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IN THE SUPREME COURT IN THE STATE OF FLORIDA

SCOTT PAUL BOUTERS
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

DCA CASE NO. 93-504

Supreme Court Case No. 83,558

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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ARGUMENT

In answer to the arguments presented by the state in it's brief on the merits, the defendant offers the following counter arguments, which are presented sequentially in the same order as the state's arguments appear in its brief.

ISSUE I

THE STATE IS MISTAKEN WHEN IT SAYS THAT UNDER THE SPECIFIC FACTS OF THIS CASE THE CHARGES AGAINST THE DEFENDANT ARE BASED ON THREATS

The state assumes in its brief on the merits that the particular facts of the defendant's case involve threats in violation of an injunction. (P 8, state's merit brief) Based on this assumption, the state argues that the defendant's overbreadth challenge on first-amendment grounds should be rejected out of hand, since there is no first-amendment protection for threats made in violation of an injunction. (P. 8, answer brief)

What has been mounted in this case is a challenge to the facial validity of the statute, and if the statute is invalid,

the charge made under it should be also. Still, the state has raised the facts, and if the fate of the case is to be tied to the facts, the defendant must point out that a fair reading of the record clearly shows that the threatening conduct attributed to the defendant took place "in the past", (R 15) and did not form the basis for the instant charge.

A reading of the police report at pages 15 through 17 of the record shows that the injunction in this case is described only as "a domestic violence injunction". This is the only description of the injunction contained in the record, and it does not say that threats were enjoined. An injunction of that type could take many forms, depending on the facts before the court, and it cannot be assumed without proof that the defendant was enjoined from visiting, calling, or even threatening. All that can be determined from this record is that the injunction did enjoin domestic violence. (R 16)

Further, and perhaps more important, there is no mention in the record that threats were actually involved in the calls made on September 18th which gave rise to the charge. The record refers only to repeated calling which the girlfriend said had "no legitimate purpose" (R 15) This leaves open the possibility that the calls might even have been conciliatory.

The information filed against the defendant is what controls the nature of the charges against him. In this case, the information specifies that the defendant was being charged for behavior on the 18th of September, 1992, (R 20). A reading of

the police report clearly shows that the threats mentioned were specified as being "in the past" as of that date. The justification for this statement is as follows: The police report at page 15 of the record says that the officer made contact with the victim on the 18th. The report then goes on to say that "...in the past" the defendant had threatened to kill the girlfriend. Since the police officer met the girlfriend on the 18th, and in his report was describing events on the 18th, it follows that the treats he was referring to as being "in the past" were in the past on the 18th of September.

Looking further, it will be seen that the information does not mention threats, and clearly states that the defendant was being charged only for conduct on the 18th. (The unwanted visit occurred on the 19th, and was therefore not covered by the information.) (R 16)

Hence, unless unsupported assumptions are made, the only fair reading of the record is that the threats involved in the case had been made prior to the 18th. Since the information confined itself to the 18th only, it follows that the threats were not included in the conduct charged in the information.

On appeal it seems axiomatic that a controlling argument can not be based upon matters not actually included in the record, but only assumed. Since, as has been shown above, it can not be validly assumed either that the charge filed against the defendant was based upon threats, or that the injunction was based upon threats, first-amendment protections still apply in this

case, and the overbreadth challenge being mounted by the defendant should not be rejected out of hand.

ISSUE II

THE FLORIDA STALKING LAW REACHES A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED CONDUCT.

In its brief the state argues that, based upon State v. Kahles, No. 93-957 (Fla. 4th DCA August 24, 1994), the Florida Stalking Law would have to interdict a substantial amount of constitutionally protected conduct to be unconstitutional for vagueness and overbreadth, or, in the alternative, be vague in all of its applications. (State brief on the merits, pages 10, 15)

The freedom of speech is a constitutionally protected activity guaranteed by the second amendment, so if the law interdicts a substantial amount of protected speech, it would be unconstitutional.

It is clear that the defendant is here being prosecuted under the Florida Stalking law for telephone calls which upset his girlfriend and were alleged by her to be without legitimate purpose. The state would make the assumption that the defendant is being prosecuted for threats, but, as shown above, this is an assumption not actually borne out by the record. What is clear from the record is that the police officer at the scene trying to make a charging decision did not hear the calls and did not put anything about their content into his report. Further, although the girlfriend said the calls served no legitimate purpose, (R 15), there is no mention that she told the officer they contained threats. So the content of the calls on the 18th is unknown.

