IN THE SUPREME COURT OF FLORIDA

VINCENT ANTHONY SAIYA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 84,412

# PETITIONER'S BRIEF ON THE MERITS

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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 Seventeenth Judicial Circuit, In and For Broward County, Florida and Respondent was the Appellee in the Fourth District and the Prosecution in the Seventeenth Judicial Circuit.

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

The symbol "R" will denote Record on Appeal.

The symbol "SR" will denote Supplemental Record on Appeal.

## STATEMENT OF THE CASE AND FACTS

The Petitioner, Vincent A. Saiya, was charged with one count of aggravated stalking in violation of § 784.048. *Florida Statutes* (1993). Petitioner filed a motion to dismiss this charge on the grounds that said statute is unconstitutional on its face. At the conclusion of the hearing, the court determined that it was necessary to review the facts of each of the five (5) cases individually to determine if the statute was indeed unconstitutional. TR 37.

The trial judge issued a written order denying Petitioner's motion to dismiss on August 5, 1993. Petitioner then pled nolo contendere to the charge of aggravated stalking on August 9, 1993, expressly reserving his right to appeal the denial of his motion to dismiss. He was placed on probation for three (3) years with special conditions. R 61-62.

A factual basis was stated for the trial court as follows, "Mr. Saiya, on January 15, [19]93, through February 9, [19]93, did willfully, maliciously, repeatedly follow, harass, did make credible threats with the intent to place Ms. Lipkowski in reasonable fear of death or bodily harm." SR 9. The Court found that this was a sufficient factual basis for his plea to the charge. Defense Counsel indicated earlier that no physical violence was involved in this case and that the charges stem from the disintegration of their romantic relationship. Petitioner followed Ms. Lipkowski and made numerous phone calls, and had other people watch her. Ms. Lipkowski felt comfortable leaving her

children with Petitioner. SR 4-5.

Notice of Appeal was filed the same day and this appeal follows.

The Fourth District in a written opinion rendered on September 9, 1994, *Saiya v. State*, 19 Fla. L. Weekly D1933 (4th DCA Sept. 9, 1994)[See Appendix 1], rejected Petitioner's numerous constitutional challenges to § 784.048 and affirmed his conviction for aggravated stalking on the authority of *State v. Kahles*, 19 Fla. L. Weekly D 1778 (Fla. 4th DCA August 24, 1994); *Blount v. State*, 19 Fla. L. Weekly D1790 (Fla. 4th DCA August 24, 1994); *Kostenski v. State*, 19 Fla. L. Weekly D1790 (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).

Timely Notice of Discretionary Review was filed by Petitioner to this Honorable Court [See Appendix 2].

## SUMMARY OF THE ARGUMENT

**POINT I**

Section 784.048, *Fla. Stat.* (1993) is unconstitutionally vague because it fails to warn a person of ordinary intelligence of what the offense is, what conduct is prohibited and what conduct is protected. The failure to sufficiently define the crime coupled with the provision for warrantless arrests invites arbitrary enforcement based not on clearly defined objective behavior but rather on the subjective view of any given police officer. Penal statutes which are vague because they fail to warn or are open to arbitrary enforcement violate due process of law.

**POINT II**

Section 784.048, the Florida Stalking Statute, is also overbroad. Though it purports to regulate "a course of conduct" that "conduct" may in fact be nothing more than protected speech. The First Amendment's free speech guarantee is therefore violated by Section 784.048.

**POINT III**

Finally, Section 784.048 violates substantive due process of law and should be declared unconstitutional on this alternative basis.

**POINT IV**

Section 784.048 is unconstitutional as applied to Petitioner. Should this court hold that the statute is ***not*** facially unconstitutional, then Petitioner submits that said statute is unconstitutional as applied to this cause.

## ARGUMENT

### POINT I

**SECTION 784.048, *Florida Statutes* (1993) IS VOID FOR VAGUENESS.**

Appellant was charged with aggravated stalking in violation of Section 784.048(4) *Fla. Stat.* (Supp. 1992). Said statute provides, in pertinent part:

> (4) Any person who, after an injunction for protection against repeat violence pursuant to s. 784.048, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree punishable as provided in s. 775.082, s. 775.083, or 775.084.

