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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,377

THE STATE OF FLORIDA

Appellant,

vs.

GLOBE COMMUNICATIONS CORP.,

Appellee.

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BRIEF OF APPELLANT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Globe Communications Corp. was charged by information with two counts of unlawful publishing information identifying the victim of a sexual offense, contrary to §794.03, Florida Statutes. (R. 1118).

The defendant filed a motion to dismiss the information. (R. 1137-1338). The motion alleged that §794.03 was unconstitutional on its face, as it was both underinclusive and overinclusive, that the statute operates as an impermissible prior restraint, and that the statute was unconstitutional as applied to the facts of this case. (R. 1138-41). The motion also asserted that the statute violated Article 1, Section 4 of the Florida Constitution. (R. 1140). The State filed a traverse and demurrer in response to the motion to dismiss, as well as a memorandum of law addressing the legal issues. (R. 1358-63, 1417-57).

A hearing on the motion to dismiss commenced on July 26, 1991. (R. 1-111). After hearing legal arguments regarding the facial constitutionality of the statute, the judge deferred ruling on that issue and stated that he would later determine whether to conduct an evidentiary hearing. (R. 86). The judge subsequently decided to hear testimony regarding the facts of the case (R. 100), and the evidentiary hearing commenced on September

25, 1991. (R. 112, et seq.). On October 24, 1991, after the conclusion of the evidentiary hearing, the trial court issued a written order dismissing the information, finding that the statute was unconstitutional on its face and as applied. (R. 1627-47). The court's order included a detailed summary of the evidence upon which it was relying. (R. 1628-30). Those facts are not detailed herein as they are not relevant to the issue raised in this proceeding.

The trial court proceeded to find the statute unconstitutional on its face for the following reasons: (a) §794.03 was deemed unconstitutionally overbroad "because the statute imposes a blanket prohibition in publishing the names of all rape victims, without a hearing and a case-by-case determination that restraint of freedom to publish is necessary to accomplish a valid and important State interest. . . ."; (b) the statute was deemed unconstitutionally underinclusive, as its prohibitions applied only to instruments of mass communication that publish the victim's name; (c) the statute was an impermissible "prior restraint,' and (d) the statute violated Article 1, Section 4 of the Florida Constitution, "[b]ecause the Florida protection is at least as broad as that of the First Amendment. . . ." (R. 1639, 1640-41, 1641-44). The order had also found that the statute was unconstitutional as applied to the facts of the case.

An appeal of the County Court's order was taken to the Fourth District Court of Appeal, pursuant to §26.012(1), Florida Statutes and Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure. In that appeal, the State did not contest the trial court's ruling that the statute was unconstitutional as applied to the facts of this case. Fourth District slip op. at p. 3.[1] The appeal was limited to the issue of the facial constitutionality of the statute. Id.

The Fourth District Court of Appeal stated that it was in general agreement with the opinion of the trial court, and then proceeded to set forth the trial court's opinion, verbatim and in full. (Fourth District slip op. at pp. 3-20). The Fourth District qualified the trial court's conclusion regarding the overbreadth of the statute, concluding that the Supreme Court of the United States, in The Florida Star, infra, did not technically say that Florida's statute was overboard. (Fourth District slip op. at p. 22). Nevertheless, the Fourth District concluded that the fact that criminal sanctions mandated by the statute flow automatically from any publication, regardless of the circumstances, constituted a fundamental defect in the statute's "broad sweep." (Fourth District slip op. at p. 24). Therefore, "the statute fails the strict tests for overbreadth .

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[1] As of the time of the filing of the State's Brief in this Court, the Clerk of the Fourth District Court of Appeal has not prepared or transmitted an index to the record on appeal. Thus, the Fourth District's decision is not referred to herein by a record citation, and is referred to by the page number of the slip opinion.

. . and . . . is patently violative of the First Amendment." (Fourth District slip op. at p. 28). The Fourth District further rejected the State's approach to the overbreadth problem.

The State had contended that the situation in which the Supreme Court, in the The Florida Star, had found that justification could exist for permitting disclosure of the victim's name, could be handled through the use of affirmative defenses in state court prosecutions, thereby avoiding the overbreadth problem. Fourth District slip op. at 28-29. The Fourth District rejected this contention, concluding that it resulted in an impermissible rewriting of the existing statute. Id. at 30.

The Fourth District also concurred with the trial court's reasoning regarding the underinclusiveness of the statute. Id. at 30-31. The court viewed the statute as underinclusive because it permitted "the information to be disseminated with impunity by means other than the mass media." Id. at 31. Additionally, the court found that the phrase "instrument of mass communication" was vague, thereby rendering the statute void for vagueness. Id. at 31.

With respect to the trial court's conclusion that the statute constituted an impermissible prior restraint, the Fourth District simply indicated that it agreed with the trial court's discussion and resolution of that issue and did not discuss it

any further. Id. at 20 n. 2. Finally, the Fourth District concluded that Article I, Section 4 of the Florida Constitution provided at least the same protection as that provided by the First Amendment to the United States Constitution, and was therefore similarly applicable to §794.03.

