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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84, 028

COLIN FOLSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

In this brief, the parties are referred to as they stood in the lower court, by proper name, or as "petitioner" and "respondent" where appropriate. The symbols "R." and "Tr." refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a conviction after a bench trial. The defendant was charged by Information with two counts of Aggravated Stalking. (R. 5-6)

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 petitioner and the victim, Ms. Patti Fedechena, had lived together for seven years. (Tr. 5) They eventually ended the relationship and Ms. Fedechena obtained a restraining order against the petitioner.[1] (Tr. 6-7) On February 13, 1993, the witness said that she spoke to Mr. Folson on the telephone four or five times after he called her. (Tr. 8) Although these calls supposedly took place after the restraining order was issued, no evidence was presented establishing that the petitioner 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. (Tr. 9) She received the second call ten minutes later; the defendant stated "I'm taking you out." followed by some vulgar remarks. (Tr 10) During the third call, the defendant said "you're out of here, and he said "I know where you're at." (Tr. 11) The fourth call occurred while Officer Heber was present and he testified that the defendant stated "I'm going to kill you." (Tr. 22) When the officer arrested the defendant an hour later, the defendant was intoxicated. (Tr. 50)

The court found the defendant guilty as to both counts of the Information and sentenced the defendant to a term of five years incarceration, followed by four years of community control, followed by two years probation on each of the counts (the sentences are to run concurrently). (R. 104-107)

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

SUMMARY OF THE ARGUMENT

The Florida stalking statute, section 784.048, Florida Statutes (Supp. 1992), is unconstitutional on its face. Said statute is void for vagueness and violates the overbreadth doctrine. The stalking statute also violates substantive due process .

ARGUMENT

SECTION 784.048, FLORIDA STATUTES (SUPP. 1992), IS UNCONSTITUTIONALLY OVER-BROAD, VAGUE, AND/OR IN VIOLATION OF SUBSTANTIVE DUE PROCESS.

Both the Stalking and the Aggravated Stalking provisions of section 784.048, *Florida Statutes* (Supp. 1992), are unconstitutionally vague and over-broad. After a concise examination of the void-for-vagueness and over-breadth doctrines, this Brief will first deal with the question of vagueness as it applies to specific terms in the statute. An analysis of the statute's language will demonstrate that, among its several shortcomings, it creates a strict liability offense under certain interpretations. This careful exegesis will demonstrate that the statute gives insufficient notice to reasonable citizens about what behavior is prohibited, lacks adequate guidelines for law enforcement, and tends to criminalize constitutionally protected behavior.

I. Overbreadth--First Amendment

The stalking statute regulates action and/or speech which are protected by the guarantees of the First Amendment; it does so in a manner that is not merely ancillary to conduct not protected by the First Amendment.

The First and Fourteenth Amendments and Article I, Sections 3 and 4, of the Florida Constitution impose limitations upon governmental abridgement of freedom to associate and privacy in one's associations. *NAACP v. State of Alabama,* 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The instant statute prohibits any person from "willfully, maliciously, and repeatedly [harrassing]" another. § 784.048(2), Fla. Stat. (Supp. 1992).

The overbreadth doctrine allows a defendant to attack a statute because of its effect on conduct other than conduct for which the defendant is being punished. *Dombrowsky v.*

Pfister, 380 U.S. 479, 85 S.Ct. 1116 , 14 L.Ed.2d 22(1965); *Broaddrick v. Oklahoma,* 413 U.S. 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Florida Supreme Court has held that the "overbreadth doctrine applies only if legislation 'is susceptible of application to conduct protected by the First Amendment.'" *Southeastern Fisheries Association, Inc. v. Dept. of Natural Resources,* 453 So. 2d 1351, 1353 (Fla. 1984). The constitutionally protected conduct here is the First Amendment freedom to associate and privacy in one's association. This criminalization of the "following" of another individual without touching or harassing said person clearly violates one's right to associate and privacy in a citizen's choice of association.[2]

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[2]The statute in its entirety states:

> (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 . . .
>
> (3) Any person who willfully, *maliciously,* and repeatedly

In *W.J.W. v. State,* 356 So. 2d 48 (Fla. 1st DCA 1978), the First District struck down a city curfew ordinance. The court found that the ordinance infringed on basic constitutional rights:

> Restraining children under the age of sixteen years from freely walking upon the streets or other public places when no emergency exists is incompatible with the freedoms of speech, association, peaceful assembly and religion secured to all citizens of Florida by Article I of the Florida Constitution.

Id. at 50. *See also K.L.J. v. State,* 581 So. 2d 920, 921 (Fla. 1st DCA 1991) (Jacksonville curfew ordinance declared unconstitutional even though it contained "legitimate business" exception).

In *S.W. v. State,* 431 So. 2d 339, 340 (Fla. 2d DCA 1983), this Court invalidated a city ordinance which provided for a curfew for children under 17 years of age unless "[the minor] if properly attended by or is in the company of such minor's parent...or if such minor child shall have written permit therefore from the chief of police...." This Court concluded that the

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> 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 . . .
>
> (4) Any person who, after an injunction for protection against repeat violence pursuant to section 784.046, or an injunction for protection against domestic violence pursuant to section 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 . . .
>
> (5) Any law enforcement officer may arrest, without warrant, any person he or she Supp. has probable cause to believe has violated the provisions of this section.