With the actual content of the calls not a matter of record, the defense has as much right to argue that they were conciliatory as the state does to argue that they were threatening.

Considering for a moment that the nature of the calls may really have been conciliatory, it can be recognized that reconciliation, while annoying in this context, might still have redeeming social value, and be constitutionally protected free speech.

Assuming for a moment that the defendant had seen the error of his ways and was now trying to sue for peace, it is possible to see that the content of the calls need not have been threatening for the Florida Stalking Law to be applied. Even if the calls were conciliatory, the defendant would still be subject to prosecution under this statute if his calls caused the girlfriend to exhibit sufficient agitation to convince a police officer that the girlfriend was exhibiting substantial emotional distress.

All the defendant really had to do was to call repeatedly, and succeed in annoying the girlfriend. The officer at the scene would then have to make an on-the-spot decision as to whether or not the defendant's heart had been pure, (wilful and malicious), and whether, under his moral code, the calls served a legitimate purpose. Depending on the officer's subjective reactions to the situation, a warrantless arrest could ensue, with attendant chilling effects on first-amendment freedoms.

It is worth noting that the calls need not have even been in

violation of the injunction for subsection 4 of the stalking law to be violated.

The chilling effect of arrest on first-amendment freedoms, clearly recognized in Wyche v. State, 619 So.2d 231 (Fla. 1993), need not be elaborated upon. In the instant case, even if he is later released and told that his calls were constitutionally protected, the defendant is unlikely to call that number again.

Further, the point illustrated above is not limited to the specific facts of this case. Had the defendant called the girlfriend for any of many valid but annoying reasons, such as to talk his girl out of an abortion, or talk her into one, or convince her to become a Jehovah's Witness, the result might have been the same, depending on how upset she appeared to be, and how the officer felt about abortion, or Jehovah's Witnesses.[1]

Hence, the facts of the instant case establish that the Florida Stalking law could easily reach substantial amounts of constitutionally protected speech.

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[1]This sect has demonstrated by suits through the courts that it's witnessing practices are constitutionally protected under the first amendment.

ISSUE III

THE STATUTE IS VAGUE IN ALL ITS APPLICATIONS.

The analysis scheme devised by the U.S. Supreme Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495-96, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) is advanced by the state as the ground for an argument that the defendant's challenge to the stalking law must fail because the law is not impermisibly vague in all applications. (State's merit brief, p. 10)

In answer to this, the defense points out that this court struck down Section 893.13(1)(i), Florida Statutes in Brown v. State, 629 So.2d 841 (Fla. 1994) because the phrase "public housing facility" simply did not give citizens and law enforcement fair warning about what conduct was forbidden. The defendant now argues that because the Florida Stalking Law bases its penal sanctions on the mercurial meaning of the term "legitimate", and employs other language of imprecise and equivocal meaning, it suffers from the same type of failure to advise citizens of what conduct is forbidden that the statute in Brown did. In Brown, this court held that, because of the imprecise wording of the statute, it did not specify a standard of conduct, leaving citizens and law enforcement to guess at what was prohibited. As a consequence, this court concluded that the statute was indeed impermissibly vague in all applications.

The defendant is recommending to this court the conclusion that the Florida Stalking law is so vague and indefinite in its

wording that men of common intelligence must necessarily guess at its meaning and differ as to its application, and that it does not therefore specify a standard of conduct, leaving citizens and law enforcement to guess at what is prohibited. If this premise is accepted, this statute, as the one in Brown, will be recognized as impermissibly vague in all applications.

ISSUE IV

WHETHER THE DISTRESS OF THE VICTIM MUST BE REASONABLE IN ORDER TO JUSTIFY ARREST UNDER THIS LAW.

The state cites Pallas v. State, 636 So. 2d 1358 (3rd. DCA 1994) for the proposition that the Florida Stalking Law, as presently drafted, requires that "there be a course of conduct which would cause substantial emotional distress to a reasonable person in the position of the victim." (State's brief on the merits, page 13, 23)

This would be excellent wording if actually included in the statute, because it would go a long way toward dissipating the threat of the eggshell victim currently faced by Florida citizens. A close scrutiny of the statute, however, reveals that **it does not contain this wording.** The court has provided it by judicial gloss after the fact. This is a measure aimed at curing an obvious problem with the law.

