IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,377

THE STATE OF FLORIDA,
Appellant,

vs.

GLOBE COMMUNICATIONS CORP.,
Appellee.

ANSWER BRIEF OF APPELLEE ON THE MERITS

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PRELIMINARY STATEMENT

Appellant, the State of Florida, shall be referred to in this brief as "State." The Appellee, GLOBE COMMUNICATIONS CORP., shall be referred to herein as "GLOBE."

Citations to the Record on Appeal shall be referred to as R-_____, indicating the appropriate page number of the record; citations to the opinion of the Fourth District Court of Appeal which quotes in full the trial court opinion is contained in the Appellant's Appendix and shall be referred to as App. _____, indicating the page number of the appendix.

STATEMENT OF THE CASE AND FACTS

GLOBE generally accepts the factual and procedural statement of the State. However, there are some additional facts which further illuminate the issues raised in this case.

The facts of this case concern the GLOBE'S publication of the identity of the accuser in the rape prosecution of William Kennedy Smith.

The undisputed testimony established that the allegations concerning what occurred at the Kennedy estate in the early morning hours of March 30, 1991 was the talk of the town within hours and certainly days of the incident. (R-141, 153, 262, 453-458, 650, 659, 708,, 917). It was talked about at nightclubs (R-650), on golf courses (R-178), in restaurants (R-917), and at homes (R-917). It was talked about in person and on the telephone (R-708, 916). Investigators for both the police and Mr. Smith were interviewing people within days about their knowledge of Patricia Bowman and her allegations. (R-321). Ms. Bowman's friends, acquaintances, and neighbors were interviewed. (R-450, 452). People in nightclubs and restaurants were interviewed. (R-917). Within 48 hours of the alleged incident, the local bar looked like "the national press club." (R-918). The incident and the players, including Ms. Bowman, immediately consumed the public's interest and the interest of the press.

The interest in the allegations and the individuals involved in this case continued unabated through the date of the hearing in this case. Law enforcement and court personnel

testified that they had never been involved in a case of such magnitude in the public eye. (R-144, 805). As found by the trial court:

> Since the story involved a Kennedy, it is a national and international media event of the year, one of such magnitude that it is to be doubted that scientists working and living in igloos at the South Pole would be able to remain ignorant of it.

(App. 6).

The identity of the accuser, Patty Bowman, was also immediately known throughout the community. (R-251, 504, 710, 918). Some of those that spread the word about her allegations were contacted by Ms. Bowman personally and told what allegedly occurred. (R-448-449, 914, 916). Denny Abbott, an employee of Palm Beach County, confirmed Ms. Bowman's identity as the accuser to reporters from the GLOBE and other media representatives within days of the incident. (R-654-658). Ms. Bowman's lawyer appeared on several television shows and held press conferences to convey her side of the story to the public. (R-380, 384, 386, 389, 395, 399).

At the hearing on the Motion to Dismiss GLOBE presented testimony as to the tremendous interest in the case, the public knowledge of the accuser, and the government's assistance in confirming her identity with the media. GLOBE also introduced documents to establish the many personal facts disclosed about Ms. Bowman in newspapers (Ex. 14, 14A), and by the State in police reports (Ex. 12) and an interview during a polygraph (Ex. 5). These facts include Ms. Bowman's family history and family

problems, her employment history, the town in which she lived, her drug history, when she last had sex, and the number of abortions she has had. (R-459-460). By stipulation, GLOBE also introduced the press release read to the media by State Attorney David Bludworth on May 9, 1991 and the fact that he distributed copies to the press of the charging document and the probable cause affidavit specifically naming Ms. Bowman as the accuser. (R-133-134).

The State introduced statistics to show that rape is a serious crime problem. However, as noted by the opinion of the Fourth District Court, "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." (App. 28).

