OA 9-1-92

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,924

THE STATE OF FLORIDA,

Appellant,

-vs-

RICHARD STALDER,

Appellee.

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

BRIEF OF APPELLANT

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INTRODUCTION

The Appellant, the State of Florida, was the prosecution in the trial court. The Appellee, Richard Stalder, was the defendant below. The parties will be referred to as they stood below. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by information with simple battery. The crime was enhanced from a first degree misdemeanor to a third degree felony, pursuant to Section 775.085(1), Fla. Stat. (1989). (R. 11-12). This Statute has been commonly referred to as a Hate Crimes Statute, but the word "Hate" is not used in it, and the Statute facially is an enhancement statute. It will be referred to in this brief as "the Statute."

The Defendant pled not guilty and requested trial by jury. Prior to trial, the Defendant filed a Motion to Dismiss the Information on the ground that Section 775.085(1), the enhancement statute, was unconstitutional. (R. 15-62). In his motion and memorandum of law, the Defendant raised the following grounds concerning the Statute's alleged infirmities: (a) the Statute punishes pure speech, symbolic and/or written expression (21-23, 27-31): (b) the Statute is overbroad (10-17, 32-44); and (c) the Statute is vague. (R. 44-62). Specifically, Defendant's argument was premised on the contention that the Statute seeks to punish pure speech and therefore it suffered from vagueness and overbreadth. (R. 63).

The State responded and argued that the statute only sought to regulate speech as a by-product of regulating conduct, and that the Statute is not overbroad or vague since it regulates specific conduct and not speech. (R. 64-65).

The trial court granted Defendant's motion to dismiss. The stated grounds therefore were that the Statute did not specifically state that the State had to prove the crime evidenced prejudice beyond a reasonable doubt and therefore the Statute is vague. The trial court also adopted all arguments raised by the Defendant in his Motion to Dismiss. (R. 68-70).

The State appealed to the Fourth District Court of Appeal, which upon the State's motion, certified the case to this Court as one which requires this Court's immediate resolution. (R. 76). This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The trial court held the Statute to be facially unconstitutional. This was error since this Statute is neither overbroad nor vague.

The Statute does not attempt to regulate First Amendment conduct and therefore is not overbroad. In fact the First Amendment is not implicated, since the Statute created new substantive crimes. The substance of these new crimes is the legislative conclusion that but for an identified immutable characteristic of the victim, the entire criminal episode would not have occurred. As such the Statute punishes criminal action and does not run afoul of the First Amendment.

The Statute is also not vague since it affords a person of ordinary intelligence a reasonable opportunity to know what is prohibited and has sufficient standards for its enforcement. What is prohibited is any felony or misdemeanor that is committed because the victim has one of several identified immutable characteristics, i.e. race, color, national origin, etc. This requires scienter on the Defendant's part. Since scienter is inferred as part of the Statute, any First Amendment vagueness problems which might otherwise exist are eliminated.

As to the other possible vagueness claims, the Statute survives the challenge. Although the underlying crimes are not listed in the Statute itself, effective notice is provided by the fact that the crimes are published in Florida Statutes. A review of the terms used in this Statute establishes that they are easily definable and have been so defined, albeit in other circumstances, and therefore are fully capable of being understood by ordinary persons of common intelligence. As such the statute is not unconstitutionally vague due to a lack of intent, insufficient guidance for law enforcement, or undefined terms.

POINT ON APPEAL

WHETHER SECTION 775.085, FLA. STAT. (1989) IS UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

ARGUMENT

SECTION 775.085, FLA. STAT. (1989) IS NOT UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

INTRODUCTION

This case involves a facial challenge[1] to Section 775.085(1), Fla. Stat. (1989), which provides:

> (1) Evidencing prejudice while committing offenses; 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 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 felony 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]

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[1] A "facial" challenge, in this context, means a claim that the law is "invalid in toto and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

[2] The statute was amended in 1991 to include sexual orientation as a victim classification and to add an additional subsection (3):

The trial court found the Statute to be unconstitutional. The grounds for this determination were not made clear by the trial court, but, by its adoption by reference of the Motion to Dismiss and Memorandum of Law filed by the Defendant, apparently was based on the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Florida Constitution.