Section 784.048 *Florida Statutes* (1993 Supp.) (emphasis supplied).

ordinance "prohibits minors participating in a myriad of legitimate activities" and "bristles with the potential for selective enforcement," thus finding the ordinance to be both vague and over-broad. *Id.* at 341.

More recently in *Wyche v. State,* 619 So. 2d 231 (Fla. 1993), a Tampa loitering for prostitution ordinance was determined to be unconstitutionally over-broad and vague. Despite the detailed language of the ordinance, the statute was flawed in that it encompassed innocent conduct. The Court's finding of overbreadth was supported by the fact that the ordinance did not require *mens rea* as an element of the offense. For example, if an individual who had been recently arrested for prostitution exhibited the behavior outlined in the ordinance, yet lacked the intent to commit prostitution, they would be subject to prosecution, unless they could convince a police officer that their conduct had a *legitimate purpose.* Similarly for the statute at issue in this case, a person lacking intent to 'harass' (whatever that legally/criminally means) would be subject to prosecution unless that person could convince a police officer that the conduct in question had a "legitimate purpose" as required under section 784.048(1)(a), *Florida Statutes* (Supp. 1992).

The instant statute is also constitutionally defective on its face in that it is over-broad and regulates communicative conduct that is protected by the First Amendment. *State v. Elder,* 382 So. 2d 687 (Fla. 1980); *State v. Keaton,* 371 So. 2d 86 (Fla. 1979). Because the anti-stalking statute does not sufficiently define or enumerate the "constitutionally protected activity" that is exempted from the statute, the vagueness of the statute merges with its overbreadth and violates both constitutional precepts.

In *Spears v. State,* 337 So. 2d 977 at 980 (Fla. 1976), the Supreme Court of Florida stated:

> Over-broad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech. If this possibility were the only evil of over-broad statutes, it might suffice to review convictions on a case by case basis. But the mere existence of statutes and ordinances purporting to

> criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

The failure to define or list the "constitutionally protected activity" that is exempted causes the ordinary citizen to either have to guess at what is exempt and protected or become a constitutional scholar. This results in a chilling of First Amendment freedoms. The above-described vagueness and overbreadth becomes even more troublesome when coupled with constitutionally insufficient guidelines for law enforcement officers, more particularly described below. The law as it relates to criminal legislation that can be interpreted to encompass protected speech is clear. "Because First Amendment freedoms need breathing room to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 338 (1963). When a statute punishes only spoken words, it can withstand attack upon its facial constitutionality only if it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendment. *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). Statutes regulating speech must "punish only unprotected speech and not be susceptible of application to protected expression." *Id.* at 92 S.Ct. 1106. Where a legislative enactment "is susceptible of application to protected speech . . ., it is constitutionally over-broad and therefore facially invalid." *Lewis v. New Orleans,* 415 U.S. 130, 134, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974).

The right to obtain an abortion is a woman's constitutionally protected right. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The right to oppose an abortion is secured by the right of free speech. If a potential mother who has announced her intention to obtain an abortion and her husband, heatedly and angrily, demands that she not abort the fetus in such a manner which causes her substantial emotional distress in an attempt to persuade her to abandon her plan, has he committed the crime of stalking? If the mother

persists in calling the father to persuade him and enroll him in her decision, has she, in turn, committed the crime of stalking?

Judge Maloney, the lower court judge in *State v. Wallace,*[3] held the anti-stalking statute to be both unconstitutionally vague and over-broad. In discussing the overbreadth of the statute, Judge Maloney stated:

> Third, in defining "harasses" the legislature used the phrase "course of conduct" and went on to define "court of conduct" in subsection 1(b), to mean the following:
>
> > "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.
>
> It is one thing to say that constitutionally protected activity cannot be the basis for an arrest under this statute, but it is quite another thing to expect the ordinary citizen or the police to know what activities are constitutionally protected. The failure to define or list the exempted "constitutionally protected activities" requires the citizen or police officer to be a constitutional scholar. It also requires the citizen to think twice before saying or doing something which may or may not be a crime depending upon a judge's later decision that the activity was or was not constitutionally protected. As such, the statute is not only vague, but it is over-broad.

The Florida anti-stalking statute should be declared unconstitutional under the Fourteenth Amendment's overbreadth doctrine. The statute purports to criminalize conduct which clearly is constitutionally protected by the First Amendment.

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[3]Presently pending before the Second District Court of Appeal in case number 93-1905.

II. Vagueness

The due process vagueness doctrine (1) requires notice to citizens and (2) prevents discriminatory enforcement, but the latter purpose is more important.

> 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. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 2903 (1983) (citations omitted).

Florida law also emphasizes this necessity for guidelines to prevent selective prosecution.

