IN THE SUPREME COURT OF FLORIDA

DAVID LEWIS GILBERT, :

Petitioner, :

v. : CASE NO. 84,161

STATE OF FLORIDA, :

Respondent. :

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

DAVID LEWIS GILBERT,

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STATE OF FLORIDA,

Respondent.

_____/

BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

The record on appeal is consecutively paginated and shall be referred to by the letter "R" followed by the appropriate page number. An appendix is attached containing the Florida First District Court of Appeal's opinion in this case.

II. STATEMENT OF THE CASE AND FACTS

By second amended information, and by informations, Petitioner was charged in case numbers 92-3567, 92-4031, and 92-4733 with the "aggravated stalking" of Suzette O'Leary by knowingly, willfully, maliciously, and repeatedly following or harassing her in violation of an injunction for protection against repeat violence. (R-3-5). The operative dates for these alleged crimes, respectfully, are between July 1, 1992 and August 19, 1992; August 20, 1992; and October 2, 1992. (R-3-5).

On January 11, 1993, in exchange for the dismissal of some pending misdemeanor cases, Petitioner pled nolo contendere to three counts of aggravated stalking. (R-56-70).

On February 8, 1993, Petitioner was sentenced as follows: in case number 92-3567, Petitioner was placed on community control for a period of two years. A special condition of that community control was that he serve 11 months and 30 days in the county jail. He also was required to enroll and complete an anger control management counselling course, and not to have any contact (directly or indirectly) with the victim. During the first four months while on community control after his release from the county jail, he was to be required to wear an electronic anklet device. Costs of $575.98 were imposed, and the trial court reserved jurisdiction to determine the amount of restitution to the alleged victim. (R-103-104).

In case number 92-4031, Petitioner was also adjudicated guilty, and the same sentence was imposed, to run concurrently with his first sentence. (R-104).

In case number 92-4733, Petitioner was adjudicated guilty and placed on two years probation, with his probationary period to be served consecutively to the previous sentences. (R-104).

In Case number 92-3567, he was given credit for 168 days jail time; in case number 92-4031, he was given credit for 167 days jail time. In case number 92-4733, he was given credit for 132 days jail time. (R-104).

At the sentencing hearing, defense counsel objected to the imposition of community control and county jail time as a condition of community control. (R-105).

The sentencing guidelines scoresheet, which was prepared by the state, totalled 131 points. Thirty six of these points came from "legal constraint". (R-110).

Notice of appeal was timely filed on or about March 10, 1993. (R-112). On July 12, 1994, the Florida First District Court of Appeal issued its opinion in this case. Regarding the sentencing issues raised in the appeal, the Florida First District Court of Appeal indicated, and the state agreed, that Petitioner's scoresheet was improperly calculated because he was improperly "awarded" points for legal constraint at the time the offenses were committed. The District Court of Appeal also noted that Petitioner's special condition was improper.

The District Court of Appeal then certified the following question to this Court:

IS SECTION 784.048, FLORIDA STATUTES (SUPP. 1992) FACIALLY UNCONSTITUTIONAL AS VAGUE AND OVERBROAD?

This Court issued its order postponing decision on jurisdiction and briefing schedule on August 11, 1994.

III. SUMMARY OF THE ARGUMENT

Petitioner challenges the constitutionality of Section 784.048, Florida Statues (Supp. 1992). The facial constitutionality of the statute may be attacked without regard to whether the issue was raised below. State v. Johnson, 616 So.2d 1 (Fla. 1993).

The statute is both vague and overbroad. It is vague because the language of the statute does not place a person of ordinary intelligence on fair notice of what conduct is forbidden. It is overbroad because the effect of the statute is to proscribe speech or expressive conduct because of the disapproval of the ideas expressed.

The term "harasses" does not provide a definite warning of what conduct is required or prohibited. Within the term "harasses", the phrase "substantial emotional distress in such person" is not defined, and it does not require that the person so allegedly substantially emotionally distressed be a "reasonable person".

