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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,006

DCA CASE NO. 93-1493

JOHN L. PALLAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

CASE NO.

JOHN L. PALLAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

INTRODUCTION

Petitioner, John L. Pallas, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "T" will denote the transcript of the proceedings. The symbol "A" will refer to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

John Pallas was charged by Information with one count of Aggravated Stalking. (R. 4-7) The defendant entered a plea of *nolo contendere* reserving his right to appeal the trial court's denial of his motion to declare section 784.048 *Florida Statutes* (1993 Supp.) unconstitutional. (R. 36-37) (T. 32-34) As a result of the plea, he was placed on probation for one year. (R. 38-40)

The trial court found that the following are the relevant facts:

> On Sunday, January 24, 1993, the Defendant, soon to be the ex-husband of Edie Pallas, began calling the home of Penny and Harry Ragland, Edie's parents. The calls began at 7:00 A.M., waking Mr. & Mrs. Ragland and continued throughout the day, and numbering fifty times or more. Mr. & Mrs Ragland were hiding their daughter, who was obtaining a divorce from the Defendant. The Defendant had beaten Edie and had broken her jaw during the course of the marriage. The calls were so continuous that the Raglands had to remove the phone from the hook several times during the day.
>
> The Defendant demanded to know where Edie was. He screamed and cursed at the Raglands, he threatened to "get them," he told them he "had a gun" and "he was going to kill them." The Raglands, in fear for their lives, called the police.

State v. Pallas, 1 F.L.W.Supp. 442, 443 (Fla. 11th Cir. Ct. May 14, 1993).

The court held that the defendant lacked standing to raise a vagueness challenge because the conduct in question clearly fell within the scope of the statute such that a person of normal intelligence would have understood that such behavior would constitute a violation of Section 784.048. *Id.* at 443. The court went on, nonetheless, to perform an extended analysis of the statute's constitutionality and concluded that it suffered from neither vagueness, nor overbreadth. *Id.* at 443-445.

In affirming the trial court's denial of the appellant's motion to dismiss, the Third District Court of Appeal found that the applicable portions of section 784.048 were not

impermissibly vague. (See Appendix A court's opinion)[1]

A motion for rehearing was filed alleging that the court failed to address the fact that at least one of the elements of Aggravated Stalking implicitly incorporates the elements of a similar civil law tort thus violating the rule of strict interpretation which must be applied to the construction of criminal statutes. (See Appendix B) This motion was denied.

A timely notice to invoke jurisdiction was filed. This petition follows.

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[1]The appellate court's opinion was reported in *Pallas v. State,* 19 F.L.W. D988 (Fla. 3d DCA May 3, 1994).

SUMMARY OF THE ARGUMENT

The Florida stalking law, section 784.048 *Florida Statutes* (Supp. 1993), is unconstitutionally vague. The statute is so conceptually confused that a citizen of average intelligence could not make a sound prediction about what behavior is prohibited by the law. In cases of stalking-by-harassment, the noun phrase "substantial emotional distress" is undefined. When compared to the civil concept of severe emotional distress as it appears in the tort of intentional infliction of emotional distress, there seems to be a requirement that the victim either manifest physical symptoms of psychological trauma, or that the defendant's conduct rise to the level of outrageousness. A construction of the statute which assumes that the elements of the civil tort action are implicitly embodied by the statute violates the rule of strict interpretation. Moreover, the Third District Court of Appeal's affirmation of the statute's validity failed to address the meaning of "substantial emotional distress"

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION UPHOLDING THE VALIDITY OF THE STALKING STATUTE AGAINST A CHALLENGE FOR VAGUENESS DOES NOT CONSIDER WHETHER THE ELEMENT OF SEVERE EMOTIONAL DISTRESS IS IMPERMISSIBLY VAGUE.

This Court has jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution.

The principle criterion to be applied when a statute is challenged on the grounds of vagueness has been defined by the Supreme Court:

> [T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted).

It is also a fundamental principle of statutory construction that criminal statutes must be strictly construed according to their letter.[2] *Perkins v. State,* 576 So.2d 1310, 1314 (Fla.1991). Moreover, criminal statutes which are susceptible to differing constructions are to be narrowly construed in favor of the accused. *See, e.g., Scates v. State,* 603 So.2d 504 (Fla.1992); *Lambert v. State,* 545 So.2d 838 (Fla.1989).

The Stalking Statute states as follows:

> 784.048. **Stalking**; definitions; penalties
>
> (1) As used in this section:

---

[2]This rule derives from Article I, section 9 and article II, section 3 of the Florida Constitution. *Perkins,* 576 So.2d at 1312-14.

(a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

(c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

(2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who, after an injunction for protection against repeat violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Any law enforcement officer may arrest, without a warrant,

any person he or she has probable cause to believe has violated the provisions of this section.

In order to establish stalking-by-harassment, the state must show that the defendant:

(i) performed a series of acts over some undefined time-period;

(ii) such acts were directed at an identifiable subject;

(iii) the acts served "no legitimate purpose"; and

(iv) the conduct resulted in the suffering of *"substantial emotional distress"* by the subject of the harassment.

Since the term "substantial emotional distress" finds no other occurrence in our criminal law, we must look to its use in civil law.[3] Emotional distress, under tort theory, is generally actionable only when the plaintiff has suffered a physical impact which is the proximate cause of the distress. *See Gilliam v. Stewart,* 291 So. 2d 593 (Fla. 1974); *Claycomb v. Eichles,* 399 So. 2d 1050 (Fla. 2d DCA 1981). The Florida courts have cautiously expanded this doctrine to allow recovery in certain, narrowly defined circumstances. Most significantly, in *Champion v. Gray,* 478 So. 2d 17 (Fla. 1985), this Court carved out an exception to the impact rule in cases where the plaintiff manifests "significant discernible physical injury" resulting from the psychological trauma of seeing a close family member suffer a negligent injury.[4] *Id.* at 18-19. *See Eastern Airlines, Inc., v. King,* 557 So. 2d 574

[3]Section 914.24 (Supp. 1993), which deals with civil actions to restrain the harassment of victims and witnesses, defines "harassment" in the same manner as the stalking law.

[4] The Court stated that:

> Mental distress unaccompanied by such physical consequences, on the other hand, should still be inadequate to support a claim; nonphysical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action.