While this type of judicial legislation may result in a stroke of fairness for the defendant after he has been arrested, fingerprinted, photographed, posted bond, hired a lawyer and appeared in court (if his lawyer has read Pallas v. State) it will be unlikely to help him on the day he makes his series of phone calls.

What this absence of wording means is that a police officer on patrol who comes upon a situation where a lady is upset by phone calls will have to bring along with him a copy of the Southern Reporter and a very good legal mind before he can

properly interpret the stalking law in the copy of the criminal code he has with him in his cruiser.

Since the black letter of the statute itself does not include anything about "reasonable" the average officer may or may not ever find out that is a part of the law. Officers who know of it are likely to proceed differently than those who don't, producing differential enforcement of the same law.

The specter of the eggshell victim is a daunting one. An anxiety neurotic who was a good actress could become a veritable typhoid Mary of successful prosecution under this law unless some means is found to inject a concept of the reasonable victim into it. Judicial gloss is not the answer, because the police are unlikely to know of it and will almost certainly go on arresting anyway, sweeping an over-broad segment of the citizenry who have the misfortune to run afoul of hyper-sensitive victims, and working a long-term chilling effect on first-amendment freedoms.

As this Court ruled in Wyche v. State, 619 So. 2d 231, 236-7 (Fla. 1993), judicial gloss aimed at rectifying lapses of the legislature "would constitute judicial legislating, a practice neither our Constitution nor this Court allows. Art. II, Section 3, Fla. Const. Brown v. State, 358 So. sd 16 (Fla. 1978) The precision required of statutes must come from the Legislature."

Twelve other states which have enacted stalking laws have all seen the problems inherent in basing penal sanctions on emotion without specifying a requirement that emotion be reasonable under the circumstances, and have included a

reasonableness requirement in their statutes[2].

Clearly, such a reasonableness standard is necessary for a viable statute, or the court in Pallas, id would not have seen the need to graft one in by judicial legislation.

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[2] California Penal Code Section 646.9(a); Alabama Code s. 13a-6-90(a); Delaware Code Chapter 451, s. 1312(a); Idaho Statute 18-7905(a), 1992 rev, ch 227, s.1. page 227; Kentucky revised Statute Section 508.130; Chapter 720, Illinois Statutes, act 5/12-7.3; Louisiana Statutes, Title 14, Chapter 1, s. 40.2(a); Chapter 711, Hawaii Revised Statutes, Section 711, Act 292, Senate Bill #3354; Mississippi Code Section 97-3-107; Massachusetts General Law, Chapter 265, Section 43; New Jersey Chapter 209, Senate Number 256,(2)(b), title 2C, New Jersey Statutes.

ISSUE V

AS PRESENTLY DRAFTED, THE VAGUENESS OF THE FLORIDA STALKING LAW PRECLUDES IT FROM HAVING A LEGITIMATE SWEEP.

At page 13 of the state's brief on the merits, the state has attempted to justify the interdiction of first-amendment freedoms by the Florida Stalking Law through the argument that the behavior under analysis is really not pure speech, but conduct mixed with speech. The argument is that the statute's legitimate sweep is to punish behavior, and that, while it may also interdict some peripheral areas of first-amendment freedoms in the process, the goal of dealing with stalking behavior is so important that that it is worth giving up small amounts of free speech in order to get large amounts of additional law and order.

If that were true, and if one is preconditioned to accept the premise that first-amendment freedoms should take second place to any consideration whatever, this could be a persuasive argument.

However, the notion that the statute as presently written has a legitimate sweep at all is difficult to accept. The metaphor of a "legitimate sweep" evokes the image of purposeful and well-integrated law-enforcement personnel advancing in a systematic and inexorable sweep, driving before them the evils the law is charged to defeat. Unfortunately, since the failure to define terms like "legitimate", and "substantial" has left the meaning of the stalking law very much in doubt, and since the officers have not even been told by the text of the law that the

complainant must, in addition to being distraught, be reasonable, the metaphor of a legitimate sweep may not be a very good one. Rather than a sweep, the correct analogy for the florida stalking law might be a continuous series of devastating lightning strikes, with no man able to divine where the next discharge might occur. The meaning of the law has been left sufficiently in doubt by the legislature that even with a copy of the statute in the hands of every police officer, one could not predict from officer to officer, or victim to victim, where or when the legal lightning might strike.