Again, within the definition of the term "harasses", the term "no legitimate purpose" is unconstitutionally vague. At least one court has found a similar phrase unconstitutionally vague. See People v. Norman, 703 P.2d 1261 (Col. 1985).

Another term in the statute which is unconstitutionally vague is "course of conduct". What is "a series of acts over a period of time, however short, evidencing a continuity of purpose"? What does the phrase "constitutionally protected activity is not included within the meaning of 'course of

conduct' mean"? Not only are these phrases vague in the constitutional sense, but the initial arbiter of these phrases is a police officer who may arrest an alleged stalker without a warrant.

Furthermore, verbal conduct -- both oral and written -- is punished by this statute, depending upon how it is initially interpreted by the arresting officer.

The statute is vague. It is overbroad because it encompasses constitutionally protected (First Amendment) activity. The statute should be overturned by this Court.

The Florida First District Court of Appeal relied upon the Florida Third District Court of Appeal's opinion in Pallas v. State, 636 So.2d 1358 (Fla. 3d DCA 1994). The opinion in Pallas did not address many of the concerns raised here. Specifically, neither the Florida First District Court of Appeal nor the Florida Third District Court of Appeal apparently considered the extensive legislative analysis that is found in this brief. Moreover, the court in Pallas failed to consider arguments relating to such unconstitutionally vague phrases as "constitutionally protected activity" and "course of conduct".

IV. ARGUMENT

ISSUE:

SECTION 784.048, FLORIDA STATUTES (SUPP. 1992) IS FACIALLY UNCONSTITUTIONAL BECAUSE IT IS VAGUE AND OVERBROAD.

The facial constitutionality of a statute may be attacked in an appellate court without regard to whether the issue was raised below. State v. Johnson, 616 So.2d 1 (Fla. 1993).

This statute is both vague and overbroad. The distinction between vagueness and overbreadth is that the former implicates the Due Process Clause and the latter involves the First Amendment. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). Because the statute is alleged to be overbroad, which involves the First Amendment, Petitioner may attack the statute without demonstrating that his own conduct could be regulated by it. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830, 839-840 (1973).

The appropriate test for vagueness in Florida is whether the language of the statute places a person of ordinary intelligence on fair notice of what conduct is forbidden. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). The statutory language must "provide a definite warning of what conduct" is required or prohibited, "measured by common understanding and practice". Warren v. State, 572 So.2d 1376, 1377 (Fla. 1991) [quoting State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985)].

Section 784.048, Florida Statutes (Supp. 1992), is full of undefined or unconstitutionally poorly defined terms.[1]

For instance, as defined by 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.

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

The term "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." Section 784.048(5), Florida Statutes (Supp. 1992). Other than 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.

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[1]A copy of Chapter 92-208, Laws of Florida, is attached as an appendix to this brief for the Court's convenience.

It seems likely that the definition for "harasses" was ultimately lifted 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.

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.

Take the term "...that causes substantial emotional distress in such person". The term 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 <u>reasonable</u> 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 added].

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 added].

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 added].

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).

Similarly, 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.

It is clear that the (apparently deliberate) omission of the word "reasonable" as a modifier to the word "person" in the term "...that causes substantial emotional distress in such person" is a constitutionally fatal flaw. While the Legislature may be free to amend the statute and to correct this omission, the courts are not, because it is not their function to legislate, and the criminal statutes must be strictly construed. See, Jeffries v. State, 610 So.2d 440 (Fla. 1992). Moreover, even if this court were to read the word "reasonable" into the statute immediately prior to the word "person", it would still not cure the constitutional deficiencies of this statute because this is not the only phrase poorly defined in the statute, and because law enforcement officers are the initial arbiters of the statute.[2]

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[2]How many justices on this court would like to spend a day in jail because law enforcment officers improperly interpreted this vague statute?

