IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,377

THE STATE OF FLORIDA,

Appellant,

vs.

GLOBE COMMUNICATIONS CORP.,

Appellee.

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF AMICI CURIAE THE TIMES PUBLISHING COMPANY, THE ASSOCIATED PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, THE AMERICAN CIVIL LIBERTIES UNION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FLORIDA FIRST AMENDMENT FOUNDATION, AND GANNETT CO. INC.

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STATEMENT OF THE CASE AND FACTS

Amici curiae adopt the Statement of the Case and Facts filed by Appellee Globe Communications Corp., but would direct this Court's attention to the following factual considerations which are most relevant to a consideration of the facial constitutionality of Section 794.03 of the Florida Statutes (the "Statute"). These facts demonstrate that the Statute is overbroad, underinclusive, vague, and fails to serve a compelling State interest.

NO RAPE VICTIM

While it is not part of the record on appeal or the record below, this Court may take judicial notice of the fact that William Kennedy Smith was found "not guilty" in the rape prosecution brought by Ms. Patricia Bowman. See Gulf Coast Home Health Servs. of Fla., Inc. v. Department of Health & Rehabilitative Servs., 503 So.2d 415 (Fla. 1st DCA 1987). Thus, legally there has been no rape, and the Statute cannot be said in this case to serve the interest of any rape victim. The State can claim such interests are involved here only because Section 794.011(1)(i) defines "rape victim" to mean "the person alleging to have been the object of a sexual assault," which may include persons falsely alleging they have been raped. (Init. Br. 13). Thus, the statute expressly defines "rape victims" to include persons who are not rape victims.

The Fourth District invalidated the Statute in part because it expressly "criminalizes" publication even "where the rape allegations were false ". (Slip op. at 26).

NO PRIVATE FACT

The State of Florida argues that the Statute serves the privacy interests of rape victims, but the two lower courts have held that the uncontradicted record evidence is that the Globe published no "private fact". The State has not contested this point on appeal. The evidence is that Patricia Bowman's identity, as the person accusing William Kennedy Smith of rape, was common knowledge in Palm Beach immediately after the incident and prior to the Globe's publication. (R. 708-09, 911, 916-18, 929, 1628-30; Init. Br. 3-4). The record evidence also is that prior to the Globe's publication, Patricia Bowman's name was published throughout Europe by four English newspapers with combined circulation in the millions, and some limited distribution in Palm Beach. (R. 739-42, 1678-30, Ex. 18-20).

The record evidence is that Ms. Bowman's name was disseminated at a press conference by the State Attorney, after the Globe's publication, because the uniform, standard, and routine practice in Palm Beach is that the State Attorney's office releases the name of the complaining witness in sex offense prosecutions in public court records (the criminal informations and "probable cause" affidavits) and subsequent public judicial proceedings. (R. 837-842; 1630). The trials of rape cases are public, and the "alleged victim" does not use a "Jane Doe" or pseudonym. (R. 841-43). The State Attorney fully acknowledged that he regards it as being in the absolute discretion of his office as to when the name is made public after the witness makes her complaint. (R. 67-68, 73-76, 1052-53, 1060, 1081, 1449-50, 1150-51). There was no evidence of any attempt by anyone in the prosecutor's office to make Patricia Bowman's name confidential, and all evidence was that it would inevitably have been made public, as it was, when the criminal information was issued. Thus, there was no private fact;

nor could the Globe have "disclosed" one. The State argues privacy interests are served by the Statute even though the language of the Statute does not require the identity of the alleged victim to have been held private or confidential.

NO WITNESS SAFETY ISSUE

The record is equally clear that the falsely accused, William Kennedy Smith, and his accuser, Patricia Bowman, knew each other's identity at the time of the attack. There was no evidence that Mr. Smith's subsequent whereabouts were unknown, that he was "at large," or that Ms. Bowman feared him in any way. The lower courts so found, and the State makes no contrary claim. Thus, there is no basis in the record for claiming that anonymity was needed to protect the "witness" from retaliation by the alleged perpetrator, nor does the Statute include language limiting its scope to such situations. As The Fourth District noted, the Statute "makes no allowance for" situations in which witness safety is not at issue. (Id. at 27).

NO VICTIM "CHILL"

Both courts below also found that the State presented no competent evidence that the publication of the names of rape victims would deter their reporting the crimes committed against them. (Id. 27-28). First, the State offered the testimony of two former rape victims. (R. 880-911). Neither testified that she would not have reported the crime against her if her name had been published; in fact, both voluntarily have come forward to speak out publicly as former rape victims, allowing their names to be freely published, and one has authored a book about her experience (R. 894, 900-901). Both did testify that when they reported the crimes,

they were afraid their names might be published. But both further explained that their fear related to the fact that the perpetrators were unknown to them, had not been apprehended, and might learn their identity and location from the publication prior to being arrested. (R. 885-86, 901). Neither stated that they relied on the transient "anonymity" assertedly provided by the Statute. In fact, one victim had been a minor at the time of the attack and had incorrectly believed her name would not be revealed for that reason, (R. 887, 893, 894), and the other victim stated she was unaware of the Statute when she reported the crime (R. 899-900). Patricia Bowman, the "alleged victim" here, gave no testimony at all, let alone any statement that she would have been deterred in reporting the crime had she known her name might be published prior to the State Attorney's release of it.