> Although the goal of the Legislature in promulgation of such legislation to protect the public health, welfare, and safety of children is not only laudable but essential, there must exist some guidelines to instruct those subject thereto as to what will render them liable to its criminal sanctions. No such standards have been provided in section 827.05... . Such a statute lends itself to the unacceptable practice of selective prosecution.

State v. Winters, 346 So. 2d 991, 993-94 (Fla. 1977).

Section 784.048(2) is unconstitutionally vague in that it fails to reasonably inform a citizen of the conduct which is prohibited. As such, section 784.048 violates the Due Process Clause of the Fifth Amendment and the Florida Constitution because "men of common

intelligence must necessarily guess at it's meaning and differ as to its application". *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

One source of the statute's vagueness stems from a poor syntactic structure in that part of the law which describes and characterizes the crime of stalking by harassment. Subsections (2) and (3) state: "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person . . ." commits either stalking or aggravated stalking depending upon whether the conduct involves a credible threat, or occurs after the issuance of an injunction. The placement of the words "willfully, maliciously, and repeatedly" is ambiguous because it is impossible to know whether one needs to be willfully and maliciously harassing someone to commit stalking, or if someone who is not willful or malicious, yet whose actions occur repeatedly commits the offense. To illustrate the ambiguity here are three sentences, each syntactically clear, yet under the current statute, each represents a tenable interpretation as to what constitutes stalking. Using the exact words of the statute, the statute could be read:

1. Any person who willfully, maliciously, and repeatedly:

    1) follows or,
    2) harasses

another person commits...

2. Any person who

    1) willfully, maliciously, and repeatedly follows, or
    2) harasses

another person commits...

3. Any person who willfully, maliciously, and

    1) repeatedly follows, or
    2) harasses

another person commits...

In other words, the current sentence structure is ambiguous because the extension of the modifiers "willfully, maliciously, and repeatedly" is indeterminate. This ambiguity is fatal due to the fact that the intentional component of the crime is determined by the application of the modifiers. Under example (2), for instance, stalking-by-harassment is a strict liability offense, whereas under example (1) it is, arguably, a specific intent crime. Either interpretation is supported by the text.

A similar type of syntactic ambiguity was addressed in *McCall v. State*, 354 So. 2d 869 (Fla. 1978), wherein the Supreme Court struck down a statute restricting the use of abusive language. The statute stated, in pertinent part:

> Any person who upbraids, abuses or insults any member of the instructional staff on school property or in the presence of the pupils at a school activity, *or* any person not otherwise subject to the rules and regulations of the school who creates a disturbance on the property or grounds of any school, who commits any act that interrupts the orderly conduct of a school or any activity thereof shall be guilty of a misdemeanor of the second degree...

§ 231.07, Fla. Stat. (1975) (Emphasis supplied).

This Court rejected the state's contention that the first part of the statute related to speech which was disruptive of school functions, and thus constitutional. The Court refused to read the two disjunctive parts together asserting that, "[t]his portion of the statute is joined to the remaining portions by the disjunctive 'or' and must therefore be treated separately." *McCall*, 354 So. 2d at 872, n.3.

As noted above, example (2) takes all the scienter element out of the word "harasses." The argument that a *mens rea* requirement can save an otherwise unconstitutional statute cannot be sustained here. For the terms "willfully" and "maliciously," combined, do not necessarily mean that the conduct must be intentional with an evil purpose, i.e. with a specific intent. The big question is whether this statute is a general intent crime or a specific

intent crime. The case law does not support this higher degree of *mens rea.* In *Linehan v. State,* 442 So. 2d 244 (Fla. 2d DCA 1983), the court was faced with deciding whether the arson statute was a specific or general intent crime. In defining these terms, the court stated that the word "willfully" by itself described a general intent crime; but when it was combined with words denoting a more specific intent, the crime was a specific intent crime. In looking at the arson statute, it noted that the word "wilfully" appeared alone without a modifier (the phrase used in the statute was "willfully and unlawfully") and, therefore, was a general intent crime. In coming to this conclusion, it is important to point out that the court specifically observed that the word "maliciously" had been omitted from the statute by the Legislature in 1979. *Id.* at 247. From the court's opinion, it would be logical to argue that "willfully" combined with "maliciously" constitutes a specific intent crime. The Second District's opinion, however, was modified by this Court in *Linehan v. State,* 476 So. 2d 1262 (Fla. 1985). Although the Supreme Court agreed that arson was a general intent crime, it took great pains to emphasize that it had always been a general intent crime — despite the use of "malicious" in combination with "willful" in earlier definitions:

> Petitioner argues that the words "willfully and unlawfully" are words of specific intent and, therefore, that voluntary intoxication should be a valid defense to arson. We disagree. Arson was a general intent crime under the common law. *See* BURDICK, THE LAW OF CRIME § 692 (1946). At common law, arson was defined as "the wilful and malicious burning of a dwelling house, or outhouse within the curtilage of a dwelling of another." *Duke v. State,* 132 Fla. 865, 870, 185 So. 422, 425 (1938). *See also Sawyer v. State,* 100 Fla. 1603, 132 So. 188 (1931); *Williams v. State,* 100 Fla. 1054, 132 So. 186 (1930). Under this definition, a specific intent to burn is not required. *See Dorroh v. State,* 229 Miss. 315, 90 So.2d 653 (1956); *Crow v. State,* 136 Tenn. 333, 189 S.W. 687 (1916). We find that the present statutory definition or arson does not materially vary from the common law definition with regard to the requisite intent. There is no indication that the legislature intended to change the common law intent requirement. Accordingly, we

> hold that arson under section 806.01 is a general intent crime and, therefore, voluntary intoxication is not available as a defense to arson.

