IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,028

DCA CASE NO. 93-1196

COLIN FOLSOM,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, Colin Folsom, 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

The defendant filed a pretrial motion to have section 784.048 *Florida Statutes* (1993 Supp.) declared unconstitutional. (R. 17-31) The Court denied the defendant's motion. (R. 34-39)

The appellant and the victim, Ms. Patti Fedechena, had lived together for seven years. (T. 5) They eventually ended the relationship and Ms. Fedechena obtained a restraining order against the appellant.[1] (T. 6-7) On February 13, 1993, the witness said that she spoke to Mr. Folsom on the telephone four or five times after he called her. (T. 8) Although these calls supposedly took place after the restraining order was issued, no evidence was presented establishing that the appellant was ever served with a copy of the order.

According to Ms. Fedechena, she received the first call at 6:00 P.M., she said that the defendant asked her if she had any cocaine. (T. 9) She received the second call ten minutes later; the defendant stated "I'm taking you out." followed by some vulgar remarks. (T. 10) During the third call, the defendant said "you're out of here, and he said "I know where you're at." (T. 11) The fourth call occurred while Officer Heber was present and he testified that the defendant stated "I'm going to kill you." (T. 22) When the officer arrested the defendant an hour later, the defendant was intoxicated. (T. 50)

The court found the defendant guilty as to both counts of the Information. (R. 104-107)

The Third District Court of Appeal affirmed the Petitioner's conviction in a *per curiam* opinion citing, *inter alia*, *Pallas v. State,* ___ So. 2d ___, 19 F.L.W. D988 (Fla. 3d DCA May 3, 1994) and *Bouters v. State,* 634 So. 2d 246 (Fla. 5th DCA 1994). (A. 1)

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

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[1] The court took judicial notice of the restraining order. (T. 7)

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. In both *Pallas* and *Bouters*, the appellants have filed jurisdictional briefs seeking review before this Court. Consequently, this Court has jurisdiction based on *Jollie v. State,* 405 So. 2d 418 (Fla. 1981).

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

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[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.

(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 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

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[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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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 25th day of July, 1994.

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