The State offered no evidence as to why there had never been any prior prosecutions in Florida under the Statute, and no evidence was offered suggesting that Florida enjoyed a higher rate of rape reporting than the 47 states which do not have a law like the Statute. Of course, it is unlikely such evidence could ever be produced, because it would have to show that prohibiting mass media publications only until a criminal information is filed prevents a "chill" on rape victims coming forward to report the crimes committed against them. As the Fourth District observed, "the state has failed to provide any empirical evidence demonstrating how a blanket prohibition on the publication of information identifying a sexual offense victim has affected the number of such reports in this state." (Id.).

NO UNLAWFULLY OBTAINED INFORMATION

There is no claim in this case, nor any evidence, that the Globe learned Patricia Bowman's name unlawfully. Both lower courts held the information was lawfully obtained, and the state conceded this fact on appeal. The evidence is uncontroverted that Elizabeth Murphy, one of Ms. Bowman's friends, told Globe reporter Kenneth Harrell Ms. Bowman's name after they met at Au Bar. (R. 637-645). The name was repeatedly confirmed in other interviews. (R. 661-62).

Prior to publication, Denny Abbott, at least by his actions, if not in fact by his words, also confirmed Patricia Bowman's identity by taking her a note Harrell had asked him to give to her. (R. 654-657). Thus, Abbott, a public official, confirmed the information Murphy provided; and subsequently the State Attorney himself confirmed her identity at his press conference by his routine release of her name in the public records constituting the criminal information and "probable cause" affidavits. No claim has been made that Murphy, Abbott, Harrell, or the State Attorney acted illegally; nor could there be. Yet the Statute served as the basis for the prosecution here because its language recognizes no exception for information lawfully obtained, or taken properly from government sources or records.

NO LACK OF "NEWSWORTHINESS"

The lower courts also agreed that the record evidence clearly established the publication here was "newsworthy"; that is, highly relevant to a matter of legitimate public concern. Patricia Bowman was not seeking to keep confidential private facts about her personal sex life; she sought to keep secret her identity as the person publicly accusing a member of one

of the nation's most powerful families of having committed a heinous crime. The record reveals that issues immediately arose as to whether the Kennedy family was improperly influencing the investigation, and as to whether her accusation was made in bad faith. (R. 1146, 1468). Obviously, credibility issues can be best assessed if the accuser's identity, and facts about her, are known, along with the name of the accused. The fact, that some media, including several of the amici curiae, chose to follow a voluntary policy of not publishing the alleged rape victim's name reflects the diversity of opinion freedom of the press permits, as well as the "chill" created by the Statute. The record evidence of the media's overwhelming interest in, and coverage of, this prosecution is undisputed. (R. 1145-50).

The facts of this case demonstrate that under the language of the Statute a criminal prosecution could go forward against the Globe for the truthful publication of the lawfully obtained identity of a person who falsely accused a member of one of the nation's most powerful families of a heinous crime; even when that person's identity was already known to much of the world, and was specifically confirmed, and inevitably disseminated, by the State itself. The record shows the Statute authorized the prosecution to proceed even though none of the putative interests it purportedly served was implicated by this publication.

It is scarcely surprising the lower courts found the Statute unconstitutional on its face and as applied, or that the State itself has conceded on appeal the prosecution was unconstitutional in light of the facts and the controlling decision of the United States Supreme Court in Florida Star v. B.J.F., 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed. 2d 443 (1989).

What is surprising is the State's claim that this Court may rewrite the Statute in such a way as to find it facially constitutional. It is to this contention amici curiae address their brief.

SUMMARY OF ARGUMENT

Both courts below held that Section 794.03 is "unconstitutionally overbroad because the statute imposes an absolute and blanket prohibition on the publication of information that is truthful, lawfully obtained and involves a matter of public interest," and fatally "underinclusive" because it "singles out the press . . . for special punitive treatment." (Id. at 20-21, 31).

Both courts made these holdings based on their understanding that in Florida Star the United States Supreme Court concluded the Statute failed to meet the requirements of the Daily Mail principle. That rule of First Amendment law provides that a state may only punish the publication of lawfully acquired truthful information, if at all, where a statute is narrowly tailored to serve a state interest of the highest order. Florida Star struck down a private tort action implied from Section 794.03 because the Statute does not serve a state interest of the highest order and is not narrowly tailored. This precedent is binding upon this Court.

The State argues here that this Court may remedy the Statute's constitutional infirmities as identified by Florida Star, and thereby avoid the logical implication of its holding, through a "combination of the use of proper jury instructions, affirmative defenses, and judicial definitions of some of the terms of the statute." (Br. 7). However, as the Fourth District held, "reduced to it essence, the state's argument simply makes more glaring the fact that section

794.03 is hopelessly overbroad in its application to constitutionally protected activity, and incapable of any saving construction." (Slip Op. at 30). The overbreadth problems cannot be cured by judicially engrafting affirmative defenses and jury instructions on the Statute because the overbreadth is inherent in the language enacted by the Legislature. The State cites no First Amendment case in which any court has "saved" a criminal statute with such an approach.

Moreover, Florida law makes it clear that the requested judicial "rehabilitation" of the Statute would constitute an improper usurpation of legislative authority. As the Fourth District held:

> There is no indication the legislature intended any "ifs, ands, or buts" to be read into the statute's unambiguous language. Yet, this is exactly what the state would have this court do, make the prohibition on publication contingent on an endless number of factual situations. That would involve nothing short of pure judicial legislation. After adding all of the state's ingredients to the mix, the statute would be transformed from an "apple" to an "orange" and we still could not be certain it would pass constitutional muster. None of the above-cited cases stands for the proposition that a court may rewrite a statute in this manner, and no reasonable construction of the statute's present language could authorize such tampering.