Potential examples of differential application might be: While one Jehovah's witness is packed off to jail by an irreligious officer who could not see the legitimacy of his series of calls or visits, another Jehovah's witness, whose officer was from a more tolerant tradition, might go free. A child whose baseball keeps going through the window of a crazy lady who turns out to be an eggshell complainant may sit in juvenile court, while his counterpart across town may get shouted at by a normal lady and be reported to his mother.

While it might be proper to give up first-amendment rights before a law with a legitimate sweep, such a sacrifice is of doubtful utility if the application of the law is being left to the discretion of police officers based solely on their own varying opinions as to what is legitimate.

ISSUE VI

WHETHER OR NOT THE VANDERBILT LAW REVIEW ARTICLE QUOTED IN THE DEFENDANT'S INITIAL BRIEF ON THE MERITS ACTUALLY EXPRESSED THE OPINION THAT THE FLORIDA STALKING LAW IS DRAFTED IMPRECISELY AND THEREFORE IS SUSCEPTIBLE TO CHALLENGE FOR VAGUENESS.

At page 16 of its brief on the merits, the state argues that the Vanderbilt Law Review article quoted by the defense at page 5 of its initial brief on the merits really did not mean that the author thought the Florida Stalking Law was drafted imprecisely and was therefore subject to vagueness challenges. The wording quoted in the defense brief was as follows:

> Yet current stalking laws are not comprehensive. Some, like the California and Connecticut statutes, are too narrow to address fully all dangerous stalking behavior. Others, like the Florida statute, are drafted imprecisely and are susceptible to vagueness challenges.
>
> Guy, The Nature and Constitutionality of Stalking Laws, 46 VNLR 991 (1993)

It is doubtful that the author of the article would have used these words if he did not believe that the Florida Stalking Law was susceptible to vagueness challenges. The state's point is made by quoting another paragraph of the article saying that explicit guidelines are provided to distinguish innocent and criminal behavior. To counter this, the defendant points out that, at page 12 of the quoted article, it is made clear why the author still thought the law was subject to vagueness challenges despite this explicitness:

> The Florida stalking provision punishes repeated, intentional, and malicious fol-

> lowing when no subjective or objective harm is present. But it provides no guidelines for distinguishing malicious following from innocent following.

The important point to keep track of is that, in the final analysis, the author of the learned article still thought that the wording of the Florida law was susceptible to vagueness challenges; and that is the clear meaning of his comment quoted in the defendant's initial brief.

ISSUE VII

WHETHER THE COPYING OF LANGUAGE FROM A FEDERAL INJUNCTION STATUTE SHOULD CONFER ANY PRESUMPTION OF CORRECTNESS ON THE WORDING OF THE DEFINITION OF "HARASSES" USED IN THE FLORIDA STALKING LAW.

At page 20 of its brief the state points out that the definition of harassment used in the Florida Stalking Law tracks the definition of that term used by the Federal Government in its witness protection act. The state points out that this definition was devised as part of the procedure for obtaining injunctions against harassment of Federal witnesses.

It should be understood out that, by definition, the person making a decision as to the granting of an injunction will be a federal judge, learned in the law, and well aware of all nuances of caselaw and procedure. If there is a federal case like Pallas, id, invisibly grafting into the statute a requirement that the person complaining be a "reasonable" person instead of an eggshell victim, the federal judge can be expected to know that. But a police officer is not mentally equipped like a federal judge.

Contrast the situation in Florida, where warrantless arrests are to be made by police officers of every permutation, some of them perhaps barely literate.

The defendant contends that a statute worded in the way this one is would be admirably suited for application by a federal judge who carries the entire corpus juris around with him in his head. On the other hand, that same wording will be woefully

inadequate if it is to be administered by a street cop whose concept of what might be legitimate in the situation he is facing may range from the most primitive to the most arcane, and could probably not even be guessed at by the well-bred, law-trained legislator who drafted this law. This statute is written in what amounts almost to legal shorthand by and for people who have clear concepts of the terms of art being used, and lawbooks to look them up in if they have a question. People like that are seldom found in patrol cars.

To work justice on the street where this law is designed to be administered, a much clearer and more detailed approach will be required so that the meaning and intent of the law will really be clear to our police.

ISSUE VIII

WHETHER IMPORTATION OF WELL-UNDERSTOOD TORT TERMINOLOGY TO WIT: "SEVERE EMOTIONAL DISTRESS" INTO A PENAL CRIMINAL STATUTE WILL MAKE THE MEANING OF THE STATUTE CLEAR TO THOSE WHO MUST LIVE BY IT AND ADMINISTER IT.