Finally, as the whole world knows, William Kennedy Smith was acquitted of the charges arising from Patricia Bowman's accusation.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly affirmed the trial court, concluding that Section 794.03, Florida Statutes, is unconstitutional as overbroad, underinclusive and an impermissible prior restraint. The State concedes the propriety of the trial court's order regarding the application of the statute to the facts of this case. However, it is equally clear that this statute is unconstitutional on its face.

The statute that the State seeks this Court to uphold has already been declared unconstitutional as both underinclusive and overly broad by the United States Supreme Court. The Florida Star v. BJF, 491 U.S. 540 (1989). The statute is impermissibly underinclusive because it only singles out "instrument[s] of mass communication" for penalty, while permitting disclosure of the identical information by unregulated sources. The statute is unconstitutionally overbroad because liability flows automatically upon publication, without any hearing or case-by-case adjudication as to whether the purported State interest in shielding the alleged victim is served by penalizing the individual publication. Imposing per se liability on the press is repugnant to the freedom of the press guaranteed by the First Amendment.

The State concedes the problems inherent in the statute but asserts that if this Court essentially rewrites the statute to include limitations, affirmative defenses, and jury instructions, that the constitutionality can be upheld. This Court, however, does not have the power to rewrite legislation or interpret

legislative intent not evident from a plain reading of the statute to provide the limitations suggested by the State. Moreover, since this is a penal statute the arguments of the State implicate a multitude of due process concerns regarding notice and shifting the burden of proof to a defendant. Essentially, the State asks this Court to read into the statute an affirmative defense that requires a defendant to prove innocence. The guarantee of due process of law does not allow the State to escape its obligation of proving violations of law in such a manner.

The well reasoned opinions of the trial court and the Fourth District Court of Appeal should be affirmed by this Court.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN CONCLUDING THAT SECTION 794.03, FLORIDA STATUTES, IS FACIALLY UNCONSTITUTIONAL

The trial court and district court properly held that Section 794.03, Florida Statutes, violates the freedom of press guarantees of the Federal and State Constitutions. In analyzing the constitutionality of this penal statute, GLOBE agrees that the Court must apply the standard enunciated in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) and reaffirmed in The Florida Star v. BJF, 491 U.S. 525 (1989):

> [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. . .

Florida Star, 491 U.S. at 541.

The Supreme Court in Florida Star held that civil liability under Section 794.03 would be unconstitutional. The Supreme Court's analysis and conclusion in Florida Star applies with equal force to any criminal prosecution pursuant to this statute.

A. THE STATUTE PUNISHES THE PUBLICATION OF TRUTHFUL INFORMATION LAWFULLY OBTAINED.

There is no question in the instant case the GLOBE obtained the identity of the alleged victim in a lawful manner. The State, however, asserted in the trial court that the manner of obtaining the identity of a rape victim is a relevant inquiry under the statute and a determining factor in applying constitutionally

Section 794.03. In the trial court, the State maintained with vehemence that if there was no State action in releasing the rape victim's name then liability may be imposed pursuant to this statute. This simply is not the law. The press and the public do not have to rely upon the State to choose if and when information will be made public. Indeed, the courts have routinely affirmed the press' right to gather and publish information.

Prior to Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), the case-law concerned the propriety of publishing information obtained from official public records. See, Cox Broadcasting Co. v. Cohen, 420 U.S. 469 (1975) wherein the Court held that the State could not punish the accurate publication of the identity of a rape victim obtained from public records. Accord, Oklahoma Publishing Co. v. Oklahoma County Dist. Ct., 430 U.S. 308 (1977). In Daily Mail, the Court expanded Cox Broadcasting to include information obtained after interviewing witnesses. In striking down the West Virginia Statute which prohibited publication of the identity of juvenile offenders as an impermissible restraint on First Amendment freedoms, the Supreme Court expressly endorsed the means employed by the newspaper to obtain the name of the juvenile offender and the related facts surrounding the commission of the crime:

> Here Respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. The free press cannot be made to rely upon the sufferance of government to supply it with information (citations omitted). If the information is lawfully obtained, as it was here, the State may not

> punish its publication except when necessary to further an interest more substantial than present here.