(Fla. 1990) (airline passenger could not recover for emotional distress where plane's engines failed during flight). The only other recognized exceptions to the impact-rule are: (a) the tortious interference with dead bodies, *Kirksey v. Jernigan,* 45 So.2d 188 (Fla. 1950), and (b) the intentional infliction of emotional distress. *Metropolitan Life Ins. Co., v. McCarson,* 467 So. 2d 277 (Fla. 1985). Where intentional infliction of emotional distress is claimed, however, it must be shown that the defendant's conduct was so reprehensible that it rises to the level of being outrageous.

The state asserted in their answer brief below that the civil tort of intentional infliction of emotional distress is incorporated by the stalking statute. (See Appendix C) If the traditional meaning of "emotional distress" has been incorporated into the stalking law, it would seem that in order to convict someone of stalking, where harassment is an element of the offense charged, the state must establish that the victim's psychological trauma registered somatically, or that the defendant's conduct was outrageous. The statute has, according to this construction, introduced an entrenched legal concept into a novel context without indicating if it has revised the emotional distress doctrine by either abrogating the physical manifestation criterion, or the outrageousness criterion, or whether it has created a new variant of its civil counterpart.

The stalking statute fails to give a person of ordinary intelligence fair notice that stalking-by-harassment embodies the elements of the civil tort action of intentional infliction of emotional distress.

The rules of strict construction and lenity preclude the superimposition of the elements of a tort action on a criminal statute in order to preserve the statute's validity. Moreover, "when there is doubt about a statute in a vagueness challenge, the doubt should be resolved 'in favor of the citizen and against the state.'" *Brown v. State,* 629 So. 2d 841, 843 (Fla. 1994) (citing *State v. Wershow,* 343 So.2d 605, 608 (Fla.1977)).

Champion, 478 So. 2d at 19, n. 1.

In finding that the Stalking Statute is not constitutionally vague, the Third District Court of Appeal never discussed whether the element of severe emotional distress is itself vague, nor did the court identify what that element signifies.

CONCLUSION

Based on the foregoing argument and authorities cited, this Honorable Court is respectfully requested to accept jurisdiction and review this cause on the merits.

Respectfully submitted,

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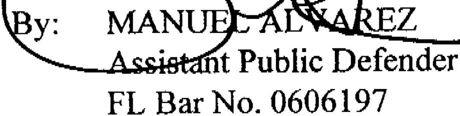

By: MANUEL ALVAREZ
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITIONER'S BRIEF ON JURISDICTION has been forwarded to the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, this 11th day of July, 1994.

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APPENDIX "A"

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1994

JOHN L. PALLAS,	**	
Appellant,	**	
vs.	**	CASE NO. 93-1493
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed May 3, 1994.

An Appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, and Parker D. Thomson, Special Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

COPE, Judge.

John L. Pallas appeals his conviction and sentence for aggravated stalking. We affirm.

Defendant was charged with aggravated stalking in violation

of subsection 784.048(3), Florida Statutes (Supp. 1992). He challenged the constitutionality of the statute, on federal and state grounds, arguing that the statute is vague and overbroad. The trial court entered a written order finding the statute constitutional. State v. Pallas, 1 Fla. L. Weekly Supp. 442 (Fla. 11th Cir. Ct. May 14, 1993).[1] Defendant pled nolo contendere, reserving the right to appeal the order finding the statute constitutional. This appeal follows:

The operative facts are set out in the trial court's order:

> On Sunday, January 24, 1993, the Defendant, soon to be the ex-husband of Edie Pallas, began calling the home of Penny and Harry Ragland, Edie's parents. The calls began at 7:00 A.M., waking Mr. & Mrs. Ragland and continued throughout the day, and numbering fifty times or more. Mr. & Mrs. Ragland were hiding their daughter, who was obtaining a divorce from the Defendant. The Defendant had beaten Edie and had broken her jaw during the course of the marriage. The calls were so continuous that the Raglands had to remove the phone from the hook several times during the day.
>
> The Defendant demanded to know where Edie was. He screamed and cursed at the Raglands, he threatened to "get them," he told them he "had a gun" and "he was going to kill them." The Raglands, in fear for their lives, called the police.

Defendant was charged with aggravated stalking. The offense is defined as follows:

> Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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[1] The trial court's order was cited with approval in Bouters v. State, 19 Fla. L. Weekly D678 (Fla. 5th DCA March 25, 1994).

§ 784.048(3), Fla. Stat. (Supp. 1992).

Under the stated facts, the defendant committed acts of harassment and made threats, but did not follow the victim. Consequently, the portion of the statute applicable to defendant is that part which punishes someone who "willfully, maliciously, and repeatedly . . . harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury." § 784.048(3), Fla. Stat. (Supp. 1992).[2]

The statute contains several definitions, as follows:

> (a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.
>
> (b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.
>
> (c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

Id. § 784.048(1)(a)-(c).

Defendant first contends that the statute is unconstitutionally vague.

We begin with the proposition that the statute is accorded a strong presumption of validity. See United States v. National Dairy Products Corp., 372 U.S. 29, 32, 83 S.Ct. 594, 9 L. Ed. 2d

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[2] The portion of the statute relating to following and threatening a victim, id., is reviewed at the conclusion of this opinion.

561 (1963); see also State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994); State v. Elder, 382 So. 2d 687, 690 (Fla. 1980). "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." United States v. National Dairy Products Corp., 372 U.S. at 32 (citations omitted).

The Supreme Court has said, "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)(citations omitted). "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." United States v. National Dairy Products Corp., 372 U.S. at 33 (citation omitted); see also Parker v. Levy, 417 U.S. 733, 757, 94 S.Ct. 2547, 41 L. Ed. 2d 439 (1974); Greenway v. State, 413 So. 2d 23, 24 (Fla. 1982); State v. Olson, 586 So. 2d 1239, 1242 (Fla. 1st DCA 1991).

Professor Tribe has summarized the applicable federal principles as follows:

> As a matter of due process, a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork. This indefiniteness runs afoul of due process concepts which require that persons be given fair notice of what to avoid, and that the discretion of law enforcement officials, with the attendant dangers of arbitrary and discriminatory enforcement, be limited by explicit

legislative standards.

> But vagueness is not calculable with precision; in any particular area, the legislature confronts a dilemma: to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others. Because that dilemma can rarely be resolved satisfactorily, the Supreme Court will not ordinarily invalidate a statute because some marginal offenses may remain within the scope of a statute's language.

Laurence H. Tribe, American Constitutional Law § 12-31, at 1033-34 (2d ed. 1988)(footnotes omitted).

