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THE SUPREME COURT OF FLORIDA

CASE NO.: 80,580

****

MICHAEL EARL DOBBINS,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA

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BRIEF OF AMICUS CURIAE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

****

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STATEMENT OF INTEREST

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

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

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

For 80 years, ADL has been committed to fighting racial and religious discrimination in employment, housing, education, and public accommodations, and to ensuring that every individual receives equal protection under the law. ADL is equally committed to protecting the basic freedoms set forth in the Bill of Rights, and is therefore highly sensitive to the constitutional issues raised in this case.

As part of this commitment, ADL has been actively involved in the formulation of laws designed to protect victims of discrimination. ADL conducts annual audits of anti-Semitic incidents nationwide, and monitors hate crimes committed against any person or group as a consequence of intolerance. In the early

1980's, ADL recognized a growing trend of anti-Semitism and intolerance at work around the country, and responded to this disturbing trend by developing model statutes to enhance the penalties for unlawful conduct directed at others because of race, color, religion, national origin, or sexual orientation. A majority of the states--including Florida--and the federal government have enacted some type of legislation to combat this serious societal problem.

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

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment and conviction--and a subsequent affirmance of same--finding the Defendant, MICHAEL EARL DOBBINS, guilty of felony battery in violation of the battery statute, Section 784.03, Fla. Stat. (1989), as enhanced pursuant to the Florida Hate Crimes Act, §775.085, Fla. Stat. (1989). Defendant's challenge to the constitutionality of Section 775.085, Fla. Stat. (1989), was denied by the trial court, which, following the return of a jury verdict finding the Defendant guilty of this charge, sentenced the Defendant to 364 days incarceration, followed by four (4) years' probation.

The Defendant filed a timely appeal to the Fifth District Court of Appeal, in which he renewed his constitutional challenge to the statute. The Fifth DCA, in a unanimous opinion, affirmed the lower court, expressly declaring Florida's Hate Crimes Act constitutional. Mr. Dobbins thereafter filed this appeal.

This brief is being filed by ADL in support of the constitutionality of the statute. ADL will not address the two trial issues raised by the Defendant (involving the jury charges and the sufficiency of the evidence), but will limit its argument to the constitutional question. Accordingly, ADL will not address any of the factual matters raised by the Defendant in his brief.

SUMMARY OF THE ARGUMENT

Florida has recognized that violence prompted by hate and religious intolerance is a national problem, and that such criminal activity is increasing. To combat this problem, Florida has promulgated a penalty enhancement statute which increases the penalty for certain criminal conduct when the perpetrator targets his or her victim because of race, color, ethnic origin, or religion.

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

Florida's law distinguishes biased thought from discriminatory conduct. In this regard, Section 775.085 is consistent with a myriad of other statutes which enhance punishment for criminal conduct directed against specified groups--such as the elderly, pregnant women, and law enforcement officers--and it incorporates the same type of degree escalation found in other criminal statutes which heighten the offense by reason of the severity of conduct.

Florida's statute does not reach constitutionally protected activity, because it can be utilized only when an individual has first committed a crime. Once that occurs, the punishment

enhancement falls outside of any constitutional protection, since courts have considerable latitude in receiving information used to determine the quantum of punishment necessary for an offender. Furthermore, the statute does not penalize protected opinion or thought, since the offender's words, thoughts, or opinions are not the focus of the crime. Instead, words utilized by an offender are merely evidence which can assist in proving the offender's motivation for the criminal act. In this regard, an offender's commission of a crime cannot be deemed protected conduct merely because the offender chooses to act in a manner which expresses that offender's intent to commit the crime.

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

ARGUMENT

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

A. The Need For Comprehensive Anti-Discrimination Laws.

The United States of America was founded upon the ideal that all people are created equal.[1] We are also a nation committed to the principle that people have the inherent right to speak out, to express their innermost thoughts, and to associate with others of

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1. The Declaration of Independence.

their own choosing.[2] But, even in our ordered system of liberty, some people act to take advantage of others because of who they are, because of their family origin, because of their religious preferences. This evil, known as discrimination, is offensive to our society at large and is damaging to our national goal of equality for all.

To combat the harm caused by discriminatory practices, the governing bodies of our nation have erected a network of laws which regulate or even outlaw practices designed to separate and classify people on the basis of race, color, ancestry, ethnicity, religion, and national origin. The Supreme Court has recognized that states have a legitimate and compelling interest in shielding its citizens from invidious discrimination. E.g., New York State Club Association v. City of New York, 487 U.S. 1, 108 S. Ct. 2225 (1988). More recently, the Supreme Court recognized that legislative efforts to help "ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace," serve a compelling societal interest. R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992) (Scalia, J., for the court).

Florida, among many other states, recognizes the harmful effects which result when individuals are victimized because of their status, such as race, ethnicity, or religion. The resulting harm to society can be greater than the harm caused by the injurious conduct alone, since entire classes of people are put at

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2. U.S. Const. Amend. I.

risk. Interracial violence, as recognized by one legal commentator, "generate(s) widespread fear and intimidation within and between communities, affecting many more individuals than the victim and his immediate acquaintances." Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv. L. Rev. 1270, 1280 (1988). "The impact of a cross-burning or a swastika-daubing is of a magnitude far greater than, for example, spray painting graffiti on a subway car." Foxman & Salberg, Try A Hate Crimes Law That Can Withstand Scalia, Miami Herald, June 28, 1992, at 3C. Such victimization is not only real, it is increasing to the point that numerous legislative bodies have attempted to find solutions to combat criminal behavior which is motivated by racial, religious, or ethnic reasons. The federal government and more than half the states have adopted "hate crimes" statutes,[3] which are designed to outlaw discrimination in the selection of a crime victim.[4]

By all reports, hate crimes are increasing in number and severity. The President of the United States, before signing into law the Federal Hate Crimes Statistics Act, stated:[5]

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

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

4. Appended hereto at A-1 are transcripts of the testimony given, respectively, by Lawrence Tribe and Floyd Abrams before the House Judiciary Committee, Subcommittee on Crime and Criminal Justice, regarding the constitutionality of H.R. 4797, the proposed Hate Crimes Sentencing Enforcement Act of 1992.