Id. at 1264-1265.

Based on the above, it would appear that the word "maliciously" does nothing to add to the *mens rea* of the anti-stalking statute and stalking is, at the most, a general intent crime. Thus, the claim that a heightened degree of *mens rea* saves a vague criminal statute must fail.

Section 784.08 is full of undefined or unconstitutionally poorly defined terms. For instance, as defined by the statute, "harasses"[4]:

> 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.

The term "no legitimate purpose," included in the definition of "harasses," is not defined at all in the statute. Similarly, "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.

The initial "arbiter" of the definitions of these terms is "[a]ny law enforcement officer [who] may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section." § 784.048(5), Fla. Stat. (Supp. 1992). Other than

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[4] It seems likely that the definition for "harasses" was taken from Title 18, UNITED STATES CODE, Section 1514, which (as a civil action) allows the United States government to obtain an injunction to prohibit the harassment of a Federal witness. There, the definition of the term "harassment" was to be used to allow the government to obtain an injunction and was not used to define a crime. However, in the criminal context, as defined in section 784.048(1), Florida Statutes (Supp. 1992), the term is so poorly defined as to be vague in the constitutional sense.

excluding picketing or other organized protests, the term "constitutionally protected activity" is not defined in the statute but, along with the rest of these vague terms, is left up to the "discretion" of the warrantless arresting officer.

Another defective clause in the definition of "harassment" asserts, ". . . that causes substantial emotional distress in such person." This clause does not require that the person harassed be a "reasonable person," which means that otherwise innocent conduct which causes substantial emotional distress in an unreasonable person triggers the criminal sanctions of the statute. This is especially so because the statute also fails to define "substantial emotional distress." Other states have found it necessary in the definition of the term "harass" or "harassment" to require the person allegedly suffering "substantial emotional distress" to be a "reasonable" person. California, for example, which apparently promulgated the first "stalking statute," in pertinent part, defines misdemeanor stalking as:

> (a)ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in *reasonable* fear of death or great bodily injury or to place that person in reasonable fear of the death or great bodily injury of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment. [California penal code section 646.9(a) (1992 amendment) Emphasis supplied].

Alabama Code s.13a-6-90(a) provides that the crime of stalking is committed when:

> A person who intentionally and repeatedly follows or harasses another person and who makes a credible threat, either expresses or implied, with the intent to place that person in *reasonable* fear of death or serious bodily harm is guilty of the crime of stalking. [Emphasis supplied].

The definitional section of that statute defines harasses as follows:

> [a person who] engages in an intentional course of conduct directed at a specified person which alarms or annoys that person, or interferes with the freedom of movement of that person, and which serves no legitimate purpose. The course of

> conduct must be such as would cause a *reasonable* person to suffer substantial emotional distress, and must actually cause substantial emotional distress. Constitutionally protected conduct is not included within the definition of this term. [Emphasis supplied].

Likewise, Delaware, Idaho, Kentucky, Illinois, and Louisiana require a "reasonable person" to suffer some sort of substantial emotional distress. Delaware Code Chapter 451, s.1312a; Idaho Statute 18-7905(a), as added by 1992, ch. 227, s.1, page 677; Kentucky revised Statute section 508.130 (1992); Chapter 720, Illinois Statutes, act 5/12-7.3 (1992); Louisiana Statutes, Title 14, Chapter 1, s. 40.2(a). Connecticut, Hawaii, Mississippi, Massachusetts, and New Jersey all require, under comparable circumstances, that a person be a "reasonable" one. Chapter 711, Hawaii revised statutes, Section 711, Act 292, Senate Bill number 3354 (effective upon its approval date of June 29, 1992); Mississippi Code Section 97-3-107 (1992); Massachusetts General Law Chapter 265 Section 43 (1992); New Jersey Chapter 209, Senate number 256,(2)(b), supplementing Title 2C of the New Jersey statutes.

In Florida, "substantial emotional distress" was not defined by the legislature. The Court and our citizens are not given guidance as to where such definitions should be found. The lack of definitions of these terms in conjunction with the lack of an objective standard or specific prohibitive acts leaves the ordinary citizen to guess not only what acts constitute "stalking" but what level of distress must be caused *before* the statute is invoked.

The common definition of the word "substantial" as found in WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th Ed. 1986) is:

> 1. a) Constituting of or relating to substance; (b) Real, True; c) Important, Essential; 2: ample to satisfy and nourish; full 3: possessed of means; Well-to-do; 4: firmly constructed; sturdy; 5: being that specified to a large degree or in the main (a victory).