(Id.).

The State is also mistaken in its claim that underinclusiveness alone cannot invalidate a statute. Its argument confuses constitutionally permitted differential state taxation of sales made by distinguishable classes of media companies with the Statute's unconstitutional, content-based, discriminatory punishment of the media for the publication of lawfully obtained

truthful information. The Statute is unconstitutional because it indulges in the latter, not the former.

Finally, the State's contentions as to the prior restraint doctrine are irrelevant to the facial constitutionality of the Statute since this law can meet neither the Daily Mail principle, nor the prior restraint test. Its claim that the Statute is not unconstitutionally vague overlooks the special vagueness rule applicable to First Amendment cases.

ARGUMENT

I. THE COURTS BELOW CORRECTLY APPLIED FLORIDA STAR V. B.J.F. IN RULING THAT SECTION 794.03 OF THE FLORIDA STATUTES IS FACIALLY UNCONSTITUTIONAL

It is a well-settled principle of the constitutional law of this country that a state may punish the publication of truthful information, if at all, only where the penal statute (i) serves "a state interest of the highest order" and (ii) is "narrowly tailored" to advance that interest (hereafter, the "Daily Mail principle"). Cohen v. Cowles Media Co., 111 S.Ct. 2513, 115 L.Ed. 2d 586 (1991) (citing Daily Mail principle with approval); Butterworth v. Smith, 494 U.S. 624, 110 S. Ct. 1376, 108 L.Ed. 2d 572 (1990) (grand jury secrecy interests insufficient to satisfy Daily Mail principle where a news reporter sought to publish truthfully his own grand jury testimony in contravention of a Florida criminal statute); Florida Star v. B.J.F., 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed. 2d 443 (1989) (implied civil action based on Section 794.03 of the Florida Statutes fails Daily Mail principle because it imposes liability for truthful speech without serving a state interest of the highest order and is not narrowly tailored); Smith v. Daily

Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed. 2d 399 (1979) (criminal statute prohibiting truthful publication of identity of juvenile offenders fails two-part test and is therefore unconstitutional); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978) (criminal statute punishing truthful publication of confidential judicial disciplinary proceedings is unconstitutional); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975) (civil damage action against press for truthful publication of the name of a rape victim held unconstitutional where the name was obtained from public court records).

A. The Courts Below Properly Held The Daily Mail Principle Applies To The Statute

The Supreme Court explained in Florida Star v. B.J.F. that, in addition to the overarching "public interest, secured by the Constitution, in the dissemination of truth," the Daily Mail principle is supported by at least three separate considerations. 491 U.S. at 533-34 (quoting Garrison v. Louisiana, 379 U.S. 64, 73, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964)).

The first supporting consideration is that the protection afforded the publication of truthful information is limited to material the press has "lawfully obtained." Florida Star, 491 U.S. at 534 (emphasis added). Government may rely upon its power to limit the disclosure of sensitive information by regulating the conduct of governmental and, sometimes, other custodians of such records, but it cannot punish the truthful publication of information the press has lawfully acquired. The Court observed:

> Where information is entrusted to the government, a less drastic means than punishing truthful publication almost

> always exists for guarding against the dissemination of private facts.

Id. Thus, Florida's legislature may protect the privacy interests of persons alleging rape, if at all, by enacting laws prohibiting government officials from disclosing the identities of such complainants. Punishing the press for publishing the lawfully obtained truth as to the identity of an accuser goes too far. The Globe lawfully obtained Ms. Bowman's name.

The second consideration "undergirding the Daily Mail principle is the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." Florida Star, 491 U.S. at 535. Here, of course, Ms. Bowman's name was widely known in the Palm Beach community, and throughout the rest of the world, prior to the Globe's publication. Moreover, the Statute by its terms makes no distinction between cases in which the name is publicly known and those in which it is not. The State concedes that Ms. Bowman's name would inevitably have become a part of the public record when the criminal information was filed.

The "third and final consideration is the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing truthful information." Id. (quoting Cox Broadcasting, 420 U.S. at 496). That consideration is obviously present here. Despite the fact Ms. Bowman's name had been published not only by some news organizations, but also by the prosecutor's office, the police, and in public court papers, some news organizations still declined to publish her name. Many such decisions are motivated by editorial considerations, but others were the result of the "chill" of a potential criminal prosecution. Some media were

in doubt as to what personal facts they could publish concerning Ms. Bowman without violating the Statute.

Thus, there is no question that the courts below properly followed Florida Star by ruling that the Daily Mail principle must be applied to this criminal prosecution. The result of that application is set forth and explained below.

B. The Courts Below Correctly Interpreted Florida Star To Require Their Ruling That The Statute Violates The Daily Mail Principle Because It Is Not Narrowly Tailored To Serve A State Interest Of The Highest Order

This Court need not speculate or conduct an unguided analysis as to whether Section 794.03 meets the Daily Mail principle by serving a state interest of the highest order. The United States Supreme Court in Florida Star v. B.J.F. already has conducted such an analysis and concluded the Statute violates the Daily Mail principle. The lower courts have also so held. The United States Supreme Court held:

> [W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and . . . no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case.

