IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,377

THE STATE OF FLORIDA,

Appellant,

-vs-

GLOBE COMMUNICATIONS CORP.,

Appellee.

REPLY BRIEF OF APPELLANT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Appellant, the State of Florida, relies on the Statement of the Case and Facts set forth in its initial Brief of Appellant in this proceeding. The State would simply note that the Answer Briefs of Appellee and Amici Curiae contain extensive factual details regarding the instant case. These facts are not pertinent to the issue pending before this Court. In the Fourth District Court of Appeal, the State conceded that §794.03, Florida Statutes, could not be constitutionally applied to the facts of the instant case. (Fourth District slip. op. at p. 3). That appeal was limited to the issue of the facial constitutionality of the statute and the appeal to this Court is similarly limited.

POINT INVOLVED 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

The State relies on the Summary of the Argument set forth in its initial Brief of Appellant.

ARGUMENT

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

One of the State's principal contentions has been that the overbreadth concerns expressed in The Florida Star v. B.J.F., 491 U.S. 525, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989), can adequately be dealt with in a manner consistent with §794.03, Florida Statutes, by recognizing affirmative defenses available at trial, for which a qualifying defendant would receive appropriate jury instructions. In that manner, §794.03 would be limited to what is constitutionally proscribable. This Court, in its recent decision in State v. Stalder, 19 Fla. L. Weekly S56 (Fla. Jan. 27, 1994), utilized a similar approach in determining whether Florida's Hate Crimes Statute, §775.085, Florida Statutes, violated the First Amendment. That statute enhances offense penalties "if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, or natural origin of the victim." Two distinct categories of bias-evidencing crimes were perceived to exist by this Court: "those offenses committed because of prejudice" and "those offenses committed for some reason other than prejudice but that *nevertheless show bias* in their commission." Id. at S58. Florida's statute would survive First Amendment analysis only if it could be construed as applying to the first class of conduct, the narrower class of cases. Id.

Even though the statutory language did not distinguish between those two classes of conduct, this Court attributed to the legislature an intent to have its statute construed in the narrow manner which would render it constitutional:

> The question before us is whether section 775.085 can pass constitutional muster by being read narrowly as proscribing the first class of conduct. We note that in assessing a statute's constitutionality, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Elder, 382 So. 2d 687, 690 (Fla. 1980). Further, "[w]henever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment." Firestone v. News Press Publishing Co., 538 So. 2d 457, 459-60 (Fla. 1989)(citations omitted).
>
> Here, our legislature has determined that prejudice resulting in criminal acts against members of particular groups inflicts great individual and societal harm and is thus deserving of enhanced punishment. The legislature's apparent intent is to discourage criminal acts directed against groups that have historically been subjected to prejudicial acts. A reading of section 775.085 as embracing only bias-motivated crimes is entirely consistent with this intent.

Id. Not only does this reading narrow the scope of the statute, but it does so in a manner which will necessitate special jury instructions advising the jury of the narrow class of conduct, which instructions are not otherwise apparent from the face of the statute. Just as the State is suggesting in the instant

case that there is a legislative intent to have the statute read in a limited manner which avoids constitutional dilemmas, this Court utilized a general legislative intent to have the Hate Crimes statute read in a narrow, constitutional manner. Both cases present the need to use special jury instructions, the language of which does not appear in the statute itself. The State's arguments with respect to §794.03 do not result in a rewriting of that statute; they merely recognize limitations, in the same sense that this Court recognized limitations in Stalder.

Whatever judicial legislating improperly inheres in this case will not derive from the State's contentions; rather it will result, if at all, from the Fourth District's act of questioning whether criminal sanctions are needed to protect sexual assault victims against a disclosure of their identities, since only four of the 50 states have deemed penal sanctions necessary, and 46 states have not enacted such statutes. (Fourth District slip op. at p. 19; see also, Brief of Appellee, p. 17). From this "absence" of legislation, the lower court divines "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." Id. The standard for judicial review of legislation is the legislation's constitutionality, not its "necessity." By professing concerns for the legislation's necessity, the lower court merely

substituted its judgment on a policy issue for that of the legislature. That is not a proper function for the judiciary. That is the judicial intrusion into the realm of the legislature which is presented by the circumstances of this case.