We have no difficulty in concluding that the statute gives fair notice of the proscribed activity, and is not void for vagueness. Defendant contends that in the statutory phrase, "willfully, maliciously, and repeatedly follows or harasses another person," § 784.048(3), Fla. Stat. (Supp. 1992), "willfully, maliciously, and repeatedly" only modifies the word "follows" and does not modify the word "harasses." From this faulty premise defendant argues that the statute is therefore vague as regards the term "harasses." We agree with the trial court that "willfully, maliciously, and repeatedly" does in fact modify the word "harasses." The language of subsection 784.048(3), in conjunction with the definitions, is reasonably clear and specific.

Defendant also argues that the statutory definition of "harasses," id. § 784.048(1)(a), is vague. Under the statute, "'Harasses' means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." Id. Defendant reads the statute to create an entirely subjective standard for

"substantial emotional distress." Thus, reasons defendant, if the victim is an unusually sensitive person the victim may suffer "substantial emotional distress" from entirely innocent social contact. Defendant contends that the statute creates a standard which is too vague and uncertain to be enforced.

In our view the statute creates no such subjective standard, but in fact creates a "reasonable person" standard. The stalking statute bears a family resemblance to the assault statutes. See § 784.011(1), Fla. Stat. (1993)("An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."); id. § 784.021 (aggravated assault).[3] Under the assault statutes, it is settled that a "well-founded fear" is measured by a reasonable person standard, not a subjective standard. Indeed, "where the circumstances were such as to ordinarily induce fear in the mind of a reasonable man, then the victim may be found to be in fear, and actual fear need not be strictly and precisely shown." Gilbert v. State, 347 So. 2d 1087, 1088 (Fla. 3d DCA 1977)(citations omitted); McClain v. State, 383 So. 2d 1146, 1147 (Fla. 4th DCA), review denied, 392 So. 2d 1376 (Fla. 1980). The same principle applies to the definition of "harasses" under the stalking statute; the legislature has proscribed willful, malicious, and repeated acts of harassment which are directed at a specific person, which serve no legitimate

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[3] The stalking statute is codified as part of chapter 784, entitled "Assault; Battery; Culpable Negligence."

purpose, and which would cause substantial emotional distress in a reasonable person. See generally State v. Elder, 382 So. 2d at 689 (upholding constitutionality of statute forbidding "the making of an anonymous telephone call with the intent to annoy, abuse, threaten, or harass the recipient of the call . . . .").

We concur with the trial court that the statute is not vague and gives fair notice of the conduct which is proscribed. The defendant's conduct in this case falls squarely within the ambit of the statute.[4]

Defendant also argues that the statute is overbroad. The Supreme Court has said:

> The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. In Broadrick [v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L. Ed. 2d 830 (1973)], we recognized that this rule reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, and prudential limitations on constitutional adjudication. In United States v. Raines, [362 U.S. 17, 21, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960)], we noted the "incontrovertible proposition" that it "'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation[.]'" By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment." This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

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[4] The trial court's opinion pointed out that a number of the terms used in the aggravated stalking statute are similar to terminology used in other civil or criminal statutes. See State v. Pallas, 1 Fla. L. Weekly Supp. at 443-44.

> What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervailing policies." The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.
>
> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." Broadrick, 413 U.S., at 613, 93 S.Ct., at 2916. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.

New York v. Ferber, 458 U.S. 747, 767-69, 102 S.Ct. 3348, 73 L. Ed. 2d 1113 (1982)(citations and footnotes omitted); see also Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984).[5]

In Broadrick v. Oklahoma, the Court said:

> Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. Equally important, overbreadth claims, if entertained at all, have been curtailed when

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[5] "Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision, and a vague law need not reach activity protected by the first amendment." Laurence H. Tribe, supra § 12-31, at 1033 (footnotes omitted).

invoked against ordinary criminal laws that are sought to be applied to protected conduct. In Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), Jesse Cantwell, a Jehovah's Witness, was convicted of common-law breach of the peace for playing a phonograph record attacking the Catholic Church before two Catholic men on a New Haven street. The Court reversed the judgment affirming Cantwell's conviction, but only on the ground that his conduct, "considered in the light of the constitutional guarantees," could not be punished under "the common law offense in question." Id., at 311, 60 S.Ct., at 906 (footnote omitted). The Court did not hold that the offense "known as breach of the peace" must fall in toto because it was capable of some unconstitutional applications, and, in fact, the Court seemingly envisioned its continued use against "a great variety of conduct destroying or menacing public order and tranquility." Id., at 308, 60 S.Ct., at 905. Similarly, in reviewing the statutory breach-of-the-peace convictions involved in Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), and Cox v. Louisiana, supra, 379 U.S., at 544-552, 85 S.Ct., at 458-463, the Court considered in detail the State's evidence and in each case concluded that the conduct at issue could not itself be punished under a breach-of-the-peace statute. On that basis, the judgments affirming the convictions were reversed. Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. Coates v. City of Cincinnati, 402 U.S. 611, 617, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971)(opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so

> prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. Alderman v. United States, 394 U.S. 165, 174-175, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

413 U.S. at 613-15 (citations and footnotes omitted).

Defendant argues that the overbreadth doctrine is applicable here because the statute is capable of being applied to speech. Indeed, speech was involved in the series of harassing telephone calls made by defendant. Defendant contends that the statute could be applied to entirely innocent conduct. He suggests that if an overzealous suitor repeatedly telephoned an unusually sensitive individual in hopes of establishing a romantic relationship, the suitor could be charged under this statute. Defendant also suggests that the statute could be applied against a person who played practical jokes, or someone who uses a figure of speech such as "You'll get yours!"

In setting forth these examples, the defendant relies on the erroneous interpretation of the statute discussed earlier in this opinion. The conduct of the defendant must be willful, malicious, and repeated. § 784.048(3), Fla. Stat. (Supp. 1992). There must be a course of conduct which would cause substantial emotional distress to a reasonable person in the position of the victim. Id. § 784.048(1)(a). The conduct must serve no legitimate purpose. Id. Furthermore, the statute also provides, "Constitutionally protected activity is not included within the meaning of 'course of conduct.' Such constitutionally protected

activity includes picketing or other organized protests." Id. § 784.048(1)(b). Finally, for aggravated stalking under subsection 784.048(3), there must also be a credible threat made with the intent to place the victim in reasonable fear of death or bodily injury. Id. § 784.048(1)(c), (3).