Florida Star, 491 U.S. at 541. As demonstrated below, the Supreme Court's analysis and conclusion in Florida Star that civil liability under Section 794.03 would be unconstitutional

under the facts of that case apply with full force to this criminal prosecution pursuant to the Statute.[1]

1. The Florida Star Invalidated The Private Tort Action Implied From The Statute Because The Statute Fails to Serve a State Interest of the Highest Order

The Supreme Court's analysis in Florida Star of the Statute's constitutional infirmities is thorough and binding on this Court. The Supreme Court first noted that "even assuming the Constitution permitted a state" to do so, Florida law "has not taken" the step of proscribing the "receipt of information" concerning the identity of a victim of a sexual offense. Florida Star, 491 U.S. at 536 (emphasis in original). Because the receipt of such information is not unlawful, the Globe's lawful acquisition of information from governmental and private sources triggers the Daily Mail principle, in just the same way The Florida Star's acquisition of the name of the rape victim did.

The Court's "second inquiry is whether imposing liability on appellant pursuant to § 794.03 serves 'a need to further a state interest of the highest order.'" Id. at 537 (quoting

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[1] That Florida Star applied the Daily Mail principle to an implied civil action based on the Statute, rather than a criminal prosecution, creates no legally meaningful basis for distinguishing this case from Florida Star. The central flaws the Florida Star opinion attributed to the implied action were facial defects in the Statute. Moreover, Daily Mail itself struck down a state criminal statute that punished the publication of the names of juvenile offenders. The Court found the state's interest in aiding the rehabilitation of juvenile offenders to be insufficient to justify punishment of the publication of truthful information. This interest in protecting juveniles is at least as weighty as protecting persons publicly accusing others of the crime of rape from publication of their names in the "mass media."

Daily Mail, 443 U.S. at 103). The Court identified three interests the Statute might be said to serve: "the privacy of victims of sexual offenses; the physical safety of such victims . . .; and the goal of encouraging victims of such crimes to report those offenses . . . ." Id. The Supreme Court found that none of these interests justifies press liability under Section 794.03, because the Statute either fails to meaningfully advance these interests or the interests are themselves insufficient to punish the truthful publication of a "rape victim's" name. Id. at 538-41.[2] This Court must follow these controlling holdings of the United States Supreme Court.

The Supreme Court held that the Statute on its face fails to serve a state interest of the highest order for a very fundamental reason. The Statute proscribes only publications of a rape victim's name in the "mass media"; it does not prohibit the disclosure of the "victim's" identity in non-media speech. Thus, as in the case here, people throughout the Palm Beach community are free to disclose Ms. Bowman's identity to anyone they please, but there can be no "publication" of the name in the mass media. In short, the Statute discriminates against the press. The Supreme Court so held:

> [T]he facial underinclusiveness of § 794.03 raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance. Section 794.03 prohibits the

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[2] Aside from the Court's reasons, set forth infra, for rejecting the Statute's claimed justifications, the Court also held the Statute would be both overinclusive and underinclusive if protecting the safety of the rape complainant were its goal. There are many crimes besides rape in which publishing the name of the alleged victim could endanger her, and publication of the rape victim's name frequently would pose no such danger. The record evidence in this case shows Ms. Bowman could have no such fear because she and Mr. Smith already knew each other's identity and he was not "at large". Moreover, there is always the less intrusive means (and more effective) of actually protecting a witness whose safety is genuinely threatened.

> publication of identifying information only if this information appears in an "instrument of mass communication," a term the statute does not define. Section 794.03 does not prohibit the spread by other means of the identities of victims of sexual offenses. An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers. See Tr. of Oral Arg. 49-50 (appellee acknowledges that § 794.03 would not apply to "the backyard gossip who tells 50 people that don't have to know").
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> When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury. A ban on disclosures effected by "instrument[s] of mass communication" simply cannot be defended on the ground that partial prohibitions may effect partial relief. See Daily Mail, 443 U.S. at 104-105 (statute is insufficiently tailored to interest in protecting anonymity where it restricted only newspapers, not the electronic media or other forms of publication, from identifying juvenile defendants); id., at 110 (REHNQUIST, J. concurring in judgment)(same); cf. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983). Without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose.

Florida Star, 491 U.S. at 540-41; see also, id. at 541-42 (Scalia, J., concurring). Far from serving a state interest of the highest order, the Statute serves the unconstitutional purpose of discriminating against speech by the media.

2. Florida Star Also Determined The Statute Is Not Narrowly Tailored To Serve Such A State Interest

The Statute is not "narrowly tailored" to serve a state interest of the "highest order"; rather, it is as "overbroad" as it is "underinclusive."

The Supreme Court expressly held the Statute overbroad:

> A second problem with Florida's imposition of liability for publication is the broad sweep of the negligence per se standard applied under the civil cause of action implied from § 794.03. Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive. On the contrary, under the per se theory of negligence adopted by the courts below, liability follows automatically from publication. This is so regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern-because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person.

Florida Star, 491 U.S. at 539. The Court's concerns regarding the danger of the overbroad reach of the Statute are thoroughly borne out by the State's prosecution of the Globe. Here the allegations have "become a reasonable subject of public concern-because, perhaps, questions have arisen whether [Ms. Bowman] fabricated an assault by [Mr. Smith]." Id. The "identity of the victim [was] already known throughout the community" prior to the Globe's first publication of the name. Id. And prior to the second publication, the name had been published by many of the leading media in the United States.