Similarly, the question of whether victims of sexual offenses would be as devastated by exposure through word of mouth in residential or work communities, as opposed to exposure through instruments of mass communication, is a question whose resolution belongs with the legislative rather than judicial branch. Jurists have no exceptional qualifications for the resolution of such a question. Such a question should not be resolved by judicial resort to the use of presumptions, based on the application by the judiciary, of notions of popular or amateur psychology. Why should legislators not be able to conclude that a victim of a sexual offense would feel more aggrieved by the printing of the victim's name and photograph on the front page of national publication read by millions, than by casual disclosure, by word of mouth, to a relatively small number of persons. In the latter case, the victim may never become aware of the disclosure. Or, the victim might feel the existence of a much greater invasion of privacy knowing that an entire nation now shares his or her experience.

When factual predicates upon which legislative policies exist are either disputed or unclear, courts should give

deference to the legislature. In American Booksellers Association, Inc. v. Hudnut, 773 F. 2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001, 106 S. Ct. 1172, 89 L. Ed. 2d 291 (1986), the Seventh Circuit Court of Appeals, while finding a municipal anti-pornography ordinance unconstitutional, noted the deference which must be given to the legislature:

> In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions.

773 F. 2d at 329, n.7. See generally, Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So. 2d 235, 236 (Fla. 1951)(requiring that judicial deference be accorded to legislative findings of fact as opposed to mere conclusions). Florida's legislature has implicity found that invasions of privacy by instruments of mass communication warrant punishment and deterrence, while invasions of a lesser magnitude do not. Such a finding should be entitled to deference. See, Gregg v. Georgia, 428 U.S. 153, 186-87, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)(Georgia legislature's determination that capital punishment may be necessary in some cases was not clearly wrong and was entitled to deference out of "respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction....").

The briefs of Appellee and amici curiae also contend that the State's suggested use of affirmative defenses to deal with overbreadth problems is improper. Contrary to their argument, the State is not shifting the burden of proof. The State still has the burden of proving the publication of the victim's name. The defense would then have the burden of coming forward with the reason for excusing the publication, while admitting that there was such a publication. That is precisely the function of an affirmative defense, as it admits the underlying conduct while furnishing the "good reason" for that conduct. State v. Cohen, 568 So. 2d 49, 51-52 (Fla. 1990).

The answer brief of amici curiae also suggests that any penal statute prohibiting publication must encompass the elements of common law privacy. See Answer Brief of Amici Curiae, pp. 22-23. Nothing in the Florida Star decision imposes any such burden on the State. Florida Star may require case-by-case findings as to matters which would justify publication, but the Supreme Court's decision does not say that such matters must be negated, as elements of a penal statute. Florida Star is fully consistent with a procedure which relies on affirmative defenses, as that permits the individualized findings.

Amici curiae have argued that the State's brief, in reference to the vagueness issue, utilizes an improper standard of review. As set forth in the State's prior brief, 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, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Amici curiae argue that this standard is inapplicable in cases involving First Amendment rights, because of the following footnote in the Hoffman Estates case: "'[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.'" 455 U.S. at 495, n.7 (quoting United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975)). Thus, amici curiae argue that vagueness review in First Amendment contexts is not limited to the particular facts of the case being reviewed. Amici curiae, however, have misconstrued the footnote in question, as neither that footnote, nor other pertinent cases, permit vagueness attacks, even in the context of First Amendment claims, when the facts of the instant case clearly fall within the language of the statute.

In Parker v. Levy, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974), an attack on provisions of the Uniform Code of Military Justice implicated the First Amendment. The Supreme Court nevertheless found a lack of standing to assert a vagueness attack on the statute since the claimant's conduct clearly fell within the statutory language: "One to whose

conduct a statute clearly applies may not successfully challenge it for vagueness." Similarly, in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973), federal employees contended that the Hatch Act violated their First Amendment rights. In rejecting a vagueness attack on that statute, the Supreme Court stated:

> Surely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act.

413 U.S. at 579. Thus, even in the context of the First Amendment, vagueness attacks may not be predicated upon the hypothetical application of a statute to a matter not at issue. See also, Aiello v. City of Wilmington, Delaware, 623 F. 2d 845, 850-51 (3d Cir. 1980); United States v. Johnson, 952 F. 2d 565, 579 (1st Cir. 1991), cert. denied, __U.S.__, __S.Ct.__, 121 U.S. 27 (1992); Herzbrun v. Milwaukee County, 504 F. 2d 1189, 1193 (7th Cir. 1974); Ferguson v. Estelle, 718 F. 2d 730, 734-35 (5th Cir. 1983); Rode v. Dellarciprete, 845 F. 2d 1195, 1200 (3d Cir. 1988).