The Statute regulates only nonprotected conduct. It does not criminalize the use of words, whether alone or in conjunction with conduct, unless words evidenced the prejudicial intent to commit the crime. If the State did attempt to punish pure expression, it would be unconstitutional. As the United States Supreme Court held this term in R.A.V. v. City of St. Paul, Minnesota, 1992 WL 135564 (June 22, 1992).

The trial court having made a facial determination of unconstitutionality, the facts of this case are irrelevant. 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. However, even under those

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> (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.

circumstances the State would urge that this Court consider and validate the facial constitutionality of the Statute, leaving determinations as to its constitutionality as applied for individual cases. The facial constitutionality of the Statute is presently before three District Courts: the Third District in Richards v. State, Case No. 90-2912, case argued on October 2, 1991; the Fifth District in Dobbins v. State, Case No. 91-1953, oral argument set for September 15, 1992; and the Fourth District in State v. Leatherman, Case No. 92-1932, the State's initial brief due on July 24, 1992. The Leatherman case was decided by the same trial judge as the one below and adopted, in total, the ruling herein.

Several courts have passed on the constitutionality of enhancement statutes, but the differences in the language of these statutes make conclusions therefrom difficult to draw. The Oregon statute has been upheld against free speech and vagueness attacks. State v. Beebe, 67 Or. App. 738, 680 P.2d 11, appeal denied, 297 Or. 459, 683 P.2d 1372 (1984); State v. Hendrix, 107 Or. App. 734, 813 P.2d 1115 (1991). So has the New York statute. People v. Grupe, 141 Misc.2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988). The Ohio statute, which is very similar to the ADL model,[3] has been held unconstitutional in State v. Van Gundy, No.

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[3] Many of the enhancement statutes in effect in various states are modelled on a form of statute created by the Anti-Defamation League of B'Nai B'rith ("ADL"). The ADL model statute reads:

90 AP-473, 1991 Ohio App. LEXIS 2066 (1991) and State v. May, No. 12239, 1991 Ohio App. LEXIS 2066 (1991) principally on grounds of vagueness of the terms "by reason of" and "race of another" (that is, whether the term applies to the victim or another), neither of which terms occurs in Florida's Statute; however, the Ohio statute was held to be facially constitutional by another Ohio appellate court in State v. Wyant, No. 90-CA-2, 1990 Ohio App. LEXIS 5589 (1990). It is our understanding the issue is presently before the Ohio Supreme Court. The Michigan statute, which is substantially different than both the ADL model statute and Florida's Statute, has been held unconstitutional on both vagueness and free speech grounds in People v. Justice, No. 1-90-1793 (Mich. Dist. Ct. 1990). Again, we understand that an appeal from the trial court's dismissal is pending. Finally, the day

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Intimidation

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ____ of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutory proscribed criminal conduct].

B. Intimidation is a ____ misdemeanor/felony [the degree of criminal liability should be made continent upon the severity of the injury incurred or the property lost or damaged].

One commentator recently stated that "twenty two states have adopted laws resembling the ADL model intimidation statute." Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. 333, 340 (1991). Florida's Statute is quite different in form from the ADL model statute.

after the decision by the United States Supreme Court in R.A.V., the Wisconsin Supreme Court in a 5-2 decision, held the Wisconsin statute unconstitutional.[4] Since the Wisconsin statute is

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[4] This statute is similar to that of Florida. It provides:

At the time of Mitchell's crimes, sec. 939.645, 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

similar to Florida's and the ruling on its constitutionality is that of a state Supreme Court, the Wisconsin Supreme Court's opinion in State of Wisconsin v. Mitchell is included in the Appendix.