POINT ON APPEAL

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT SECTION 794.03, FLORIDA STATUTES VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

SUMMARY OF THE ARGUMENT

A careful reading of the United States Supreme Court's Florida Star decision, infra, compels the conclusion that §794.03, Florida Statutes, is facially constitutional and does not violate the First Amendment. The problems which were found to exist in Florida Star can adequately be dealt with through a combination of the use of proper jury instructions, affirmative defenses, and judicial definitions of some of the terms of the statute.

The lower court's conclusion that the statute in question was an impermissible prior restraint fails to perceive the valid distinctions between true prior restraints and subsequent punishment statutes, and proceeds to ignore recent decisions from this Court which make it clear that the prior restraint doctrine is not applicable in the instant case.

ARGUMENT

THE LOWER COURT ERRED IN CONCLUDING THAT SECTION 794.03, FLORIDA STATUTES VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

The legislative effort to deter publication of information identifying the victim of a sexual offense promotes strong and legitimate governmental interests which should not lightly be ignored or swept aside. Those interests include the privacy rights of the victim; the physical safety of the victim from potential retaliation; and the goal of encouraging victims to report such crimes. See, The Florida Star v. B.J.F., 491 U.S. 525, 537, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). Section 794.03, Florida Statutes, which is consistent with those interests, provides:

> No person shall print, publish, or broadcast, or cause to 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. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in §775.082, § 775.083, or §775.084.

The term "victim" is defined in §794.011(1)(i), Florida Statutes, as "the person alleging to have been the object of a sexual offense."

The lower court's reasons for finding §794.03 unconstitutional derived, primarily, from the lower court's analysis of the Florida Star decision. A proper analysis and application of that decision therefore lies at the heart of this appeal.

Prior to the Florida Star decision, several cases had rejected efforts to prohibit publication of information which might implicate privacy interests. What emerges from those prior cases, as well as from Florida Star, is that the holdings were always narrowly tailored to the particular factors of the particular cases, and invariably left open the possibility that, given appropriate circumstances, legislative proscriptions against publication of information implicating privacy interests will be upheld.

Pre-Florida Star Decisions

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), a Georgia statute made it a misdemeanor to publish a rape victim's name. A civil action was brought, in reliance on that statute, against the television station which broadcast the name. Ultimately, the Supreme Court found that the civil damages award was unconstitutional. The victim's name had been obtained from public records - i.e., the indictments which had been filed in the public records - and the Supreme Court, in a narrowly drawn conclusion, held that the State could not "impose sanctions on the accurate publication of

the name of a rape victim obtained from public records" which were open to public inspection. 420 U.S. at 491. Thus, the Court refused to permit sanctions for that which the State had already made public. Id. at 495-96. The Court specifically refused to address "the broader question[s] of whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or . . . whether the State may ever define and protect an area of privacy free from unwanted publicity in the press. . . ." Id. at 491.

In Oklahoma Publishing Co. v. Oklahoma County District Court, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977), a pretrial court order enjoined the media from publishing the name or picture of a juvenile in connection with a juvenile proceeding involving that child and which proceeding some reporters had attended. In reliance on the Cox rationale, the Supreme Court found that since the juvenile proceeding had been open to the public and attended by the media, with knowledge of the judge and counsel, the juvenile's name and picture were already public information which the media could publish. Once again, the focus narrowly centers on the previous acts of the State in making the information public.

Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), involved a West Virginia statute making it a crime for newspapers to publish the name of any youth charged as a juvenile offender, without prior court approval.

Newspapers, having learned the juvenile's name by monitoring the police radio band frequency, published the name of a juvenile and were indicted. The Court concluded that the statute did not further the state interests which were asserted. The state's asserted interest in protecting the anonymity of the juvenile offender was not deemed to be of sufficient magnitude to justify application of criminal penalties. 443 U.S. at 104-05. Thus, the interest in the juvenile offender's anonymity was not deemed to implicate any "issue . . . of privacy." Id. at 105.

In the final pre-Florida Star case of significance, Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), a state statute criminalized the publication of information regarding proceedings before a state judicial review commission, which heard cases of alleged judicial misconduct. While the State's interests in confidentiality were assumed to be legitimate for purposes of the Supreme Court's decisions, such interests of confidentiality of judicial review commission proceedings were not deemed sufficient to justify the encroachment on the First Amendment. 435 U.S. at 841-42.

The holdings in Landmark and Daily Mail were both narrow, as they did not hold that the State could never prohibit the publication of truthful information. The conclusions that the interests asserted in those cases were insufficient to enroach upon the First Amendment do not compel a similar conclusion about

the privacy interests surrounding victims of sexual offenses. Indeed, as will be seen shortly, the Florida Star decision does recognize the legitimacy of those interests and suggests that they are sufficiently compelling to permit statutory prohibitions against the publication of information identifying victims of sexual offenses.

Analysis of Florida Star and its Application to Globe

Not only is the Florida Star decision narrowly drawn, much like the previously discussed cases, but its reasoning clearly opens the door, in appropriate factual circumstances, for legislative sanctions for publishing information identifying victims of sexual offenses. In Florida Star, a newspaper published the name of a sexual assault victim after the paper's reporter discovered the name in a sheriff's report which had been placed in the Sheriff Department's pressroom. A civil action was filed, alleging that the newspaper and Sheriff's Department negligently violated section 794.03, Florida Statutes. The Sheriff's Department settled the case for $2,500, and a jury trial resulted in a damages award of $100,000 against the newspaper. The Supreme Court ultimately found that the award of damages violated the First Amendment. The narrowness of the holding was duly noted and emphasized. Thus, the Court explicitly failed to hold "that truthful publication may never be punished consistent with the First Amendment." 491 U.S. at 532. Consistent with the narrow approach of prior cases, the Court

continued "to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." Id. at 533. Similarly, the Court explicitly noted that it did "not rule our the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance [the State's] interests. . . ." Id. at 537.

