

IN THE SUPREME COURT OF FLORIDA

017
FILED

SID J. WHITE

AUG 31 1994

CLERK, SUPREME COURT
By _____

Chief Deputy Clerk

LEROIS BLOUNT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. 84-315

DCA Case No. 93-0461

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Lerois Blount

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3

ARGUMENT

THE INSTANT OPINION AFFIRMING PETITIONER'S CONVICTION FOR AGGRAVATED STALKING, IN VIOLATION OF § 784.048, FLA. STAT. (1993) EXPRESSLY DECLARES VALID A FLORIDA STATUTE AND CITES TO A DECISION PRESENTLY PENDING FOR REVIEW BEFORE THIS HONORABLE COURT.	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>Blount v. State</i> , Case No. 93-046 (Fla. 4th DCA August 24, 1994)	2
<i>Bouters v. State</i> , 634 So. 2d 246 (Fla. 5th DCA 1994), review granted, Supreme Court Case No. 83,558 (1994)	2-5
<i>Jollie v. State</i> , 405 So. 2d 418 (Fla. 1981)	4
<i>Pallas v. State</i> , 636 So. 2d 1358 (Fla. 3d DCA 1994)	2, 5
 <u>UNITED STATES CONSTITUTION</u>	
First Amendment	3, 5
Fourteenth Amendment	3, 5
 <u>FLORIDA CONSTITUTION</u>	
Article V, Section 3(b)(3)	4
 <u>FLORIDA STATUTES</u>	
§ 784.048	2-5
 <u>OTHER AUTHORITIES</u>	
<i>Fla. R. App. P.</i> 9.030(a)(2)(A)(ii)	5

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Okeechobee County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with one (1) count of aggravated stalking in violation of § 784.048, *Florida Statutes* (1993). R 15.

Prior to trial, Petitioner filed a motion to declare § 784.048 unconstitutional. R 28-29. A hearing was held on Petitioner's motion to declare § 784.048 unconstitutional. Said motion was denied. R 4. Whereupon, Petitioner entered a plea of nolo contendere to aggravated stalking, expressly reserving his right to appeal this ruling on his motion to declare § 784.048 unconstitutional. R 4.

Petitioner was placed on three (3) years probation.

Petitioner timely filed an appeal to the Fourth District Court of Appeal. R 50-51.

The Fourth District in a written opinion rendered on August 24, 1994, *Blount v. State*, Case No. 93-046 (Fla. 4th DCA August 24, 1994) [See Appendix 1] rejected Petitioner's numerous constitutional challenges to § 784.048 and affirmed his conviction for aggravated stalking on the authority of *Pallas v. State*, 636 So. 2d 1358 (Fla. 3d DCA 1994)[See Appendix 2] and *Bouters v. State*, 634 So. 2d 246 (Fla. 5th DCA 1994), review granted, Supreme Court Case No. 83,558 (1994)[See Appendix 3].

Timely Notice of Discretionary Review was filed by Petitioner [See Appendix 4].

SUMMARY OF ARGUMENT

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction over the instant case on three (3) separate grounds. First, the Fourth District Court of Appeal affirmed Petitioner's conviction on the authority of a case pending before this Court, *Bouters v. State*, Case No. 83,558 (Fla. June 21, 1994). Hence, discretionary jurisdiction is provided under the "citation PCA" rule. Second, the Fourth District, based on its two (2) cited opinions, expressly declared valid a Florida State Statute, § 784.048, *Fla. Stat.* (1993). And finally, based on the two opinions cited, the Fourth District *interpreted* the First and Fourteenth Amendments to the United States Constitution, which this Court has discretionary jurisdiction to review.

ARGUMENT

THE INSTANT OPINION AFFIRMING PETITIONER'S
CONVICTION FOR AGGRAVATED STALKING, IN
VIOLATION OF § 784.048, FLA. STAT. (1993)
EXPRESSLY DECLARES VALID A FLORIDA STATUTE AND
CITES TO A DECISION PRESENTLY PENDING FOR
REVIEW BEFORE THIS HONORABLE COURT.