STANDARD OF REVIEW

State statutes are presumed to be constitutional, and every reasonable presumption must be drawn in favor of the validity of the statute. Tal Mason v. State, 515 So.2d 738 (Fla. 1987); State v. State Board of Education of Florida, 467 So.2d 294 (Fla. 1985); Gardner v. Johnson, 451 So.2d 477 (Fla. 1984); VanBibber v. Hartford Acc. & Idem. Ins. Co., 439 So.2d 880 (Fla. 1983). Indeed, any reasonable doubt is deemed to support the constitutionality of the statute. Bunnell v. State, 453 So.2d 808 (Fla. 1984). It is with these well established standards in mind that this Court must assess whether the trial judge in the instant case correctly concluded that the Hate Crimes Statute is unconstitutional.

Appellate courts must give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637

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proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

(1983). The statute's opponent must establish that it is invalid beyond, and to the exclusion of, every reasonable doubt. See State v. Kinner, 398 So.2d 1360 (Fla. 1981). See also New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). (Burden of showing statute to be unconstitutional is on the one challenging it, not the one defending it).

OVERBREADTH

Overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not present before the Court. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). In a facial challenge to the overbreadthness of a law, the Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Statute, as hereinafter analyzed, does not apply to a substantial amount of protected conduct, and therefore the overbreadth challenge fails.

The Statute does not implicate the First Amendment[5] because it does not seek to regulate words, expressions or thought. The Statute seeks to punish indisputable illegal activity that would not have been perpetrated but for the defendant's reasonable belief that the victim belonged to a class encompassed by the Statute. As such, the Statute creates a new substantive crime, which carries a more severe penalty than crimes which occur for reasons other than the defendant's state of mind towards an perceived immutable characteristic of his victim.[6] The legislature appropriately determined that once it is shown beyond a reasonable doubt that the Defendant committed a particular act

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[5] The Defendant has also challenged the Statute under the State's Constitutional freedom of speech clause, see Art. 1, Sec. 4 Florida Constitution. However, it will not be addressed separately herein since the scope of the State and Federal Constitutions' guarantees of freedom of speech are the same. Florida Canners Ass'n v. State, Dept. of Citrus, 371 So.2d 503 (Fla. 2d DCA 1979), affirmed, 406 So.2d 1079 (Fla. 1981).

[6] Once a conviction has been obtained evidence that the defendant committed the crime because it was racially motivated is a proper factor for increasing the type or length of punishment. In capital sentencing proceedings, evidence of racial intolerance is admissible where such is relevant to an aggravating circumstance. In Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Court held that a sentencing judge in a capital case might properly take into consideration Barclay's racial hatred and his desire to start a race war to support an aggravating factor. This term in Dawson v. Delaware, ___ U.S. ___, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) this principle was reconfirmed. In Dawson the Court found the evidence that defendant belonged to a hate group was irrelevant to the reason for the murder. However, it did hold that had some evidentiary connection been made between his membership in the hate group and the killing, then it would have been admissible to support an aggravating factor and reaffirmed the rule of Barclay. Id. at 117 L.Ed.2d at 317-318. Likewise, in noncapital cases, evidence that the defendant's crime was racially motivated is a sufficient reason for an upward departure in the sentencing guidelines for a conviction of shooting into an occupied dwelling. Grant v. State, 586 So.2d 438 (Fla. 1st DCA 1991).

because the victim was a member of an enumerated class, the length of punishment should be more substantial than in other cases.

This interpretation is consistent with how the State treats other specialized victims; to wit: the elderly and juveniles. An aggravated assault or aggravated battery upon a person 65 years of age or older is not only reclassified to a higher degree, but also requires the imposition of a 3 year minimum mandatory term. See Section 784.08 Florida Statutes (1991). Juveniles are also afforded favorite treatment and extra protection against crime. See Section 794.011 Florida Statutes (1991) regarding increased penalties for sexual batteries on minors based on the age of the minor-victim.