A careful review of the Florida Star decision compels the conclusion that §794.03 is not facially invalid and does not violate the First Amendment. The Supreme Court, relying on Daily Mail, supra, found the following principle to set forth the analytical framework for cases involving attempts to punish truthful publication:

> '[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'

491 U.S. at 533, quoting Daily Mail, supra, 433 U.S. at 103.

The first inquiry under the Daily Mail principle is "whether the newspaper 'lawfully obtain[ed] truthful information about a matter of public significance.'" 491 U.S. at 536. The

inquiry then continues, to determine whether there is a "need to further a State interest of the highest order," by nevertheless imposing liability for the publication of the information, even though the information was lawfully obtained. Id. at 533, 537. In Florida Star, the Supreme Court noted three interests of the State: "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure." Id. at 537. Not only were these interests acknowledged as being "highly significant interests," but they were further deemed to be of sufficient weight to possibly permit sanctions for violations of those interests:

> We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the Daily Mail standard.

Id

Notwithstanding the apparent legitimacy of the State's interests, and their sufficient weight to satisfy the Daily Mail standard in appropriate cases, the Court set forth three reasons for finding that "liability of publication under the circumstances of this case is too precipitous a means of advancing those interests to convince us that there is a 'need'

within the meaning of the Daily Mail formulation for Florida to take this extreme step." Id.

The first of those reasons was "the manner in which appellant obtained the identifying information in question." Id. at 538. In Florida Star, as in previous cases, the government had been the source of the disseminated information, making it available to the press through a police report. Under such circumstances, "the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." Id.

The second reason why the Florida Star decision found that the circumstances of that case precluded liability for publication was that the trial court, in the civil tort action, had imposed a negligence per se standard. 491 U.S. at 539. The Supreme Court embellished upon this:

> . . . 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 flows 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. Nor is there any 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.

491 U.S. at 539. The problems described in this section of Florida Star are not inherent in the statute; rather, they relate to the manner in which one particular trial judge applied the statute. Not only are the trial judges in a position to apply the statute in a different manner, but the trial courts can do so in a manner which is fully consistent with Florida Star.

The problems described in this part of Florida Star are referred to as the overbreadth problem, as allowances are not made for situations which would conflict with the First Amendment protections - e.g., when the victim's identity is already widely known; when the victim has called public attention to the offense; etc. Such situations can adequately be dealt with, in a manner consistent with the statute, by recognizing affirmative defenses available at trial, for which a qualifying defendant would receive appropriate jury instructions. These matters would clearly constitute affirmative defenses, as such defenses are defined in State v. Cohen, 568 So. 2d 49, 51-52 (Fla. 1990), which states that an affirmative defense is "any defense that assumes the complaint or charges to be correct but raises other

facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'" The use of affirmative defenses would further be appropriate as the State would otherwise have the clearly untenable position of having initially to prove an endless multitude of negatives, many of which the particular defendant might never even claim.

The notion that Florida courts could established such affirmative defenses to render the statute consistent with the Supreme Court's concerns, is fully consistent with the obligation of state courts to adopt, if reasonably possible, a construction of a statue which comports with the dictates of the Constitution. See, e.g., Vildibil v. Johnson, 492 So. 2d 1047 (Fla. 1986); White v. State, 330 So. 2d 3, 5 (Fla. 1976); Community Futures Trading Commission v. Schor, 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). Utilizing such affirmative defenses, liability would no longer automatically flow from publication, and the Supreme Court's concerns would be alleviated. The use of such affirmative defenses would also permit the case-by-case findings desired by the Court in Florida Star regarding whether "the disclosure of a fact about a person's life was one that a reasonable person would find highly offensive." 491 U.S. at 539. The jury instructions on the affirmative defenses would enable

juries to deny criminal liability for those situations which reasonable people would not find highly offensive.

The lower court rejected the State's argument regarding the use of affirmative defenses to address the overbreadth problem, asserting that it was tantamount to rewriting the statute. Such a conclusion, however, is repudiated by a long line of cases in which judicially mandated affirmative defenses have addressed matters which are not explicitly referred to in the penal statute in question. For example, Florida courts have long recognized the entrapment defense. Yet, prior to the adoption of §777.201(2), Florida Statutes, in 1987, which statute codified the entrapment defense, the legislature had done little regarding the defense of entrapment. See, Herrera v. State, 594 So. 2d 275, 277 at n. 1 (Fla. 1992). Notwithstanding the legislature's inaction prior to 1987, the courts of Florida, as a matter of pubic policy, had created the affirmative defense of entrapment and placed the burden of proof on the defendant. Kimmons v. State, 322 So. 2d 36, 38 (Fla. 1st DCA 1975); Evenson v. State, 277 So. 2d 587 (Fla. 4th DCA 1973). See also, Sorrells v. United States, 287 U.S. 53 S.Ct. 210, 77 L.Ed.2d 413 (1932). The entrapment defense was judicially mandated, notwithstanding that there was no express legislative intent to incorporate that defense into every substantive penal statute previously enacted.