The constitutionality of the Florida stalking statute, § 784.048, Fla. Stat. (1993) is now presently pending before this Court in *Bouters v. State*, 634 So. 2d 246 (Fla. 5th DCA 1994), review granted, Case No. 83,558 (Fla. June 21, 1994). Because the instant decision of the Fourth District is a "citation PCA," jurisdiction is established by reference to the cited case. See *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). In *Jollie*, this Court recognized that the "randomness of the District Court's processing" should not control a party's right to Supreme Court review. *Jollie*, 405 So. 2d at 421. Hence, this Honorable Court has discretionary jurisdiction to accept review of the instant case from the Fourth District because the cited authority, *Bouters*, is presently pending before this Court.

The Fourth District's decision, by reference to the two cited opinions, expressly declared *valid* a Florida state statute, § 784.048, Fla. Stat. (1993). This Court has the power to review a district court decision that declares a state statute valid. Article V, Section 3(b)(3), Florida Constitution (1980), which states: "[The Supreme Court] may review any decision of a district court of appeal that expressly declares valid a state statute." This is an independent basis of accepting discretionary jurisdiction over this cause.

A decision expressly construing a provision of the state or federal constitution is also subject of the discretionary review of this court. See Article V, Section 3(b)3), Florida Constitution (1980); Fla. R. App. P. 9.030(a)(2)(A)(ii). Here, the decision of the Fourth District by reference to the cited opinions of *Bouters* and *Pallas* expressly construed, explained or defined the disputed constitutional language of the First and the Fourteenth Amendments to the United States Constitution.

The importance of taking the instant case lies in the fact that Petitioner was convicted of violating an extremely vague and overbroad penal statute, § 784.048, Florida Statutes (1993). Said statute is unconstitutional on its face and as applied to Petitioner.

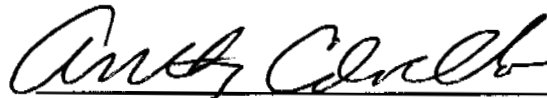
Therefore, on the basis of any and/or all three (3) grounds cited by Petitioner, this Honorable Court has discretionary jurisdiction over the instant case. Petitioner requests this Court to grant his petition for discretionary review, declare § 784.048 unconstitutional and vacate Petitioner's conviction for aggravated stalking.

CONCLUSION

Petitioner requests this Court to accept jurisdiction to review the merits of this case.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

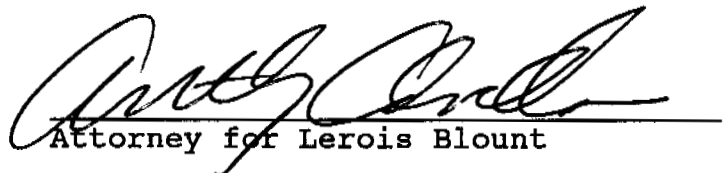


ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Lerois Blount

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 and by U.S. Mail to Michael Niemand, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, 33101, this 26th day of August, 1994.



Attorney for Lerois Blount

IN THE SUPREME COURT OF FLORIDA

LEROIS BLOUNT,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. _____
DCA CASE NO: 93-0461

A P P E N D I X

1. *Blount v. State*, Case No. 93-046
(Fla. 4th DCA August 24, 1994) 1
2. *Pallas v. State*, 636 So. 2d 1358
(Fla. 3d DCA 1994) 2-8
3. *Bouters v. State*, 634 So. 2d 246
(Fla. 5th DCA 1994),
review granted, No. 83,558 (Fla. June 21, 1994) 9-10
4. *Notice of Discretionary Review, Blount v. State*
Filed August 24, 1994 11

LEROI'S BLOUNT,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

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

CASE NO. 93-0461.

L.T. CASE NO. 92-404-CFA.

Opinion filed August 24, 1994

Appeal from the Circuit Court
for Okeechobee County; Edward A.
Miller, Judge.

Richard L. Jorandby, Public
Defender, Peggy Natale and Anthony
Calvello, Assistant Public Defenders,
West Palm Beach, for appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, Michael J.
Neimand, Assistant Attorney General,
Miami, Parker D. Thomson and Carol A.
Licko, Special Assistant Attorneys
General, Miami, and Joan Fowler,
Assistant Attorney General, West Palm
Beach, for appellee.

PER CURIAM.