Another problematical and unconstitutionally vague term in the definition of the word "harasses" is the phrase "...and serves no legitimate purpose". As the term "no legitimate purpose" is not defined in the statute, a person of ordinary intelligence is not placed on 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 this statute and is therefore (ipso facto) illegitimate?

Resort to Black's Law Dictionary, 6th Edition (West Publishing Company, 1990) defines the verb "legitimate" as:

> To make lawful; to confer legitimacy; e.g., to place a child born before marriage on the legal footing of those born in lawful wedlock. [Id. at 901].

That same dictionary defines "legitimate" as an adjective 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. [Id. at 901].

These definitions are 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 surveil spouse B. Spouse B notices the surveillance, and believes the detective to be engaged in a course of conduct directed at him or her and one 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.[3]

The list of vague terms in this statute goes on. Although the term "course of conduct" is "defined" in the statute, its definition is not helpful. What is "a series of acts over a period of time, however short, evidencing a continuity of purpose."? 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

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[3]See People v. Norman, 703 P.2d 1261 (Co. 1985), where the term "without any legitimate purpose" was found to inject unconstitutional uncertainty into a statute criminally punishing harassment.

"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).[4]

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. But the phrase is far more vague and far more troubling than this.

A law enforcement officer is ill-equipped to decide the mixed question of law and fact as to what exactly constitutes constitutionally protected activity. It is not clear from the statute whether this helps to define the offense of "stalking"

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[4]Consider this scenario: two women were roller-blading along the St. Marks Trail when they noticed a man "following them on a bike". Of course, the trail is linear, and people bicycle toward the St. Marks on the right side and return towards Tallahassee on the right side. The women sped up, and the man pedaled faster. The women slowed down, and the man slowed down. They stopped, and the man stopped. One of the women turned around and told the man to "leave them alone" but the man got off of his bike and walked towards them. One of the women threatened the man with pepper spray, but he continued to walk toward the younger of the two women, so she battered him with the pepper spray. Was this aggravated stalking even though it took place in a public place, where no force or violence was apparently offered to the women? Apparently the Leon County Sheriff's Department thought so, because according to the Tallahassee Democrat, August 31, 1994 edition, the man was arrested for aggravated stalking and "threats" and held in the Leon County Jail that night without bail.

and "aggravated stalking" or whether it is an affirmative defense. At any rate, this is not a term designed or calculated to place a person of ordinary intelligence on fair notice of what conduct is forbidden.

It is, however, a term that should trouble this court, just as what constitutes constitutionally protected activity has troubled lots of courts, both state and federal. It is unclear who makes the decision as to what is constitutionally protected activity, and what guidelines are used by the arbiter in order to determine constitutionally protected activity. Initially, it's a law enforcement officer; then is it a judge or is it the jury? If it's a jury, how is the jury to be instructed by the court on what constitutionally protected conduct is without the court (improperly) commenting on the evidence? Will the court read a constitutional text to the jury? Will the court allow the jury to take back legal opinions and determine the law? If so, it will be an "informed jury", which to date no court has allowed.

In the context used here, the phrase "constitutionally protected conduct" is vague, and serves no guidepost, providing a "definite warning of what conduct" is required or prohibited, "measured by common understanding and practice". Whether this phrase appears in the statute, the Legislature cannot outlaw constitutionally protected conduct no matter how much it wants to do so.

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 provisions of this section are vague, murky, and susceptible to numerous interpretations.

This statute is also overbroad in the sense that it can encompass activities or conduct protected by the First Amendment. A court must ensure that a statute does not proscribe speech or expressive conduct because of disapproval of the ideas expressed. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. ___, 112 S.Ct. ___ 120 L.Ed.2d 305 (1992).

Consider this scenario. A local high school teacher on two occasions walks behind a 16-year old female student of the school to the parking lot where his and her cars are parked. On the first occasion, he tells her that "she ha[s] a cute butt and stuff like that". On the second occasion, he hands her a note, which indicates when he will be alone at his house.