In a similar vein, this Court, in State v. Glosson, 462 So. 2d 1082 (Fla. 1985), recognized and created a constitutional due

process defense in drug prosecutions, requiring dismissal upon proof that an informant was paid a contingent fee while required to testify in order to collect the fee. Such a defense is not a part of any drug trafficking statute; yet, prosecution under the narcotics statutes under such circumstances would be unconstitutional. The judicially created defense therefore saves the statute from unconstitutional application.

The same pattern can be seen in cases permitting the defense of selective prosecution, a judicially created defense, designed to avoid unconstitutional prosecutions, while placing the burden on the defense to establish that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution was based on an improper motive. See, e.g. United States v. Wayman, 724 F.2d 684, 687 (8th Cir. 1984); Thomas v. State, 583 So. 2d 336 (Fla. 5th DCA 1991); Bell v. State, 369 so. 2d 932 (Fla. 1979).

Similarly, notwithstanding the absence of any legislative pronouncement, courts have adopted the defense of withdrawal, which requires the defendant to prove that he abandoned his criminal intent and communicated the renunciation to accomplices in time for them to consider abandoning the criminal plan. Smith v. State, 424 So. 2d 726,732 (Fla. 1983); United States v. Bailey, 834 F. 2d 218, 227 (1st Cir. 1987).

It is therefore readily apparent that judicially created defenses are often utilized, without legislative sanction, to avoid a variety of constitutional or public policy problems. The use of such defenses neither amounts to a rewriting of any existing statute nor runs counter to any legislative intent. The defenses are consistent with the policy of construing a statute, wherever possible, so as not to conflict with the Constitution. Firestone v. Newspress Publishing Co., 538 So. 2d 457, 459 (Fla. 1989). As acknowledged in Firestone, an appellate court, "under the proper circumstances," may "place narrowing constructions" on legislative acts when such constructions do not amount to a rewriting of the statue. Id. at 459-60, "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality. . . . " Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). See also, White v. State, 330 So. 2d 3, 5 (Fla. 1976).

Furthermore, the use of affirmative defenses, as proposed by the State, would be fully consistent with any legislative intent. While the legislature clearly intended that publication of the names of victims of sexual offenses be broadly prohibited, the legislature always intends that its statutes be within the confines of what is constitutionally permissible. Thus, Florida's Constitutions, at all pertinent times, have required legislators to take oaths to support, protect and defend the Constitution of the United States. See, Art. XVI, s. 2, Florida

Constitution of 1968. It must therefore be presumed that the legislature intended the prohibition to be applicable only to the extent that it would be consistent with the federal constitution. Any limitation of the statute, through the use of affirmative defenses, does no disservice to legislative intent.

The Florida Star decision was also concerned with the absence of any scienter requirement under §794.03. The reasoning in that regard appears uniquely related to the fact that Florida Star involved a civil tort claim where the trial court, upon motion of the plaintiff, directed verdict on the issue of negligence. Thus, the Court queried why truthful publications, in a civil action, should be judged by a per se negligence standard while defamatory falsehoods are judged by a standard of ordinary negligence.

Such reasoning should apply solely in the civil tort claim context. In terms of criminal offenses while there are reasons to criminalize the truthful publication of a rape victim's identity, no such reasons exist for criminalizing false allegations that a person was raped. One of the interests behind the penal statute is the privacy interest of the rape victim. The rape victim should not be forced to relive the nightmare through the publication of the name. When a person is falsely, or erroneously identified as a victim, that victim, when confronted with those allegations, is not being compelled to live any nightmare, since the nightmare for that person is

nonexistent. Thus, while Florida Star's analysis on this point may be valid in a civil context, it is not applicable in a criminal context.

The State would note, however, that it is difficult to contend that the statute has no scienter requirement. Virtually all statutes in Florida, regardless of whether they specify an intent or knowledge requirement, are judicially construed to have either a general intent requirement or a requirement that the conduct be knowing. See, e.g., State v. Oxx, So. 2d 287 (Fla. 5th DCA 1982) (possession of drug statutes are typically read to require that possession be "knowing" even though statutes do not explicitly refer to knowing possession). Just as possession of contraband must be "knowing," notwithstanding the absence of any such language in the penal statute, §794.03 could also be read to require a "knowing" publication. That would eliminate criminal liability in the case where the publication of the name was accidental, as when an editorial decision had been made to delete the victim's name from the story, but the wrong version of the story accidentally went to press.

Although the Supreme Court may have construed § 794.03, as applied in the civil tort case in Florida Star, as being overly broad, there is no reason why the courts of this State cannot now provide a constitutionally correct construction of the statute. For example, in Bauserman v. Blunt, 147 U.S. 647, 13 S.Ct. 466, 37 L.Ed. 316 (1993), the Supreme Court stated that "[i]f the

highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications." Moreover, the Supreme Court, when evaluating facial challenges to state statutes, always considers any limiting constructions of state courts. Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Thus, it can readily be seen that all of the "overbreadth" problems alluded to in Florida Star can be fully handled through proper state court construction and application of the statute through the use of affirmative defenses and jury instructions.