AFFIRMED. See State v. Kahles, No. 93-0957 (Fla. 4th
DCA August 24, 1994); Pallas v. State, 636 So. 2d 1358 (Fla. 3d
DCA 1994); Bouters v. State, 634 So. 2d 246 (Fla. 5th DCA 1994),
review granted, No. 83,558 (Fla. June 21, 1994).

GUNTHER, WARNER and POLEN, JJ., concur.

John L. PALLAS, Appellant,

v.

The STATE of Florida, Appellee.

No. 93-1493.

District Court of Appeal of Florida,
Third District.

May 3, 1994.

Rehearing Denied June 14, 1994.

Defendant was convicted of aggravated stalking for making harassing and threatening telephone calls to in-laws pursuant to his plea of nolo contendere in the Circuit Court, Dade County, Leslie B. Rothenberg, J. Defendant appealed. The District Court of Appeal, Cope, J., held that: (1) statute defining offense of aggravated stalking was not unconstitutionally vague; (2) statute defining offense of aggravated stalking was not overbroad; and (3) defendant had no standing to challenge "follows" portion of statute on grounds of vagueness.

Affirmed.

1. Extortion and Threats ⇌25.1

Statute defining offense of aggravated stalking was not unconstitutionally vague so as to be void; statutory phrase "willfully, maliciously, and repeatedly" modified both "follows" and "harasses" so that language gave fair notice of proscribed activity. West's F.S.A. § 784.048(3).

2. Constitutional Law ⇌48(1)

Statute is accorded strong presumption of validity.

3. Extortion and Threats ⇌25.1

Statutory definition of "harasses," for purposes of statute defining offense of aggravated stalking, was not unconstitutionally vague so as to be void; statute did not create entirely subjective standard for substantial emotional distress but instead created reasonable person standard. West's F.S.A. § 784.048(1)(a).

4. Extortion and Threats ⇌25.1

Statute defining offense of aggravated stalking proscribes willful, malicious, and repeated acts of harassment which are directed at specific person, which serve no legitimate purpose, and which would cause substantial emotional distress in reasonable person. West's F.S.A. § 784.048(3).

5. Extortion and Threats ⇌25.1

Telephone calls made by defendant to wife's parents beginning at 7:00 in the morning and numbering 50 times or more in one day during which calls defendant screamed and cursed at wife's parents, threatened to "get them," told them he had gun, and was going to kill them fell squarely within ambit of statute defining offense of aggravated stalking as willful, malicious, and repeated acts of harassment which create substantial emotional distress in reasonable person. West's F.S.A. § 784.048(1)(a), (3).

6. Constitutional Law ⇌90.1(1)

Extortion and Threats ⇌25.1

Statute defining offense of aggravated stalking as willful, malicious, and repeated following or harassment of another person and making credible threats with intent to place person in reasonable fear of death or bodily injury was not unconstitutionally overbroad because harassing telephone calls that were basis of stalking charge involved speech, where statute required conduct of defendant to be willful, malicious, and repeated, to cause substantial emotional distress to reasonable person in position of victim, and to serve no legitimate purpose. West's F.S.A. § 784.048(1)(a-c), (3).

7. Constitutional Law ⇌42.1(3)

Defendant who was prosecuted under harassment plus threat portion of aggravated stalking statute did not have standing to challenge statutory term "follows" on grounds of vagueness. West's F.S.A. § 784.048(3).

8. Constitutional Law ⇌90.1(1)

Extortion and Threats ⇌25.1

"Follows" portion of aggravated stalking statute was not overbroad, where "follows" portion was directed primarily at conduct, not First Amendment expression. West's

F.S.A. § 784.048(3); U.S.C.A. Const.Amend. 1.

9. Statutes ⇨64(6)

Assuming that "follows" portion of aggravated stalking statute were constitutionally infirm, remedy would be to narrow construction of statute by invalidating "follows" portion but leaving remainder of statute intact. West's F.S.A. § 784.048(1)(a), (3).

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

Robert A. Butterworth, Atty. Gen., and Michael J. Neimand, Asst. Atty. Gen., and Parker D. Thomson, Sp. Asst. Atty. Gen., for appellee.

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

COPE, Judge.