The Due Process Clauses of the United States and Florida Constitutions require a statute to (1) provide adequate notice to the public as to what conduct is proscribed, and (2) to set clear standards to limit law enforcement's discretion in effecting arrests to avoid arbitrary and discriminatory enforcement of the law. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 109-109 (1972); *Cuda v. State*, 639 So. 2d 22 (Fla. 1994); *Brown v. State*, 629 So. 2d 841 (Fla. 1994); *Linville v. State*, 359 So. 2d 450, 451-52 (Fla. 1978); *Springfield Armory, Inc. v. City of Columbus*, 29 F. 3d 250 (6th Cir. 1994). A law containing vague provisions which fail to meet either of these requirements violates due process. By enacting the

Florida Stalking Statute[1] described as the "toughest stalking law in the country,"[2] the Florida Legislature has created a broadly worded, fatally vague statute. Though a law targeting specific stalking behavior constitutes a legitimate exercise of legislative authority, the broadly worded provisions here do not capture the essence of stalking behavior; instead they result in vague prohibitions which are unconstitutionally susceptible to discriminatory and arbitrary enforcement while allowing some of the most dangerous offenders to escape the statute's reach.

*A. THE STATUTE FAILS TO SUFFICIENTLY DEFINE PROSCRIBED CONDUCT*

Where a statute contains "terms so vague that [people] of common intelligence must guess at its meaning and differ as to its application," the statute violates due process of law. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); see also *Linville*, 359 So. 2d at 451-52. Moreover, "important elements cannot be left to conjecture, or be supplied by either the court or the jury"; rather they must be clearly defined within the statute. *Connally*, 269 U.S. at 392. Here, the statute fails to define with sufficient certainty the elements of the offense of

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[1] Section 784.048(2), the misdemeanor stalking statute provision provides:

> Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor first degree, punishable as provides in s. 775.082 or s. 775.084

[2] Rosiland Resnick, *States Enact "Stalking" Laws*, Nat'l L.J., 27, May 11, 1992.

stalking so that citizens can understand at what point their behavior becomes criminal.

Stalking behavior usually involves harassing, obsessive or threatening behavior that includes repeatedly following a person, surveillance, appearing at a person's home or office, making harassing telephone calls, threatening that person or an immediate family member, leaving threatening messages, harming a pet or vandalizing property. See generally, K. Thomas, *Anti-Stalking Statutes: Background and Constitutional Analysis*, 2 CRS Report for Congress (September 26, 1992) (hereinafter "Anti-Stalking Statutes"). Neither Section 784.048 nor the legislative history describe as stalking this type of conduct; rather, the statute prohibits "following" and "harassing," failing to define, or defining too broadly, the elements of the offense.

1. *"Follows" is not statutorily defined, does not fall within the exclusion for protected activity, and fails to place citizens on notice of what conduct is proscribed.*

The stalking statute criminalizes the behavior of willfully maliciously and repeatedly following another person even if the following does not threaten another. § 784.048(2), *Fla. Stat.*; see *Anti-Stalking Statutes, supra*. The statute provides no definition to indicate "how far, or how often, or in what context such a following is prohibited." *Id.* at 9. In fact, the law fails to reveal whether a victim need even be aware that one is being followed. *Id.* at 7, n. 29; *see* Note, *The Nature and Constitutionality of Stalking Laws*, 46 Vand. L. Rev. 991, 1004 (1993); *See also generally* Wickers, James C., *Michigan's New Anti-*

*Stalking Laws: Good Intentions Gone Awry*, 1994 Det. C.L. Rev. 157 (1994). Additionally, the provision exempting constitutionally protected activity from the statute's reach does not include following. The combination of failing to provide notice to citizens as what specific "following" is proscribed and the ability of law enforcement to make arrests based upon this ill-defined statute violates due process. *Kolender v. Lawson, supra; see also* 46 Vand. L. Rev. at 1017.

2. *"Harasses" is too broadly defined within the statute to provide notice of prohibited conduct.*

Similarly, the statute subjects to criminal prosecution anyone who "wilfully, maliciously, and repeatedly...harasses another person." The statute provides the following definition for "harasses":

> (a) *"Harasses"* means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.
>
> (b) *"Course of conduct"* means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

§ 784.048(1)(a), (b), *Fla. Stat.* (Supp. 1992). The course of conduct defined in the statute includes no substantive description of what is proscribed. Moreover, the statute provides no standard of harm by which a defendant may measure one's actions. Again, the statute fails to define what constitutes "substantial emotional

distress" and how it is measured. Instead, the statute purports to criminalize communicative conduct based upon its emotional effect on the state of mind of the person to whom it is directed. The statute provides no guidance as to how either a citizen or a police officer decides whether a course of conduct serves a "legitimate purpose."