In State v. Elder, the Florida Supreme Court rejected an overbreadth challenge to a statute which forbade "the making of an anonymous telephone call with the intent to annoy, abuse, threaten, or harass the recipient of the call . . . ." 382 So. 2d at 689. The court there rejected an argument similar to the argument made by the defendant in this case:

> That this conduct may be effected in part by verbal means does not necessarily invalidate the statute on freedom of speech grounds. At most, the use of words as the method with which to harass the recipient of the call involves conduct mixed with speech, to which the controlling constitutional considerations differ somewhat from those applied to pure speech.

Id. at 690. The court concluded that the claim of overbreadth "is not real and substantial judged in relation to the statute's plainly legitimate sweep." Id. Likewise in the present case the statute is not overbroad.

Defendant also challenges the portion of subsection 784.048(3), Florida Statutes (Supp. 1992), which punishes someone who "willfully, maliciously, and repeatedly follows . . . another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury . . . ." Id. Defendant was not prosecuted for following the victim. Instead he was prosecuted under the "harassment plus threat" portion of the statute. In our view defendant is without standing to challenge

the statutory term "follows" on grounds of vagueness. Parker v. Levy, 417 U.S. at 757; Wells v. State, 402 So. 2d 402, 405 (Fla. 1981).

For the same reason we doubt defendant's standing to raise an overbreadth challenge to the "follows" portion of the statute.[6] Assuming arguendo that defendant may make an overbreadth challenge of the "follows" portion of the statute, we conclude that the statute is not overbroad. "Follows" is directed primarily at conduct, not First Amendment expression. This portion of the statute does not suffer from real and substantial overbreadth judged in relation to the statute's plainly legitimate sweep. See Broadrick v. Oklahoma, 413 U.S. at 615; State v. Elder, 382 So. 2d at 690.

We reject the defendant's challenge to the constitutionality of subsection 784.048(3), Florida Statutes (Supp. 1992). In so holding we concur with the Fifth District Court of Appeal.

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[6] In Broadrick v. Oklahoma, the overbreadth challenge was directed exclusively at subsections 6 and 7 of section 818 of Oklahoma's Merit System of Personnel Administration Act. 413 U.S. at 602-03 & n.1. There, as here, the challenge was leveled at only the operative portions of the statute in question. "A litigant is not heard to urge the unconstitutionality of a statute who is not harmfully affected by the particular features of the statutes alleged to be in conflict with the constitution." State ex rel. Hoffman v. Vocelle, 159 Fla. 88, 98, 31 So. 2d 52, 57 (1947).

The term "follows" is severable. Assuming arguendo "follows" were found to be constitutionally infirm, the remedy would be to narrow the construction of the statute by invalidating "follows" but leaving the remainder of subsection 784.048(3) intact. See State v. Stalder, 630 So. 2d at 1076 (Fla. 1994)(court should adopt narrowing construction of statute if necessary to preserve its constitutionality, where it is possible to do so).

Bouters v. State, 19 Fla. L. Weekly D678 (Fla. 5th DCA March 25, 1994).

Affirmed.

APPENDIX "B"

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CASE NO. 93-1493

JOHN PALLAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

______________________/

MOTION FOR REHEARING AND FOR CERTIFICATION

The Appellant, by and through undersigned counsel, moves for rehearing or clarification on the basis that the Court has overlooked the following, and also requests that this Court certify this case to the Florida Supreme Court.

1. The opinion in this case determined that under section 784.048 *Florida Statutes* (Supp. 1992), the definition of "harasses," which contains the element of "substantial emotional distress," is unproblematic without addressing the question of what constitutes "substantial emotional distress." (Slip op. at 5-6) In its brief, the Appellee conceded that the concept of "substantial emotional distress" emanates from the civil tort action of intentional infliction of emotional distress. (Brief of Appellee at 19-21) If "substantial emotional distress" encompasses the elements of the aforementioned tort, then proof of harassment requires that either the victim suffer a physical manifestation of the distress, or that the defendant's conduct rise to the level of outrageousness, as the meaning of this term has been developed in tort law. As maintained in the Appellant's brief, a reasonably intelligent citizen could not ascertain that section 784.048 only criminalizes harassment which satisfies the elements of the civil tort action of intentional infliction of emotional distress. (Brief of Appellant at 15-17) Moreover, in light of the rule of statutory construction

that criminal statutes are to be strictly construed, it would be impermissible to read the elements of a civil tort action into the stalking statute.

2. Because it is still unclear what the elements of stalking-by-harassment consist of, this Court should clarify the meaning and content of the element of "substantial emotional distress," and certify to the Florida Supreme Court whether this deficiency in the statute renders it unconstitutionally vague as a matter of great public importance.

WHEREFORE, the Appellant requests that rehearing or clarification of this Court's opinion be granted as to the matters stated, and that the decision be certified to the Florida Supreme Court as one of great public importance.

Respectfully submitted,

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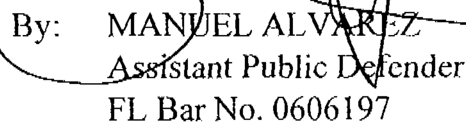

By: MANUEL ALVAREZ
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, this 18th day of May, 1994.

By: MANUEL ALVAREZ
Assistant Public Defender

APPENDIX "C"

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 93-1493

JOHN PALLAS,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE COUNTY COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

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INTRODUCTION

The Appellant, the **JOHN PALLAS**, was the defendant below. The Appellee, **THE STATE OF FLORIDA**, was the prosecution below. The parties will be referred to as they stood below. The symbol "R" will be used to designate the record on appeal and the symbol "T" will be used to designate the transcript of proceedings.

STATUTE AT ISSUE

Florida Stalking Statute, Section 784.048, Florida Statutes (1992) provides:

784.048. Stalking; definitions; penalties

(1) As used in this section:

(a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

(c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

(2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who, after an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and

repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's statement of the case and facts as a substantially accurate account of the proceedings below.

POINT ON APPEAL

WHETHER SECTION 784.048, FLA. STAT. (1992) IS UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

SUMMARY OF THE ARGUMENT

Florida's Stalking Statute, Section 784.048, Florida Statutes, is not unconstitutional as being either overbroad or vague.

Overbreadth is a doctrine applied to statutes posing First Amendment problems. The Stalking Statute regulates conduct, and therefore the First Amendment is not involved. The United States Supreme Court's decision upholding Wisconsin's "hate crimes" statute verifies this conclusion. Wisconsin v. Mitchell, 508 U.S. ___, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). Proof of commission of a "hate crime" almost invariably involve some speech component, whereas stalking, far more often than not, involves none.