The definition of "substantial" in BLACK'S LAW DICTIONARY (4th Ed. Rev. 1968) is:

> Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing, real; not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.

These varying definitions do not sufficiently specify the quality of "emotional distress" necessary to invoke the anti-stalking law. Is this statute saying that one is liable for merely worrying others? If so, how much crying, anxiety, stress is necessary? Additionally, the statute does not sufficiently define the conduct that may cause substantial emotional distress in another. Is making another person cry substantial emotional distress? The Legislature may not establish a standard that requires an individual to act at his or her peril based upon the subjective effects of those feelings in another, especially if they do not *define* the depth of the mental anguish necessary to trigger the statute. In the instant situation the legislature did not even attempt to establish an objective standard by outlining the prohibited conduct in terms of its probable effect on a reasonable person under the circumstances, but rather utilized a subjective standard with vague or undefined terms.

"Substantial emotional distress" is not a medically defined concept. No such term or definition exists in the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDER (3d Ed. Rev.) or any other psychological text. It may be a novel species of the historical emotional distress concept that has evolved in civil tort law. 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 drawn circumstances. Most significantly, in *Champion v. Gray,* 478 So. 2d 17 (Fla. 1985), the Supreme 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.[5] *Id.* at 18-19. *See Eastern Airlines, Inc., v. King,* 557 So. 2d 574 (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:[6]

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. 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.

Metropolitan Life, 467 So. 2d at 278-279 (emphasis supplied) (quoting §46 RESTATEMENT (SECOND) OF TORTS (1965)); *see also Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th

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[5]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.

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

[6]Only when the defendant's conduct is outrageous is there no requirement that the plaintiff prove physical injury arising from the psychic trauma. *Williams,* 575 So. 2d at 693-694.

DCA 1991) (conduct outrageous where police privately viewed autopsy video of plaintiff's son in party-atmosphere).

Stalking by harassment entails more than mere emotional distress, since the Legislature added the adjective, "substantial"; this implies that either a greater degree of distress must exist, or that a greater quantum of proof of psychological trauma must be shown (or both), than is called for in tort cases.[7] 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's defectiveness is made apparent by the fact that this question eludes an answer. For the statute has 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, more stringent variant of its civil counterpart.

If an individual approaches another in a social function and asks them to dance, they decline, next offers them a drink, asks for a phone number and continues to engage that person in conversation, at what point does this behavior violate the stalking statute and become criminal? Some individuals may find this flattering and exciting, yet to others this behavior would rise to the level of causing "substantial emotional distress." Again the statute requires the citizen to guess at what point his conduct crosses the line and becomes a course of conduct that is criminal. The lack of a clear-cut line delineating where behavior ceases to be legal and become criminal renders this statute void for vagueness.

Another unconstitutionally vague term in the definition of the word "harasses" is the phrase "and serves no legitimate purpose." The "no legitimate purpose" language is so broad

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[7]It is also unclear whether "substantial" is equivalent in degree to the term "severe" in "severe emotional distress." If there is a distinction between the two concepts, the stalking statute offers no clues.

that a person of ordinary intelligence is not given fair notice of what conduct is forbidden. What is a "legitimate purpose"? Does this mean the purpose carried out by an alleged violator of this statute has to violate another statute or ordinance? Is it only determined by the circular reasoning that the alleged violator's conduct violates all the other sections of the statute and is therefore (*ipso facto*) illegitimate? The adjective "legitimate" is defined by BLACK'S LAW DICTIONARY, 6th Edition (West Publishing Company, 1990) as:

> That which is lawful, legal, recognized by law, or according to law; as legitimate children, legitimate authority, lawful power, legitimate sport or amusement. *People v. Commons,* 64 Cal.App.2d Supp. 925, 148 Pacific 2d 724, 731. Real, valid, or genuine. *United States v. Schenck,* C.C.A.N.Y., 126 F.2d 702, 705, 707.

This definition is not helpful. Take, for instance, the following scenario. Spouse A suspects spouse B of cheating, and divorce proceedings have either been filed or are contemplated. Spouse A hires a private detective to serveil spouse B. Spouse B notices the surveillance and believes the detective to be engaged in a course of conduct directed at him or her which causes substantial emotional distress in him or her; and as far as he or she is concerned, this course of conduct serves no legitimate purpose. Spouse B complains to law enforcement officials, who are left to guess as to whether this conduct serves a legitimate purpose. It certainly doesn't serve a legitimate purpose to spouse B, particularly if spouse B is innocent of the conduct spouse A believes that he or she is guilty of. At any rate, the initial arbiter of this vague phrase is the arresting police officer, who is afraid to do otherwise under this statute.