The overbroad ambit of the Statute is also shown by the absence of any scienter requirement. As the Supreme Court held:

> Nor is there a scienter requirement of any kind under § 794.03, engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures, where liability is evaluated under a standard, usually applied by a jury, of ordinary negligence. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interest are at stake. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (invalidating state statute providing for the categorical exclusion of the public from trials of sexual offenses involving juvenile victims). More individualized adjudication is no less indispensable where the State, seeking to safeguard the anonymity of crime victims, sets its force against publication of their names.

Florida Star, 491 U.S. at 539-40.

The Court in Florida Star also noted that a finding that the Statute was narrowly tailored to serve a state interest of the highest order was precluded by the fact government officials had provided the information to the press. The Court held "where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." Id. at 538. In the case at bar, the trial court found that a coordinator for the victim service section of the Palm Beach Board of County Commissioners had confirmed to the Globe Ms. Bowman's identity as the accuser. In so doing, this public official did not violate Florida law, and neither did the Globe by receiving the information. Id. at 538-39. Even more telling, the State has admitted that the alleged victim's name would

quickly and inevitably have become a matter of public record when the criminal information was filed. The Statute makes no distinction between publication of the name when it is disclosed by a government official or record, or otherwise lawfully received, and publication when the information is obtained unlawfully. Yet, as a matter of basic First Amendment doctrine, there can be liability only for the latter. Florida Star; Cox Broadcasting. Accordingly, the Statute is overbroad.

The Statute punishes the publication of the accuser's name irrespective of whether the accuser wanted the name published; irrespective of whether there was any rape at all;[3] irrespective of whether the name already was known to the public or already had been published or was part of a public record or disclosed by government; and irrespective of whether the name should have been published because the accuser's identity had become a matter of public concern.

The threat of self-censorship under the overbroad law is obvious. The threat is magnified by the vague language of its proscription: no person "shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address or other identifying fact or information of the victim of any sexual offense within this chapter." § 794.03, Fla. Stat. (emphasis added). The Statute provides no clue as to what constitutes "identifying fact or information."

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[3] The Statute defines "victim of any sexual offense" to include persons not shown to be victims at all, namely persons who have simply made (possibly false) allegations of the crime. § 794.011(l)(i), Fla. Stat. Here, of course, Patricia Bowman's allegations were rejected by a jury. There was no "rape victim," yet the Statute does not allow publication even after the judicial system has determined there was no "rape."

In the instant case, prior to the Globe's publication, the press published extensive detail about Ms. Bowman's personal life without naming her. For example, the press reported she was a 29 year old white woman with a child two years old; that she was from the Midwest; that she had attended Rollins College and Palm Beach Community College; that she lived on Royal Poinciana Way; that she had worked at a law firm, at Disney World, and The Palm Beach Post; and that she had lived with her stepfather, a millionaire in Jupiter, Florida. (R. 1147). No one can read the Statute and know whether any of these publications violate its prohibitions.

The Supreme Court issued its opinion in Florida Star in 1989. Since that time the Florida legislature has had ample opportunity to attempt, by amending the Statute, to correct the many constitutional defects noted by Florida Star. Florida has not done so. One can only conclude that Florida lawmakers do not believe the Statute serves a state interest of the highest order.[4]

II. THE COURT BELOW PROPERLY CONCLUDED THE STATE HAS OFFERED NO VALID REASON TO DEPART FROM FLORIDA STAR AND SEEKS NOTHING LESS THAN A JUDICIAL USURPATION OF LEGISLATIVE AUTHORITY BY REQUESTING A WHOLESALE REWRITING OF THE STATUTE

The State offers four basic arguments as to why the trial court erred in holding the Statute facially unconstitutional. Each is mistaken.

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[4] This conclusion is scarcely surprising since at the time the Court decided Florida Star, only two other states had enacted Statutes punishing the truthful publication of the name of an alleged rape victim. S.C. Code Ann. § 16-3-730; Ga. Code Ann. § 26-9901.

The State begins its argument with the observation that the Supreme Court has steadfastly declined to hold that a state may never punish the publication of truthful information, that each of the precedents decided in the field is narrow in scope, and collectively they leave the door open to enactment of a statute punishing truthful speech which is narrowly drawn to serve a compelling state interest. (Init. Br. 8-12). The State neglects the fact that the Court has never permitted the punishment of truthful speech in any case it has decided, and has in each case expressly reserved this issue.

The State asserts that Florida Star identified three interests which taken together, or perhaps individually, might justify a statute punishing truthful speech: (i) the privacy rights of victims; (ii) the physical safety of the victims; and (iii) the goal of encouraging the victim to report the crime. The State then argues that properly "interpreted", narrowed, or construed by this Court, and despite the language of Florida Star, the Statute would be just such a law. (Init. Br. 12-22).

The strategy of the State's brief is to argue (A) that the conceded overbreadth of the Statute may be remedied by this Court reading into it certain narrowing and clarifying definitions and terms, by requiring the recognition of certain affirmative defenses, and, by specifying certain jury instructions (Init. Br. 16-22); (B) that "underinclusiveness" alone is not enough to invalidate the Statute (Init. Br. 23-30); (C) that the courts below erred in concluding there is little difference between "subsequent punishment" cases and "prior restraint" cases (Init. Br. 31-40); and (D) that the lower courts erred in finding that the Statute is unconstitutionally vague. (Init. Br. 40-41). The State's strategy fails in all respects.