5. President George Bush, April 23, 1990.

> society blind to prejudice, a society open to all.

There is no question that some form of legislation is necessary to combat hate crimes. In 1991, ADL identified 1,879 anti-Semitic incidents, and reports from 42 states indicated the highest cumulative total of incidents ever recorded in the thirteen year history of the ADL audits.[6] That same year saw the highest number of reported serious crimes based on discrimination, including assaults, vandalism, arson, and bombings.[7]

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

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

Attorney General Bob Butterworth, Hate Crimes in Florida (1991). Other states have noted similarly alarming trends.[8]

Against this backdrop, the Florida Legislature has determined that the harms inflicted by criminal conduct motivated by race,

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

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

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

color, creed, religion, or sexual orientation demand a strong public response. Since hate-inspired crimes are so damaging to the fabric of society, special statutory treatment is justified by enhancing the penalty for criminal conduct involved in the underlying criminal act.

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

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

For these reasons, Florida has chosen to enforce its ideal of a nondiscriminatory society by enacting a statutory scheme in which criminal transgressors are punished more severely when they choose to commit a crime while practicing bias or discrimination. The law serves a legitimate, compelling public purpose, and achieves its ends while staying true to the fundamental liberties protected by the Constitution.

B. Section 775.085 Is Neither Vague Nor Overbroad.

Appellant first suggests that Section 775.085 is vague and overbroad because, while it enhances penalties for any felony or misdemeanor "if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity,

religion, or national origin of the victim," it fails to define "prejudice." The implied objection to the statute, therefore, is that by using, without defining, the word "prejudice," the statute is not specific enough to put persons of common intelligence on notice as to the word's meaning. A review of various statutes, rules, and cases reveals otherwise.

Appended hereto as A-2, is a list of 143 statutes and rules which use the word "prejudice." While many of the cited sections use the word in the legal context of an event occurring "with prejudice" or "without prejudice," many use the word in the more colloquial context to connote bias. For example:

- Section 38.10, Fla. Stat., which provides a means by which litigants can redress "the prejudice of [a] judge" by showing "the reasons for the belief that any such bias or prejudice exists . . . ."

- Section 120.71(1), Fla. Stat., which provides for the disqualification of agency heads "for bias, prejudice, or interest . . . ."

- Section 364.10, Fla. Stat., which prohibits telephone companies from subjecting "any particular person or locality to any undue or unreasonable prejudice or disadvantage . . . ."

- Section 904.04(1)(b), Fla. Stat., which provides a means by which a prospective grand juror can be challenged for being unable to act impartially and "without prejudice" to the rights of the party charged.

- Rules 8.320(d) and 8.850(a), Fla.R.Juv.P., which provide the procedure for disqualification of judges "for prejudice" and "on account of prejudice," respectively.

[Emphasis added.]

While the foregoing are not the only instances of statutes or rules in which the word "prejudice" is used to connote bias, they

nevertheless illustrate the frequency of such use, and they demonstrate that the word has developed--and has--a common meaning. Although the ADL could locate no Florida case law specifically declaring the word "prejudice" to be capable of common understanding, this very Court, reviewing a case involving the above-cited Section 38.10, Fla. Stat., was familiar enough with the word to rule that a judge's comments about a witness were sufficient to sustain a litigant's belief that "prejudice" existed. Brown v. St. George Island, Ltd., 561 So.2d 253 (Fla. 1990). And, the two Rules of Juvenile Procedure set forth above were approved by a unanimous Florida Supreme Court. Petition of The Florida Bar to Amend the Florida Rules of Juvenile Procedure, 462 So.2d 399 (Fla. 1984). We must be permitted to assume that this Court would not have promulgated rules using unconstitutionally vague verbiage.

The word "prejudice" has a long and recognized history in Florida law and jurisprudence. When read in the context of Section 775.085, Fla. Stat. (1989), the meaning of the word is clear and understandable.[9]

Appellant next suggests that inasmuch as Section 775.085 "criminalizes certain kinds of 'prejudice' evidenced by the commission of a crime," it is too vague to ensure that punishment will not be imposed upon constitutionally protected speech or opinion. Because it has an erroneous premise, this argument is fundamentally wrong.

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9. The Legislature amended Section 775.085, Fla. Stat., in 1991, but the amendment does not affect the issues in this appeal. The amended statute is appended hereto as A-3.

Section 775.085 does not criminalize prejudice. Nothing within the language of Section 775.085 renders biased thought, biased speech, or biased association a crime. In Florida, it is still perfectly legal to hate, despise, and loathe, rationally or irrationally, Section 775.085 notwithstanding. The law pertains to prejudice not by criminalizing it, but by providing merely that if one's commission of a separate and distinct criminal offense displays bias toward the victim under certain categories, the punishment for the underlying crime will be enhanced. Nothing within the statute renders prejudice alone criminal, and no citizen of the State of Florida is under any risk of being justly prosecuted under Section 775.085 merely for the possession of prejudiced thoughts, or the expression of prejudiced ideas.

C. Section 775.085 Is a Penalty Enhancement Statute.

In contrast to statutes of some other states which have isolated certain discriminatory thoughts or conduct deemed offensive to the community, Florida merely reclassifies existing criminal conduct which is perpetrated by reason of the status of the victim. Thus, Florida's Hate Crimes Law, Section 775.085, Fla. Stat. (1989),[10] is essentially a punishment statute, providing

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

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

(continued...)

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

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

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10.(...continued)

> (a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.
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> (b) A misdemeanor of the first degree shall be punishable as if it were a felony of their degree.
>
> (c) A felony of the third degree shall be punishable as if it were a felony of the second degree.
>
> (d) A felony of the second degree shall be punishable as if it were a felony of the first degree.

> (2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, and injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

11. §775.0845, Fla. Stat. (1991).

