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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,924

THE STATE OF FLORIDA,

Appellant,

-vs-

RICHARD STALDER,

Appellee.

_____/

STATE OF FLORIDA,

Appellant,

-vs-

EVAN DALE LEATHERMAN,

Appellee.

_____/

80,126

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

REPLY BRIEF OF APPELLANT

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SECTION 775.085, FLORIDA STATUTES (1989) IS NOT UNCONSTITUTIONALLY VAGUE AND/OR OVERBROAD.

1. Introduction

Since the filing of the State's Initial Briefs in these cases, the cases been consolidated by order of this Court dated July 23, 1992. This single Reply Brief therefore is filed in both cases.

The subject of this case is patently of considerable importance, as reflected in the amicus briefs filed in support of the State by the Anti-Defamation League, the American Jewish Congress, and International Association of Jewish Lawyers and Jurists (American Section) (hereinafter collectively referred to as "the ADL") and in support of Appellees by The American Civil Liberties Union Foundation of Florida, Inc. ("the ACLU") and the Florida Association of Criminal Defense Lawyers ("FACDL").[1] Certain aspects of these amicus briefs will be considered in this Reply Brief.

2. Testimony With Respect To The Hate Crimes Sentencing Enhancement Act Being Considered By The United States Congress Validates The Constitutionality of Section 775.085(1), Florida Statutes

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[1] The FACDL Brief contains a useful review of the legislative history of Section 775.085, Florida Statutes (FACDL Brief, pp.5-7). Despite the fact that the Florida Legislature chose not to include sex as an immutable target characteristic (FACDL Brief, p.6), it may be noted that the proposed federal Hate Crimes Sentencing Act of 1992 does. See Appendix C.

In the State's Initial Brief, not only was Section 775.085, Florida Statutes ("the Statute") considered, but so also were other state statutes dealing in one way or another with "hate crimes", including the ADL model statute. This variety of legislative approaches was also considered in the amicus briefs. But this is a rapidly developing field, because of the major concerns about the increasing incidence of hate crimes in our society, summarized both in the State's Initial Brief and in the ADL Brief, pp.8-9.

In this context, we have set forth in the Appendix to this Reply Brief the Hate Crimes Sentencing Enhancement Act of 1992 ("H.R. 4797") and the statements of seven individuals to the House of Representatives Committee on the Judiciary Subcommittee on Crime and Criminal Justice with respect to H.R. 4797. Two of these statements are by individuals nationally and singularly identified with legal protection of First Amendment values, Professor Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School, and Floyd Abrams of the New York law firm of Cahill, Gordon & Reindel,[2] both defending the

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[2] (Tribe): **Rust v. Sullivan**, 111 S.Ct. 1759, 114 L.Ed.2d 233, 59 U.S.L.W. 4451 (1991); **Sable Communications of California, Inc. v. F.C.C.**, 492 U.S. 115, 109 S.Ct. 2819, 106 L.Ed.2d 93, 57 U.S.L.W. 4920 (1989); **Heffron v. International Soc. for Krishna Consciousness, Inc.**, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); **Richmond Newspapers, Inc. v. Virginia**, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

(Abrams): **Metromedia, Inc. v. City of San Diego**, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); **CBS, Inc. v. F.C.C.**, 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981); **Smith v. Daily Mail Pub. Co.**, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979);

constitutionality of H.R. 4797. Also included are statements by Bruce Fein, former Associate Attorney General in the Reagan Administration, to the same effect, and Professor Rodney A. Smolla, Director of the Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law to the effect that the proposed law is facially constitutional but might have problems if applied to an offense itself directed to expressive activity, such as distribution of obscene material, and, in opposition to H.R. 4797, statements of Professor Susan Gellman, Adjunct Professor, Capital University Law School and author of 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 (1991), opposing H.R. 4797 on policy as well as legal reasons, Professor Martin H. Redish, Professor of Law and Public Policy at Northwestern University School of Law, and Robert S. Peck, Legislative Counsel of the American Civil Liberties Union.