As a preliminary matter, the State's argument misstates the Daily Mail principle, which Florida Star does no more than apply. This principle does not require that government have provided the press with the information published for its publication to be protected. The rule entails only that the information be lawfully acquired. Daily Mail, 443 U.S. at 103; Florida Star, 491 U.S. at 533. If the information is truthful and lawfully acquired, then government may punish its publication, if at all, only where the statute is narrowly tailored to serve a state interest of the highest order. See supra at pp. 15-17. Since the truthful information was lawfully acquired here, the Daily Mail principle applies to this prosecution. The State has confused this rule with the absolute immunity rule announced in Cox Broadcasting Corp. v. Cohn, holding that the press has an absolute right to publish material obtained from a public record. In neither Landmark nor Daily Mail did the Court require that the information come from the government or its records. In Landmark the information did not; in Daily Mail it came from various sources.

The Globe's publication is protected from prosecution under both the Daily Mail rule and the Cox rule. And the Statute is facially unconstitutional because by its express terms it recognizes neither. The Statute's terms admit no exception either for information lawfully obtained or obtained from public records.

A. The Statute's Overbreadth Flaws Cannot Be Judicially Rehabilitated

The State concedes the Statute as written is overbroad for many reasons, (Init. Br. 12-16), but claims that these defects can be corrected by limiting judicial interpretations, requiring special jury instructions, and creating affirmative defenses. (Init. Br. 16-22). The

claim is made that the problems "are not inherent in the statute" but rather in the way "one particular trial judge applied the statute." (Init. Br. 16).

This argument is mistaken because the problems are inherent in the Statute, and no cases hold they may be corrected by the wholesale judicial "rewriting" of its provisions. The State acknowledges that the Statute is overbroad because it applies even where the victim's identity is already well-known, the victim has caused or wants her name to be published, the matter is of legitimate public concern, the disclosure would not be highly offensive, the rape allegations were ultimately held to be false, or there was no scienter. But the State does not begin to fairly state the problems with the Statute, it confuses affirmative defenses with the essential elements of a crime or tort, and it ignores the basic rule of Florida law that a court cannot legislate.

The most fundamental problems with the Statute are that it does not require proof of those essential elements which constitute the tort of invasion of privacy, and it does not recognize the defenses to that tort. Under common law privacy there must be (a) an embarrassing private fact which is (b) disclosed in a (c) highly offensive manner. The newsworthiness of the fact is an absolute defense, as is any publication based on public records, or any report of statements by public officials or of official actions. The Statute does not require any proof of a "private fact," or its "disclosure" or that it occurred in a "highly offensive" manner. That is why there was a prosecution here, even though the name was widely known in Palm Beach, was not "private" and the publication occurred after the name had been "disclosed" throughout Europe. Section 793.04 is not a "privacy" law because it does not require proof of either a private fact or its disclosure. The Statute does not require that the

disclosure be highly offensive; that is why it would apply even if the "victim" consents to publication or has lied about the incident. These are not affirmative defenses that the trial court overlooked; they are essential elements of the "wrong" which are not in the Statute.

The State's view that those missing elements may be supplied by the Court is naive at best. A criminal statute, unlike a common law cause of action which is adjudicated case-by-case, must state a clearly articulated norm. Paradoxically, recognition of the classic affirmative defense of "newsworthiness" would be both essential to the Statute's constitutionality and render it too vague to impose criminal sanctions. Indeed, the problems are much more difficult than the State believes. Under what circumstances would the publication of the name of a person accusing another of a crime be "newsworthy?" When would it not be? The press itself often does not agree on this point.

Other overbroad aspects are not even addressed. If a purpose of the Statute is to protect witness safety, should there not be statutory language limiting its application to such situations or at least recognizing this factor? Should there not be language in the Statute providing for immunity when the name is provided by government records, proceedings, or spokesmen?

No cases cited by the State support the wholesale legislative rewriting of the Statute it requests. Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986), did not involve the judicial creation of affirmative defenses, but rather a straightforward construction of the Florida Wrongful Death Act, in which the court applied the well-known canon that "[i]f a statute may reasonably be construed in more than one manner, this Court is obligated to adopt the construction that comports with the dictates of the Constitution." Id. at 1050. Similarly, White

v. State, 330 So.2d 3 (Fla. 1976), is not a case in which the court creates an affirmative defense designed to correct a statute's constitutional flaw, it is a case in which the court merely carried out its "responsibility to avoid a holding of unconstitutionality if a fair construction of the statute can be made within constitutional limits." Id. at 5. The State cites Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed. 2d 675 (1986), a case which rejects, rather than supports, the State's argument. In Schor, the Court reversed as "untenable" the court of appeals' effort "to manufacture a restriction . . . that was nowhere contemplated by Congress" in order to "avoid unnecessary constitutional adjudication. . . ." Id. at 847. Underlying the Court's ruling was an acknowledgment that where serious doubts arise concerning a statute's constitutionality, "a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional issue can be avoided." Id. at 841. The Court further held that:

> It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it.

Id. (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed. 2d 992 (1964)).

Florida law is no different. As the Supreme Court of Florida explained in Brown v. State, 358 So.2d 16, 20 (Fla. 1978), in which it held an "open profanity" statute unconstitutional under the First Amendment:

> This Court has traditionally adhered to the policy that all doubts as to the validity of a statute are to be resolved in favor of constitutionality when reasonably possible. However, it has also been wary of transcending its constitutional authority by invading the province of the legislature. When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment. The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. This constitutional mandate obtains for two reasons. First, if legislative intent is not apparent from the statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a statute. The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet, undetermined.