This interpretation is similar to how the burden of proof is allocated in discrimination cases under Title VII of the Civil Rights Act of 1964 (42 USC § 2000 e et seq.). In the civil anti-discrimination context, discriminatory intent must be at least a substantial factor in causing the complained of result. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The Court rejected a but for analysis, in favor of the substantial factor test. However, this makes sense since Title VII litigation is civil and, as such, the standard of proof is the preponderance of the evidence. In criminal cases, where the reasonable doubt standard exists, it is consistent therewith to utilize a but for standard to determine discriminatory intent.

The foregoing interpretation of the Statute would also be faithful to the Legislature's reason for its enactment. The Statute serves the State's compelling interest in protecting its citizens from prejudice based on race, color, ancestry, ethnicity, religion, or national origin. Regardless 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.[7]

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[7] The Statute is one of many enacted in this country to deal with a pressing problem, the massive increase of "hate crimes" in this country. See, Hernandez, Note: Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence", 99 Yale L.J. 845 (1990) (hereinafter "Hernandez"); Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. L. Rev. 333 (1991) (hereinafter "Gellman"). As summarized by Hernandez:

> Although there are no accurate data on the number of bias crimes committed each year, every national indicator shows that violence against individuals based on their race, ethnicity, and sexual orientation is increasing. Three thousand acts of bias-related violence were documented nationwide between 1980 and 1986. For example, the Puerto Rican Legal Defendant & Education Fund has seen a marked increase in racial violence (hate crimes or bias crimes) against Latinos, to a point where it now receives an average of two calls per weeks about such incidents. More than one in five gay men and nearly one in ten lesbians have been physically assaulted because of their sexual orientation. As such statistics indicate, the term commonly knows as "racially motivated violence" is not quite accurate in as much as such bias-related violence extends to discrete groups other than racial minorities. (at 845-6, footnotes omitted).

Furthermore, the impact of such crimes is diverse and severe. As summarized by Gellman:

> Without question, bigotry-motivated crime, like all bigoted action and expression, causes real and serious harm to its direct victims, to other members of

"[C]rimes of interracial violence generate widespread fear and intimidation within and between communities, affecting many more individuals than the victim and his immediate acquaintances."

> the victims' groups, to members of other minority groups, and to society as a whole. Whatever police and constitutional problems ethnic intimidation statutes may have, these statutes are the reflection of legislatures' recognition that these harms are real and significant.
>
> ...
>
> The psychological harm of race-based stigma is often much more severe than that of other stereotypes, because race is an immutable characteristic (unlike poverty or alcoholism, for example). To a great extent, this is also true of the other characteristics included in various ethnic intimidation statutes: religion, national origin, gender, sexual orientation, and handicap. Victims of stigmatization begin to doubt their own worth and sometimes even begin to believe the stereotypes. When this happens, they either despise themselves or lose their sense of self altogether. These victims may ultimately reject their own identity as members of the group.
>
> The effects of stigmatization occur on several levels. Psychological responses include humiliation, isolation, and self-hatred. These responses may affect intergroup relations and even relationships within the group. Racial stigmatization can also contribute to mental illness and psychosomatic disease. It can lead to substance abuse as victims seek escape. Stress-based hypertension may also be related to racial labeling. These psychological injuries may affect victims' careers as well, creating defeatism and expectation of failure. Minority group children are particularly vulnerable, exhibiting self-hatred early and coming to question their own intelligence, competence, and worth.
>
> The continued existence of bigotry is evidence that our society has failed to live up to its professed ideal of egalitarianism. Failure of our legal system to provide at least a civil form of redress to victims of bigotry-related harm sends the message that our commitment to that ideal is not so strong as we might like to believe. (at 340-341).

Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv. L. Rev. 1270, 1280 (1988). Such crimes "have the potential to incite further violence." Id. "[I]nterracial violence possesses a capacity to destroy racial harmony, pluralism, and equality." Id. at 1281. See Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431 (emphasizing the immediacy of the injurious impact of racial insults, and the psychological injuries sustained by those victimized).