The third, and final, problem in Florida Star was "facial underinclusiveness":

> Third, and finally, the 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 prohibits the publication of identifying 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 the

> 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.').
>
> 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. . . . 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.

491 U.S. at 540-41.

A proper reading of Florida Star and subsequent pronouncements from the Supreme Court, however, reflects that the "underinclusiveness" rationale would not, in and of itself, result in a violation of the First Amendment. Thus, for a starting point, the Florid Star decision regarding this issue spoke, initially, in terms of "serious doubts." Id. at 540. Doubts, however serious, imply that an issue is unresolved, that there is room to accommodate contenders of differing perspectives.

The fact that these 'serious doubts" were not elevated to an independent holding of Florida Star is clarified by a subsequent decision of the Supreme Court, Leathers v. Medlock, 499 U.S. ___, 111 S.Ct. ___, 113 L.Ed.2d 494 (1991). That case involved a state sales tax scheme which applied to some segments of the media - cable television and satellite television services - while exempting others. As the sales tax scheme was obviously "underinclusive" in the sense that it applied to some, but not all of the media, it raised the same type of issue as was analyzed in Florida Star. The Supreme Court, in Medlock, noted its prior decisions in which tax schemes which discriminated among segments of the media had bee deemed to violate the First Amendment. See, e.g., Grosjean v. American Press Co., 297 U.S. 233, 54 S.Ct. 444, 80 L.Ed.2d 660 (1936); Minneapolis Star & Tribune Co. v. Minneapolis Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983); Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). The Court, in Medlock, summarized the reasons why those prior decisions found discriminatory tax schemes to be underinclusive and violative of the First Amendment. 113 L.Ed.2d at 503-04. In each of those prior cases, some compelling reason operated, in conjunction with the statutory underinclusiveness, to render the discriminatory scheme violative of the First Amendment. Id. Finding that none of those prior concerns were implicated by the sales tax scheme in Medlock, the Supreme Court proceeded to find that underinclusiveness, in and of itself, did not result in a violation of the First Amendment:

> Because the Arkansas sales tax presents none of the First Amendment difficulties that have led us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents 'an additional basis' for concluding that the State has violated petitioners' First Amendment rights.

Id. at 505. In a similar manner, the Court proceeded to state "[t]hat a differential burden on speakers is insufficient by itself to raise First Amendment concerns" was evident from prior decisions. Id. at 507. Thus, when Florida Star is read in conjunction with the subsequent decision in Medlock, it must be concluded that any underinclusiveness of §794.03, in and of itself, does not result in a violation of the First Amendment. Furthermore, since the other concerns of Florida Star - i.e., manner of obtaining information, overbreadth - can be satisfactorily resolved, any remaining underinclusiveness would necessarily stand alone and would not constitute a violation of the First Amendment.

It was argued by the Appellee herein, in the lower court, that Medlock's application was limited to the context of discriminatory taxes on broadcasters. The Supreme Court made it clear, however, that the principle of Medlock, that "a differential burden on speakers is insufficient by itself to raise First Amendment concerns. . . .," is not limited to discriminatory taxes on broadcasters. The Supreme Court made

that clear when it indicated, in Medlock, that it was relying on earlier cases, Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 2111, 90 L.Ed. 607 (1946), and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). The Court, in Medlock, emphasized that those earlier cases "do not involve taxation, but they do involve governmental action that places differential burdens on members of the press." In those earlier cases, provisions of the Fair Labor Standards Act of 1938 were applicable to some, but not all, newspapers.

In view of the Court's conclusion that underinclusiveness does not, in and of itself, result in a First Amendment violation, it would be appropriate to note that three Justices strongly dissented from the majority's reasoning and conclusions in Florida Star. Indeed, Justice O'Connor, the author of the Medlock decision, was one of the dissenters in Florida Star. Furthermore, in one comparable case subsequent to Florida Star, Dorman v. Aiken Communications, Inc., 398 S.Ed. 2d 687 (S.C. 1990), the Supreme Court of South Carolina found that its statute prohibiting the publication of the names of victims of sexual offenses was not facially unconstitutional. In reaching that conclusion, the Supreme Court of South Carolina noted that "the United States Supreme Court has declined to rule similar statutes unconstitutional on their face. [citations omitted]. Instead, it has addressed the First Amendment issue 'only as it arose in a discrete factual context.' Florida Star [citation omitted]." 398 S.Ed. 2d at 688-98.

Moreover, even if the underinclusiveness of §794.03 were still deemed a problem, that, too, could satisfactorily be resolved through proper judicial construction of the statute by the state courts. As previously noted, any state court limiting constructions of statutes are binding on the Supreme Court. Hoffman Estates, supra; Bauserman, supra. In the Florida Star opinion, the concern was with the scope of the definition of "instrument of mass communication" as encompassing only "media giants." 491 U.S. at 540. Thus, the majority noted that counsel for B.J.F., at the oral argument, conceded that the statute would not apply to "the backyard gossip who tells 50 people that don't have to know.'" Id. Unfortunately, B.J.F.'s counsel did not speak for the State of Florida, had no authority to commit the State to the proposition, and was incorrect in doing so. The State has no difficulty in concluding that it would have the statutory power to prosecute the individual described in that scenario. Indeed, as expressly stated by the prosecutor in the court below, "'If Mrs. Jones gets a megaphone or copy machine, we'll prosecute her too.'" (R. 1641). The language of the statute clearly encompasses "media giants," but it likewise applies to any non-media individual who broadcasts the pertinent date at the general public through non-media instruments such as megaphones, fliers, facsimile machines, copiers, etc.

