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IN THE SUPREME COURT OF FLORIDA

LEROIS BLOUNT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 84,315

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Okeechobee County, Florida and Respondent was the Appellee in the Fourth District and the Prosecution in the Nineteenth Judicial Circuit.

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

The following symbols will be used.

"R" = Record on Appeal.

"RB" = Respondent's Answer Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as found in his Initial Brief on the Merits.

ARGUMENT

POINT I

SECTION 784.048, *FLORIDA STATUTES* (1993) IS VOID FOR VAGUENESS.

A. VOID FOR VAGUENESS TEST

Respondent-State asks this Court to accept the Fourth District's "analytical framework" found in *State v. Kahles*, 19 Fla. L. Weekly D1778 (Fla. 4th DCA 1994), wherein said court quoted an "excerpt" from the United States Supreme Court decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186 (1982). RB 10. The fundamental problem with this request is that the "excerpt" relied upon by the Fourth District in *Kahles* is an incomplete statement of the applicable law.

The Sixth Circuit recently outlined the applicable law in *Springfield Armory, Inc. v. City of Columbus*, 29 F. 3d 250 (6th Cir. 1994)[See Appendix]:

> At times, the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982), but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application. *Kolender v. Lawson*, 461 U.S. 352, 358-59 n. 8, 103 S. Ct. 1855, 1859 n. 8, 75 L. Ed. 2d 903 (1983); *Colautti v. Franklin*, 439 U.S. 379, 394-401, 99 S. Ct. 675, 685-88, 58 L. Ed. 2d 596 (1979). "The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment." *Hoffman Estates*, 455 U.S. at

> 498, 102 S. Ct. at 1193. ***When criminal penalties are at stake,*** as they are in the present case, a relatively strict test is warranted. *Id.* at 499, 102 S. Ct. at 1193.

Id. at 252 [Emphasis Added]. See also *Brown v. State*, 629 So. 2d 841 (Fla. 1994).

The court in *Springfield Armory* applied this proper test in judging a city ordinance[1] that banned "assault weapons." The ordinance defines an "assault weapon" as any one of thirty four specific rifles, three specific shotguns and nine specific pistols, or "[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements...." The weapons are specified by brand name and model, not generically or by defined categories.

The Sixth Circuit held this "assault weapon" ordinance void for vagueness:

> In the present case, the ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer or the judge. The Columbus ordinance outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability. The ordinance does not achieve the stated purpose of the local legislature - to get assault weapons off the street. The ordinance purports to ban "assault weapons" but in fact it bans only a arbitrary and ill-defined subset of these weapons without providing any explanation for its selections.

Id. at 252.

Further, the *Springfield Armory* court made clear that the

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[1] *Columbus City Codes* § 2323.01(I).

district court erred in ***failing*** to consider the facial validity of this city ordinance. Instead, the district court examined only the question of whether this ordinance was vague as applied to a number of ***specific weapons***. The Sixth Circuit explained the fallacy of the lower court's restricted inquiry:

> The district court erred in failing to consider the facial validity of this ordinance and instead examined only the question of whether the ordinance was vague as applied to a number of specific weapons. In order to restrict its inquiry, the court relied on the Supreme Court's statement that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand," *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 714, 42 L. Ed. 2d 706 (1975). Nothing in *Mazurie* indicates that a facial challenge cannot succeed simply because constitutionally-protected activity is not imperiled. ***To the contrary, the Supreme Court has expressly stated that the question of whether or not a statute impinges on constitutionally-protected activity is but the first inquiry in a court's examination of a statute challenged on vagueness grounds.*** *Hoffman Estates*, 455 U.S. at 495, 102 S. Ct. at 1191. A court must also inquire whether the law has any valid application. *Id.* at 494-95, 102 S. Ct. at 1191-92. The district court never considered the question of ***whether or not a person of ordinary intelligence could make sense of this provision.*** Instead it requested that plaintiffs produce the "other firearms" which they believed might be covered and evaluated the ordinance as applied to those weapons. After conducting an evidentiary hearing, the court found the ordinance void as applied to certain firearms and valid as applied to others, with no consideration of the plaintiffs' facial challenge. This was an erroneous way to approach the vagueness problem in this case.
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> *Id.* at 254 [Emphasis Supplied].