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

Statutes like these do not proscribe criminal conduct, they merely reclassify the punishment scheme based on factors unique to the offense or the offender. Florida courts have routinely approved the use and application of such enhancement statutes. E.g., State v. Whitehead, 472 So.2d 730 (Fla. 1985) (use of firearm during felony); Strickland v. State, 437 So.2d 150 (Fla. 1983) (use of firearm during felony); Jennings v. State, 498 So.2d 1373 (Fla. 1st DCA 1986) (wearing mask while committing offense);

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12. §775.087, Fla. Stat. (1991).

13. §775.0823, Fla. Stat. (1991).

14. §784.08, Fla. Stat. (1991).

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

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

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

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

With its emphasis on enhancing punishment for offenders who have acted in accordance with a racial or ethnic bias, Florida's statute differs from many hate crime laws promulgated by other sovereigns. In particular, it is a very different statute from the St. Paul ordinance recently held unconstitutional by the Supreme Court in R.A.V., supra. That ordinance defined a new offense which

essentially was bias-motivated disorderly conduct. Because the ordinance applied to the expression of certain thoughts and beliefs, it was not directed toward punishing patently criminal conduct.

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

Because Section 775.085 is a penalty enhancement statute, it is not subject to the same scrutiny as a criminal statute defining a crime. Courts have considerable "latitude in the information [a trial judge] uses to determine the sentence." United States v. Perez, 858 F.2d 1272, 1275 (7th Cir. 1988). See Payne v. Tennessee, 111 S. Ct. 2597 (1991). A trial judge may

"appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information (the judge) may consider, or the source from which it might come." United States v. Tucker, 404 U.S. 443, 446 (1972). As part of this broad inquiry, a trial judge is permitted to consider a wide variety of factors, including hearsay evidence (see United States v. Mealy, 851 F.2d 890, 907 (7th Cir. 1988)), a defendant's refusal to recognize the proven offense conduct (see United States v. Marquardt, 786 F.2d 771, 782 (7th Cir. 1986)), and even a defendant's threat to others. United States v. Marshall, 719 F.2d 887 (7th Cir. 1983). As recognized by the Seventh Circuit in Marshall, at 891:

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

As a component of an enhancement statute, proof that a defendant directed the crime against a particular victim because of discrimination or bias is not offensive merely because proof of that discrimination may involve evidence of speech or association. That is merely an acceptable use of evidence. The United States Court of Appeals for the Eleventh Circuit has previously recognized that a defendant's associational activity with the Aryan Brotherhood white supremacist prison gang was properly admitted into evidence to establish "a chain of events forming the context, motive, and set-up of the crime," notwithstanding that it was an

associational right of the defendant to join such a group. United States v. Mills, 704 F.2d 1553, 1559 (11th Cir. 1983), cert. denied, 467 U.S. 1243 (1984).

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

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

> Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For

> example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In Barclay, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker. See 463 U.S. at 942-944, 103 S. Ct. at 3420-3421 (plurality opinion). We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder." Id. at 949, 103 S. Ct. at 3424. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing. [Emphasis added.]

Id. at 1098.

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

In United States v. Abel, 469 U.S. 45 (1984), the government was permitted to impeach a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, whose members were sworn to lie on behalf of one another. Thus, evidence of bias, even if protected by the First Amendment, is nonetheless admissible in the proper context.

D. Section 775.085 Does Not Penalize Protected Opinion, Speech, Or Thought.

The Supreme Court only recently visited the constitutionality of the Minnesota Bias-Motivated Crime Ordinance, which prohibited the display of a symbol which a person knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." R.A.V., 112 S. Ct. at 2540. The ordinance was, by language and intent, applicable only to racial, religious or gender-specific symbols such as a burning cross, Nazi swastika or other instrumentality of like import. While conceding that the municipality had a compelling interest in eliminating discrimination, the Supreme Court determined that the ordinance was "facially unconstitutional" in that it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses. Id. at 2547. Justice Scalia, writing for the divided majority, based his decision on the principle that the First Amendment prohibits content discrimination.

Far from approving the concept of "thought police" restricting one's freedom of expression, Justice Scalia distinguished a statute which punishes conduct from one which proscribes distasteful ideas. See Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). By these constitutional standards, Florida's law is directed against conduct, and does not merely look to words that communicate messages of racial, gender, or religious intolerance. Under

Justice Scalia's analysis, section 775.085 does not offend the First Amendment.

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

The nature of the harm and the narrow application of the law warrant the use of the police power to punish the offender. Not only is the enhancement statute directed at criminal conduct which causes physical harm, thus satisfying one of the basic principles of constitutional adjudication, but it also does not deprive the offenders of any legitimate right to freedom, autonomy, or privacy. From the viewpoint of constitutional adjudication, the statute is

valid. Moreover, the law is consistent with an individual victim's constitutional right of privacy. See Art. I, §23, Fla.Const. ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.")

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

Other courts are grappling with the same issues now confronting this court. The Wisconsin Supreme Court recently examined its hate crimes statute in light of claims that it offended the First Amendment, due process, and equal protection. The Wisconsin law, which is similar but not identical to Florida's statute, provides for an increased penalty if a defendant commits a crime "because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property." The majority found the statute unconstitutional on First Amendment grounds, essentially

adopting the Supreme Court's approach in R.A.V. The Wisconsin court construed the statute as providing for "punishment of offensive motive or thought." State v. Mitchell, 485 N.W.2d 807, 813 (Wis. 1992). The court's view was that the "selecting" of a victim for discriminatory reasons "necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime." Id. at 813.

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

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

the Wisconsin statute adequately protects against unconstitutional application. He wrote:

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

State v. Mitchell, 485 N.W.2d at 818-819 (Abrahamson, J., dissenting). By narrowing the focus of the statute and by requiring a clear nexus between the criminal conduct and the discrimination, Justice Abrahamson's view would remove any possibility that a defendant might be punished for pure thought.

Justice Bablitch, approaching the constitutional analysis from another direction, stated that "criminal conduct plus purposeful selection" is properly punished under the Wisconsin statute. Id. at 821 (Bablitch, J., dissenting). People remain free to think whatever they choose, but acting out those beliefs in a manner which results in otherwise criminal conduct is not protected. Justice Bablitch analogized the commission of such a crime to that involved in many other offenses, where a defendant's conduct coupled with the defendant's words prove the penal nature of the actions. The dissent also saw no reason to distinguish between a discrimination enhancement statute and laws which prohibit discrimination.

