and apple pie': a simple issue, ...". Ironically, in retrospect, that would now seem to depend on whose mother and whose pie.

And lastly, as the Court in R.A.V., supra, stated when commenting on the bigotry of that case: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."

CONCLUSION

The debate continues, as it has for two hundred years, between those who accept the First Amendment as it is written and those who interpret it as not applicable to those thoughts and ideas that do not suit them. There will always be groups who think they know what's best for everyone and attempt to impose those views on others. This is done, always of course, in the name of the greater good. Protecting us from ourselves by deciding, the music that we shouldn't listen to, books we shouldn't read and art that we shouldn't view, always at the expense of our freedoms.

If history teaches us anything, it is that eliminating people's rights and freedoms, notwithstanding the popular view at the time, is generally the evil to be guarded against. Our countries darkest moments, the burning of our citizens as witches, the keeping of persons of a different skin color as slaves, the imprisonment of Japanese-Americans during World War II, and the McCarthy inquisitions always arose from the popular or emotionally right thing to do at the time.

Our right to think and believe what we would is what distinguishes us throughout the world as a free society. At least for today! There are of course, countries in this world where people are placed in prison for advocating their thoughts and ideas. Lest this be the first step towards that frightening prospect, the Appellee would respectfully urge this Honorable Court to affirm the Trial Court's ruling declaring Florida's thinly disguised "thought crime" statute unconstitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 4th day of August, 1992 to Michael J. Neimand, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128; Benedict P. Kuehne, Esq., One Biscayne Tower, #2600, 2 South Biscayne Blvd., Miami, Florida 33131; Jeanne Baker, Esq., 3130 S.E. Financial Center, 200 S. Biscayne Blvd., Miami, Florida 33131 and Robert Griscti, Esq., 204 W. University Ave., Gainesville, Florida 32602.

Respectfully submitted,

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