Accord State v. Keaton, 371 So.2d 86, 89 (Fla. 1979) ("[C]ourts may not vary the intent of the legislature with respect to the meaning of the statute in order to [render it constitutional]."); State v. Wershow, 343 So.2d 605, 607-08 (Fla. 1977) ("[T]he subject statute is so vague and overbroad that it is not amenable to such saving construction unless the court is willing to invade the province of the Legislature and virtually rewrite it. Under our constitutional system, courts cannot legislate. . . . To construe [the statute] as the state here suggests would require an abandonment of judicial restraint."); Cassady v. Consolidated Naval Stores Co., 119 So.2d 35, 37 (Fla. 1960) ("We are conscious of our duty to interpret a legislative Act so as to effect a constitutional result if it is possible to do so. We are, however, bound by the unambiguous terms of a statute . . . ."); In re Investigation of Circuit Judge, 93 So.2d 601, 607 (Fla. 1957)

("It is our duty to interpret the law as given us by the people in the Constitution or by the Legislature. We are not permitted to substitute judicial cerebration for law or that which we think the law should be and command that it be enforced."); McDonald v. Roland, 65 So.2d 12, 14 (Fla. 1953) ("[W]here the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify it or shade it, out of any consideration of policy or regard for untoward consequences. If the statute involved here is to encounter constitutional objection, it must then stand or fall on its own merits."); Vinikoff v. Adelman, 159 Fla. 74, 30 So.2d 748, 751 (Fla. 1947) ("[W]here the words used have a definite and precise meaning, the courts have no power to go elsewhere in search of conjecture in order to restrict or extend the meaning. Courts cannot correct supposed errors, omissions, or defects in legislation.").

In ruling that the Statute could not be saved by judicial "reconstruction," the Fourth District did no more than adhere to its own decisions following the rulings of this Court. In City of Pompano Beach v. Capalbo, 455 So.2d 468 (Fla. 4th DCA 1984), pet. for rev. denied, 461 So.2d 113 (Fla.), cert. denied, 474 U.S. 824, 106 S.Ct. 80, 88 L.Ed. 2d 65 (1985), in holding unconstitutional a city ordinance prohibiting sleeping or lodging in a vehicle, the Fourth District declined to give the ordinance a reading which contradicted its unambiguous language in order to cure a "constitutional infirmity", holding that "[a] court is not a super-legislature that second guesses what a legislature really meant to say; the legislated language speaks for itself." Id. at 469.

Similarly, in Holmes v. Blazer Financial Services, Inc., 369 So.2d 987 (Fla. 4th DCA 1979), the court refused a litigant's invitation to interpret Florida's garnishment law so as to enlarge a statutory exemption, holding:

> It is the prerogative of the legislature to extend or restrict such exemptions. This Court cannot extend the effect of the statute beyond the unambiguous language chosen by the legislature.

Id. at 990. And most recently, in Lacentra Trucking Inc. v. Flagler Federal Savings & Loan Ass'n of Miami, 586 So.2d 474 (Fla. 4th DCA 1991), the court overruled the trial court's forced reading of a provision of the mechanic's lien law, stating as follows:

> It is fundamental to our reading of statutes that if one is plain and unambiguous, as this one is, we have no power to read or construe it in a way that extends, modifies or limits its express terms or its reasonable and obvious implications.

Id. at 476.

The case at bar does not present an ambiguous statute such that this Court could review legislative history to divine legislative intent. Nor is this a case in which the statutory language is reasonably susceptible of two meanings, one of which would render the statute unconstitutional, and one which would not, such that this Court could adopt the interpretation which salvages the statute. On the contrary, the Statute here is "plain and unambiguous," and this Court cannot second guess the legislature, or restrict or limit the express terms of the Statute in order to save it. Nor is this a case where a statute may be saved by reading into it an implied, but otherwise long recognized and well-established, element or defense that had obviously been overlooked in drafting the particular statute. No case supports the State's position that this Court may re-write the Statute and, by judicial fiat, create a myriad of affirmative defenses, judicially defined elements, and engrafted jury instructions, designed to prevent unconstitutional applications of the Statute. That is a legislative function and this Court should reject the State's request that it act as a "super-legislature." This judicial restraint is

especially needed where a penal statute punishes and stigmatizes expression otherwise protected by the First Amendment. Under such circumstances, "bright line" rules and fair notice on the face of the law of what conduct is proscribed are mandated.

B. The Statute's Underinclusiveness May Not Be Interpreted Away

The State argues that the Statute is not facially unconstitutional because underinclusiveness by itself cannot render the Statute unconstitutional and the overbreadth problems may be cured by the means discussed above. (Init. Br. 23-30).

Again the State is mistaken in two important ways: First, the underinclusiveness problem is far more serious than the State acknowledges. Second, the State is simply mistaken in its claim that underinclusiveness alone cannot invalidate a law on First Amendment grounds.