ADL finds substantial promise in the Mitchell dissenting opinions. Both recognize that people must be free to express their

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

CONCLUSION

The Florida Legislature promulgated a carefully crafted and narrowly tailored statute to enhance the punishment meted out to criminals who select their targets because of discriminatory intent. Florida has seen fit to aid the fight against discrimination and racial intolerance by declaring that criminals who target victims because of a protected status will be punished severely. Section 775.085 does not prohibit speech or thought, and is not capable of being applied to First Amendment expressions. It

is a constitutionally acceptable way of punishing criminal conduct. The statute should be declared constitutional and the decision of the 5th DCA should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Michael J. Neimand, Esq., Assistant Attorney General, 401 N.W. 2d Avenue, Suite N-921, Miami, Florida, 33128; and Jeffrey L. Dees, Esq., Dunn, Abraham, Swain & Dees, 347 South Ridgewood Avenue, P.O. Drawer 2600, Daytona Beach, FL 32115-2600, this 16th day of March, 1993.

By: _____
KENNETH W. SHAPIRO

APPENDIX INDEX

STATEMENT OF

LAURENCE H. TRIBE
Tyler Professor of Constitutional Law
Harvard Law School

ON

H.R. 4797, the "Hate Crimes Sentencing Enhancement Act of 1992"

BEFORE THE

SUBCOMMITTEE ON CRIME AND CRIMINAL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

Wednesday, July 29, 1992

DOES THE CONSTITUTION PREVENT ENHANCED SENTENCING FOR "HATE CRIMES"?

TESTIMONY OF LAURENCE H. TRIBE
Tyler Professor of Constitutional Law
Harvard Law School

on H.R. 4797, before the Subcommittee on Crime and Criminal Justice

July 29, 1992

I am honored to appear before the Subcommittee on Crime and Criminal Justice at the invitation of Chairman Jack Brooks of the House Judiciary Committee to address the constitutionality of H.R. 4797, the "Hate Crimes Sentencing Enhancement Act of 1992." I understand that some have raised questions about whether the Act might violate the First Amendment in light of the U.S. Supreme Court's decision this June 22, 1992, in R.A.V. v City of St. Paul. I believe that this decision poses no serious constitutional problem for the Act.

Enhancing a criminal sentence for any "hate crime", defined as "a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, [etc.] . . . of another individual or group of individuals," in no way creates a "thought crime" or penalizes anyone's conduct based upon a non-proscribable viewpoint or message that such conduct

contains or expresses. In this crucial respect, the trigger for enhanced punishment under the proposed Act differs completely from the constitutionally problematic trigger for punishment under the St. Paul ordinance struck down by the Supreme Court in the R.A.V. case.

It is certainly true that the evidence tending to show that a defendant's conduct was in fact motivated by racial or similar hatred or bias might in a particular case include statements made by the defendant before, during, or after the alleged conduct. But nothing in the R.A.V. 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.

In many criminal prosecutions, the statutorily required mens rea or mental state may be evidenced in significant part by communications that could not independently be punished by virtue of their content. For example, it would certainly violate the First Amendment to punish X simply for saying, "I wish Y were dead; my life would be a lot easier without interference from that S.O.B." It does not follow, however, in a prosecution of X for the premeditated murder of Y, that the First Amendment precludes proving the element of premeditation in whole or in part through evidence about X's statement.

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. The First Amendment's commitment to a society in which government may never target particular disfavored views or topics for special punishment hardly entails a commitment to a society in which government is indifferent to the special evil of attacks motivated by hatred or bias based on race, religion, nationality, ethnicity, gender, or sexual orientation.

On the contrary, if the First Amendment, or any other provision of the Bill of Rights, were to require governmental indifference 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. Title VII of the Civil Rights Act of 1964 for example, and similar state anti-discrimination laws and local anti-discrimination ordinances, render unlawful a wide variety of actions by employers (such as refusals to hire, or decisions to terminate employment, or certain forms of harassment) when, and only when, those actions are motivated by the employee's race, gender, religion, or other special status. 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.

In recently reaching a contrary conclusion regarding a state "hate crimes" statute, a majority of the Supreme Court of Wisconsin attempted to reconcile its holding with the continued validity of such anti-discrimination laws. See State v. Mitchell (June 23, 1992). The attempted reconciliation was completely unconvincing. Among other things, the state court majority found it necessary to suggest that such anti-discrimination provisions pass constitutional muster only when they include purely civil penalties, for then they supposedly represent merely "slight incursions into free speech where the overarching concern is protection from objective acts of bigotry in the employment marketplace."

Justice Bablitch, dissenting from the state court's conclusion, was right in finding "no support in law or logic" for the majority's distinction. There is simply no answer to the dissenter's telling questions:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the

> same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

I think it is particularly important to lay to rest the sophistry through which the Wisconsin Supreme Court sought to defend its distinction between "hate crimes" legislation and anti-discrimination laws. For the distinction is one that will, in the end, crumble under analysis, and the upshot of accepting the Wisconsin Supreme Court's bottom line about hate crimes legislation will be not simply to jeopardize such state measures, and to endanger laws such as the proposed "Hate Crimes Sentencing Enhancement Act of 1992," but also to invalidate Title VII itself. Indeed, the Wisconsin Supreme Court's reading of R.A.V. and of the First Amendment would lead to the invalidation of the entire array of laws through which Congress, the states, and the municipalities have sought to reflect the reality that there is all the difference in the world between firing or disciplining someone because of dissatisfaction with her job performance, and doing so because of her gender, race, or religion.