The Court in *People v. Norman,* 703 P. 2d 1261 at 1267 (Colo. 1985), ruled that the phrase "no legitimate purpose" had no defined meaning under the statute and no objective meaning outside of the statute; thus, the statutory language invited subjective evaluations of what behavior was prohibited by law. *See also K.L.J., supra.* It is to be noted that the decision in *Norman* was revisited in Colorado in deciding the unconstitutionality of an

ordinance on harassment. In *People v. Gomez,* 843 P.2d 1321 (Colo. 1993), the defendant mailed a ten-page letter to his former wife replete with profanity and negative assessments of her character and conduct. A police officer filed a complaint charging the defendant with violation of the Longmont harassment ordinance.[8] The Colorado Supreme Court held that the provision of this harassment ordinance, subsection (A)(5) , was unconstitutionally vague under the due process clause of the State constitution. The Court explained:

> Subsection (A)(5) of the Longmont ordinance prohibits all conduct not previously defined therein intended to harass, threaten or abuse another that in fact produces certain results. The subsection does not in any manner limit the vast range of activity to which it refers. As in *Norman,* the requirement of a particular mental state does not sufficiently limit the broad sweep of this subsection. Because a person of ordinary

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[8]The Longmont Ordinance, Mun. Code Section 10.12.170 (1988), under review contained the following provision:

> **Harassment.** A. A person commits harassment if, with intent to harass, threaten or abuse another person he:
>
> 1. Strikes, shoves, kicks or otherwise touches a person, or subjects him to physical contact; or
>
> 2. In public place, directs obscene language or makes an obscene gesture to or at another person in such manner as is likely to create an immediate breach of the peace; or
>
> 3. Follows a person in or about a public place; or
>
> 4. Repeatedly insults, taunts or challenges another in a manner likely to provoke an immediate violent or disorderly response;
>
> 5. Engages in any other conduct that in fact harasses, threatens or abuses another person.

> intelligence cannot determine in advance whether particular conduct would result in criminal prosecution under subsection (A)(5) of the Longmont ordinance, that subsection violates the notion of fundamental fairness embodied in the due process clause of the Colorado Constitution.

Id. at 1326.

There are other problematic terms in the statute. One of these is the notion of a "course of conduct." Under the stalking law, harassment requires that one engage in a "course of conduct" which is defined as "a series of acts over a period of time, however short, evidencing a continuity of purpose." This element has a temporal and a spatial aspect, each of which is equally indeterminate. The statute says that the acts must occur over a period of time *"however short"*; of course, since there are neither timeless, nor infinitesimal acts, should the perpetrator manage to sufficiently annoy the victim in five minutes, he could be prosecuted under the statute. It is difficult to come to any definite conclusions about whether a series of acts could occur in such a fleeting time period. In *State v. Knodel,* 1 Fla. Law Weekly Supp. 542 (Fla. Escambia Cty. Ct. Sept. 2, 1993), the court declared that the stalking statute was unconstitutionally vague with respect to the term "follows," but held that the use of "harassment" was sound.[9] The court, without explanation, also concluded that the words "willfully, maliciously, and repeatedly" modify both "follows" and "harasses." The primary reason for the court's finding that the statute's use of "follows" was vague is that the legislature set no spatio-temporal boundaries to limit the term's application: "and so one might, for example, question whether the statute prohibits 'following' another into the same area of town one, two or twenty-four hours later." *Id.* at 543. What the court did not

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[9]*Contra, State v. Pallas*, 1 Fla. Law Weekly Supp. 442 (Fla. 11th Cir. Ct. May 14, 1993), *affirmed* 636 So. 2d 1358 (Fla. 3d DCA 1994). Confusion in the lower courts about the constitutionality of a statute is itself evidence that the law is unconstitutionally vague. *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). This confusion is further exemplified by lower court decisions rendered in *Wallace* and *Kahles, supra.*

consider, however, is that this temporal indefiniteness applies to "course of conduct," as used in the definition of "harasses," which involves an unspecified series of acts occurring within any time period. Albeit the drafters devoted a few extra sentences to the definition of "harasses," they failed to provide a frame of reference so that an individual could reasonably predict what sorts of acts are prohibited. To borrow the court's analogy, just as one might question whether following someone into the same area of town within a given time-frame is illegal, it is equally impossible to determine how many times, or within what time-period, one can telephone another before the conduct is covered by the statute. A single phone call during which the caller intentionally inflicts substantial emotional distress by, for instance, threatening the listener (even after the issuance of an injunction) is not prohibited under the statute. There must occur a series of acts over an unspecified time-period. How many acts are a "series of acts"? How much time must elapse between the acts? Moreover, what action must a defendant take to commit an act? If the caller hangs up on the listener three times in ten minutes, then calls again five days later and says, "You'll get yours!" has he committed aggravated stalking? Is hanging up on someone an act, or must some form of communication take place? Does the five-day period that separates the three calls, during which the caller hung up, from the fourth call imply that we have one series of acts followed by a separate, single act?

Finally, the court suggests that the harassment part of the statute can sustain a constitutional attack because in the definition of "harasses" it states that the activity in question must have "no legitimate purpose," thus furnishing a "sweeping last defense" to the accused. *Id.* at 543. It is, however, the use of such broad language that undermines procedural due process; for now a citizen has to (besides all the other conjectures he must make) prophesy about what constitutes a "legitimate purpose" and calculate whether what seems legitimate to him will ring true to the authorities.