3. *The statute fails to define the phrase "substantial emotional distress" and provides no standard of harm by which citizens may measure their conduct or speech.*

This absence of definition within the statute contributes to the statute's vagueness. This becomes critical considering that criminal liability is predicated on a ***"victim's"*** substantial emotional distress regardless of whether the defendant intended to cause such a reaction. The presence of substantial emotional distress in and of itself makes otherwise innocent behavior criminal under the statute. Accordingly, the state cannot argue that an intent requirement narrows the definitions within the statute. Not only are ordinary citizens unlikely to comprehend what constitutes substantial emotional distress; police officers too must make that distinction in determining whether probable cause exists for an arrest. This utter failure to place citizens on notice as to an element of the offense of stalking and to provide law enforcement with clear standards to govern enforcement violates due process. *Grayned*, 408 U.S. at 102; *Linville*, 359 So. 2d at 450.

The statute's failure to include a standard of harm contributes greatly to the vagueness of "substantial emotional

distress." The lack of definitions within the statute combined with the lack of any standard to determine harm leaves citizens to guess not only what conduct is prohibited, but what level of distress must be caused before the statute is invoked. Other states' stalking statutes include a ***reasonable person*** standard to determine harm or a requirement that the person's distress is "reasonable."[3] By contrast, the Florida Stalking Statute provides no guidance as to how citizens, police or courts must measure substantial emotional distress. Neither the statute nor the legislative history reveal what, if any, standard the legislature intended to apply in determining the existence of this amorphous "substantial emotional distress." Rather, a vague, subjective, idiosyncratic standardless concept is in place.

4. *The phrase "no legitimate purpose" injects into the statute more uncertainty and discretion.*

The danger of the phrase "serves no legitimate purpose" is revealed in courts' concerns that such a subjective standard leads to arbitrary and discriminatory enforcement of the law. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *City of Everett v. Moore*, 37 Wash. App. 862, 683 P.2d 617 (Wash. Ct. App. 1984). The Florida Supreme Court has also recognized the

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[3] See, e.g., *Cal. Pen. Code* § 646.9(d) (course of conduct must cause reasonable person substantial emotional distress and cause victim to suffer the same); *Tenn. Code Ann.* § 39-17.315 (Michie 1992) (requires defendant to know that reasonable person would suffer substantial emotional distress as a result of harassment); *Va. Code Ann.* § 18.2-60.3(A) (Michie Supp. 1993) (requires intent to cause emotional distress to another by placing person in reasonable fear of death or bodily injury); *S.D. Cod. Laws Ann.* § 22-19A-1 (Michie Supp. 1993) (same).

danger of such a subjective standard. In *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992), the state prosecuted parents' reliance on spiritual healing, claiming that they were not "legitimately" practicing their religion. *Id.* at 775. The court struck down the child abuse statute under which they were prosecuted, reasoning, that the statute violated due process because it failed to "clearly indicate when...conduct becomes criminal." *Id.* at 782. *See also K.L.J. v. State*, 581 So. 2d 920, 921 (Fla. 1st DCA 1991) (Jacksonville curfew ordinance declared unconstitutional even though it contained "legitimate business" exception).

Section 784.048 provides no standards for what constitutes "legitimate purpose." Nor does the statute reveal who determines whether a legitimate purpose is demonstrated. To allow law enforcement to make that determination expressly invites arbitrary and discriminatory application of the statute. Because the stalking statute suffers from vague, unintelligible definitions, the injection of a subjective standard to determine legitimacy of purpose renders the statute unequivocally unconstitutional.

B. *Arbitrary Enforcement*

In *Kolender v. Lawson, supra,* the U.S. Supreme Court emphasized that under the vagueness doctrine, a statute requires notice to citizens ***and*** must prevent discriminatory enforcement, but the latter purpose is more important.

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in

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

*Id.* at 357-358; 103 S. Ct. at 1858 (citations omitted).

This court has also emphasized this component of the vagueness doctrine to prevent selective prosecution.