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

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

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

On Sunday, January 24, 1993, the Defendant, soon to be the ex-husband of Edie Pallas, began calling the home of Penny and Harry Ragland, Edie's parents. The calls began at 7:00 A.M., waking Mr. & Mrs. Ragland and continued throughout

1. The trial court's order was cited with approval in *Bouters v. State*, 634 So.2d 246 (Fla. 5th DCA 1994).

the day, and numbering fifty times or more. Mr. & Mrs. Ragland were hiding their daughter, who was obtaining a divorce from the Defendant. The Defendant had beaten Edie and had broken her jaw during the course of the marriage. The calls were so continuous that the Raglands had to remove the phone from the hook several times during the day.

The Defendant demanded to know where Edie was. He screamed and cursed at the Raglands, he threatened to "get them," he told them he "had a gun" and "he was going to kill them." The Raglands, in fear for their lives, called the police.

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

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

§ 784.048(3), Fla.Stat. (Supp.1992).

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

The statute contains several definitions, as follows:

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

(b) "Course of conduct" means a pattern of conduct composed of a series of acts

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

over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

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

Id. § 784.048(1)(a)-(c).

[1] Defendant first contends that the statute is unconstitutionally vague.

[2] We begin with the proposition that the statute is accorded a strong presumption of validity. See *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); see also *State v. Stalder*, 630 So.2d 1072, 1076 (Fla. 1994); *State v. Elder*, 382 So.2d 687, 690 (Fla.1980). "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. National Dairy Products Corp.*, 372 U.S. at 32, 83 S.Ct. at 597 (citations omitted).

The Supreme Court has said, "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted). "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp.*, 372 U.S. at 33, 83 S.Ct. at 598 (citation omitted); see also *Parker v. Levy*, 417 U.S. 733, 757, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974); *Greenway v. State*, 413 So.2d 23, 24 (Fla.1982); *State v. Olson*, 586 So.2d 1239, 1242 (Fla. 1st DCA 1991).

Professor Tribe has summarized the applicable federal principles as follows:

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

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

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

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

Cite as 636 So.2d 1358 (Fla.App. 3 Dist. 1994)

[3] Defendant also argues that the statutory definition of "harasses," *id.* § 784.048(1)(a), is vague. Under the statute, "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." *Id.* Defendant reads the statute to create an entirely subjective standard for "substantial emotional distress." Thus, reasons defendant, if the victim is an unusually sensitive person the victim may suffer "substantial emotional distress" from entirely innocent social contact. Defendant contends that the statute creates a standard which is too vague and uncertain to be enforced.

[4] In our view the statute creates no such subjective standard, but in fact creates a "reasonable person" standard. The stalking statute bears a family resemblance to the assault statutes. See § 784.011(1), Fla.Stat. (1993) ("An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."); *id.* § 784.021 (aggravated assault).³ Under the assault statutes, it is settled that a "well-founded fear" is measured by a reasonable person standard, not a subjective standard. Indeed, "where the circumstances were such as to ordinarily induce fear in the mind of a reasonable man, then the victim may not be found to be in fear, and actual fear need not be strictly and precisely shown." *Gilbert v. State*, 347 So.2d 1087, 1088 (Fla. 3d DCA 1977) (citations omitted); *McClain v. State*, 383 So.2d 1146, 1147 (Fla. 4th DCA), *review denied*, 392 So.2d 1376 (Fla.1980). The same principle applies to the definition of "harasses" under the stalking statute; the legislature has proscribed willful, malicious, and repeated acts of harassment which are directed at a specific person, which serve no legitimate purpose, and which would cause substantial emotional distress in a reasonable person. See generally *State v. Elder*, 382

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

So.2d at 689 (upholding constitutionality of statute forbidding "the making of an anonymous telephone call with the intent to annoy, abuse, threaten, or harass the recipient of the call...").

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

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

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. In *Broadrick [v. Oklahoma]*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), we recognized that this rule reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, and prudential limitations on constitutional adjudication. In *United States v. Raines*, [362 U.S. 17, 21, 80 S.Ct. 519, [522], 4 L.Ed.2d 524 (1960)], we noted the "incontrovertible proposition" that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation[.]" By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment." This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervail-

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

ing policies." The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." *Broadrick*, 413 U.S., at 613, 93 S.Ct., at 2916. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.