143 U.S. at 104-105.

Similarly, in Butterworth v. Smith, 110 S.Ct. 1376 (1990), the Supreme Court invalidated a Florida Statute to the extent it prohibited a grand jury witness from disclosing facts he had obtained prior to and independent from a grand jury proceedings. The grand juror in Butterworth was a reporter for the Charlotte Herald News in Charlotte County, Florida and had learned of alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department through ordinary reporting techniques. After the grand jury terminated its investigation, the reporter sought to publish a news story or a book about the alleged misconduct. Fearful that a Florida law which prohibits disclosure of grand jury testimony would impose criminal sanctions upon such disclosures, the reporter sought a declaratory judgment voiding the statute as unconstitutional.

The Supreme Court held in Butterworth that the statute as applied to the newspaper reporter, violated the First Amendment. In so holding, the Court found that the State's interest in preserving the secrecy of the grand jury witness's testimony was an insufficient basis to justify penalizing the publication of truthful information about a matter of public significance which the reporter independently obtained through legitimate news gathering procedures. 110 S.Ct. at 1381-1383.

The right of the press to gather information is constitutionally protected by the First Amendment. Richmond

Newspapers Inc. v. Virginia, 448 U.S. 555 (1980) (Court held that the press and public have a right to attend criminal trials absent an overriding interest in closure); Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982) (closure ordered during testimony of a minor witness improper restriction of First Amendment Right of access to court proceedings). The right to gather information means that "without some protection for seeking out the news freedom of the press would be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972). The constitutional right to gather information through lawful means would be rendered meaningless if publications are not permitted to share information with the public. "The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." First National Bank v. Bellotti, 435 U.S. 765 (1978).

Nonetheless, the State argued that only when the government chooses to release or even inadvertently releases information may that information be made public. This argument was rejected by the trial court: "What a paternalistic constitutional abode the State invites us to dwell in." (App. 19). Indeed, this notion is offensive to the very interest guaranteed by the First Amendment: that government should control the public's access to information.

B. THE STATUTE IS NOT NARROWLY TAILORED TO SERVE A STATE INTEREST OF THE HIGHEST ORDER.

In Florida Star the Court considered several interests claimed to substantiate the law that prohibited disclosure of the identity of rape victims: the privacy rights of victims, the physical safety of these victims, and encouraging the victims of sexual offenses to report such crimes. 491 U.S. at 537. The Court concluded that these interests while "highly significant," nonetheless were insufficient to uphold the application of the statute because the sweeping restrictions placed on "instruments of mass communication" were not narrowly tailored to accomplish the State's asserted interest. 491 U.S. at 537-540.

1. THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT IS UNDERINCLUSIVE ON ITS FACE.

In Florida Star the Court held that the selective treatment of the press rendered the Florida law prohibiting disclosure unconstitutionally underinclusive. In reaching this conclusion the Court looked at the purported State interest invoked in support of the constitutionality of the law: the privacy right of the victim. However, the statute did not prohibit the dissemination which may be "equally devastating" to the rape victim's privacy such as by persons who live near or work with the victim or the backyard gossip. The significance of this was explained:

> 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 small time 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 affected by "instrument[s] of mass communication" simply cannot be defended on the ground that partial prohibitions may affect partial relief. . . 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 state purpose.

491 U.S. at 540-541.

Justice Scalia in his concurrence also relied on the statute's facially unconstitutional underinclusiveness:

> [A] law cannot be regarded as protecting an interest 'of the highest order,' [citations omitted] and thus as justifying a restriction upon truthful speech when it leaves appreciable damage to that supposedly vital interest unprohibited. . . this law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself.

491 U.S. at 541-542 (Scalia J. concurring).

Similarly, in Daily Mail, the Court held that a statute which criminalized publication of the name of a juvenile offender in "newspapers" was unconstitutional because it failed to prohibit publication in the electronic media or any other form of publication. 443 U.S. at 105-106.