The Stalking Statute cannot be considered vague because a violation requires willful conduct on the part of the perpetrator. The requirement of "willfulness" makes the statutes a specific intent statute and, as such, cures any problem of vagueness relating to warning the perpetrator as to what conduct is prohibited. Further, the action must be malicious (a term well known in the criminal law) and repeated (a term well known to anyone).

Other terms in the Stalking Statute challenged by Defendant as being "vague" are "harasses", "course of conduct", "substantial emotional distress", "no legitimate purpose", and, since the charge here involved is that of "aggravated stalking", the words "credible threat". "Harasses" is a term challenged by its component parts: "substantial emotional distress" and "no legitimate purpose".

"Harass" itself is a term with an ordinary dictionary meaning. "Course of conduct" means a limited series of otherwise defined actions taking place over even a brief period of time. The term is further limited by the term "constitutionally protected activity" which is excluded from 'course of conduct'". "Substantial emotional distress," is the same as "severe emotional distress", defined in the Restatement of Torts and, as such, adopted by the Florida Supreme Court. Metropolitan Life Insurance Company v. McCarson, 467 So. 2d 277 (Fla. 1985). "No legitimate purpose" is simple enough to understand and excludes from the statutory scope reasonable activity. By reason of the requirement of proof beyond a reasonable doubt for conviction of willfulness and maliciousness of the proscribed conduct, these words are probably surplusage.

"Credible threat" poses no problems since it requires the intent to create a well founded fear and the same intent is part of the assault, aggravated assault, and robbery statutes.

The terms of the Stalking Statute are clear and the Statute is facially constitutional.

ARGUMENT

SECTION 784.048, FLA. STAT. (1992) IS NOT UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

INTRODUCTION

This case involves a facial challenge[1] to Section 784.048, Fla. Stat. (1992). The Defendant's challenge to the Stalking Statute (hereinafter referred to as the Statute) is based on its overbreadth and vagueness, in violation of the First and Fourteenth Amendments to the United States Constitution. The trial court found the Statute to be constitutional. (R. 17-31).

Although the Defendant was charged with violating, §§784.048(3) of the Statute the present challenge is to the entire Statute. Sections (2) and (4) of the Statute prohibit the same conduct, to wit: wilfully, maliciously and repeatedly following or harassing another person. Section (2) is a misdemeanor of the first degree since that Section only prohibits the following or harassing of another with malicious intent. Section (4) is elevated to a third degree felony because the

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1 A "facial" challenge, in this context, means a claim that the law is "invalid in toto and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

following or harassing conduct is in violation of a previous court order prohibiting such conduct.

Section (3) of the Statute is a distinct form of aggravated stalking, which is also a third degree felony. This section prohibits following or harassing conduct which is accompanied by a credible threat with the intent to place that person in reasonable fear of death or bodily injury. The additional conduct of "credible threat" does not pose a constitutional vagueness problem inasmuch as a "well founded fear in other persons" has long been an element in the crimes of assault, aggravated assault and robbery. See §784.011, 784.021 and 812.13 Fla. Stat. (1991).

STANDARD OF REVIEW

State statutes are presumed to be constitutional, and every reasonable presumption must be drawn in favor of the validity of the statute. Tal Mason v. State, 515 So. 2d 738 (Fla. 1987); State v. State Board of Education of Florida, 467 So. 2d 294 (Fla. 1985); Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); VanBibber v. Hartford Acc. & Idem. Ins. Co., 439 So. 2d 880 (Fla. 1983). Indeed, any reasonable doubt is deemed to support the constitutionality of the statute. Bunnell v. State, 453 So. 2d 808 (Fla. 1984). It is with these well established standards in mind that this Court must assess whether the trial judge in the instant case correctly concluded that the Statute is constitutional.

Appellate courts must give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). The statute's opponent must establish that it is invalid beyond, and to the exclusion of, every reasonable doubt. See State v. Kinner, 398 So. 2d 1360 (Fla. 1981). See also New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). (Burden of showing statute to be unconstitutional is on the one challenging it, not the one defending it).

THE STATUTE IS NOT OVERBROAD

Overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not present before the Court. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). This doctrine is limited to First Amendment challenges. Normally, the constitutionality of a law is upheld unless it has been unlawfully applied to the defendant. The overbreadth doctrine permits a challenge even by an unaffected defendant to protect against the "chilling effect" in a Free Speech context, of the statutes.

In a facial challenge to the overbreadth of a law, the Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected speech. If it does not, then the overbreadth challenge must fail. Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Statute, as hereinafter analyzed, does not apply to a substantial amount of protected speech, and therefore the overbreadth challenge fails.

The Statute does not implicate the First Amendment because it does not seek to regulate words, experiences or thoughts. The Statute seeks to punish only conduct. Stalking means: "1b: [T]o pursue or follow in a stealthy, furtive or persistent manner." Webster's Third New International Dictionary; 2221 (1986 Ed.) By its plain meaning, stalking is conduct. Although stalking may, in an occasional instance, be proved by the evidentiary use of speech, conduct is the target and the First Amendment is not implicated. Wisconsin v. Mitchell, 508 U.S. ___, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993).

Furthermore, one component the Statute ("course of conduct") by its terms excludes constitutionally protected activity. This type of exclusion has saved statutes from overbreadth challenges. See Arnett v. Kennedy, 416 U.S. 134, 162, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (Holding that the statute excluded

constitutionally protected speech and thus the statute was not overbroad.) Colten v. Kentucky, 407 U.S. 104, 111, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (Under State Court construction of statute a crime is committed only where there is no bona fide intention to exercise a constitutional right); see also, Gilligan, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 Ga. L. Rev. 285-338 (1992).

THE STATUTE IS NOT VAGUE

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. The defendant, in order to succeed must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, supra. The standards for evaluating vagueness were delineated in Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

The foregoing standards are not to be mechanically applied. The degree of vagueness depends in part on the nature of the enactment. Criminal enactments are viewed more stringently. However, a scienter requirement may mitigate a criminal law's vagueness, especially with respect to the adequacy of notice as to what conduct is proscribed. Village of Hoffman Estates v. Flipside, Hoffman Estates, supra.