H.R. 4797 provides for "sentencing enhancements of not less than three offense levels for offenses that are hate crimes.[3] "Hate crimes" are then defined:

Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); **Landmark Communications, Inc. v. Virginia**, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); **Nixon v. Warner Communications, Inc.**, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); **Nebraska Press Ass'n v. Stuart**, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); **Branzburg v. Hayes**, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

[3] The federal sentencing guidelines in 18 U.S.C. Appendix 4, Ch. 5, Part A. H.R. 4797 would require that those sentencing

> [T]he term "hate crime" is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individual or group of individuals.

H.R. 4797 thus uses the identical "based on" language of Florida's statute, applies it to both an actual immutable target characteristic and a perceived one and substitutes for the Statute's "the commission of [the crime] evidences prejudice" the words "is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice."

The words of Professor Tribe defending the constitutionality of H.R. 4797 are of interest:

> But nothing in the R.A.V.,[4] decision creates a constitutional exclusionary rule requiring government to be blind to words and statements insofar as they shed light on a constitutionally permissible element of an offense. [He then notes that many crimes are "evidenced" (the

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guidelines be increased at least three offense levels. An analysis of H.R. 4797 by the Committee on the Judiciary says: "Raising an offense by three severity levels translates into an average sentence enhancement of one-third of real times served." It is difficult to make an exact comparison of the significance of this mandatory increase in offense levels to the impact of the penalty reclassification set out in the Act, since to do so would require the application to that reclassified penalty of Florida's own sentencing guidelines, which are set out in Fla.R.Crim.P. 3.701 and Section 921.001, Florida Statutes. Necessarily, the comparison becomes individual dependent. Suffice it to say there is no philosophical difference between the approach of H.R. 4797 and the Act.

[4] R.A.V. v. City of St. Paul, ____ U.S. ____, 112 S.Ct. 2538, ____ L.Ed.2d ____ (1992).

> word in Florida's Statute most challenged by Appellee and supportive amici) "in significant part by communications" and continues:]
>
> Nothing in the holding or rationale of the R.A.V. decision suggests that a state or the United States must be neutral as between racially or religiously or sexually motivated assaults or other offenses, and otherwise identical conduct that lacks this sort of motive . . .
>
> On the contrary, if the First Amendment, or any other provision of the bill of Rights, were to require governmental indifferences to the racial or otherwise bigoted motive underlying a hurtful act, it would follow that an enormous body of anti-discrimination law, both state and federal, would be unconstitutional [referencing Title VII of the Civil Rights Act of 1964 and similar state enactments]. If R.A.V. were to cast a constitutional shadow over the Hate Crimes Sentencing Enhancement Act, precisely the same shadow would befall this entire corpus of anti-discrimination law.

Mr. Abrams likewise affirms the constitutionality of H.R. 4797 when, after first observing that the decision of Mr. Justice Scalia in R.A.V. v. City of St. Paul, ____ U.S. ____, 112 S.Ct. 2538, ____ L.Ed.2d ____ (1992), "seemed to me not only correct but admirable," then observed in support of the constitutionality of H.R. 4797.[5]

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[5] Mr. Abrams has some concern with the language of H.R. 4797 referring to the immutable characteristic "of another individual or group of individuals," pointing out that this may be deemed to be persons other than the victim, and suggests clarification in the statute or in legislative history. This problem does not exist for Florida's Statutes, which references only victims.

> But, that does not mean that speech is irrelevant or inadmissible or improper to consider in sentencing . . . [C]onsideration of evil motive or moral turpitude in determining an appropriate sentence has long been held permissible . . . [T]he Government may constitutionally take unlawful motive into account in determining a sentence.[6]

The State submits that the foregoing commentary on H.R. 4797 is supportive of the constitutionality of the Act. Although H.R. 4797 is titled an act relating to sentencing,[7] as noted, there is little, if any, difference in the impact of H.R. 4797 and Florida's Statute. To the extent that the sentencing process permits a lower standard of proof and a more liberal rule of permissible evidence, the positions of Professor Tribe and Mr. Abrams as to the constitutionality of H.R. 4797 should speak a fortiorari to the constitutionality of Florida's Act.[8]

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[6] The remaining five commentaries are included in the Appendix. Professor Tribe and Mr. Abrams are quoted in the text because of their singular national prominence in First Amendment issues and the fact they support both the decision in **R.A.V.**, and the constitutionality of H.R. 4797. If nothing else, this makes clear that **R.A.V.** does not control the matter at issue here, as Appellee and his supporting amici argue.