The Statute is underinclusive, as noted above, because it punishes truthful speech in the mass media based upon its content, but not the same expression when uttered by nonmedia speakers. It discriminates against the press. See Florida Star. The State acknowledges this inescapable fact, but attempts to minimize it by asserting that the subsequent case of Leathers v. Medlock, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed. 2d 494 (1991), modifies or clarifies Florida Star. The State claims that Leathers holds that underinclusiveness does not by itself render a statute unconstitutional under the First Amendment; that because the Supreme Court allowed differential taxation of sales by cable television and newspapers, underinclusiveness by itself is not a fatal First Amendment flaw.

The Statute's underinclusiveness is much more serious than the State admits, and the State completely misunderstands Leathers and the underinclusiveness doctrine. The Statute,

as Florida Star found, is fatally underinclusive because it punishes truthful expression in a discriminatory manner. Moreover, the punishment is content-based, and the discrimination singles out only the press for the punishment. Florida Star held that since punishment of truthful speech may be justified, if at all, only by a narrowly tailored law serving a state interest of the highest order, the prohibition on underinclusiveness must be stringently observed. Leathers did not involve punishment of truthful expression or even a content-based restraint on speech. In fact, it did not involve any prohibition on speech. The issue in Leathers was whether differential taxation of different types of media sales violated the "incidental burden" test, not the Daily Mail principle. The Court held that such taxation did not; the differential taxation of different types of media sales, not "expression," was held justified. Had the facts of Leathers revealed the differential taxation was part of a discriminatory scheme to single out media sales from non-media sales for taxation, the tax would have been invalidated. Had Leathers involved taxation of truthful speech by the media, or some media, to punish the press, the tax would have been invalidated under Daily Mail.

In R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 120 L.Ed. 2d 305 (1992), the Supreme Court struck down the "hate crime" ordinance of St. Paul, Minnesota, for its underinclusive punishment of only selected "fighting words." The Court held that because only those "fighting words" related to racial or gender discrimination were punished, the statute violated the First Amendment on underinclusiveness grounds.[5]

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[5]The State also erroneously argues that the Statute is not a content-based prohibition on speech even though it punishes speech because of its content, namely expression which identifies an alleged rape victim. The State claims this is not content-based discrimination because it does not censor a point of view, but of course the State is absolutely wrong. The Statute punishes such publications because it has a certain point of view about rape, and will not tolerate a point

The Statute's underinclusiveness problem is much worse than the State acknowledges because to meaningfully advance the "privacy" interests asserted, the Statute would have to be "read" to bar disclosure of alleged rape victims' names by the State itself in the criminal informations, pleadings, court proceedings, and of course, press conferences. Disclosure by non-media speakers would also have to be prohibited. This is not judicial "interpretation," it is "legislation," and unconstitutional legislation at that.

C. Whether the Statute Is A Prior Restraint Is Irrelevant To Its Facial Unconstitutionality

The State spends nine pages of its argument attacking the trial court for stating that the difference between prior restraint and subsequent punishment has eroded, and that the Statute is an invalid prior restraint. (Init. Br. 31-40).

Amici Curiae would only note that they believe there are viable conceptual distinctions between a prior restraint and the subsequent punishment of truthful expression. As noted above, subsequent punishment of truthful speech, if it may ever be permitted, at least requires a state interest of the highest order and a statute narrowly tailored to serve that interest. The prior restraint test, with its "heavy presumption" against the validity of any such restriction on expression, has never been met. Amici Curiae believe the prior restraint test is generally regarded as the more stringent standard, but since the Statute cannot meet either test, the issue is somewhat academic.

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of view that rape is a violent crime which is best approached openly, and that secrecy only reinforces the dysfunctional stereotype that stigmatizes rape victims in the eyes of the prejudiced. Amici do not endorse this, or any other, viewpoint; they merely note that the Statute is anything but viewpoint neutral.

The position of the trial court, whether correct or not, is irrelevant to the facial constitutionality of the Statute because, as the Supreme Court stated in Daily Mail:

> Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.

443 U.S. at 101-02. This Court reached a similar conclusion in Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.), cert. denied, 459 U.S. 865, 103 S.Ct. 143, 74 L.Ed. 2d 201 (1982). The Statute is not sustained by the "highest form" of state interest.

Whether the trial judge may have been mistaken in concluding the Statute is both an invalid penal statute and a prior restraint is irrelevant, since he was right in finding it facially unconstitutional under the arguably less demanding test.

D. The Statute Is Unconstitutionally Vague

The State concludes its brief with a very short argument (Init. Br. 40-41) that the Statute is not unconstitutionally vague because the "conclusion that a statute is impermissibly vague can be reached only if the complainant 'demonstrates that the law is impermissibly vague in all of its applications,'" citing Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed. 2d 367 (1982). Apparently the State overlooked that this standard does not apply at all when First Amendment rights are at issue. That limitation is set forth in a footnote to the very sentences the States relies upon in Village of Hoffman Estates v. Flipside. 455 U.S. at 495 n.7 ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."). Indeed, the rule in

First Amendment cases is that "overbroad" statutes ordinarily cannot be saved by narrowing judicial constructions precisely because that narrowing through case-by-case adjudication would produce impermissible "vagueness." Aptheker v. Secretary of State, 378 U.S. 500, 517-18, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964).

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the decision below summarily affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of January, 1994, to Paul V. LiCalsi, Esq. Gold, Farrell & Marks, 41 Madison Avenue, New York, New York 10010; Tierney & Haughwout, 324 Datura Street, Commerce Center, Suite 250, West Palm Beach, Florida 33401, Attorneys for Globe Communications Corp., and to Richard L. Polin, Esq., Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33101.

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