New York v. Ferber, 458 U.S. 747, 767-69, 102 S.Ct. 3348, 3360-61, 73 L.Ed.2d 1113 (1982) (citations and footnotes omitted); see also *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla.1984).⁵

In *Broadrick v. Oklahoma*, the Court said:

Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.

1213 (1940), Jesse Cantwell, a Jehovah's Witness, was convicted of common-law breach of the peace for playing a phonograph record attacking the Catholic Church before two Catholic men on a New Haven street. The Court reversed the judgment affirming Cantwell's conviction, but only on the ground that his conduct, "considered in the light of the constitutional guarantees," could not be punished under "the common law offense in question." *Id.*, at 311, 60 S.Ct., at 906 (footnote omitted). The Court did not hold that the offense "known as breach of the peace" must fall *in toto* because it was capable of some unconstitutional applications, and, in fact, the Court seemingly envisioned its continued use against "a great variety of conduct destroying or menacing public order and tranquility." *Id.*, at 308, 60 S.Ct., at 905. Similarly, in reviewing the statutory breach-of-the-peace convictions involved in *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), and *Cox v. Louisiana, supra*, 379 U.S. [536], at 544-552, 85 S.Ct. [453], at 458-463 [, 13 L.Ed.2d 471], the Court considered in detail the State's evidence and in each case concluded that the conduct at issue could not itself be punished under a breach-of-the-peace statute. On that basis, the judgments affirming the convictions were reversed. Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. *Coates v. City of Cincinnati*, 402 U.S. 611, 617, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971) (opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the out-

5. "Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision, and a

vague law need not reach activity protected by the first amendment." Laurence H. Tribe, *supra* § 12-31, at 1033 (footnotes omitted).

set, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Cf. Alderman v. United States*, 394 U.S. 165, 174–175, 89 S.Ct. 961, 966–967, 22 L.Ed.2d 176 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

413 U.S. at 613–15, 93 S.Ct. at 2916–18 (citations and footnotes omitted).

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

In setting forth these examples, the defendant relies on the erroneous interpretation of the statute discussed earlier in this opinion. The conduct of the defendant must be willful, malicious, and repeated. § 784.048(3), Fla.

Stat. (Supp.1992). There must be a course of conduct which would cause substantial emotional distress to a reasonable person in the position of the victim. *Id.* § 784.048(1)(a). The conduct must serve no legitimate purpose. *Id.* Furthermore, the statute also provides, "Constitutionally protected activity is not included within the meaning of 'course of conduct.' Such constitutionally protected activity includes picketing or other organized protests." *Id.* § 784.048(1)(b). Finally, for aggravated stalking under subsection 784.048(3), there must also be a credible threat made with the intent to place the victim in reasonable fear of death or bodily injury. *Id.* § 784.048(1)(c), (3).

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

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

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

[7] Defendant also challenges the portion of subsection 784.048(3), Florida Statutes (Supp.1992), which punishes someone who "willfully, maliciously, and repeatedly follows ... another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury...." *Id.* Defendant was not prosecuted for following the victim. Instead he was prosecuted under the "harassment plus

threat" portion of the statute. In our view defendant is without standing to challenge the statutory term "follows" on grounds of vagueness. *Parker v. Levy*, 417 U.S. at 757, 94 S.Ct. at 2562; *Wells v. State*, 402 So.2d 402, 405 (Fla.1981).

[8, 9] For the same reason we doubt defendant's standing to raise an overbreadth challenge to the "follows" portion of the statute.⁶ Assuming arguendo that defendant may make an overbreadth challenge of the "follows" portion of the statute, we conclude that the statute is not overbroad. "Follows" is directed primarily at conduct, not First Amendment expression. This portion of the statute does not suffer from real and substantial overbreadth judged in relation to the statute's plainly legitimate sweep. See *Broadrick v. Oklahoma*, 413 U.S. at 615, 93 S.Ct. at 2917; *State v. Elder*, 382 So.2d at 690.

We reject the defendant's challenge to the constitutionality of subsection 784.048(3), Florida Statutes (Supp.1992). In so holding we concur with the Fifth District Court of Appeal. *Bouters v. State*, 634 So.2d 246 (Fla. 5th DCA 1994).

Affirmed.