Laws which place restrictions solely upon the media have generally been held to be an abridgment of the freedoms guaranteed by the First Amendment. As early as 1936 the Supreme Court held that taxes which solely affect the press are unconstitutional. Grosjean v. American Press Company, 297 U.S. 233 (1936). The concern with restrictions which single out the press for application was summarized by the Court in Minneapolis Star and

Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 586 (1983):

> [D]ifferential treatment, unless justified by some special characteristic of the press suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.

The State further argues that the underinclusiveness of the statute does not in and of itself render the statute unconstitutional. This is indeed a novel argument given the Supreme Court's unequivocal ruling to the contrary in Florida Star. See also, R.A.V. v. City of St. Paul, 6 F.L.W. Fed. S479 (June 22, 1992), where the Court held that an ordinance prohibiting bias-motivated incitements was unconstitutionally underinclusive because it left many, equally offensive messages untouched. The problem in the State's arguments is that it overlooks the essential problem with underinclusiveness: that is, the underinclusive application of the prohibition undermines the State's assertion that the statute serves a compelling State interest. When the statute fails to apply to other, equally devastating disclosures, there can be no constitutional reason for punishing speech protected by the First Amendment.

The Fourth District Court of Appeal concluded:

> Such "underinclusiveness" obviously undermines the alleged purpose of the statute and diminishes the strength of the State's alleged interests. The State can hardly claim that the protection of this information is an interest "of the highest order" when it permits the information to be disseminated with impunity by means other than the mass media. In addition, this uneven treatment would appear especially violative of the federal and state protections of freedom of the press. The statute, in effect, singles out the "press," the most

> apparent "instrument of mass communication," for special punitive treatment, while it leaves the dissemination of the same information by other means completely untreated.

(App. 31).

The facts of this case aptly demonstrate the significant privacy interests left unprotected by this statute. First, the extensive discussion amongst the public about Patricia Bowman simply could not be prosecuted pursuant to this statute. Although the State argues that it would prosecute a small time disseminator or backyard gossip, the statute very specifically prohibits only the publication of a rape victim's identity in "any instrument of mass communication." § 793.04, Fla.Stat. Therefore, although the State argues it would prosecute, there is no such authority to do so. Indeed, in the present case much of the discussion was generated by Ms. Bowman, her friends, and her lawyer. Would the State likewise prosecute them? The statute makes no exception for consentual release but isn't such a release just as damaging to the State's purported interest in encouraging rape victims to report crime or privacy interests?

Second, the State conceded that after charges were filed, and the State Attorney held a press conference disclosing the name of Patricia Bowman, no one can be punished pursuant to the statute. Therefore, any alleged "compelling" interest asserted by the State is short-lived and exists solely at the State's discretion. Finally, there were a number of very private facts released about Patricia Bowman in the media including where she worked, went to college, her family history, her drug history, her abortions and

her sexual history. Much of this information was obtained through disclosures by the State. The statute, however, only punishes the fact of her identity. It is apparent by the disclosure of all these other private facts that the statute protecting identity does not serve a compelling privacy interest.

The Fourth District opinion also notes a further concern with the statute's underinclusiveness and that is the phrase "instrument of mass communication" is so ambiguous that it may render the statute subject to a void-for-vagueness challenge:

> Does it apply to anyone with access to a copy machine or megaphone as well as to a major newspaper, television and radio? Although not addressed by the trial court's order, this problem stems from the legislature's failure to define the phrase, as well as the phrase's inherent ambiguity. If left intact, juries would have to determine the meaning of the phrase on an ad hoc basis, inevitably leading to highly unpredictable results.

(App. 31).

2. THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

In Florida Star, the Supreme Court also found that Florida Statute Section 794.03 was overly broad because liability flowed per se from publication. The Court explained its concern as follows:

> [Actions based on the statute] require no case-by-case findings that the disclosure of a fact about a person's private life that a reasonable person would find highly offensive. On the contrary. . . liability flows automatically from the publication. This is so regardless of whether the victim is already known throughout the community; whether the victim has voluntarily called attention to 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.

491 U.S. at 539.

The Court stated that such "categorical prohibitions upon the media are impermissible where important First Amendment interests are at stake." Id. at 539. The Florida Statutes adoption of a blanket prohibition against dissemination is unconstitutional when First Amendment interests are at stake. See, Globe Newspaper Company v. Superior Court for the County of Northfolk, 457 U.S. 596, 607-611 (1982); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844-846 (1978).

In Globe Newspaper Company v. Superior Court, supra, the Supreme Court reviewed a Massachusetts statute which mandated closure of the courtroom during the testimony of a minor victim of a sexual offense. Massachusetts asserted two interests to justify infringing on the rights of the press and the public: the protection of minor victims of sex crimes from further embarrassment and trauma, and the encouragement of such victims to come forward to testify in a truthful and credible manner.

While the Court found the State's first interest which is similar to the interest asserted in support of prohibiting victim identification, to be compelling, the Court held that it did not justify a mandatory closure rule. The Court found the statute overbroad and unconstitutional because Massachusetts' interest could be served by requiring the trial court to determine on a case-by-case basis whether the concerns for the privacy and well-being of the minor victim necessitate closure. Id. at 609-610.

The Court also rejected the purported interest in encouraging rape victims to come forward and testify in a truthful manner as unsupported by empirical date. With respect to this alleged interest the Court stated:

> [E]ven if [the statute] effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward. Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's arguments based on this interest therefore proves too much. . .

457 U.S. at 610.

In considering this issue as it pertains to the instant case the Fourth District noted:

> Furthermore, the State has made no contention or attempted to demonstrate that victim safety is of any greater concern in sexual offense cases than with many other violent crimes, such as domestic assault. This uneven treatment diminishes the strength of the State's assertion that this is an interest of the "highest order."
>
> . . . . .
>
> Similarly, in this case, 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. The only data introduced into evidence below is that the number of reported incidents has increased in both Florida and the nation as a whole, but there is no nexus established between the increase in reports and the statute involved herein. The State has also failed to address the issue of whether this concern, as well as the others discussed above, could be addressed by other, less restrictive, means.

(App. 27, 28).

The trial court also addressed the State's purported interest in protecting the identity of sexual assault victims:

> This opinion leaves unanswered the question of how the State will protect alleged sexual assault victims against a disclosure of their identities. The need for a criminal statute with punitive sanctions for such disclosures is deemed necessary by the legislatures of only four states, Florida, Georgia, South Carolina and Wisconsin. The fact that forty-six states are able to conduct sexual assault investigations and trials without punishing the press criminally for a disclosure of the victim's identity is, in itself, a circumstance which leads this Court to conclude that the State's expressed concerns about a victim's safety and privacy are somewhat exaggerated and overblown.

(App. 19) (citation omitted).

In a related case, this Court affirmed a judgment declaring unconstitutional a Florida Statute criminalizing any publication of "the name of any person who is served with, or is to be served with, an inventory or notification of interception of wire or oral communications until that person has been indicted or informed against." Gardener v. The Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982), cert. den., 459 U.S. 856 (1982). The Court held that it was unable to balance the asserted overriding government interest in the confidentiality sought with a restraint on the First Amendment rights of a newspaper and as such the statute was unconstitutionally overbroad. The Court stressed that it was not "faced with a statute incorporating adequate procedural safeguards such as a prior hearing before a Court of competent jurisdiction." Id. at 12. Likewise, the Georgia Supreme Court has held that a statute which prohibited publication of the name and picture of any child before the juvenile court was unconstitutional

because "the public and/or press must be given an opportunity to show that the State's or juvenile's interest in closed hearing is not 'overriding or compelling'." Florida Publishing Company v. Morgan, 332 So.2d 233 (Ga. 1984).