The Appellee herein argued in the lower court that the State's underinclusiveness analysis was flawed by virtue of the

recent decision in R.A.V. City of St. Paul, Minnesota, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 305 (1992). R.A.V., however, does not undermine the State's argument. The concern in underinclusiveness cases is with whether the differential treatment threatens to suppress the expression of particular ideas or viewpoints or whether it discriminates on the basis of the content of speech. Medlock, supra, 113 L.Ed.2d at 503-04. R.A.V., which found invalid a city ordinance banning the display of symbols that arouse anger in others on the basis of race, color, creed, religion or gender, discussed, at length, the concept of underinclusiveness as it relates to First Amendment concerns. Thus, "the First Amendment imposes not an "underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." 120 L.Ed.2d at 320. "Content discrimination" focuses on "'the specter that the Government may effectively drive certain ideas or viewpoints from the market place. . . .'" R.A.V., 120 L.Ed.2d at 320, quoting form Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. ___, ___, 112 S.Ct., 501, 116 L.Ed.2d 476, ___ (1991).

What becomes clear from R.A.V. is that underinclusiveness, or content discrimination, relates to situations in which the government prohibits some forms of speech, but not all instances of a class of proscribable speech. Id. That is not the same dilemma the Florida Star was dealing with when it discussed underinclusiveness. Underinclusiveness, in Florida Star, related

to differential treatment of classes of speakers - i.e., media versus non-mass media. The concern in Florida Star was not with the potential suppression of a message, viewpoint or ideas. Implicit in the Florida Star decision is the possibility that a prohibition against all speakers, broadcasters, etc., from disclosing the identity of a rape victim, might be valid. If that is indeed a plausible possibility, then it immediately becomes clear that: (1) underinclusiveness in the Florida Star sense was not concerned with "content discrimination;" and (2) the evil which elevates underinclusiveness or content discrimination to a First Amendment violation was lacking in both Florida Star and the instant case.

Since "content discrimination" concerns the fear of driving ideas or viewpoints from the market place, it must also be clear that prohibitions against publishing a rape victim's name do not implicate such concerns. The name adds nothing to whatever ideas or viewpoints are being communicated. There is no fear that without the name, the ideas or viewpoints will be suppressed. See generally, C. Sunstein, The Partial Constitution (Harvard Univ. Press 1993), pp. 197 -256, 244 (expressing the view that forms of speech related to promotion of deliberative democracy are entitled to greater protection under First Amendment than other forms of speech, and that prohibition of disclosure of names of rape victims is consistent with First Amendment values).

Thus, R.A.V. is inapplicable for the following reasons: (1) the underinclusiveness issue in Florida Star and the instant case did not involve content discrimination, as it was not concerned with the threat of censorship of ideas, see, R.A.V., 120 L.Ed.2d at 324; (2) the underinclusiveness issue in the instant case and Florida Star involves differential treatment of different classes of speakers as to the same speech; and (3) R.A.V. involved discrimination among various instances of a class of proscribable speech.

Not only is R.A.V. inapplicable to the underinclusiveness analysis of Florida Star and the instant case, but Medlock, with its concern for differential treatment of classes of speakers does come closer to the same type of analysis required in the instant case. Thus, we revert back to the original position under Medlock: differential treatment of classes of speakers, in the absence of content discrimination concerns, does not, in and of itself, result in a First Amendment violation.

Prior Restraint Doctrine

The lower court's order approving the trial court's analysis, concludes that §794.03 constitutes an impermissible prior restraint. The First Amendment prohibits prior restraints against the exercise of speech in the absence of proof of exceptional circumstances to justify the use of the prior restraint. See generally, Near v. Minnesota ex rel. Olson, 283

U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); L. Tribe, American Constitutional Law, 2d Ed. (The Foundation Press, Inc. 1988), §§12-34, 12-35, 12-36, 12-27, 12-38, 12-39;

The doctrine of prior restraints has traditionally been associated with court orders which, prior to the exercise of speech, enjoin such speech, or pre-speech licensing schemes. Nebraska Press Association, supra; Smolla, supra; Tribe, supra. Thus, "the doctrine imposes a special bar on attempts to suppress speech prior to publication, a bar that is distinct from the scope of constitutional protection accorded the material after publication." Tribe, supra, at 1040. The prohibition against prior restraints is not absolute; the barrier may be overcome in exceptional cases. Near, supra, 283 U.S. at 716.

The lower courts concluded that the distinction between prior restraints and subsequent criminal punishment has been eroded over the years, and that a penal statute which becomes operative only after the exercise of the speech should therefore similarly be treated as an impermissible prior restraint. (R. 1641-43). Near v. Minnesota itself had clearly validated differential treatment of prior restraints and subsequent punishment: "Subsequent punishment for such abuses as

may exist is the appropriate remedy, consistent with constitutional privilege." 283 U.S. at 720.