Because the statute makes no attempt to temporally delimit this concept, there is no point of reference relative to which one can individuate discreet incidents.[10] Also undefined is the term "repeatedly." The statute is not only vague on the type of behavior that is prohibited but the number or duration of the acts required. The citizen, therefore, is not informed as to when a "course of conduct" crosses the line delineating the scope of illegal conduct. *See Hermanson v. State,* 604 So. 2d 775 (Fla. 1992). Because 784.048(2) defines one form of stalking as a "knowing and willful course of conduct by any person who willfully, maliciously, and repeatedly *follows*" (another person), it is conceivable that television and newspaper reporters who carry out their professions repeatedly run afoul of this statute as well as other citizens whose behavior were not intended to be regulated by this statute. Surely the legislature did not intend to criminally penalize all conduct occurring once more. This could mean as little as twice. For example, honking a horn twice at the car in front of you in a traffic jam where the driver of the car cannot move and when the honking causes the driver in front "substantial emotional distress" could arguably result in criminal behavior. It is unclear whether honking twice would be a violation or whether one would have to honk 50 times for the crime to result.

Even more troubling is the latter part of the definition of "course of conduct" which states that: "constitutionally protected activity is not included within the meaning of 'course of conduct.'" Guess who initially decides that? Not a neutral and detached magistrate, but a law enforcement officer. A law enforcement officer, however, is ill-equipped to decide the mixed question of law and fact as to what exactly activities are constitutionally

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[10]If one person follows another out into the parking lot but stops each time the followed person stares at him or her, is this "a pattern of conduct composed of a series of acts over a period of time, *however short*, evidencing a continuity of purpose"? If the person allegedly "followed" is not a "reasonable" person, this harmless activity may cause that person "substantial emotional distress" and that person may think that such conduct does not serve a "legitimate purpose" (whatever that is).

protected. It is not clear from the statute whether this helps to define the offense of "stalking" and "aggravated stalking," or whether it is an affirmative defense. At any rate, this is not a qualification designed to place a person of ordinary intelligence on fair notice of what conduct is forbidden.

In the context used here, the phrase "constitutionally protected conduct" fails to provide a "definite warning of what conduct" is required or prohibited, "measured by common understanding and practice". Just as an alleged violator of ordinary intelligence is not placed on fair notice of what conduct is forbidden, neither is any law enforcement officer who may arrest (without a warrant) any person that he or she "has probable cause to believe has violated the provisions of this section." The vague terms, therefore, will result in discriminatory and arbitrary enforcement since the Legislature has failed to set forth minimal guidelines to govern law enforcement. This deficiency renders the statute constitutionally unsound.

The ultimate conclusion to be drawn from all of the above-noted vague terms and subjective standards used in the anti-stalking statute is that the statute fails to warn a citizen of ordinary intelligence what conduct constitutes a crime under this statute and fails to provide minimal guidelines to law enforcement, prosecutors, judges, and juries so as to prevent selective, discriminatory enforcement.

Recently, this Court was faced with trying to determine the legal meaning of one simple phrase, viz., "public housing facility." Although the concept seemed easy enough and at least two District Court of Appeals (the First and Third) had no problems with the meaning of the phrase, this Court in *Brown v. State,* 629 So. 2d 841 (Fla. 1994), determined that the phrase was impermissibly vague:

> We find no need to resort to dictionaries or to present a parade of hypothetical horribles in reaching our conclusion that section 893.13(1)(i) is void for vagueness. The statute presents a due process problem because the phrase "public housing facility" gives virtually no notice to Florida citizens of the type of

> conduct banned. Art. I, § 9, Fla. Const. No matter what goals the Legislature had in mind when enacting section 893.13(1)(i), statutes nonetheless must include sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions. When the Legislature fails to provide guidelines, this Court cannot step in and guess about legislative intent. Such a practice would constitute judicial legislating, a practice neither our Constitution nor this Court allows. Art. II, § 3, Fla. Const.; *Brown v. State,* 358 So. 2d 16 (Fla. 1978). The precision required of statutes must come from the Legislature.

Id. at 843.

The same principles upon which this Court relied in *Brown* are applicable to the anti-stalking statute. After all the dictionary definitions have been examined and hypothetical horribles have been paraded, the ultimate conclusion is that section 784.048 is void for vagueness. The Legislature failed to provide essential guidelines to put the people of Florida on notice and to direct law enforcement and the courts on the administration of this law. The courts cannot step in and cure the problems which presently undermine this statute; thus, the statute has to be found void for vagueness.