6. In *Broadrick v. Oklahoma*, the overbreadth challenge was directed exclusively at subsections 6 and 7 of section 818 of Oklahoma's Merit System of Personnel Administration Act. 413 U.S. at 602-03 & n. 1, 93 S.Ct. at 2910-12 & n. 1. There, as here, the challenge was leveled at only the operative portions of the statute in question. "A litigant is not heard to urge the unconstitutionality of a statute who is not harmfully affected by the particular features of the statutes alleged to be in conflict with the constitution." *State ex rel. Hoffman v. Vocelle*, 159 Fla. 88, 98, 31 So.2d 52, 57 (1947).

Fredric M. BERNSTEIN,
Appellant/Cross-
Appellee,

v.

Richard C. TRUE, and Maureen
O'Sullivan, Appellees/Cross-
Appellants,

and

Charlie Luckie, Jr., as personal representative of the Estate of George Zicheck; Stephanie Zicheck, and Thomas F. True, III, Appellees.

No. 92-2168.

District Court of Appeal of Florida,
Fourth District.

May 4, 1994.

Rehearings Denied June 14, 1994.

Unsuccessful purchaser brought action against vendors, real estate broker, and trustees under land trust agreement entered into by purchaser after it entered into purchase agreement that ultimately fell through. The Circuit Court for Palm Beach County, John D. Wessel, J., directed verdict in favor of vendors, entered judgment notwithstanding the verdict in favor of broker, and entered judgment on verdict against trustees on fraud claim, although it refused to submit punitive damages question to jury. Parties appealed. The District Court of Appeal, Ramirez, Juan, Jr., Associate Judge, held that: (1) vendors did not breach implied covenant of good faith by negotiating another purchase agreement after purchaser breached his agreement; (2) vendors' negotiation of new agreement did not interfere with any viable

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

Municipal Corporations ⇨1040

Plaintiff's attorney fee award would be limited to 25% of judgment under sovereign immunity waiver statute, even though plaintiff was entitled to statutory attorney fees after defendant city rejected his settlement offer and ultimate judgment was at least 25% greater than the offer; government controls absolutely how much it will pay in tort claim cases. West's F.S.A. §§ 768.28(8), 768.79.

William W. Fernandez of the Law Offices of William W. Fernandez, Orlando, for appellant.

Edward L. Fagan of Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A., Orlando, for appellee.

DAUKSCH, Judge.

This is an appeal from an order awarding attorney's fees in a case where an offer of judgment was made, rejected, and the statutory attorney's fees became available. § 768.79, Fla.Stat.

When the appellant, plaintiff below, offered to settle his case he did so in accordance with the statute. When the defendant city rejected his offer it put itself in jeopardy of having to pay attorney fees if the ultimate judgment was at least 25% greater than the offer. That is what occurred here.

But the court did not give a full award of attorney's fees, it limited the amount to 25% of the judgment because the sovereign immunity waiver statute says that is the limit. § 768.28(8), Fla.Stat.

Because the government controls absolutely how much it will pay in tort claim cases, we are bound by the statute limiting the award of attorney's fees. Appellant's remedy is in the legislature, not the courts.

AFFIRMED.

W. SHARP and THOMPSON, JJ., concur.



Scott BOUTERS, Appellant,

v.

STATE of Florida, Appellee.

No. 93-504.

District Court of Appeal of Florida,
Fifth District.

March 25, 1994.

Defendant was charged with offense of aggravated stalking. Defendant moved to dismiss on ground statute was unconstitutional. The Circuit Court, Orange County, Richard F. Conrad, J., denied motion and appeal was taken. The District Court of Appeal held that: (1) statute was not facially vague or overbroad, and (2) assuming that word "harasses" as used in statute is vague, statute in its entirety rendered that particular phrase superfluous and hence harmless.

Affirmed.

Extortion and Threats ⇨25.1

Antistalking statute was constitutional, even though it contained definition of term "harasses" which was allegedly vague and served no legitimate purpose; statute, read in its entirety, rendered phrase in question superfluous, and hence harmless. West's F.S.A. § 784.048(1)(a), (3).

James B. Gibson, Public Defender, and S.C. Van Voorhees, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Michael J. Neimand, Asst. Atty. Gen., Parker D. Thomson, and Carol A. Licko, Sp. Asst. Attys. Gen., Miami, for appellee.