As the foregoing establishes, the Statute does not regulate protected conduct and therefore the First Amendment overbreadth is not applicable. In order for the Defendant to maintain his challenge to the Statute on the ground of non-First Amendment overbreadth, he is required to establish that his own admitted conduct is wholly innocent and its proscription is not supported by any rational relationship to a proper governmental objective. State v. Ashcraft, 378 So.2d 284 (Fla. 1979). The Defendant herein cannot meet this requirement. First, there was an unlawful touching and this is not wholly innocent conduct and further that making an unlawful touching a crime bears a rational relationship to public safety.

VAGUENESS

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. The Defendant, in order to succeed must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, supra. The standards for evaluating vagueness were delineated in Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

The foregoing standards are not to be mechanically applied. The degree of vagueness depends in part on the nature of the enactment. Criminal enactments are viewed more stringently. However, a scienter requirement may mitigate a criminal laws vagueness, especially with respect to the adequacy of notice as to what conduct is proscribed. Likewise a more stringent

vagueness test applies if the enactment threatens to inhibit First Amendment rights. Village of Hoffman Estates v. Flipside, Hoffman Estates, supra.

A criminal statute which as a strict liability statute might infringe on First Amendment freedoms, can be rescued from First Amendment pitfalls by reading scienter into the statute. In Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) the Court found a statute, which made it illegal to possess any obscene or indecent writing, vague because it did not require scienter or mens rea. As such, the statute tended to inhibit people from validly exercising their First Amendment freedoms. In Cohen v. State, 125 So.2d 560 (Fla. 1960), a statute similar to the one struck down in Smith v. California was upheld. The Court found it was constitutional and did not infringe on the First Amendment, because scienter was read into the statute and therefore the State had to charge and prove this element.

The instant Statute does not specifically require scienter, however, based on the foregoing, it is to be read into the Statute,[8] thus saving the Statute from a First Amendment vagueness attack. With the addition of the scienter element, an individual's First Amendment right to speak and spew hatred is

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[8] That scienter is impliedly included in the Statute is a reasonable interpretation, inasmuch as the 1991 amendment, see footnote 1, explicitly adds knowledge as an element of the offense and thus makes explicit what previously was implicit.

not regulated. Further, the addition of scienter mitigates against vagueness, since this is adequate notice of what conduct is proscribed, to wit: any felony or misdemeanor that is committed only because of the victims' protected status.

Since scienter is impliedly included in the Statute, it does not have First Amendment implications and therefore is subject to a less stringent vagueness test. However, since the Statute is a criminal enactment, it is necessary to determine the level of knowledge necessary to defeat a non-First Amendment vagueness challenge. The State submits that if the scienter requirement is read as specific intent, then the Statute is sufficiently clear to defeat the vagueness challenge.

At common law, crimes generally were classified as requiring either "general intent" or "specific intent". The main distinction between specific intent and general intent is the element of bad or evil purpose which is only required for specific intent. A person who knowingly commits an act which the law makes a crime has "general intent," while the person who commits the same act with bad purpose has "specific intent." In a general sense "purpose" corresponds loosely with specific intent, while knowledge corresponds loosely with general intent. See United States v. Bailey, 444 U.S. 394, 402-405, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). United States v. Holdeman, 559 F.2d 31, 114, (DC Cir. 1976).

As stated hereinbefore, the Statute creates a but for crime. As such, the defendant's purpose is at issue, thereby making a violation of the Statute a specific intent crime. A defendant's purpose in committing the underlying offense is to harm his victims based on their immutable characteristics, which are protected by the Statute. The purpose to commit the crime and harm the victim, must, of course, be proven beyond a reasonable doubt. Therefore, a defendant is clearly on notice as to what conduct is proscribed and the Statute does not suffer from vagueness.

The Statute is also not vague for failing to list all the felonies and misdemeanors to which it applies. The fact that the crimes are published in Florida Statutes defeats such a claim.