III. Substantive Due Process

The State's "police power" to enact laws for the protection of its citizens is confined to those acts which may be reasonably construed as expedient for the protection of the public health, safety, welfare, and morals. *State v. Saiez,* 489 So. 2d 1125 (Fla. 1986). Substantive due process is violated, however, when the means adopted by the Legislature are not rationally related to the goal (e.g. they are draconian, or they are over-inclusive). *Schmitt v. State,* 590 So. 2d 404 (Fla. 1991); *State v. Walker,* 444 So. 2d 1137 (Fla. 2d DCA), *affirmed,* 461 So. 2d 108 (Fla. 1984). In the final analysis, the question is whether or not the criminal statute in question has outlawed innocent conduct along with the criminal conduct

it sought to render illegal. Some examples of statutes found to have violated Florida's guarantee of due process are as follows:

In *Schmitt* the State sought to eliminate child sexual exploitation in section 827.071(5), Florida Statutes (1987), by making it illegal to knowingly possess depictions of a child involving sexual conduct. "Sexual conduct" was then broadly defined so as to include innocent photographs of a parent bathing a baby. The Florida Supreme Court held there could be no rational basis for criminalizing such innocent conduct and found the statute lacked a rational relationship to its obvious purpose. The statute was found void under the guarantee of due process.

In *Saiez* the Court invalidated a statute which prohibited possession of credit card embossing machines. §817.63, *Fla. Stat.* (1983). Though the statute had a permissible goal, attempting to curtail credit card fraud, the means chosen, prohibiting possession of the machines, did not bear a rational relationship to that goal. Criminalizing the mere possession of the machines interferes with the "the legitimate personal and property rights of a number of individuals who use (them) for non-criminal activities." *Saiez*, 489 So. 2d at 1129. In other words, the statute "criminalizes activity that is otherwise inherently innocent." *Id.*

In *Walker,* a statute criminalized possession of a prescription drug when not in its original container. § 893.13(2)(a)(7), *Fla. Stat.* (1987). Again, though the goal, controlling the distribution prescription drugs, was legitimate, the means chosen to achieve the goal was not. "In the final analysis (the statute) criminalizes activity that is otherwise inherently innocent." *Walker*, 444 So. 2d at 1140. The statute was declared unconstitutional.

Section 784.048(2), Florida Statutes (Supp. 1992) suffers from the same infirmity. While the ostensible goal, elimination of "stalking" as it has been defined by a few public, high-profile cases, is laudable, criminalizing all conduct that comes under "willfully, maliciously, and repeatedly follows or harasses" also encompasses innocent, albeit obnoxious, conduct. The attentions of a newspaper/television reporter trying to uncover an

unsavory story about a person would be one example, as noted above. The fact that the supposed victim need not be aware of the "stalking" or suffer "reasonable" fear adds to the argument that this statute has been too broadly defined so as to lack a rational basis for protecting the public's health, safety, and welfare. What rational basis does the State have in using its police powers to protect people who have no idea they need protection (keeping in mind that parts of this statue don't require any threat of harm) or in protecting people who are not "reasonably" being caused emotional distress?

There is also the consideration that relief available to people who justifiably fear further contact with specific individuals. An injunction issued by a Court in an impartial, judicial proceeding can offer relief when that injunction is violated. In addition, there are other criminal statutes available, e.g. a charge of harassing telephone calls pursuant to section 365.16, Florida Statutes (1991).

CONCLUSION

Wherefore, based on the above-stated arguments and authorities, this Court should hold that the Florida stalking-statute is facially void-for-vagueness, over-broad and violates substantive due process.

Respectfully submitted,
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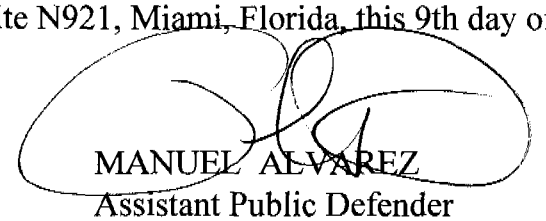
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's brief on the merits has been forwarded to the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, this 9th day of January, 1995.



MANUEL ALVAREZ
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APPENDIX

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

COLIN FOLSOM,	**	
Appellant,	**	
vs.	**	CASE NO. 93-1196
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed June 21, 1994.

An appeal from the Circuit Court for Monroe County, Ruth Becker, Acting 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 and Carol A. Licko, Special Assistant Attorneys General, for appellee.

Before NESBITT, JORGENSON, and LEVY, JJ.

PER CURIAM.

Defendant seeks reversal of his conviction for violating Florida's anti-stalking statute, sections 784.048(3) and (4), Florida Statutes (1993). We affirm and remand for resentencing.

We find this Court's opinion in Pallas v. State, 19 Fla. L. Weekly D988 (Fla. 3d DCA May 3, 1994) and State v. Bossie, 1 Fla. L. Weekly Supp. 465 (Fla. Brevard County Ct. June 22, 1993) dispositive of the issues posed on appeal. See also Bouters v. State, 634 So. 2d 246 (Fla. 5th DCA 1994).

We do find, however, that aggravated stalking is classified as a third degree felony, and as such the appellant's period of incarceration plus probation cannot exceed the maximum of five years. §775.082(3)(d), Fla. Stat. (1993). Thus, we remand for imposition of a sentence no greater than the statutory maximum.

Affirmed and remanded for resentencing.