[7] The State in its Initial Brief (p.14, n.6) dealt with the cases clearly permitting consideration of racial and other discriminatory motivation in the sentencing aspect. Appellee (Brief, pp.19-20) and FACDL (Brief, pp.3, 16-17) attempt to deal with these cases and distinguish the sentencing aspect as greatly different. The State never suggested to the contrary, but believes those cases to be directly relevant for the reasons stated in the Initial Brief and the Hate Crimes Sentencing Act to be even more directly relevant for the reasons state herein.

[8] Professor Tribe severely criticized the Wisconsin Supreme Court's decision in **State v. Mitchell** and complimented Judge Bablitch's dissent. For this reason, we assume Professor Tribe would agree with the comparability of H.R. 4797 and a penalty enhancement statute.

3. The Wisconsin Supreme Court's decision in State v. Mitchell should not be followed by this Court in interpreting Section 775.085, Florida Statutes.

In the State's Initial Brief, no effort was made to analyze the decision just entered by the Wisconsin Supreme Court, State v. Mitchell, 45 N.W.2d 807 (Wis. 1992) (although all opinions in the case were included in the Appendix to the Initial Brief), since the decision was 5-2 with each of the dissenters writing an opinion, and the three opinions speak for themselves. Not surprisingly Appellee and his supporting amici argue that this Court should follow the majority in Mitchell. The State believes that a careful analysis of the majority opinion in Mitchell shows it should not be followed.

First, we bring to this Court's attention one passage and attendant footnote in the majority opinion to reflect its inherent error. The opinion states:

> Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought. 17/
> 17.The dissent of Justice Bablitch asserts that punishing motive is permissible, based upon Dawson v. Delaware, 90-6704 (U.S. Supreme Court, March 9, 1992), wherein the United States Supreme Court indicated that evidence of a convicted murderer's bigoted motivation in committing the murder is a relevant inquiry in sentencing. Dissenting Op. at pp. 11-12. The dissent is wrong. 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.

Appellee quotes this entire passage in his brief (at p. 20) in attempting to distinguish the State's footnote reliance on Dawson v. Delaware, __ U.S. __, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) and Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). (Init. Br., p.14, n.6). Appellee argues that sentencing is inherently different than reference to "hate crime" motive in a separate crime. (Brief, pp.19-20).

But Professor Tribe, as noted above, flatly disagreed with the majority, and, inferentially, Appellee, in his commentary on H.R. 4797 included in the Appendix. We thus have, on the one hand, the majority in Mitchell saying: "[I]t 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" and, on the other hand, one of the foremost First Amendment scholars in the country endorsing the constitutionality of a congressional bill which does just exactly that ("sentencing enhancements of not less than three offense levels for offenses that are hate crimes").

Second, we direct the Court's attention to the handling by the majority in Mitchell of the repeated upholdings of Title VII and comparable state anti-discrimination laws, and submit this to be another major flaw in that decision. The majority attempts to distinguish the anti-discrimination decisions first

on an assertion that such laws are subjective and Wisconsin's penalty enhancement law is objective, and second on an assertion that the First Amendment may be infringed more easily in discrimination cases than the criminal context of the penalty enhancement law. The majority stated:

> Prohibited acts of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2, and analogous state antidiscrimination statutes, such as refusal to hire, termination, etc., involve objective acts of discrimination. What is punished by the hate crimes penalty enhancer is a subjective mental process, not an objective act. The actor's penalty is enhanced not because the actor fired the victim, terminated the victim's employment, harassed the victim, abused the victim or otherwise objectively mistreated the victim because of the victim's protected status; the penalty is enhanced because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act.
>
> Finally, there is the difference between the civil penalties imposed under Title VII and other antidiscrimination statutes and the criminal penalties imposed by the hate crimes law... (emphasis added).