In Screws v. United States, 395 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1985), the Court upheld the vagueness challenge to 18 U.S.C. 52[2] which provided:

> Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects or causes to be subjected any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to

---

2 This Statute was the predecessor to 18 U.S.C. 242, which still requires the violation to be willful.

§ 242. Deprivation of rights under color of law

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

> **different punishment, pains, or penalties on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.**

In upholding the constitutionality of the statute, the Court reaffirmed the principal that "when [willful is] used in a criminal statute it generally means an act done with a bad purpose." Id. at 101. The Court stated further that willfulness requires more "than the doing of the act proscribed by statute" and that "[a]n evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." Id. at 101. As to vagueness the Court then held:

> ...The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the notice of which the statute does not define and hence of which it gives no warning. (Citation omitted). But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the

statute of the objection that it punishes without warning an offense of which the accused was unaware.

Id. at 101-102.

Florida has defined "willful" similarly to the United States Supreme Court's definition. "Willful" means intentionally, knowingly and purposely. Paterson v. State, 512 So. 2d 1109 (Fla. 1 DCA 1987). The Stalking Statute contains the necessary scienter element, since in all sections it punishes only that perpetrator who willfully, maliciously and repeatedly follows or harasses another person. A person of ordinary intelligence can understand that he will have violated a statute if he followed or harassed another intentionally and with a bad purpose. It is the perpetrator's mental state which is the measure of his criminality.

But the Statute requires not only that the act be intentional and with a bad purpose (maliciously). It also has to be done repeatedly. Each of these terms adds limitations to the Statute, curing any vagueness as to what conduct is prohibited.

Maliciously is a term well defined in criminal law. It is defined as "wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person." Fla. Std. Jury Instr. (Crim.) 130, 109. See also State v. Gaylord, 356 So. 2d 313 (Fla. 1978)("Maliciously"

means ill will, hatred, spite, an evil intent). The term maliciously, in combination, with the term "willful", clearly requires the perpetrator's conduct to be done intentionally, with an evil purpose and without legal justification. The terms "willfully" and "maliciously" are legal terms and therefore are defined in familiar legal terms. Bradley v. United States, 410 U.S. 605, 93 S.Ct. 1151, 35 L. Ed. 2d 528 (1973). As such, these terms delineate what conduct is proscribed.

The plain and ordinary meaning of "repeatedly" can be determined by referring a dictionary. Green v. State, 604 So. 2d 471 (Fla. 1992). Repeated means: "1: renewed or recurring again and again: constant, frequent." Webster's Third New International Dictionary; 1924 (1986 Ed.). Applying this definition to the term "repeatedly" further clarifies the proscribed conduct. The perpetrator must act intentionally with an evil purpose and such act must be more than an isolated incident.

The Statute by requiring the following or harassment to be done willfully, maliciously and repeatedly, gives adequate warning of what conduct is proscribed. Conduct which would otherwise be proscribed does not fall within the Statute's bounds unless it is done repeatedly and intentionally with an evil motive. Totally lawful conduct can never fall within the Statute since such conduct can never be done with an evil motive or

maliciously. As written and interpreted, the Statute is not vague for failing to advise what type of conduct is proscribed. Gilligan, supra. Further, the "course of conduct" requirement itself excludes constitutional acts.

The Defendant agrees with the State that the terms "willfully" and "maliciously" makes the crime of stalking a specific intent crime. (Appellant's Brief pp. 20-22). The Defendant attempts to nullify his admission by contending that the entire term of "willfully, maliciously, and repeatedly follows or harasses another person" is grammatically ambiguous. Particularly, Defendant argues that the term is ambiguous because one cannot ascertain from reading the terms whether the modifiers "willfully, maliciously and repeatedly" apply to both "follows" and "harasses".

The foregoing contention is meritless inasmuch as it ignores basic principles of statutory construction in favor of grammatical construction. It is a fundamental rule of statutory construction that legislative intent is the polestar by which a court must be guided. Construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. To determine Legislative intent, a court must consider the act as a whole, which includes the evil to be corrected, the language of the act, including its titles, the history of the enactment and the state of law already in

existence bearing on the subject. State v. Webb, 398 So. 2d 820 (Fla. 1981). Applying the foregoing herein, establishes that the modifiers "willfully, maliciously, and repeatedly" applies to both "follows" and "harasses". This is evidenced by the legislative intent, as contained in the "whereas clause" which defines stalking as conduct "which consists of a knowing and willful course of conduct by any person who willfully, maliciously, and repeatedly follows or harasses another person..." (R. 17). The legislative intent, as clearly enunciated above, establishes that the crime of stalking by harassment is a specific intent crime and therefore the modifiers apply to both "follows" and "harasses".

The Defendants reliance on McCall v. State, 354 So. 2d 869 (Fla. 1978) is misplaced. The statute in issue in McCall contained two completely separate offenses separated by an "or". As such the Court was required to treat the offenses separately. Here, the Statute contains one offense, which offense is defined in two ways. Therefore, "harasses" cannot be treated separately from "follows".

The Statute also meets the second prong of the vagueness challenge since the Statute offers guidelines concerning the prohibited conduct, so that law enforcement officials, prosecutors, judges and juries cannot enforce the Statute in an arbitrary manner. The Statute accomplishes this with its scienter element and with its easily definable terms.

The scienter element ensures that law enforcement officials do not have boundless discretion in defining the crime. Only upon a finding of probable cause that the perpetrator had a bad purpose in harassing the victim can there be an arrest or prosecution. There can be a conviction only when the State proves beyond a reasonable doubt that the defendant committed the stalking with the necessary scienter and malice.

Of course the Stalking Statute need not defined all terms. In determining the meaning of statutory language, words used must be given plain and ordinary meaning, unless such words are defined in the Statute or by the clear intent of the legislature. Green v. State, supra.

The Statute in Section (1)(a) defines harasses as follows:

> (a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

This statutory definition is being challenged on the individual terms and not on the whole statutory definition. It is alleged that the terms "substantial emotion distress" and "no legitimate purpose" are not sufficient to prevent arbitrary enforcement. This contention ignores the basic rule of statutory construction of nositur a sociis. This rule requires that particular terms in a statute be defined by reference to word's associated with them in the statute. 49 Fla. Jur. 2d Statutes §127 (1984).

The Statute's definition of "harasses" emanates from the civil cause of action of intentional infliction of emotional distress. In Metropolitan Life Insurance Company v. McCarson, 467 So. 2d 277 (Fla. 1985), the Florida Supreme Court recognized that the tort of intentional infliction of emotional distress exists in Florida. In so doing, the Court adopted Section 46, Restatement (Second) of Torts (1965) definition of the tort.

> § 46 Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The Court also adopted the comments explaining the application of Section 46.