Whatever else it did, the R.A.V. decision, fairly read, did not spell constitutional doom for all such laws, and it would be a tragedy to construe it as though it did. Independent of R.A.V., of course, and apart from the First Amendment concerns it articulated, other constitutional constraints must be complied with in drafting legislation of this kind. In my view, however, no such constraints are

transgressed by the proposed bill. In particular, the equality component of the Fifth Amendment's Due Process Clause would, of course, raise issues quite apart from the First Amendment if Congress were to impose more severe punishment upon offenders motivated by anti-black bias than by anti-white bias, or were to treat religiously motivated attacks against one religious group more severely than religiously motivated attacks against another religious group. But the proposed statute does nothing of this kind. Rather, it identifies bias at a level of generality high enough to avoid any serious condemnation on equality grounds.

Finally, there is no doubt as to Congress's affirmative authority to direct the Sentencing Commission in the manner proposed by the Act, and there are no separation of powers obstacles to the proposed directive. On the contrary, separation of powers concerns that were raised by the structure and mission of the United States Sentencing Commission are, if anything, reduced by the proposed directive insofar as it represents a reassertion by Congress of a quintessentially legislative responsibility.

STATEMENT OF FLOYD ABRAMS

BEFORE THE

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME AND CRIMINAL JUSTICE

RE: H.R. 4797 -- HATE CRIMES
SENTENCING ENFORCEMENT ACT OF 1992

July 29, 1992

SUMMARY OF STATEMENT OF FLOYD ABRAMS

H.R. 4797, the Hate Crimes Sentencing Enforcement Act of 1992, would in all likelihood be held to be constitutional.

The recent ruling of the Supreme Court in R.A.V. v. City of St. Paul established a significant and admirable First Amendment rule that even within the realm of generally unprotected speech such as "fighting words", the state must act in a content-neutral fashion. Neither that ruling nor any other, however, is likely to be held to shed doubt on the long established general principle that in determining the sentence to be imposed for any crime, the motivation of the criminal is appropriate to consider. That principle has consistently been applied and approved with respect to racially motivated crimes. Most recently, in its 1992 ruling in Dawson v. Delaware, the Supreme Court unanimously expressed the view that a biased motivation for committing what may be a capital offense may be deemed an aggravating circumstance which could lead to the execution of a defendant.

While there are limits to the proposition that sentence enhancement may consitutionally be based upon racial or similar motivation, H.R. 4797 seems well within tolerable constitutional limits.

TESTIMONY OF FLOYD ABRAMS
WITH RESPECT TO H.R. 4797,
THE "HATE CRIMES SENTENCING
ENFORCEMENT ACT OF 1992"

Mr. Chairman and members of the Committee:

I appear here today, at your request, to comment upon the constitutionality of H.R. 4797, legislation which provides for sentencing enhancements of not less than 3 offense levels for hate crimes. Although the constitutional issues raised with respect to the legislation are not insubstantial, I believe the legislation is constitutional and would be so held by the Supreme Court.

I appear before you as someone who welcomed and publicly praised the Supreme Court's recent ruling in R.A.V. v. City of St. Paul, striking down a Minnesota law that prohibited the bias-motivated display of a symbol which one has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." While I believe that statute could have been held unconstitutional (as Justice White and three other Justices concluded) as constitutionally overbroad, Justice Scalia's ruling for the Court striking the statute down on the ground that it was not content-neutral seemed to me not only correct but admirable. And uniquely American. The First Amendment protects -- as it should -- a good deal of despicable expression, expression that we are

alone in the world in protecting. We should, I think, be proud of our willingness to tolerate a good deal of some of the vilest speech imaginable. In doing so, we engage in a constitutionally compelled trade-off: we accept the pain caused by the brutality of some expression for a society that is freer by far for not having banned it. It is not an easy choice; it remains, in my view, a brave and far-sighted one.

But that does not mean that that speech is irrelevant or inadmissible or improper to consider in sentencing. It does not mean that H.R. 4797 is unconstitutional. For notwithstanding the fact that the Government generally may not punish thoughts and ideas in determining if one has committed a crime, consideration of evil motive or moral turpitude in determining an appropriate sentence has long been held permissible. Just as the Government is entitled to exercise its judgment with respect to the relative severity of crimes committed under various circumstances, such as the age of the victim or the purpose of the offender, the Government may constitutionally take unlawful motive into account in determining a sentence. Specifically, when racial hatred is the reason for committing a crime, this information may appropriately be considered in sentencing.

In Dawson v. Delaware, 112 S.Ct. 1093 (1992), for example, the Supreme Court determined that evidence showing that the defendant belonged to the white supremicist group called the Aryan Brotherhood was impermissibly submitted during the penalty phase of a capital case since the victim, like the defendant, was white, and "elements of racial hatred were therefore not involved in the killing." Dawson, 112 S.Ct. at 1098. However, the Court was unanimously of the view that where evidence of a convicted murderer's biased motivation in committing a murder is relevant to why he or she committed the crime, that motivation may properly be recognized as an aggravating circumstance in sentencing -- even, in fact, in leading to the death penalty being inflicted.

In its analysis, the Dawson Court cited an earlier decision, Barclay v. Florida, 46 US. 939 (1983), with approval. It said:

> In Barclay, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a 'racial war,' were related to the murder of a white hitchhiker. See 463 U.S., at 942-944, 103 S.Ct., at 3420-3421 (plurality opinion). We concluded that it was most proper for the sentencing judge to 'tak[e] into account the elements of racial hatred in this murder.' (Emphasis added).

Dawson, 112 S.Ct., at 1098. Under different facts than in Dawson, the Court observed, evidence concerning a defendant's biased motivation "might be relevant in proving other aggravating circumstances" since "[t]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Dawson, 112 S.Ct., at 1097-1098.

The Court had arrived at a similar result in United States v. Abel, 469 U.S. 45 (1984). There, the Court held that the Government could impeach a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, and that members were sworn to lie on behalf of each other. The Court held the evidence admissible to show bias, even assuming that membership in the organization was among the associational freedoms protected by the First Amendment. Abel, 469 U.S., at 49.

The Court has thus clearly indicated that motive, and more specifically racial hatred, is an appropriate consideration in sentencing. Further, the First Amendment has been held to be not unduly burdened when otherwise protected statements

are used as circumstantial evidence to show that conduct was motivated by hatred, bias, or prejudice.