B. EMOTIONAL DISTRESS - SUBJECTIVE OR OBJECTIVE TEST

Respondent-State in its Answer Brief (RB 12), citing *Pallas v. State*, 636 So. 2d 1358, 1361 (Fla. 3d DCA 1994), indicates that to violate the stalking statute, "there must be a course of conduct which would cause substantial emotional distress to a reasonable person in the position of the victim." RB 13.

Contrary to the Third District's decision in *Pallas*, there is absolutely no statutory support for the argument that the Florida Stalking Statute requires the perpetrator to engage in a course of conduct which would cause "substantial emotional distress to a reasonable person in the position of the victim." Compare *State v. Elder*, 382 So. 2d 687, 691 (Fla. 1980)(holding telephone harassment statute not overbroad ***because*** it contained requirements for improper intent and nonconsensual contact). The statute actually states the following in defining "harasses" under § 784.048(1)(a):

> (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."

§ 784.048(1)(a), *Fla. Stat.* [Emphasis Supplied].

It is readily apparent that the Third District in *Pallas* has engaged in "judicial drafting" to reach a conclusion unsupported by the wording of the statute. The deliberate omission of the word "reasonable" by the legislature as a modifier to the word "person" in the phrase "cause substantial emotional distress in such person" is a constitutionally fatal flaw in Florida's stalking statute.

Unlike California's and numerous other states' stalking statute, Florida's statute does not require that a defendant possess the intent to create fear in the victim. see generally James C. Wickens, *Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry*, 1994 Det. C.L. Rev. 157, 183 (1994). While the Florida Legislature may be free to amend the stalking statute and rectify this grievous constitutional flaw, the courts are not, because it is not a judicial function to write legislation. "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." *Brown v. State*, 629 So. 2d 841, 843 (Fla. 1994).

POINT II

SECTION 784.048 IS OVERBROAD.

Respondent seems to suggest that the overbreadth doctrine is inapplicable to the Florida Stalking Statute because "[s]talking, whether by word or deed, done with the specific intent to cause ***harm*** or ***threat*** to the victim is not protected by the First Amendment. The Stalking Statute regulates the conduct that causes threat or harm, not the content of a message that may accompany it." RB 14. The problem with this argument is two-fold.

Any overbreadth analysis begins with the determination of whether the challenged statute regulates protected or unprotected speech. An overbreadth challenge is triggered where a law is "susceptible of application to conduct protected by the First Amendment." *Southeastern Fisheries Association v. Department of Natural Resources*, 453 So. 2d 1351, 1353 (Fla. 1984). Both the Florida and U.S. Constitutions protect freedom of expression which includes "conducted intended to communicate." *Wyche v. State*, 619 So. 2d 231, 234 (Fla. 1993).

The Respondent-State's position that the stalking statute punishes only conduct does not avert an overbreadth challenge. See *Texas v. Johnson*, 491 U.S. 397 (1989)(burning U.S. flag is protected speech). See also *McCall v. State*, 354 So. 2d 869, 872 (Fla. 1978)(holding statute that made it illegal to upbraid, abuse or insult a teacher unconstitutional because it was not narrowly tailored to exclude constitutionally protected speech).

In a recent law review article, Robert N. Miller, *"Stalk*

Talk": A First Look at Anti-Stalking Legislation, 50 Wash. & Lee L. Rev. 1303, 1320 (1993), carefully articulated why this Honorable Court should find the Florida Stalking Statute potentially overbroad. Mr. Miller explained:

> Florida's stalking statute also is potentially overbroad. Like other courts, the Supreme Court of Florida has made a distinction between speech and conduct in its overbreadth analysis; statutes regulating conduct mist be "substantially overbroad" to be invalid. In reviewing overbreadth challenges to statutes prohibiting harassment and similar conduct, the Supreme court of Florida has favored narrowly tailored statutes with time, place, and manner restrictions that avoid bringing constitutionally protected activity within the scope of the statute's prohibitions. More importantly, the court also prefers statutes requiring an intent to harass by the defendant and a lack of consent by the victim.