> d. *Extreme and outrageous conduct*
>
> .....It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim. "Outrageous.!"

. . . . .

g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

The Statute's definition of "substantial emotional distress" and the Restatement's definition of "severe emotional distress" are the same. Both require an intentional act which the ordinary person would find outrageous. Further, both exempt intentional acts if the act attempts to enforce a legal right in a lawful way. 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.

The Defendant contends, however. that the definition of "harasses" is impermissibly vague since it contains a subjective standard. The subjective standard suggested is that the term "that causes substantial emotional distress in such person and serves no legitimate purpose" introduces the concept of the "eggshell plaintiff" into criminal law. As such the Defendant argues that a defendant does not know if his conduct offends; until after the stalking occurred since in some situations a normal person would not suffer substantial emotional distress while a highly sensitive person would.

The foregoing interpretation of the term "harasses" is in derogation of the principle of statutory instruction that a narrowing construction to terms should be given when at all possible. Brown v. State, 358 So. 2d 16, 20 (Fla. 1978). The State's narrowing interpretation is that the Statute requires that the defendant's conduct be done with the intent to cause the harm. As such, the victim's state of mind is irrelevant to the constitutionality of the Statute. The victim's state mind is relevant as to proof of the offense since without proof that the victim suffered severe emotional distress, the evidence would be insufficient to convict for stalking by harassment. This is exactly what occurs when a defendant is charged with assault. An assault is an intentional unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing same act which creates a well-founded fear in such other person that such violence is imminent. The State charges assault based on the defendant's conduct and not the victim's well founded fear. At trial if the victim's fear is not proved, the evidence is insufficient. The assault statute, however is not deemed unconstitutional because an element of proof is the subjective state of mind of the victim. Again it is the intent to cause the harm that is the gravamen of the crime. M.M. v. State, 391 So. 2d 366 (Fla. 1 DCA 1980). Pray v. State, 571 So. 2d 554 (Fla. 4 DCA 1990)(Same reasoning for crime of aggravated assault).

Likewise, by broadly construing "such person" as to encompass all persons and not the reasonable person is also in derogation of the principles of statutory construction. To give a construction to "person", as not being the reasonable person, would give the Statute an absurd interpretation. Such an interpretation should be avoided in favor of a constitutional one. City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950). Since all statutes are directed at the reasonable man, the failure to construe "person" in this Statute as a reasonable one would be absurd and therefore improper.

Defendant also contends that the failure to define "substantial emotional distress" renders the Statute vague. Specifically, he argues that the failure to state the degree of proof required to establish "substantial emotional distress" renders the Statute vague, since individual juries have the power to determine what is "substantial emotional distress."

This position has been addressed and rejected in the similar situation of the sentencing guidelines and the departure reason of infliction of emotional or psychological trauma. Emotional or psychological trauma may be used to support an upward departure when it arises from extraordinary circumstances or produces a discernible physical manifestation. State v. Rousseau, 509 So. 2d 281 (Fla. 1987). Emotional trauma must be established beyond

a reasonable doubt. Casteel v. State, 498 So. 2d 1249 (Fla. 1986). The sentencer looks to the facts presented at trial to determine if the State met its burden of proof. Alfonso v. State, 560 So. 2d 1207 (Fla. 3d DCA 1990).

The degree of proof to support "substantial emotional distress" under the Stalking Statute should be the same as under the sentencing guidelines. Therefore, in order for the evidence to be sufficient to support the element of the offense of substantial emotional distress, the State's evidence must establish, beyond a reasonable doubt, that it arises from extraordinary circumstances or produces a discernible physical manifestation.

Further, the Statute's overall definition of "harasses" has a model in federal criminal law. In 1982, attempting to strengthen legal protections for victims and witnesses of federal crimes, the United States Congress enacted the Victim Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248. In that Act, in addition to the criminal sections of 18 U.S.C. § 1512 and 1513, relating to the intimidation of or retaliation against witnesses and informants, Congress enacted § 1514(b)(1), which permits the Government to obtain an injunction to prohibit harassment of a federal witness. The term "harassment" is defined by Section 1514(c) as follows:

(c) As used in this section --

(1) the term "harassment" means a course of conduct directed at a specific person that --

(A) causes substantial emotional distress in such person; and

(B) serves no legitimate purpose; and

(2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

This model for the Stalking Statute's definition was enforced in United States v. Tison, 780 F.2d 1569 (11th Cir. 1986). Although the constitutionality of the Statute was not there at issue, the Court was required to ascertain the meaning of the term "harassment." The Court had no trouble since it applied the Federal counterpart to the State rule of statutory construction that the plain or unambiguous language in a statute is conclusive absent an expressed legislative intention to the contrary.

Finally, in 1984, the State of Florida enacted Sec. 914.24 Fla. Stat., which tracks 18 U.S.C. § 1514. This Statute entitled "Civil action to restrain harassment of a victim or witness." It also allows for injunctive relief for harassment of victims or witnesses and it contains the same definitions as 18 U.S.C. §1514.

The State has cited the foregoing acts and case law only to show that the term "harasses" has an ordinary and understandable

definitions in the law. Once a term has such a definition in the law, it provides a definite standard of conduct understandable by a person of ordinary intelligence. State v. Gaylord, supra.

THE TERM "FOLLOWING" IS NOT VAGUE

The term "following" when read as part of the whole and not in isolation, limits arbitrary enforcement. Following only becomes criminal when done willfully, maliciously and repeatedly. Thus, a perpetrator can be charged with stalking if he intentionally, knowingly, purposely and without legal justification or excuse, follows another person with the knowledge that injury or danger will or is likely to be caused to such person or the person's property. This certainly meets constitutional muster.

The Defendant also contends that the term "follows" is flawed since it does not require that the victim be aware of the "following". This does not present a problem inasmuch as the same situation occurs under the robbery statute. When there is a purse snatching it is robbery only if the victim is aware of the snatch and is placed in fear. If the snatch occurs from behind and the victim is unaware until the act is completed then only a theft occurred. Walker v. State, 546 So. 2d 1165 (Fla. 3d DCA 1989). The same situation applies to the Statute. If the victim is unaware of the following, then the Defendant can only be convicted of stalking by following and not by harassing. If the

victim is aware of the following then the defendant can be convicted of stalking by harassment.