He is arrested for stalking. Without regard to whether she is a reasonable person, she alleges that she has suffered substantial emotional distress. The officer believes that the teacher's action and speech serve no legitimate purpose.

Clearly, verbal conduct--both oral and written--is being punished here. Equally clearly, no matter what your views on the appropriateness of the teacher's comments, the comments are not "illegal" (although the alleged victim and the officer may have thought that they served no legitimate purpose). Constitutionally protected activity? Infringement of the First

Amendment? Mentioned earlier, it's not clear who will ultimately decide but it is clear that a police officer will initially decide, and based on the complaint, and the ambiguities of the statute, seize the person of the teacher and place him under arrest.

The statute is vague. It is overbroad because it encompasses constitutionally protected (First Amendment) activity. It apparently was a statute driven by the media, and in its haste to get to the destination desired by the media, the Legislature (at the very least) inartfully and unconstitutionally drafted it.[5] It also unconstitutionally attempts to predict future "dangerous" activity. See, for example, Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). It should be declared unconstitutional by this Court.

In affirming Petitioner's convictions for aggravated stalking, the District Court claimed that it rejected "similar arguments" in Varney v. State, 19 Fla. L. Weekly D1521 (Fla. 1st DCA 1994), and relied upon Pallas v. State, 636 So.2d 1358 (Fla. 3d DCA 1994). Pallas also was cited (in its circuit court form) by the Fifth District Court of Appeal in rejecting the defendant's arguments in Bouters v. State, 634 So.2d 246 (Fla. 5th DCA 1994), which is presently pending before this

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[5]Consider the language of the Preamble of the statute: "WHEREAS, the Legislature has been informed through the media...".

Court and scheduled for oral argument in November. Bouters v. State, Supreme Court Case Number 83,558.[6]

The truth of the matter is that none of these cases rejected the arguments made in this case. In the District Court of Appeal, the Attorney General's Office imported some "special assistants" who were instrumental in reflecting the state's position in Pallas and who wrote a form brief that did not address many of the arguments raised by the Petitioner in this case.

For instance, in this case, original research was undertaken to compare and contrast the stalking statutes of various states. The important differences or similarities between these statutes and the Florida Statute was not addressed by the First, Third or Fifth District Courts of Appeal.

In Pallas v. State, for example, the Third District Court of Appeal gratuitously read into the statute a "reasonableness" requirement in interpreting the term "...that causes substantial emotional distress in such person." Of course, this was blatant legislation on the part of the Florida Third District Court of Appeal, and it had no business doing so.

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[6]Appellant's brief in Bouters does not raise many of the arguments raised in this brief. The arguments raised in this brief should be considered by this Court in addition to any arguments raised in Bouters.

Significantly, and unaddressed by any District Court of Appeal as far as the undersigned can determine, is the significance of the term "reasonable" which is found in virtually all of the other states' stalking statutes but is conspicuous by its omission in the state of Florida "stalking" statute. Presumably, many of the other states felt it necessary that the legislature use the term "reasonable" in defining the term "harasses" or other similar terms found in their respective statutes. The Florida Third District Court of Appeal, tacitly, recognizing this as one of the Achilles' heels of the statute, blithely and without authority judicially legislated in Pallas that the phrase "substantial emotional distress in such person" is the type of "substantial emotional distress" that would be felt by a reasonable person under the circumstances. This is a criminal statute that Pallas interpreted, and the Florida Third District Court of Appeal's conclusion that the statute "...bears a family resemblance to the assault statutes" is a stretch of the legal imagination which is not allowed in the criminal law. The statute, on its face, creates a subjective standard, which is constitutionally vague.

The Florida Third District Court of Appeal in Pallas v. State also glosses over other vague and undefined terms in the statute. For instance, for the term "constitutionally protected activity" the Florida Third District Court of Appeal appears to assume that this troublesome phrase requires no further definition other than the exclusion of picketing or

other organized protests. Pallas at 1363. Of course, this phrase is one of the most constitutionally troubling phrases in the statute, and requires the police to be constitutional scholars in order to avoid the abrogation of sensitive but fundamental constitutional rights.