That, of course, does not necessarily end our analysis. As I mentioned earlier, in the R.A.V. case, accepting the Minnesota Supreme Court determination that the ordinance reached only expressions that constituted "fighting words", the Court held that the government may not constitutionally regulate even otherwise unprotected speech on the basis of hostility towards the idea expressed by the speaker. R.A.V., 1992 WL 135564, at 9. In short, regulation of abstract thoughts, beliefs, or ideas, however repugnant they are, is unconstitutional. See Texas v. Johnson, 491 U.S. 397, 414 (1989). The Government surely is barred from penalizing the expression of an idea simply because society finds the idea itself offensive or disagreeable; selective proscription is valid only where "there is no realistic possibility that regulation of ideas is afoot." R.A.V., 1992 WL 135564, at 6.

The question, then, is what we should take from cases such as Dawson and R.A.V. when those cases (and the principles embodied in them) are considered with regard to H.R. 4797. My view is that the St. Paul ordinance invalidated in R.A.V. is plainly distinguishable from the Hate Crimes Sentencing

Enhancement Act. Whereas the city of St. Paul passed a separate statute that criminalized fighting words containing certain messages of bias-motivated hatred, here there is nothing but enhancement of penalties for other criminal conduct when it is bias-related or bias-motivated. Enhanced punishment of a defendant on the basis for his or her motive is generally constitutional notwithstanding that no criminal action could have been commenced based upon the evil motive alone. See People v. Grupe, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988).

What I have just said requires some limiting principles. I have no doubt that at some point the distinction between sentence enhancement based on motive and regulation of underlying abstract beliefs could be so blurred as to be lost. Consider the following illustration. Suppose that the Congress is deciding whether to enact one of two statutes. The first statute provides a five day jail sentence for an offense and adds another five days to the sentence if the assault were motivated by racial animus. The second statute also criminalizes the substantive offense and imposes a five day sentence, but provides for a sentence enhancement of five years rather than five days. In both cases, motivation is plainly relevant to sentencing of the underlying criminal conduct. Yet the first statute seems plainly constitutional under Dawson,

whereas the second might well -- and probably should -- be held unconstitutional since its thrust (because of its penalty provision) may be deemed the effectuation of a content based regulation of beliefs. No one ever promised that the lot of an appellate judge was easy; in this area courts must be vigilant not to allow supposed sentence enhancement to swallow up the First Amendment protections articulated in R.A.V. and other cases. It may also be that, as applied, some sentence enhancement proceedings may overstep constitutional bounds.

Nonetheless, viewing H.R. 4797 on its face, I believe it is constitutional. It seems to fall squarely within the line of cases illustrated by the Court's dictum in Dawson and would, for that reason, likely pass constitutional muster.

I do have a few suggestions. I would prefer it if instead of establishing guidelines that require sentence enhancements of not less than 3 offense levels for hate crimes, the legislation permitted such enhancements. I would also recommend that instead of providing for sentence enhancements of "not less than 3 offense levels" (leaving entirely open-ended the degree of sentence enhancement), the legislation simply permitted enhancements of up to 3 levels.

I would suggest, as well, careful consideration of whether potential vagueness challenges could be avoided. Some state courts have found their hate crime statutes to be impermissibly vague, and have held the statutes to be neither sufficiently definite to give persons of ordinary intelligence who wish to abide by the law adequate notice of the proscribed conduct, nor adequate to provide standards for those who enforce the laws and adjudicate guilt. See e.g., State v. Van Gundy, 1991 Ohio App. LEXIS 2066 (Ohio Ct. App. 1991); People v. Justice, No. 1-0--1793 (Mich. Dist. Ct. 1990). But cf., State of Oregon v. Hendrix, 813 P.2d 1115 (Ore. 1991).

To avoid H.R. 4797 being attacked on similar grounds, it might be well, for example, to consider specifying whether the term "actual or perceived race, ... or sexual orientation of another individual or group of individuals" refers only to the background of the victim, or might apply to someone else as well. The Act plainly covers cases where the offender is of a different background than the victim, but may also include cases where background is only tangentially related to the offense. For example, someone may react adversely to the white person of an interracial couple, or two whites might fight over the treatment of a member of a suspect class. Such an issue might be dealt with in legislative history (something which

Justice Scalia, for one, would surely disapprove of) or in text. I cite it now by way of illustration simply to urge the Committee to assure itself that vagueness cannot be the basis of a successful constitutional challenge.

In the end, the constitutionality of H.R. 4797 is likely to be determined on the basis of the well-established rule that motive is -- and should be -- relevant in sentencing. That being so, I believe H.R. 4797 would be held constitutional.

