IN THE SUPREME COURT OF FLORIDA

SARA GILBREATH,

Petitioner,

v. Case No. 83,090

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON JURISDICTION

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SUMMARY OF THE ARGUMENT

Because it is clear that any constitutional problems with the §365.16(1)(a) Fla. Stat. have been cured, this Court need not accept discretionary review of the instant case.

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD ACCEPT JURISDICTION IN THE INSTANT CASE.

Respondent agrees with Petitioner that this Court can accept jurisdiction in the instant case as the Second District in its opinion expressly declared valid §365.16(1)(a) Fla. Stat. (1991). See Florida Rules of Appellate Procedures 9.030(2)(a)(i). However Respondent submits that this Court should decline to review the decision of the Second District Court of Appeal.

Petitioner argues that the above statute is impermissibly overbroad and subject to misapplication. The Second District in its well reasoned opinion stated that any infirmities in the above statute have already been cured by the legislative amendment to the statute. The Second District in its opinion stated the following:

> A prior incarnation of the statute was invalidated on constitutional grounds. State v. Keaton, 371 So. 2d 86 (Fla. 1979). The old statute arguably penalized obscene calls without regard to whether the recipient consented to hear them. Accordingly, the supreme court found the statute unacceptably vague and potentially violative of First Amendment rights of free speech. In declaring the statute invalid, the court made it clear that the state could "proscribe obscene telephone communications. . . to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener." 371 So. 2d at 92. This "expectation of privacy" language was then explicitly written into the statute, and certain confusing phraseology was clarified,

> by legislative amendment. In the view of the circuit court, and ours, the constitutional infirmities that prompted the decision in Keaton have thereby been cured. And see State v. Elder, 382 So. 2d 687 (Fla. 1980), involving subsection (b) of the same statute, which proscribes anonymous calls which are intended to annoy or harass.

Gilbreath v. State, 19 FLW D19 [Fla. 2nd DCA, Opinion filed December 22, 1993]

Accordingly because it is clear that any constitutional problems with the old statute have been cured, this Court need not accept discretionary review of the instant case.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court should decline jurisdiction.

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 GARY R. GOSSETT, JR., 1755 U.S. 27 South, Sebring, Florida 33870, this 18th day of February, 1994.

OF COUNSEL FOR RESPONDENT