Likewise, the Florida Third District Court of Appeal appears to believe that the vague and constitutionally ambiguous phrases "course of conduct" and "no legitimate purpose" constitutionally limit the application of the statute and provide solace to the aggrieved citizen who has had the misfortune to end up in jail because of the subjective interpretations of these phrases by the arresting law enforcement "constitutional scholars" required to implement the statute.

None of the cases cited by the Florida First District Court of Appeal have addressed these concerns. Neither, for that matter, has the Attorney General's Office yet to address these concerns, as of the writing of this brief.

V. CONCLUSION

Based on the foregoing arguments and authorities, the statute, as written, is void for vagueness and overbreadth, and the certified question must be answered in the affirmative.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to Michael J. Neimand, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 31ST day of August, 1994.

DAVID P. GAULDIN

IN THE SUPREME COURT OF FLORIDA

DAVID LEWIS GILBERT,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CASE NO. 84,161
	:	
STATE OF FLORIDA,	:	
	:	
Respondent.	:	
	:	

A P P E N D I X

of material printed by that printer for that nonresident print purchaser when the print purchaser does not furnish the printer a resale certificate containing a sales tax registration number but does furnish to the printer a statement declaring that such material will be resold by the nonresident print purchaser.

Section 3. Paragraph (aa) of subsection (1) of section 220.03, Florida Statutes, is amended to read:

220.03 Definitions.—

(1) SPECIFIC TERMS.—When used in this code, and when not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the following terms shall have the following meanings:

(aa) "Taxpayer" means any corporation subject to the tax imposed by this code, and includes all corporations for which a consolidated return is filed under s. 220.131. However, "taxpayer" does not include a corporation having no individuals (including individuals employed by an affiliate) receiving compensation in this state as defined in s. 220.15 when the only property owned or leased by said corporation (including an affiliate) in this state is located at the premises of a printer with which it has contracted for printing, if such property consists of the final printed product, property which becomes a part of the final printed product, or property from which the printed product is produced.

Section 4. Subsections (3) and (4) are renumbered as (4) and (5), and subsection (3) of section 283.62, Florida Statutes, is created to read:

(3) Publications may be printed and prepared in-house, by another agency, or purchased on bid, whichever is more economical and practicable as determined by the agency. An agency may contract for binding separately when more economical or practicable, whether or not the remainder of the printing is done in-house. A bidder may subcontract for binding and still be considered a qualified bidder or offeror, notwithstanding s. 287.012(13).

Section 5. This act shall take effect upon becoming a law.

Became a law without the Governor's approval April 11, 1992.

Filed in Office Secretary of State April 10, 1992.

CHAPTER 92-208

Committee Substitute for House Bill No. 97

An act relating to stalking; creating s. 784.048, F.S.; providing definitions; creating the offenses of stalking and aggravated stalking; providing criminal penalties; providing an effective date.

WHEREAS, the Legislature has been informed through the media and by complaints from victims, their families, and friends about prolonged suffering from conduct commonly described as stalking, which consists of a knowing and willful course of conduct by any 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, and

WHEREAS, the traditional pr
utes are not always applicable t

WHEREAS, the Legislature de
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FORE,

Be It Enacted by the Legislature

Section 1. Section 784.048, F

784.048 Stalking; definitions;

(1) As used in this section:

(a) "Harasses" means to engag
son that causes substantial emoti
mate purpose.

(b) "Course of conduct" means
over a period of time, however sh
tionally protected activity is not
duct." Such constitutionally prot
nized protests.

(c) "Credible threat" means a
who is the target of the threat to
must be against the life of, or a t

(2) Any person who willfully,
another person commits the offen
punishable as provided in s. 775.

(3) Any person who willfully,
another person, and makes a cred
in reasonable fear of death or b
stalking, a felony of the third d
775.083, or s. 775.084.