50 Wash. & Lee L. Rev. at 1320 [footnotes omitted].

The stalking statute's lack of precise definitions of what conduct is prohibited renders it easily susceptible to application to protected speech and/or conduct. See, e.g, *Cox v. Louisiana*, 379 U.S. 536 (1965) (striking down statute due to failure to limit to unprotected expression); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (finding statute failed to provide objective standard of "annoy"). As this Court observed in *Wyche*, "[a]ll Florida citizens enjoy the inherent right to window shop, saunter down a sidewalk, and wave to friends and passersby with no fear of arrest." 619 So. 2d at 235. Under the stalking statute, if a citizen passes the same shop every day and looks in the window "willfully, maliciously and repeatedly," a law enforcement officer may arrest him or her

for stalking the store manager.

Although the statute excludes from its application "constitutionally protected activity [that] includes picketing or other organized protests,"[2] it is impermissibly overbroad because it "deters constitutionally protected conduct while purporting to criminalize [only] nonprotected activities." *Northern Va. Chapter, ACLU v. City of Alexandria*, 747 F. Supp. 324, 326 (E.D. Va. 1990). Where the legislature seeks to avoid the statute's application to constitutional activity, it must narrowly and expressly define the conduct it seeks to prohibit. See *NAACP v. Button*, 371 U.S. 415, 433 (1963). The legislature's failure to sufficiently define the elements of the offense results in the banning of First Amendment activity and impermissibly leaves the statute subject to "open-ended interpretation." *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987). In other words, the stalking statute in no way evinces a "considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society," *Broadrick v. Oklahoma*, 413 U.S. 608, 611-612, 93 S.Ct. 2908 (1973); see also *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (striking down statute having "broader sweep" than definition of "fighting words").

Further, Respondent-State's assumption that the Florida Stalking Statute's purported attempt to exclude constitutionally protected conduct somehow insulates this statute from an

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[2] Fla. Stat. § 784.048(1)(b).

overbreadth attack is without merit. RB 14. First, Respondent-State fails to recognize that the term "following" is not subject to the exclusion of constitutionally protected activity. Thus, the statute is easily susceptible to application to constitutionally protected conduct. *Cf. Wyche*, 619 So. 2d at 234 (freedom of expression includes freedom of movement). *Accord Northern Va. Chapter, ACLU*, 747 F. Supp. at 325 n. 2.

Secondly, Respondent-State fails to explain how the ***statutory*** definition of "stalking" excludes all protected conduct and speech. The definitions of "harasses" and "course of conduct" are what must place citizens on notice of proscribed conduct. The statute itself contains no exclusion of speech. *McCall v. State, supra* (statute unconstitutional that made it illegal to upbraid, abuse, or insult a teacher because it was not narrowly tailored to exclude constitutionally protected speech). And more importantly, who will decide what is "constitutionally protected conduct" prior to a defendant's arrest.

Finally, the State's contention that the statute reaches only unprotected conduct is wholly untenable. The State fails to recognize that the First Amendment provides protection to more than just speech. Because the statute is devoid of intelligible definitions, it is unconstitutionally vague and violates due process. This vagueness renders the statute substantially overbroad, threatening protected speech and conduct. The Florida Stalking Statute should be declared unconstitutional under the overbreadth doctrine. The statute purports to criminalize various

conduct which is protected by the First Amendment. As such, the Florida Stalking Statute is not only vague but it is overbroad.

POINT III

SECTION 784.048 VIOLATES SUBSTANTIVE DUE PROCESS OF LAW.

Petitioner relies on his argument as found in the Initial Brief on the Merits.

POINT IV

SECTION 784.048 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONER.

Petitioner relies on his argument as found in the Initial Brief on the Merits.

CONCLUSION

Based on the above-stated arguments and authorities and the arguments and authorities contained in Petitioner's Initial Brief on the Merits, this Court should reverse the trial court's and appellate court's findings that the Florida Stalking Statute, Section 784.048, is constitutional and declare said statute unconstitutional. Should this Court disagree with the above, then it should still find the statute vague as applied in Petitioner's case and vacate his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier and by U.S. Mail to Michael Niemand, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue, N 921, Miami, FL 33128, this 5th day of December, 1994.

Attorney for Lerois Blount