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40. West's F.S.A. s 409.2665 WEST'S FLORIDA STATUTES ANNOTATED
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41. West's F.S.A. s 413.445 WEST'S FLORIDA STATUTES ANNOTATED
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42. West's F.S.A. s 440.20 WEST'S FLORIDA STATUTES ANNOTATED
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43. West's F.S.A. s 475.25 WEST'S FLORIDA STATUTES ANNOTATED
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6. West's F.S.A. s 607.1320 WEST'S FLORIDA STATUTES ANNOTATED
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7. West's F.S.A. s 607.154 WEST'S FLORIDA STATUTES ANNOTATED
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.154. Repealed by Laws 1989, c. 89-154, s 166, eff. July 1, 1990; Laws
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8. West's F.S.A. s 607.247 WEST'S FLORIDA STATUTES ANNOTATED
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.201 to 607.311. Repealed by Laws 1989, c. 89-154, s 166, eff. July 1,
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9. West's F.S.A. s 620.75 WEST'S FLORIDA STATUTES ANNOTATED
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7.626. Renumbered as 627.6085 by Laws 1990, c. 90-249, s 12, eff. Oct. 1,
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4. West's F.S.A. s 627.664 WEST'S FLORIDA STATUTES ANNOTATED
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59. West's F.S.A. s 628.4615 WEST'S FLORIDA STATUTES ANNOTATED
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60. West's F.S.A. s 629.401 WEST'S FLORIDA STATUTES ANNOTATED
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61. West's F.S.A. s 631.181 WEST'S FLORIDA STATUTES ANNOTATED
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64. West's F.S.A. s 655.033 WEST'S FLORIDA STATUTES ANNOTATED
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65. West's F.S.A. s 655.417 WEST'S FLORIDA STATUTES ANNOTATED
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66. West's F.S.A. s 660.33 WEST'S FLORIDA STATUTES ANNOTATED
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67. West's F.S.A. s 665.038 WEST'S FLORIDA STATUTES ANNOTATED
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68. West's F.S.A. s 665.045 WEST'S FLORIDA STATUTES ANNOTATED
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70. West's F.S.A. s 672.210 WEST'S FLORIDA STATUTES ANNOTATED
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71. West's F.S.A. s 672.507 WEST'S FLORIDA STATUTES ANNOTATED
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72. West's F.S.A. s 672.609 WEST'S FLORIDA STATUTES ANNOTATED
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73. West's F.S.A. s 678.101 WEST'S FLORIDA STATUTES ANNOTATED
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74. West's F.S.A. s 679.204 WEST'S FLORIDA STATUTES ANNOTATED
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75. West's F.S.A. s 679.313 WEST'S FLORIDA STATUTES ANNOTATED
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76. West's F.S.A. s 680.303 WEST'S FLORIDA STATUTES ANNOTATED
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77. West's F.S.A. s 680.401 WEST'S FLORIDA STATUTES ANNOTATED
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78. West's F.S.A. s 682.13 WEST'S FLORIDA STATUTES ANNOTATED
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79. West's F.S.A. s 684.16 WEST'S FLORIDA STATUTES ANNOTATED
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80. West's F.S.A. s 684.19 WEST'S FLORIDA STATUTES ANNOTATED
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81. West's F.S.A. s 684.23 WEST'S FLORIDA STATUTES ANNOTATED
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82. West's F.S.A. s 684.25 WEST'S FLORIDA STATUTES ANNOTATED
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83. West's F.S.A. s 713.30 WEST'S FLORIDA STATUTES ANNOTATED
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PART I. MECHANICS' LIENS 713.30. Other actions not barred

84. West's F.S.A. s 718.116 WEST'S FLORIDA STATUTES ANNOTATED
TLE XL. REAL AND PERSONAL PROPERTY CHAPTER 718. CONDOMINIUMS
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85. West's F.S.A. s 719.108 WEST'S FLORIDA STATUTES ANNOTATED
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86. West's F.S.A. s 721.15 WEST'S FLORIDA STATUTES ANNOTATED
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87. West's F.S.A. s 733.814 WEST'S FLORIDA STATUTES ANNOTATED
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88. West's F.S.A. s 742.12 WEST'S FLORIDA STATUTES ANNOTATED
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2.12. Scientific testing to determine paternity

89. West's F.S.A. s 766.107 WEST'S FLORIDA STATUTES ANNOTATED
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66.107. Court-ordered arbitration

90. West's F.S.A. s 768.043 WEST'S FLORIDA STATUTES ANNOTATED
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91. West's F.S.A. s 768.49 WEST'S FLORIDA STATUTES ANNOTATED
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PART II. MEDICAL MALPRACTICE AND RELATED MATTERS
768.48, 768.49. Repealed by Laws 1986, c. 86-160, s 68, eff. July 1, 1986

92. West's F.S.A. s 768.74 WEST'S FLORIDA STATUTES ANNOTATED
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93. West's F.S.A. s 775.085 WEST'S FLORIDA STATUTES ANNOTATED
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94. West's F.S.A. s 877.19 WEST'S FLORIDA STATUTES ANNOTATED
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95. West's F.S.A. s 905.04 WEST'S FLORIDA STATUTES ANNOTATED
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96. West's F.S.A. s 924.28 WEST'S FLORIDA STATUTES ANNOTATED
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97. West's F.S.A. s 941.45 WEST'S FLORIDA STATUTES ANNOTATED
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98. West's F.S.A. s 943.139 WEST'S FLORIDA STATUTES ANNOTATED
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99. West's F.S.A. s 944.025 WEST'S FLORIDA STATUTES ANNOTATED
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100. West's F.S.A. RCP Rule 1.060 FLORIDA RULES OF CIVIL PROCEDURE
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101. West's F.S.A. RCP Rule 1.070 FLORIDA RULES OF CIVIL PROCEDURE
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102. West's F.S.A. RCP Rule 1.190 FLORIDA RULES OF CIVIL PROCEDURE
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103. West's F.S.A. RCP Rule 1.270 FLORIDA RULES OF CIVIL PROCEDURE
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104. West's F.S.A. RCP Rule 1.370 FLORIDA RULES OF CIVIL PROCEDURE
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105. West's F.S.A. RCP Rule 1.420 FLORIDA RULES OF CIVIL PROCEDURE
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106. West's F.S.A. RCP Rule 1.431 FLORIDA RULES OF CIVIL PROCEDURE
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107. West's F.S.A. RCrP Rule 3.140 RULES OF CRIMINAL PROCEDURE
III. PRELIMINARY PROCEEDINGS RULE 3.140 INDICTMENTS; INFORMATIONS

108. West's F.S.A. RCrP Rule 3.152 RULES OF CRIMINAL PROCEDURE
III. PRELIMINARY PROCEEDINGS RULE 3.152 SEVERANCE OF OFFENSES AND DEFENDANTS

109. West's F.S.A. RCrP Rule 3.172 RULES OF CRIMINAL PROCEDURE
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110. West's F.S.A. RCrP Rule 3.213 RULES OF CRIMINAL PROCEDURE
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112. West's F.S.A. RCrP Rule 3.240 RULES OF CRIMINAL PROCEDURE
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113. West's F.S.A. W.C.R.P.Rule 4.056
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114. West's F.S.A. W.C.R.P.Rule 4.110
ORKERS' COMPENSATION RULES OF PROCEDURE PART A. TRIAL PROCEEDINGS
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115. West's F.S.A. Small Claims Rule 7.110 SMALL CLAIMS RULES
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116. West's F.S.A. R.Juv.P.Rule 8.110 FLORIDA RULES OF JUVENILE PROCEDURE
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117. West's F.S.A. R.Juv.P.Rule 8.320 FLORIDA RULES OF JUVENILE PROCEDURE
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ULE 8.320 DISQUALIFICATION OF JUDGE