(4) Any person who, after an
pursuant to s. 784.046, or an inju
pursuant to s. 741.30, or after an
ward the subject person or that p
ly, and repeatedly follows or hara
vated stalking, a felony of the th
s. 775.083, or s. 775.084.

(5) Any law enforcement offi
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Section 2. This act shall take

Approved by the Governor Ap

Filed in Office Secretary of St

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which a consolidated return is filed under
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an affiliate) receiving compensation in this
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ing, if such property consists of the final
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l still be considered a qualified bidder or

upon becoming a law.

s approval April 11, 1992.

ril 10, 1992.

ER 92-208

for House Bill No. 97

784.048, F.S.; providing definitions;
aggravated stalking; providing crimi-
date.

informed through the media and by com-
friends about prolonged suffering from
, which consists of a knowing and willful
fully, maliciously, and repeatedly follows
kes a credible threat with the intent to
leath or great bodily injury, and

HEREAS, the traditional protections currently available under criminal stat-
are not always applicable to stalking, and

HEREAS, the Legislature desires to provide protections to victims, their fam-
s, and friends from the needless torment caused by stalking, NOW, THERE-
RE,

t Enacted by the Legislature of the State of Florida:

ction 1. Section 784.048, Florida Statutes, is created to read:

4.048 Stalking; definitions; penalties.—

(1) As used in this section:

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

(b) "Course of conduct" means a pattern of conduct composed of a series of acts
er a period of time, however short, evidencing a continuity of purpose. Constitu-
nally protected activity is not included within the meaning of "course of con-
ct." Such constitutionally protected activity includes picketing or other orga-
zed protests.

(c) "Credible threat" means a threat made with the intent to cause the person
no 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 to-
ward the subject person or that person's property, knowingly, willfully, malicious-
ly, and repeatedly follows or harasses another person commits the offense of aggra-
vated 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 h
or she has probable cause to believe has violated the provisions of this section.

Section 2. This act shall take effect July 1, 1992.

Approved by the Governor April 13, 1992.

Filed in Office Secretary of State April 13, 1992.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DAVID LEWIS GILBERT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-854

Opinion filed July 12, 1994.

An appeal from the Circuit Court for Escambia County. John Parnham, Judge.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee; Michael J. Neimand, Assistant Attorney General; Parker D. Thomson, Special Assistant Attorney General; Carol A. Licko, Special Assistant Attorney General, Miami, for Appellee.

PER CURIAM.

Appellant seeks reversal of his judgment of conviction and sentences for aggravated stalking. We affirm in part and reverse in part.

Appellant pled no contest to three counts of aggravated stalking. For each count, appellant was sentenced to community control with the special condition that he serve 11 months and 30 days in county jail. Credit for time served was given, and the sentences are to be served concurrently. On the guidelines scoresheet used to arrive at this sentence, appellant was scored for being under legal constraint at the time the offenses were committed. The state concedes that this scoring was improper and recommends a remand on this point. We note that the sentence is also improper as the special condition contravenes case law. See, State v. Davis, 630 So. 2d 1059 (Fla. 1994).

We find the remaining issue in this appeal to be without merit. Appellant argues that section 784.048, Florida Statutes (Supp. 1992), is vague and overbroad and is, therefore, unconstitutional. We rejected substantially similar arguments in Varney v. State, Case No. 93-782, opinion released June ___, 1994 (___ Fla. L. Weekly D___), citing Pallas v. State, 19 Fla. L. Weekly D988 (Fla. 3d DCA May 3, 1994), and other decisions. Accordingly, we affirm on this issue, and, as we did in Varney, certify as being of great public importance, the following question:

> IS SECTION 784.048, FLORIDA STATUTES (SUPP. 1992) FACIALLY UNCONSTITUTIONAL AS VAGUE AND OVERBROAD?

We AFFIRM in part, REVERSE in part and REMAND for resentencing.

ZEHMER, C.J., ERVIN AND SMITH, JJ., CONCUR.