Slip Op. at 20-21. Emphasis is added to the first quoted paragraph because the abuse of the victim is the predicate crime in Florida's Statute and the objective mistreatment is the "evidences prejudice based on" of that State. Justice Bablitch's dissent (and Professor Tribe's commentary on H.R. 4797 which excoriates the majority opinion in Mitchell and compliments Justice Bablitch's dissent) correctly says all the above are

distinctions without differences. Justice Bablitch observes the obvious (apparently except to the majority):

> The majority posits that the distinction between the penalty enhancer statute and antidiscrimination laws is that antidiscrimination laws punish only the discrimination, i.e., the refusal to hire, not the discriminatory motive,. The majority forgets a key requirement of antidiscrimination statutes. Antidiscrimination statutes do not prohibit a person from not hiring someone of a protected class, they prohibit a person from not hiring someone of a protected class because or on the basis of his or her protected class. It is not, as the majority suggests, the failure to hire that is being punished, it is the failure to hire because of status.

Slip Op. at 10. And the idea that infringements on First Amendment protections are permissible in the civil context when not in the criminal was rejected by the United States Supreme Court at least as long ago as New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

4. Section 775.085 Meets Constitutional Requirements

The drafting of a Hate Crimes law is not an easy task. The ACLU brief spends considerable time dealing with the wordsmithing of such a law, not surprisingly endorses their own preferred language, suggests that the ADL model statute is a better way to approach the issue than that chosen by the Florida's Legislature, and contends that the unconstitutionality of the Statute is clear. One suspects that any such law not drafted by the ACLU would be challenged by them.

Certain ironies exist in the ACLU argument. First, the argument mischaracterizes the Statute. The Statute punishes the commission of a crime which evidences prejudice. But the ACLU says the Statute punishes persons who "evidence[s] prejudice". The ACLU then puts forth its preferred language for what it suggests is a constitutional statute, but in doing so accepts the framework of a penalty enhancement format (which is not the format of the ADL model statute) and then suggests as language "if the commission of [the crime] is proven . . . to have been motivated, in whole or in part, by the defendant's specific intent to commit such act because of" an immutable victim characteristic. (ACLU Brief, p.8, n.8). Other than adding the level of proof of motivation (reasonable doubt) which the State believes this Court should imply and specific intent, which again the State believes this Court should imply, we must suggest that the ACLU has bought the Florida Legislatures's own phraseology.

The ADL model statute is quoted in pp. 9-10, fn. 3 of the Initial Brief. Some of the cases finding state laws modelled on that statute to be unconstitutional have been concerned with the phrases "by reason of" and "another individual or group of individuals" (the Ohio analogue is "race of another"). The latter is problematic, since it may be read to cover a person who is not the victim of the crime." The former is similar to the Florida Statute's "based on."

The ACLU's attack seems to turn on a belief that "evidences prejudice based on" is inherently vague (the ACLUE does not comment on H.R. 4797's conduct was motivated by hatred, bias, or prejudice, based on, although one would think that the motivation of prejudice therein would have to be "evidenced". As noted in the Initial Brief, no less a defender of the First Amendment that Mr. Justice Hugo Black observed that motivation could lawfully be "evidenced" by speech (without running afoul of the First Amendment). Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 89 S.Ct. 684, 93 L.Ed. 834 (1949). But, the ACLU's suggested language does nothing more than the State has already suggested is a proper construction of the Act, and certainly one this Court is fully able to apply. Thus, the ACLU's statutory language says that the motivation must be proven beyond a reasonable doubt and that the motivation must reflect the defendants specific intent. However, as the State's Initial Brief shows, the State concurs that both these items are part of the law as it stands. The remaining preferred ACLU language which, says the ACLU, "provides additional protection of First Amendment activity" relates to how speech "evidences" motivation. Certainly this language is unnecessary, however desirable it may be.

The main thing that the briefs of Appellee and supporting amici show is that statutory drafting in this area is not easy. The Florida Legislature has done its best. H.R. 4797 shows that

this best is quite good, and that this Court should find it facially constitutional.