118. West's F.S.A. R.Juv.P.Rule 8.720 FLORIDA RULES OF JUVENILE PROCEDURE
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119. West's F.S.A. R.Juv.P.Rule 8.850 FLORIDA RULES OF JUVENILE PROCEDURE
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120. West's F.S.A. R.Juv.P.Rule 8.885 FLORIDA RULES OF JUVENILE PROCEDURE
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121. West's F.S.A. R.App.P.Rule 9.600 FLORIDA RULES OF APPELLATE PROCEDURE
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122. Uniform Guidelines for Taxation of Costs in Civil Actions
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123. West's F.S.A. Code of Jud.Conduct, Canon 3 CODE OF JUDICIAL CONDUCT
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124. West's F.S.A. Judicial Qualifications Comm. Rule 26
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125. West's F.S.A. Bar Rule 3-5.1 RULES REGULATING THE FLORIDA BAR
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126. West's F.S.A. Bar Rule 3-7.6 RULES REGULATING THE FLORIDA BAR
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127. West's F.S.A. Bar Rule 3-7.7 RULES REGULATING THE FLORIDA BAR
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128. West's F.S.A. Bar Rule 3-7.11 RULES REGULATING THE FLORIDA BAR
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129. West's F.S.A. Bar Rule 4-2.2 RULES REGULATING THE FLORIDA BAR
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130. West's F.S.A. Bar Rule 5-1.1 RULES REGULATING THE FLORIDA BAR
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131. West's F.S.A. Admission to Bar, Art. 3
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132. U.S.Dist.Ct.Rules N.D.Fla., General Rule 15
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ENERAL RULES ADMINISTRATION OF COURT BUSINESS
ULE 15. RELEASE OF INFORMATION IN CRIMINAL AND CIVIL CASES

133. U.S.Dist.Ct.Rules N.D.Fla., General Rule 24
ULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
ENERAL RULES ADMINISTRATION OF COURT BUSINESS
ULE 24. AUTHORITY OF UNITED STATES MAGISTRATES

134. U.S.Dist.Ct.Rules N.D.Fla., Admiralty Rule 18
ULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
DMIRALTY RULES RULE 18. LIMITATION OF CLAIMS AFTER SALE

135. U.S.Dist.Ct.Rules M.D.Fla., Rule 1.07
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ULE 1.07 PREPARATION, SERVICE AND RETURN OF PROCESS

136. U.S.Dist.Ct.Rules M.D.Fla., Rule 4.07
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137. U.S.Dist.Ct.Rules M.D.Fla., Rule 4.10
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138. U.S.Dist.Ct.Rules M.D.Fla., Rule 6.01
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ULE 6.01 DUTIES OF UNITED STATES MAGISTRATES

139. U.S.Dist.Ct.Rules M.D.Fla., Rule 7.05
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140. U.S.Dist.Ct.Rules M.D.Fla., Rule 8.03
ULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
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141. U.S.Dist.Ct.Rules M.D.Fla., Rule 9.02
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ULE 9.02 CERTIFICATION; QUALIFICATION AND COMPENSATION OF MEDIATORS

142. U.S.Bankr.Ct.Rules M.D.Fla., Mediation Rule 1.7
OCAL RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES BANKRUPTCY COURT FOR
HE MIDDLE DISTRICT OF FLORIDA
ROCEDURES GOVERNING MEDIATION OF CONTESTED MATTERS AND ADVERSARY PROCEEDINGS
N BANKRUPTCY CASES RULE 1.7 DISQUALIFICATION OF A MEDIATOR

143. U.S.Dist.Ct.Rules S.D.Fla., General Rule 21
RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
ENERAL RULES
ULE 21. RELEASE OF INFORMATION IN CRIMINAL AND CIVIL PROCEEDINGS

ND OF CITATIONS LIST

775.085. Evidencing prejudice while committing offense; enhanced penalties

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

(a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.

(b) A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.

(c) A felony of the third degree shall be punishable as if it were a felony of the second degree.

(d) A felony of the second degree shall be punishable as if it were a felony of the first degree.

(2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

(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.

Section 2. Section 877.19, Florida Statutes, is amended to read:

877.19. Hate Crimes Reporting Act

(1) Short title.—This section may be cited as the "Hate Crimes Reporting Act."

(2) Acquisition and publication of data.—The Governor, through the Florida Department of Law Enforcement, shall collect and disseminate data on incidents of criminal acts that evidence prejudice based on race, religion, ethnicity, color, ancestry, sexual orientation, or national origin. All law enforcement agencies shall report monthly to the Florida Department of Law Enforcement concerning such offenses in such form and in such manner as prescribed by rules adopted by the department. Such information shall be compiled by the department and disseminated upon request to any local law enforcement agency, unit of local government, or state agency.

(3) Limitation on use and content of data.—Dissemination of such information shall be subject to all confidentiality requirements otherwise imposed by law. Data required pursuant to this section shall be used only for research or statistical purposes and shall not include any information that may reveal the identity of an individual victim of a crime.

(4) Annual summary.—The Attorney General shall publish an annual summary of the data required pursuant to this section.

Section 3. Section 876.18, Florida Statutes, is amended to read:

876.18. Placing burning or flaming cross on property of another

It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 4. Section 876.21, Florida Statutes, is amended to read:

876.21. Penalty.

Any person or persons violating ss. 876.11-876.20, except as provided in s. 876.18, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

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

Section 6. This act shall take effect October 1, 1991.

Approved by the Governor May 24, 1991.

Filed in Office Secretary of State May 24, 1991.

and administered at
believe such person
alcoholic beverages.
at a detention facili
the request of a law
was using a firearm
The urine test shall
otherwise, which is
ensure the accuracy
The administration
The refusal to subm
law enforcement of
criminal proceeding
outlined in s. 790.1

(b) If the arresti