The Statute also withstands a vagueness challenge because the terms "evidencing prejudice" is capable of being understood by persons of ordinary intelligence. The failure to define the term "evidencing" within the Statute is of no moment. The Statute's use of the verb "evidences" makes it clear that one is not held accountable for merely holding an opinion. "Evidences" means: "[T]o offer of constitute evidence of: PROVE, DISPLAY, EVINCE . . .." Webster's Third New International Dictionary 789 (1986 ed.). "Evidences" is used in Florida's rules and statutes in its verb form. See § 90.953, Fla. Stat. (1989); §

384.281(1)(c), Fla. Stat. (1989); § 392.57(1)(c), Fla. Stat. (1989); Rules Regulating the Florida Bar 8-2.2(f). This term has consistently been used by the United States Supreme Court, without additional definition, to mean to offer or constitute evidence of. Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 502, 89 S.Ct. 684, 93 L.Ed. 834 (1949). (Freedom of speech and press is not unconstitutionally abridged by legislation making a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed). Walton v. Arizona, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 511, 529 (1990). (A crime is committed in an especially depraved manner when the perpetrator relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in the killing).

The failure to define the term "prejudice" within the Statute is also not fatal. The State contends that its ordinary meaning is a matter of common understanding. In the context of the Statute, "prejudice" is: "2c: [A]n irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics - compare discrimination." Webster's Third New International Dictionary, 1788 (1986 ed.). Examples of the use of "prejudice" in Florida's rules and statutes include:

(1) Florida Statute § 38.10 which give a party to a legal proceeding the right to have the judge disqualified "for prejudice" upon submission of an affidavit giving "the reasons for the belief that any such bias or prejudice exists . . .." § 38.10, Fla. Stat. (1989).

(2) Florida Statute § 120.71(1) which provides for disqualification "from serving in an agency proceeding for bias, prejudice, or interest . . .." § 120.71(1), Fla. Stat. (1989).

(3) Florida Statute § 364.10 which prohibits a telephone company from subjecting "any particular person or locality to any undue or unreasonable prejudice or disadvantage . . .." § 364.10, Fla. Stat. (1989).

(4) Florida Statute § 905.04(1)(b) which provides that a prospective member of the grand jury can be challenged "on the ground that the juror . . . [h]as a state of mind that will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging." § 905.04(1)(b), Fla. Stat. (1989).

(5) Rules of Juvenile Procedure 8.320(d) and 8.850(a) set out the procedure to disqualify judges "for prejudice" and "on account of prejudice." Fla.R.Juv.P. 8.320(d), 8.850(a).

However, perhaps the best example of the use of the word "prejudice" to connote bias is found in Florida's evidentiary statutes. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice . . .." (emphasis added) § 90.403, Fla. Stat. (1989). The courts of this State deal with this provision on a daily basis. The courts have also recognized and considered racial prejudice in connection with prosecutorial misconduct issues. See Robinson v. State, 520 So.2d 1, 6-7 (Fla. 1988); Battle v. United States, 209 U.S. 36, 28 S.Ct. 422, 52 L.Ed. 670 (1908).

CONCLUSION

Based on the foregoing points and authorities, the State respectfully submits that the trial court's order finding § 775.085, Fla. Stat. (1989) unconstitutional should be reversed.

Respectfully submitted,

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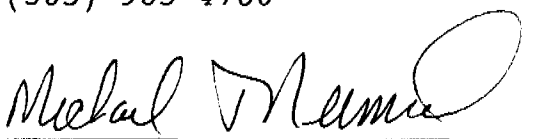

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing BRIEF OF APPELLANT was furnished by mail to DON ROBERT SILBER, Attorney for Appellee, 110 Tower, 110 Southeast 6th Street, Suite 1500, Fort Lauderdale, Florida 33301 on this 15 day of July, 1992.

Michael J. Neimand

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/bfr