At page 21 of the state brief, the point is made that the terminology "substantial emotional distress" used in the Florida Stalking Law is analogous to the term "severe emotional distress", used in the Restatement of Torts, which is well understood by those lawyers, judges, and legal scholars who comprehend tort law. The state then concludes: "As such, this aspect of the Statute's definition of harasses has established roots in the legal system and therefore provides the necessary guidance to avoid arbitrary enforcement."

If the man in the street and the general run of police officers understood tort law, and were acquainted with the nuances of caselaw which make this terminology precisely meaningful to lawyers and judges, this might be a true statement. The Restatement of Torts will, however, avail most citizens, men of only common intelligence, little. If one must go to the Restatement of Torts and to the judicial gloss which interprets it in order to derive the meaning of a penal statute designed to be administered by normal people, incomprehension by these normal people is virtually assured.

In Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) this court dealt with the use of terms of art in penal statutes intended to be understood by and administered by normal people:

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. [citations omitted] This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. [Citations omitted] Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

The meaning of terms of art is inscrutable to people of common training and intelligence. Adding them to legislation designed to be understood and administered by non-lawyers serves only to confuse the laymen who who read it.

ISSUE IX

WHETHER THE TERMS WILFULLY, MALICIOUSLY AND REPEATEDLY AS USED IN THE STATUTE OBVIATE THE NEED FOR A CLEAR DEFINITION OF THE TERM LEGITIMATE.

The defendant has argued that the term "Legitimate", as used in the statute is unconstitutionally vague in that it is undefined, yet central to the definition of the word "harasses" which is central to enforcement of the statute. Police are sent out to punish harassment, but when facing a situation of possible harassment, they are told not to proceed if the harassment is "legitimate". If legitimate were defined in a rigorous way,[3]clarity might be established as to what is meant so that all persons viewing a situation could agree, and the same conclusions could be arrived at from situation to situation. But it is not defined, and therefore leaves the issue of legitimacy, and therefore harassment, open to ethical interpretation according to the varying mores of the beholder. Since we all, including police officers, have varying concepts of what will be legitimate in many situations, this is nothing more than an abdication of any set legal standard in favor of the intuitive feelings of the officer as to what would be legitimate a given situation.

This opens up the possibility that, without specific guidelines, various enforcers from different cultural backgrounds

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[3]Such as: That which is not illegal under Florida statute; or that which poses no immediate prospect of damage to the person or property of the victim.

will differ as to the application of this statute. This possibility of divers application because of divers cultural backgrounds is good evidence that the law is unconstitutional, because the U.S. Supreme Court has held that a statute is unconstitutionally vague if it is so drafted that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Company, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926)

At page 24 of the state brief, the state argues that the words wilfully, maliciously and repeatedly in the statute obviate the need for a definition of legitimate. In Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) this court specified that words and meanings beyond the literal language may not be entertained in penal statutes.

Taking these three words in their commonly understood meanings, there are numerous activities which can be done wilfully, maliciously, and repeatedly, and still fit most normative definitions of legitimate behavior. Examples would be: eviction, picketing, striking another in self-defense, expulsion of trespassers, besting another in an argument, defeating another in chess, investigative reporting, and private investigation.

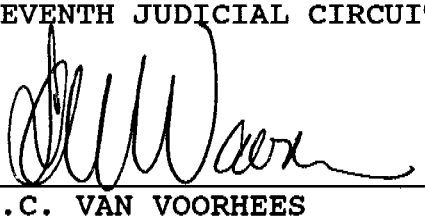
Hence, the use of the words wilfully, maliciously, and repeatedly does nothing to dispel the mystery in the statute as to how the word "legitimate" is to be interpreted.

CONCLUSION

The Florida Stalking Law is facially unconstitutional because it so vague and overbroad as to risk that those governed by it will be deprived of due process of law and other constitutional guarantees. For this reason it is void as being contrary to the meaning and intent of both the state and federal constitutions.

The Florida Stalking Law should be held void as unconstitutional, and the defendant's conviction under it should be reversed.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Fla. 32118, in his basket at the Fifth District Court of Appeal; and mailed to Scott P. Bouters, DC# 370511, Housing 5, Quad 4, Central Florida Reception Center Main Unit, Orlando, Florida 32862-8040, on this 3rd day of October 1994.

S.C. Van Voorhees
ASSISTANT PUBLIC DEFENDER