The Supreme Court of the United States, in Kolender v. Lawson, 461 U.S. 352, 358 at n.8, 103 S.Ct. 1855, 75 L. Ed. 2d 903 (1983), has language suggesting that vagueness claims are not limited to the conduct of particular cases in First

Amendment situations. The Fifth Circuit Court of Appeals, clearly aware of that language, in Ferguson, supra, did not find it controlling. 718 F. 2d at 735. It may be, that the footnote in Kolender is perceived as dicta, since the party attacking the statute in that case was one who was legitimately able to raise the scope of the statute's applicability. [1] Furthermore, subsequent to Kolender, the Supreme Court, in Member of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), addressed facial challenges to statutes which implicate First Amendment concerns, and stated that "[t]here are two quite different ways in which a statute or ordinance may be considered invalid 'on its face' - either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is constitutionally "overbroad." 466 U.S. at 796. Thus, even in the First Amendment context - Vincent involved limits on the posting of signs on public property - facial attacks other than overbreadth - i.e., vagueness attacks - must demonstrate that the statute is unconstitutional in every conceivable application. Such a vagueness attack cannot succeed when the

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[1] The statute in Kolender, required persons loitering to provide "credible and reliable" identification when so requested by an officer who has reasonable suspicion to conduct a Terry stop. 461 U.S. at 353. Lawson had been stopped or arrested about 15 times, prosecuted twice and convicted once. What constituted credible and reliable identification therefore appear to have been at issue. The Kolender footnote also suggests that its broad language, regarding vagueness claims in the First Amendment context, is limited to the arbitrary enforcement context. The instant case does not implicate such concerns.

publication in the instant case is clearly an instrument of mass communication. The vagueness attack is therefore not properly raised in this case, as the instant case did not legitimately raise any question as to whether a mass circulation newspaper was an instrument of mass communication. The facial attack on the statute should therefore have been limited to the overbreadth attack.

Amici curiae also assert, on the basis of Aptheker v. Secretary of State, 378 U. S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964), that narrowing of a statute on a case-by-case basis, in the judiciary, renders the statute vague. Aptheker does not support such a broad proposition. The Court declined to narrow the statute because it would have entailed a substantial rewriting of the statute under the peculiar facts of that case. 378 U.S. at 515-16. Such judicial acts would have added vagueness and uncertainty. That is not so in the instant case, as clearly identifiable affirmative defenses exist in light of Florida Star, and their judicial implementation would not add any vagueness or uncertainty.

With respect to the prior restraint issue, the State would simply note that the Supreme Court has recently utilized prior restraint analysis in Forsyth County v. The Nationalist Movement, __U.S.__, 112 S. Ct. __, 120 L. Ed. 2d 101, 111 (1992). If the doctrine had previously been interred, such

analysis would have been pointless. Obviously it is still a pertinent issue and not one to be cavalierly brushed aside as the media herein are so attempting.

Lastly, and perhaps most importantly, it must be borne in mind that this case is not merely a question of the media's First Amendment rights. This case presents a conflict between legitimate constitutional concerns - those of the media and the privacy interests of victims of sexual offenses. The Supreme Court, in Florida Star, accepted the legitimacy of the victim's privacy interests. Beyond that point, a proper balancing of interests is required. Prohibitions against publication of victims' names are a relatively minor intrusion into the realm of the First Amendment. Potential invasions of victims' privacy interests can, on the other hand, have devastating personal consequences. The Supreme Court, in New York State Club Association, Inc. v. City of New York, 487 U.S. 1, 14 at n.5, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988), recently noted the importance of balancing First Amendment concerns with the constitutional interest of combating invidious discrimination. Unfortunately, First Amendment rights do not exist in a vacuum. The issues that they raise here are not one sided. The Appellee and amici curiae appear to have lost sight of the legitimacy of the interests of victims.

CONCLUSION

Based on the foregoing, the decision of the lower court should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT ON THE MERITS** was furnished by mail to **JOHN TIERNEY, Esq.**, and **CAREY HAUGHWOUT, Esq.**, 324 Datura Street, Suite 250, West Palm Beach, Florida 33401, and **RICHARD OVELMAN, Esq.**, Suite 1600, Barnett Tower, 701 Brickell Avenue, Miami, Florida 33131 on this 14 day of March, 1994.

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