PER CURIAM.

The appellant, Scott Bouters, was charged with the offense of aggravated stalking pursuant to section 784.048(3), Florida Statutes (Supp.1992), known as the Florida Stalking

Cite as 634 So.2d 247 (Fla.App. 5 Dist. 1994)

Law. He moved to dismiss on the ground that such statute is facially unconstitutional because of vagueness and overbreadth. Following denial of that motion, he pled nolo contendere and then filed the instant appeal. Without belaboring the issue, we find the aforesaid statute to be facially constitutional, and basically agree with the analysis of that statute as found in *State v. Pallas*, 1 Fla.L.Weekly Supp. 442 (Fla. 11th Cir. June 9, 1993). In respect to the argument that the definition of the word "harasses" in subsection (1)(a) of the statute is vague because of the nonspecific term "serves no legitimate purpose," we agree with the analysis in *State v. Bossie*, 1 Fla.L.Weekly Supp. 465, 466 (Fla. Brevard County Ct. June 22, 1993), that the statute, read in its entirety, renders that particular phrase superfluous, hence, harmless.

AFFIRMED.

DAUKSCH, COBB and GRIFFIN, JJ.,
concur.



STATE of Florida, Appellant,

v.

Kurt GLOVER, Appellee.

No. 93-936.

District Court of Appeal of Florida,
Fifth District.

March 25, 1994.

Defendant pled guilty to attempted sexual battery, and below guidelines sentence involving community control was imposed by the Circuit Court, Orange County, John H. Adams, J. After defendant violated terms of community control, a second sentence was imposed, also below guidelines. Appeal was taken by the state. The District Court of Appeal, Goshorn, J., held that: (1) state's

original stipulation to a sentence below guidelines applied to second sentence imposed after defendant violated terms of first sentence, and (2) in imposing second sentence, court was required to give credit for time spent under community control pursuant to first sentence.

Reversed and remanded with directions.

Harris, C.J., concurred in part and dissented in part, and filed opinion.

1. Criminal Law \S 982.9(7)

State's prior stipulation to sentence which represented downward departure from sentencing guidelines was valid ground for supporting subsequent sentence below guidelines, entered after defendant violated terms of probation under first sentence. West's F.S.A. \S 948.06(1).

2. Criminal Law \S 982.9(7)

In imposing sentence for violation of terms of first sentence, trial court was required to give credit for time served on community control under first sentence. West's F.S.A. \S 948.01(4).

Robert A. Butterworth, Atty. Gen., Tallahassee, and Bonnie Jean Parrish, Asst. Atty. Gen., Daytona Beach, for appellant.

James B. Gibson, Public Defender, and Sean K. Ahmed, Asst. Public Defender, Daytona Beach, for appellee.

GOSHORN, Judge.

Kurt Glover was originally charged with three counts of capital sexual battery. Pursuant to a plea agreement, Glover was placed on community control and probation for two counts of attempted sexual battery. An affidavit was subsequently filed alleging defendant had violated the terms of his community control.

The court held a hearing on the violation and, after accepting testimony from various witnesses and argument from counsel, the trial judge found Glover guilty of the violation. The State requested that Glover be incarcerated. Glover requested that his orig-

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LEROIS BLOUNT,)
)
 Defendant/Petitioner,)
)
 v.)
)
 STATE OF FLORIDA)
)
 Respondent/Appellee.)
 _____)

CASE NO. 93-0461

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Lerois Blount, Defendant/Appellant/Petitioner, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered on August 24, 1994. The decision expressly construes a provision of the state or federal constitution and expressly declares valid a state statute. See Rule 9.030(a)(2)(a).

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender



ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
15th Judicial Circuit of Florida
9th Floor, Governmental Center
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Lerois Blount

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401 and by U.S. Mail to Stacey Pastel, Assistant Public Defender, 201 SE 6th Street, Room 730, Fort Lauderdale, FL 33301, and Michael Niemand, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue, N 921, Miami, FL 33128, this 24th day of August, 1994.


Attorney for Lerois Blount

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of these Appendices has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 and by U.S. Mail to Michael Niemand, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue, Miami, FL 33101, this 20th day of August, 1994.



ANTHONY CALVELLO
Assistant Public Defender