Commentators and courts have proffered many reasons why prior restraints should be subject to more rigid scrutiny than statutes which impose subsequent punishment. Thus, "[a] criminal statute chills, a prior restraint freezes." A. Bickel, The Morality of Consent (Yale University Press 1975), 61. Or, as stated in Nebraska Press Association, supra:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement of First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.

427 U.S. at 559 (footnote omitted) (emphasis added).

Perhaps the most compelling and most common reason advanced for the differential treatment of prior restraints and subsequent punishment statutes is that when the prior

restraint - i.e., the injunctive order - is violated, the offender is subject to incarceration for contempt of court, and the First Amendment will not furnish a defense for the violation of the court order. Thus, even if the court's order enjoining the speech was erroneous, the First Amendment will not prevail as a defense. See, Smolla, supra, at 284 ("When a defendant is prosecuted for disobeying a court order, the defendant is not permitted to challenge the legal merits of the court order."); Tribe, supra, at 1042-44; Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967) (Supreme Court upheld conviction of Martin Luther King, Jr. and other ministers for violating court order forbidding march without permit required by City ordinance; as the defendants had failed to appeal the state court order, they could not assert First Amendment defense to contempt of court charges).[2]

Prior restraints are also differentiated in terms of the immediacy of the punishment that ensues upon violation of a court order and the direct and personal relation that the prior order has on the speaker. Smolla, supra, at 287-88. A statute in a book in a law library does not affect a potential speaker with the same sense of immediacy.

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[2] Indeed, it is interesting to note that the sole commentator on whom the trial court's order relies, Jeffries, "Rethinking Prior Restraint," 92 Yale L.J. 409 (1983), for the proposition that "prior restraint" has lost its utility in First Amendment analysis, has himself conceded that the collateral bar rule provides a valid basis for distinguishing prior restraints from subsequent punishment statutes. 92 Yale L.J. at 431.

Other, more subtle and sophisticated justifications for differential treatment of prior restraints and subsequent punishment statutes have been advanced. See, Blasi, "Toward a Theory of Prior Restraint: The Central Linkage," 66 U. Minn. L. Rev. 11 (1981). Professor Blasi believes that adjudication at the prior restraint stage results in abstract adjudication, often swayed by ideological passion, whereas subsequent punishment statutes permit adjudication of First Amendment claims in an environment promoting more pragmatic considerations, with fuller opportunities for factual development. Id. at 53-54. Blasi also believes that prior restraints promote a tendency toward overuse by those who impose the restraints, as contrasted to subsequent punishment schemes. Id. at 63. Adjudication in the context of prior restraints also serves to lessen the ultimate impact of the speaker's words on the ultimate audience; the audience receives the words through the filter of prior litigation, never knowing whether the speaker has altered the message as a result of the prior adjudicatory proceedings. Id. at 63-69. Prior restraints promote the notion, which Blasi finds objectionable, "that it is more dangerous to trust audiences with controversial communications than it is to trust the legal process with the power to suppress speech." Id. at 84-85.

On the basis of Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982), cert. denied, 459 U.S. 865, 103 S.Ct. 143, 74 L.Ed.2d 121 (1982), the trial court, as affirmed on appeal,

concluded that there is no longer any distinction between prior restraints and subsequent punishment statutes, and that subsequent punishment statutes are now tested by the same high barriers - i.e., exceptional circumstances - as are prior restraints. A careful reading of Gardner and subsequent decisions compels the conclusion that the lower court's treatment of the instant statute as a prior restraint is erroneous.

Gardner involved §934.091, Florida Statutes (1977), which imposed criminal penalties on those who published the name of any person who was a party to an interception of wire or oral communications until that person had been charged with an offense. In that case, a newspaper, prior to publication, sought a declaratory judgment regarding the applicability of the statute as to a particular person whose name the paper desired to publish. The trial court found the statute to be unconstitutional. On appeal, this Court stated:

> . . . The absolute terms of this statute effectively result in a prior restraint on the press. Prior restraints have always been accorded the most exacting judicial scrutiny. Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 5 46, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The United States Supreme Court has made it clear that the method of imposing restriction on the press is not the critical factor:
>
> [']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.[']
>
> Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-02, 99 S.Ct. 2667, 2669-70, 61 L.Ed.2d 399 (1979).

413 So.2d at 11. While Gardner can be read to pronounce the death sentence on the prior restraint/subsequent punishment dichotomy, Gardner is not the final word on the subject. Several years later, in Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 35 (Fla. 1988), this Court reverted back to the more traditional definition of prior restraints:

> . . . Prior restraint is a term of art which is customarily applied to orders prohibiting publication or broadcast of information already in the possession of the press.

Such a reversion back to the traditional definition of prior restraint clearly reflects that the dichotomy between prior restraints and subsequent punishment still exists. That conclusion is further corroborated by the subsequent decision of this Court in Stall v. State, 570 So.2d 257 (Fla. 1990). Stall upheld the constitutionality of Florida's statute which criminalized the sale or display of obscene materials. The opinion did not treat this subsequent punishment statute as a prior restraint and did not even ask the question whether exceptional circumstances existed to permit such a prior

restraint. By failing to treat that subsequent punishment statute as a prior restraint, the Supreme Court, once again, as in McCrary, confirmed the notion that subsequent punishment statutes are not automatic prior restraints, are distinguishable from prior restraints, and are not analyzed as prior restraints. This Court has clearly receded from Gardner, which cannot be reconciled with Stall or McCrary, and the dichotomy between prior restraints and subsequent punishment statutes is still alive.