In response to the clear language of Florida Star recognizing the overbreadth infirmities of this statute, the State argues that the statute can nonetheless be upheld if this Court applies a limiting construction to the statute, recognizes affirmative defenses, and applies jury instructions. The State attempts to rewrite the statute to include affirmative defenses to prosecution such as the victim was already known throughout the community, the victim had already called public attention to the offense, or the victim's identity had otherwise become a reasonable subject of public concern.

The State would also have this Court limit the meaning of the statute so that it would not apply to consentual publications, it would require "knowing" publication, and it would not apply if the identity of the victim was obtained from the State or otherwise released in public records. The State's efforts to rewrite this piece of legislation are valiant but misplaced in this proceeding. Rather, such efforts must be directed to the legislature.

Without question, a statute should be construed in such a manner as to avoid conflict with the Constitution. Schultz v. State, 361 So.2d 416 (Fla. 1978). However, the judiciary is not free to effectively rewrite a legislative enactment. Brown v. State, 358 So.2d 16, 19 (Fla. 1978) ("...we cannot condone judicial

excision of statute's overbreadth or clarification of its ambiguities where, as here, there is no statutory language to support judicial restructuring."). Nor can the Court vary the intent of the legislature with respect to the meaning of a statute in order to render it constitutional. State v. Keaton, 371 So.2d 86 (Fla. 1979).

Absent from the State's argument is any reference to the legislative history behind Section 794.03, Florida Statutes. Absent such history, or other legislative enactments which reveal the intent of the legislature, there is simply no means for this Court to infer that the legislature intended all the limitations argued by the State. The Fourth District observed:

> By its plain terms, the statute's ban on publication is absolute and unequivocal: "No person shall print..." (Emphasis added). Criminal prosecution flows automatically from the statute. 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.

(App. 29).

Finally, reading the affirmative defenses required by the State into this statute implicates a multitude of due process concerns regarding notice and shifting the burden of proof to a defendant. This is, after all, a penal statute. Essentially, the State argues that if the defendant proves innocence by virtue of First Amendment protection, then a defendant cannot be convicted of

the crime of publishing a rape victim's name. Such an argument violates not only the First Amendment but the Fourteenth Amendment as well.

In State v. Cohen, 568 So.2d 49 (Fla. 1990), this Court addressed the propriety of legislation which actually included an affirmative defense of this nature. The Court held that requiring a defendant to prove he or she engaged in lawful conduct violated due process by failing to create genuine affirmative defenses and by impermissibly shifting the burden of proof to the defendant. In Cohen, this Court reviewed a provision of the witness tampering statute establishing an affirmative defense under which the defendant was required to prove by a preponderance of the evidence that he or she was engaged solely in lawful conduct. The Court held that it was not a true affirmative defense because rather than conceding the unlawful conduct it negated it.

Similarly, in the present case the State's argument is that conduct is not unlawful if the defendant proves the "affirmative defenses" that the victim's identity is already widely known; the victim has called public attention to the offense; or the identity of the victim has otherwise become a reasonable subject of public concern. However, proof of these matters negates the offense thereby impermissibly shifting the burden of proof to the defendant to prove innocence. These are not affirmative defenses as defined in Cohen. The fallacy in the State's argument is that the conduct prohibited by Section 794.03 is not unlawful under the circumstances the State argues should be affirmative

defenses. Florida Star. It is not like other affirmative defenses that admit the unlawful nature of the conduct but assert valid excuses or justifications. State v. Cohen, 568 So.2d at 51. Rather, the circumstances urged by the State to be considered affirmative defenses entitle one to engage in the very conduct that is prohibited.