THE TERMS "SERVES A LEGITIMATE PURPOSE" AND "CONSTITUTIONALLY PROTECTED ACTIVITY" ARE NOT VAGUE

The Statute excludes from criminal prosecution conduct which "serves a legitimate purpose" or which is "constitutionally protected activity." The fact that the Statute fails to define these terms is of no moment because the terms are surplusage. American Radio Relay League v. F.C.C., 617 Fed. 875 (D.C. Cir. 1980)(A statute should be construed so that effect is given to all its provisions, but courts will not give independent meaning to a word where it is apparent from the context of the statute the word is surplusage). As previously stated, stalking can only be charged if a perpetrator harasses another maliciously, to wit: wrongfully, intentionally, and without legal justification or excuse. Therefore, conduct is only proscribed if done without legal justification or excuse, which under the Statute, would equate to "without a legitimate purpose." If the conduct is constitutionally protected, then it is done with "lawful justification," and then does not fall within the Statute.

In his Motion to Dismiss, the Defendant relied on Everett v. Moore, 683 P. 2d 617 (Wash. App. 1984) and People v. Norman, 703 P. 2d 1261 (Colo. 1985). These cases are not apposite.

In Everett v. Moore, 683 P.2d 517 (Wash. App. 1984), the Washington Court of Appeals was faced with a similar situation. The Court found an ordinance proscribing communication by telephone or in writing or with a course of conduct causing annoyance and alarm was constitutionally overbroad. The Court found the ordinance violated First Amendment freedom of speech principles since the ordinance could be applied to constitutionally protected speech. The Court found that the ordinance applied to all speech and was not limited to communications which abused the listener in an essentially intolerable manner, which limitation would have, pursuant to Cohen v. California, 403 U.S. 15, 2[illegible] 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1974), rendered the ordinance constitutional. But the Stalking Statute regulates conduct and not speech, and the limitations in it are, in any case, comparable to Cohen.

The Court in Everett found the following section of the ordinance vague:

> A person commits the crime of harassment, if, with intent to harass, annoy or alarm another person, he: ... (4) engages in a course of conduct that alarms or seriously annoys another person and which serves no legitimate purpose.

The Court found the ordinance vague because it did not draw a reasonably clear line between the kind of annoying conduct which is criminal and which is not. The Court also found a lack of

guidance because the term "no legitimate purpose" was not defined. The reason the Court found the terms "annoy" and "alarm" vague was because there were no limits placed thereon. The conduct which caused the annoyance or alarm could have been innocent or well intended. The ordinance did not require that the act be done with specific intent and evil purpose to cause the annoyance or alarm. Since the terms "annoy" and "alarm" were not so limited the Court found that the term "no legitimate purpose" further muddied the statute. This was so because unintentional conduct, done without a bad purpose, would be subject to the ordinance. Once again, this holding provides no impediment to the Stalking Statute. First, the Statute provides notice as to when the conduct is criminal and that is when it is done willfully, intentionally and repeatedly. Only when the conduct is done with the specific intent to cause the injury is the Statute violated. Since the Statute requires specific intent to commit a violation, innocent conduct cannot be caught in its web. Likewise, the failure of the Stalking Statute to define the term "no legitimate purpose" also is no impediment. The Statute requires such conduct to be willful and malicious and prohibits only unlawful acts. Therefore the term "no legitimate purpose" is mere surplusage and its failure to be defined does not affect the Statute.

In People v. Norman, supra, the Supreme Court of Colorado, was faced with an identical statute as the one in Everett found

unconstitutional. The Court in Norman also found it unconstitutional on the same grounds as the court in Everett. The same reasoning that makes Everett inapplicable herein makes Norman inapplicable.

THE TERM "COURSE OF CONDUCT" IS NOT VAGUE

The term "course of conduct" is defined by the Statute as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." The terms of the definition are clear and unequivocal. A "series of acts" by its plain and ordinary meaning, is more than one act in sequence. This term must be read in conjunction with the term "a period of time" and together they mean that a linked series of otherwise defined actions taking place over even a brief period of time is criminal activity that may subject the perpetrator to prosecution. See 18 U.S.C. 1514, supra.

The Defendant also relies on the rejected suitor hypothetical to attempt to establish the Statute's infirmities. Applying the foregoing interpretation of the Statute to this example establishes that such conduct is not within the Statute's reach. The Defendant contends that a suitor who persists in trying to make a date at a social function, might violate the Statute. Clearly, this type of conduct is not willful and malicious. Such conduct therefore is excluded from the Statute's prohibitions because it is done without a specific intent to cause any injury.

Based on the foregoing, the terms of the Statute, when read as a whole, provides the Statute with an interlocking framework which clearly articulates to persons of average intelligence the prohibited conduct and adequately guides law enforcement its application so as to limit their discretion. As such, the Statute is not overbroad or vague and is constitutional.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully prays that this Court affirm the trial court and hold that Section 784.048 Fla. Stat. (1992) is constitutional.

Respectfully submitted,

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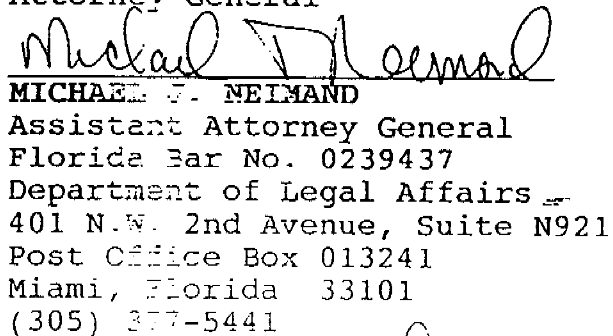

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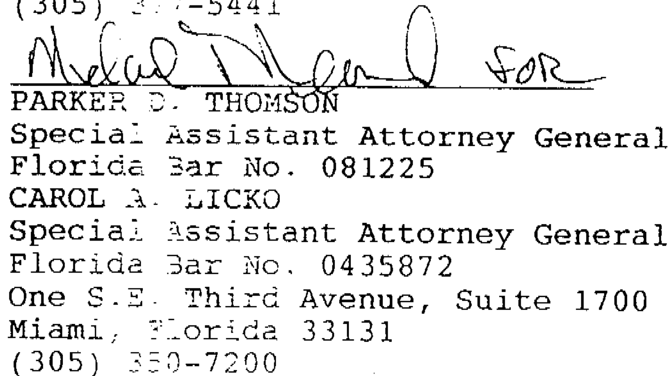

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was furnished by mail to **MANUEL ALVAREZ**, Assistant Public Defender. Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street. Miami, Florida 33125, on this 23 day of February, 1994.

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