Several things should be noted about Gardner. Most significantly, it should never have implicated prior restraint analysis since it involved speech which was protected under the First Amendment. As noted by Professor Tribe:

> In order to test the extent and strength of the prior restraint doctrine, therefore, one must examine expression that is at least arguably outside the ambit of substantive first amendment protection, yet inside the ban on prior restraints. A frequent pitfall of both courts and commentators is to employ the doctrine in cases involving expression clearly within the first amendment guarantees, in ignorance of the fact that '[w]here the speech in question is in all events guaranteed by the First Amendment, attributing that guarantee to the circumstance of the prior restraint is at best irrelevant and often misleading.'

Tribe, supra, at 1040. Thus, in Florida Star, the Supreme Court concluded that since the speech involved was protected under the first amendment, it was unnecessary to reach the issue of

whether that statute was an impermissible prior restraint. 491 U.S. at 541, n. 9. Since Gardner involved protected speech in any event, there was likewise no reason to revert to prior restraint analysis.

Gardner's second major flaw was its misuse of and reliance on Smith v. Daily Mail, supra. Daily Mail, as previously discussed, involved a statute criminalizing the publication of the identity of a youth charged as a juvenile offender, without prior court approval. The United States Supreme Court explicitly avoided any resolution of the question of whether the statute was a prior restraint:

> The resolution of this case does not turn on whether the statutory grant of authority to the juvenile judge to permit publication of the juvenile's name is, in and of itself, a prior restraint.

443 U.S. at 101. Rather, the Supreme Court held that the speech involved was protected under the First Amendment, and it was therefore unnecessary to determine whether the statute was a prior restraint. Therefore, Daily Mail hardly stands for the proposition that there is no distinction between prior restraints and subsequent punishment statutes. Just as there was no reason to reach the issue in Daily Mail or Florida Star, there was no reason to do so in Gardner.

As Gardner was an aberrational decision, misconstruing the nature of the prior restraint doctrine, and misapplying pronouncements from the United States Supreme Court, it must be concluded that the dichotomy between prior restraints and subsequent punishment statutes still exists, as recognized in the later cases of McCrary and Stall. See also, Aiken, supra, 398 S.E.2d at 689, n. 3 (South Carolina Supreme Court rejected the contention that statute imposing subsequent punishment for publication of rape victim's name was prior restraint).

Accordingly, compelling reasons exist for concluding that the lower court erred in treating §794.03 as an impermissible prior restraint.

Vagueness

The lower court also concluded that the State's use of the phrase "instrument of mass communication," rendered the statute "so ambiguous that it may also render the statute void-for-vagueness." Fourth District slip op. at p. 31. The term "mass," in its adjectival form, is defined in Webster's Third New International Dictionary (1986 ed.), as follows: "participated in, attended by, or affecting a large number of individuals." The term "mass" is commonly used in such senses as "mass demonstrations" or "nuclear weapons of mass destruction." Thus, the statutory phrase is easily understood as referring to instruments of communication which are are designed to reach a large number of individuals. There is nothing ambiguous about

that. There may occasionally be a close or difficult case - for example, an individual who orally communicates the proscribed information, to one person at a time, until the total number of individuals apprised exceeds several dozen or several hundred. However, the fact that there may be an occasional difficult or close case does not suffice to render the statute vague. It is not always easy to determine whether common household items constitute burglary tools, yet the statute proscribing possession of burglary tools has not been deemed vague. Foster v. State, 286 So. 2d 549 (Fla. 1993); Austin v. State, 373 So. 2d 451 (Fla. 2d DCA 1979). A conclusion that a statute is impermissibly vague can be reached only if the complainant "demonstrate[s] that the law is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 497, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). See also, United States v. Schneiderman, 968 F.2d 1564, 1567-68 (2d Cir. 1992). In Smith v. Gogues, 415 U.S. 566, 577-78, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), the Court recognized that a vagueness attack would be inappropriate in the sense that there is a "hard-core violator" concept, where the statute clearly applies to certain activities, "but whose application to other behavior is uncertain." In the instant case, the occasional bizarre and difficult case does not detract from the facial validity of the statute, where the concept of "instruments of communication" is readily seen as applicable to most situations - newspapers, radio, television, etc.

CONCLUSION

Based on the foregoing, the decision of the lower court should be reversed with respect to its holdings regarding the facial invalidity of §794.03, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was furnished by mail to JOHN TIERNEY, Esq. and CAREY HAUGHWOUT, Esq., 324 Datura Street, Suite 250, West Palm Beach, FL 33401; PAUL LiCALSI, Esq. and LEONARD MARKS, Esq., 41 Madison Avenue, New York, N.Y. 10010; and RICHARD J. OVELMAN, Esq., Suite 1605, 701 Brickell Avenue, Miami, FL 33131. on this 21st day of October 1993.

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