In 1989, the United States Supreme Court discussed all of these difficulties with Section 794.03. Florida Star, supra. The legislature has chosen not to respond to the significant constitutional infirmities of this statute. Compare Ga. Code Ann. § 16-6-23 (1988) where the legislature amended it's statute after Cox Broadcasting to exempt publication of names obtained from public records and Wis. Stat. Ann. §942.02 repealed by L. 1975 C. 184 §6 after Cox Broadcasting. Likewise, the legislature is the appropriate body to enact laws and determine application; the judiciary's role is to review the application to assure consistency with constitutional principles.

C. THE STATUTE OPERATES AS A PRIOR RESTRAINT.

The State takes great pains to discuss the case law concerning prior restraints. This analysis, while academically of interest, has no applicability to the issue before this Court. The lower court ruled that the distinction between prior restraints and subsequent criminal punishment has been eroded over the years and that a penal statute which become operative only after the exercise of the speech can similarly be treated as an impermissible prior restraint.

There is no question that the case-law is somewhat confusing concerning this analysis. The issue was left open by the Supreme Court in Florida Star whether the Florida law functions as an impermissible prior restraint. 491 U.S. 524, 541 n.9. Although statutes criminalizing the publication of rape victims' identities do not enjoin publication, as in the classic form of restraint, by imposing the threat of criminal sanctions on the media, the statutes in fact function as a prior restraint by chilling First Amendment activity. It is the concern for this chilling effect which allows for facial constitutional challenges based on overbreadth. See Wyche v. State, 619 So.2d 231, 235 (1993). ("The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression." (citations omitted)), Brown v. State, 358 So.2d 16, 19 (Fla. 1978) (declaring unconstitutionally overbroad a statute prohibiting profane, vulgar, or indecent language in a public place. "The impermissible chilling effect upon constitutionally protected speech is apparent." (citation omitted)).

However, under First Amendment jurisprudence, it makes no difference whether the government casts the restriction on free speech in the mold of a traditional prior restraint or fashions it as a penal sanction. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-102 (1979). See also Worrell Newspapers, Inc. v. Weshafer, 739 F.2d 1219, 1222 (7th Cir. 1984), aff'd, 469 U.S. 1200 (1985). Both prior restraints and penal sanction are subject to a most

meticulous review and require the "highest form of state interest to sustain [their] validity." Daily Mail, 443 U.S. at 101-102.

GLOBE submits that this analysis is not even necessary to the statute in question. It is simply an alternative holding for the trial court's ruling. It matters not whether the threat of criminal sanctions "chills" or "freezes" free speech: the relevant inquiry is whether it is an abridgment on free speech. The failure to provide any prior case-by-case determination of the necessity of prohibiting disclosure is an abridgment of free speech and therefore violative of the Florida and Federal Constitution.

II. SECTION 794.03, FLORIDA STATUTES VIOLATES THE FLORIDA CONSTITUTION

Article I, Section 4 of the Florida Constitution provides, in pertinent part, that "[n]o law shall be passed to restrain or abridge the liberty of speech or of the press." The Florida Supreme Court has held that the scope of protection accorded expression by Art. I, §4 is at least as broad as that required under the First Amendment. See e.g., Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Florida Canners Association v. State of Florida Dept. of Citrus, 371 So.2d 503 (Fla. App. 2d Dist. 1979). See also, News and Sun-Sentinel Company v. Cox, 702 F.Supp. 891, 902 n.28 (S.D. Fla. 1988). Indeed it has been suggested that the free speech and free press protection under the Florida Constitution may be broader than the First Amendment. In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987).

CONCLUSION

Based on the authorities contained herein, Section 794.03 is unconstitutional. The broader question of whether the legislature can draft a statute which could sustain constitutional challenge by including in the plain language of the statute all of the State's arguments is not one that can be answered in this case. GLOBE respectfully requests this Court to affirm the Fourth District Court and trial court's rulings holding Section 794.03 unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard Polin, Assistant Attorney General, 401 N. W. 2nd Avenue, Suite N921, Miami, FL 33101 and Richard Ovelmen, 701 Brickell Avenue, Miami, FL 33131 this 20th day of January, 1994.

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