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IN THE SUPREME COURT OF FLORIDA

DAVID LEWIS GILBERT, :
 :
 Petitioner, :
 :
 v. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 _____/

CASE NO. 84,161

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	i
PRELIMINARY STATEMENT	1
STATEMENT OF THE FACTS	2
ARGUMENT	
SECTION 784.048, FLORIDA STATUTES (SUPP. 1992) IS FACIALLY UNCONSTITUTIONAL BECAUSE IT IS VAGUE AND OVERBROAD.	3
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE(S)</u>
<u>Commonwealth v. Kwiatkowski</u> 55 Cr.L. 1492 (Mass. Sup.Jud.Ct. 8/3/94)	3
<u>Palace v. State</u> 636 So.2d 1358 (Fla. 3d DCA 1994)	3
<u>Woolfolk v. Virginia</u> No. 1173-93-2 (Va. Ct. App. August 23, 1994)	4
<u>OTHER AUTHORITIES</u>	
Title 18, United States Code	4

IN THE SUPREME COURT OF FLORIDA

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Petitioner,

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STATE OF FLORIDA,
Respondent.

_____ /

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

References to the Respondent's Brief shall be by the letters "RB" followed by the appropriate page number.

STATEMENT OF THE FACTS

Petitioner rejects the Respondent's "basic facts" for two reasons: 1) There is no citation to the record for these facts and 2) Petitioner challenges the facial validity of the statute. It is apparently true that the alleged victim in this case sought and received an ex parte injunction against Petitioner which resulted in these charges. (R-14-15).

ARGUMENT

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

As did the court in Palace v. State, 636 So.2d 1358 (Fla. 3d DCA 1994), upon which the respondent relies, the respondent failed to address many of the concerns raised in this brief. Specifically, neither the Florida First District Court of Appeal, the Florida Third District Court of Appeal, nor the respondent in this case considered the extensive legislative analysis that is found in Petitioner's Brief on the Merits.

As an update to that analysis, it should be pointed out that the Massachusetts Supreme Judicial Court has subsequently held its stalking statute unconstitutionally vague.

Commonwealth v. Kwiatkowski, 55 Cr.L. 1492 (Mass. Sup.Jud.Ct. 8/3/94).

Respondent attempts to defend the term "harasses" in its brief (RB-18-22) without addressing Petitioner's extensive legislative analysis.

Further, the state runs off on the tangent of what might constitute the civil tort of "the intentional infliction of emotional distress" as a defense to a vagueness challenge of this criminal statute. It is totally inappropriate to defend a criminal statute, which must be strictly construed, with standards of the civil law.

Additionally, the state indicates that the "...Statute's definition of "harass" was modeled after the definition of "harass" in federal criminal statutes." (RB-19). The

respondent then refers to Title 18, United States Code, Section 1514(c), which (as a civil action) allows the United States government under certain circumstances to obtain an injunction to prohibit the harassment of a federal witness. However, it should be pointed out that 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.

One of the problems with this statute is that it is also the victim's state of mind that is at issue because the legislature failed to require that the person allegedly suffering "substantial emotion distress" be a "reasonable" person. California, Alabama, Delaware, Idaho, Kentucky, Illinois, Louisiana, Connecticut, Hawaii, Mississippi, Massachusetts, and New Jersey all require that under comparable circumstances that a victim be a "reasonable one". (Initial Brief at 11).

The only out-of-state statute apparently considered by the state is the Virginia statute considered in its notice of supplemental authority in the case of Woolfolk v. Virginia, No. 1173-93-2 (Va. Ct. App. August 23, 1994), filed in this court on or about September 22, 1994. However, in comparing the Virginia statute to this statute apples and oranges are being compared because the opinion indicates that the statute in Virginia requires the emotional distress suffered by another person to be such that it places "...that person in reasonable fear of death or bodily injury...." (Supplemental Authority

Slip Op. at 7). That is clearly not the case in the Florida statute.

Finally, the respondent makes a point of attempting to emphasize that petitioner triggered the statute's consequences in this case by violation of a domestic violence injunction. As pointed out in the Petitioner's comments under the statement of facts in this reply brief, this injunction was issued ex parte under a statute whose own constitutionality is suspect.

CONCLUSION

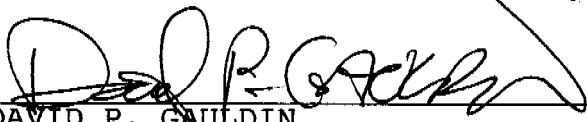
Based on the foregoing arguments and authorities, this statute should be declared unconstitutional for vagueness and overbreadth, with Petitioner's convictions invalidated.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to James W. Rogers, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 29th day of September, 1994.

Respectfully submitted,

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