Appellee and his supporting amici argue that the Statute is vague and overbroad, and as such unconstitutional.[9] These issues were dealt with at length in the Initial Brief and will not be here repeated. However, it must be noted that Appellees (and supporting amici's) arguments are somewhat circular, for in arguing these points they assume that the First Amendment is directly implicated. If it is not, then overbreadth is not even an issue, nor are vagueness issues as salient. And the State contends that it is conduct, not speech, that is here at issue and Professor Tribe and Mr. Abrams appear to agree.

In its Initial Brief, the State posited that the most reasonable interpretation of the Statute, in order to uphold its constitutionality, was that the statute created a new substantive crime, to wit: but for the victim's belonging to a protected class the crime would not have been committed. Appellee, without

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[9] Appellee further contends the Statue serves no compelling state interest (Appellee's Brief at 19), despite clear language in R.A.V. to the contrary:

> Specifically, they [St. Paul and its amici] assert that the ordinance helps to ensure the basic human rights of members of gorups that have historically been subjected to discrimination, including the right of such group members to loive in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them.
>
> 112 S.Ct. at 2549 (1992)

regard to rules of statutory construction, rejects the State's position as unreasonable. Further, Appellee contends that the only reasonable interpretation of the Statute is one which would render the Statute unconstitutional, to wit: the Statute seeks to punish pure speech and expression. The State submits that based on the applicable rules of statutory construction, its interpretation of the Statute must prevail and the Statute must be found to be constitutional.

Ordinarily criminal statutes are to be strictly construed in favor of the accused. Section 775.021(1), Florida Statutes (1991). However, they are not to be construed so strictly as to emasculate the statute and defeat the obvious intention of the Legislature. The rule of strict construction is subordinate to the rule that the intention of the Legislature must be given effect. This is so regardless of whether such construction varies from the statute's literal language. Griffis v. State, 356 So.2d 297 (Fla. 1978); Valdes v. State, 443 So.2d 221 (Fla. 1st DCA 1983); State v. Nunez, 368 So.2d 422 (Fla. 3rd DCA 1979); George v. State, 203 So.2d 173 (Fla. 2nd DCA 1967).

To determine legislative intent this Court must consider the circumstances and documentation accompanying a law's enactment, its evident purpose, the particular evil it seeks to remedy, and the fact that it seeks to protect a particular class or remedy a special problem. Carawan v. State, 515 So.2d 161 (Fla. 1967); State v. Webb, 398 So.2d 820 (Fla. 1981). When

reasonably possible and consistent with legislative intent, this Court must give preference to a construction of a statute which will give effect to the statute over another construction which would defeat it. Schultz v. State, 361 So.2d 416 (Fla. 1978).

An application of the foregoing principles of statutory construction should establish that the State's interpretation of the Statute must prevail. The Statute was enacted to remedy the acknowledged evil of bias motivated crimes. The remedy perceived by the Legislature was to more severely punish those individuals who commit crimes against a particular class of people only because those people belong to that particular class. Since the Legislature's intent was to protect individuals from bias motivated crimes, the State's construction of the Statute is eminently reasonable. This is so even though the construction varies from the Statute's literal language. The State's reasonable interpretation would save the Statute from constitutional infirmities and as such should prevail over Appellee's interpretation, regardless of its reasonableness. Therefore, Appellee's interpretation, on the basis of which he argues for finding the Statute unconstitutional should be rejected and the Statute found constitutional.

CONCLUSION

Based on the foregoing points and authorities and the points and authorities contained in the initial brief, 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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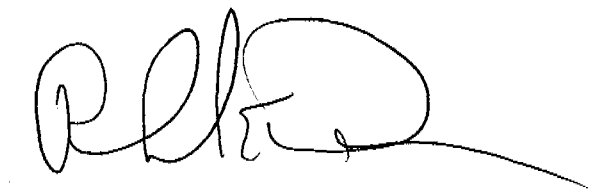
CERTIFICATE OF SERVICE

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; BEN KUEHNE, Attorney for Amicus Curie, Anti-Defamation League, One Biscayne Tower, Suite 2600, Two South Biscayne Blvd., Miami, Florida 33130 and to CHRISTINE DAHL, Attorney for Amicus Curie, ACLU, 3130 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131 on this 28th day of August, 1992.



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