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

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

The inherent vagueness of the stalking statute and the warrantless arrest provision leave the statute open to arbitrary and discriminatory enforcement. Because probable cause will be based upon unconstitutionally vague and broad elements, an officer's own opinion concerning whether a defendant has acted "willfully," "maliciously," and "repeatedly," and has caused another person "extreme emotional distress" (regardless of the defendant's intent), and whether the defendant's actions were

accompanied by an undefined "legitimate purpose" rather than clearly defined elements will govern whether that officer will make a warrantless arrest. "Probable cause" leading to arrest based upon such undefined/undefinable elements cannot be consistent with due process. *Grayned*, 408 U.S. at 109.

There are at least three equally plausible ways to interpret this section, each with distinct and difference meanings, rendering the statute subject to selective enforcement.

The placement of the words willfully, maliciously, and repeatedly is ambiguous because it is ***impossible*** to know whether one needs to be willfully and maliciously harassing someone to commit stalking or if someone who is not willful or malicious, yet who's actions are repeatedly harassing commits the offense. This ambiguity clearly makes the statute vague, and it should be declared void.

To illustrate the ambiguity, here are three sentences, each constructionally unambiguous; yet, under the current statute, each is an equally plausible interpretation as to what constitutes stalking. Using the exact words of the statute, the statute could be read:

> 1. Any person who willfully, maliciously, and repeatedly:
>
> 1) follows or,
> 2) harasses
>
> another person commits...
>
> 2. Any person who
>
> 1) willfully, maliciously, and repeatedly follows, or

2) harasses

another person commits...

3. Any person who willfully, maliciously, and

1) repeatedly follows, or
2) harasses

another person commits...

Further, there is no scienter element in regards to "harasses" in example 2. The problem of dealing with a poorly constructed sentence is similarly exemplified in *McCall v. State*, 354 So. 2d 869 (Fla. 1978), wherein this Court invalidated a state statute restricting the use of abusive language. The statute, § 231.07, *Fla. Stat.* (1977), stated, in pertinent part:

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

This Court rejected the state's contention that the first part of the statute related to speech which was disruptive of school functions, and thus constitutional. This Court refused to read the two (2) disjunctive sections together asserting that:

> This portion of the statute is joined to the remaining portions by the disjunctive "or" and must therefore be treated separately.

*Id.* at 872, n.3.

It is, therefore, unclear under the Florida Stalking Statute whether the disjunctive separating "follows" and "harasses"

signifies that the modifying adverbs only apply to the verb which they immediately precede.

This sentence-structure ambiguity has far-reaching problems, one of which is in the question of *mens rea*. As noted above, example two takes all the scienter element out of the word "harasses."

In *Linehan v. State*, 442 So. 2d 244 (Fla. 2d DCA 1983), the appellate court was faced with deciding whether the arson statute was a specific or general intent crime. From the Second District's opinion, it would be logical to argue that "willfully" combined with "maliciously" equals a specific intent crime. The Second District's opinion, however, was modified by this Court in *Linehan v. State*, 476 So. 2d 1262 (Fla. 1985). Although the Supreme Court agreed with the Second District that arson was a general intent crime, it took great pains to state that it had ***always*** been a general intent crime - despite the use of malicious in combination with willful in earlier definitions. This Court explained:

> Petitioner argues that the words "willfully and unlawfully" are words of specific intent and, therefore, that voluntary intoxication should be a valid defense to arson. We disagree. Arson was a general intent crime under the common law. See Burdick, The Law of Crime § 692 (1946). At common law, arson was defined as "the wilful and malicious burning of a dwelling house, or outhouse within the curtilage of a dwelling of another." *Duke v. State*, 132 Fla. 865, 870, 185 So. 422, 425 (1938). See also *Sawyer v. State*, 100 Fla. 1603, 132 So. 188 (1931); *Williams v. State*, 100 Fla. 1054, 132 So. 186 (1930). Under this definition, a specific intent to burn is not required. See *Dorroh v. State*, 229 Miss. 315,

> 90 So.2d 653 (1956); *Crow v. State*, 136 Tenn. 333, 189 S.W. 687 (1916). We find that the present statutory definition or arson does not materially vary from the common law definition with regard to the requisite intent. There is no indication that the legislature intended to change the common law intent requirement. Accordingly, we hold that arson under Section 806.01 is a general intent crime and, therefore, voluntary intoxication is not available as a defense to arson.
>
> *Id.* at 1264, 1265.

Based on this Court's decision in *Linehan*, it would appear that the word "maliciously" does nothing to add to the *mens rea* of the Florida stalking statute; and the statute is - at the most - a general intent crime. Thus, any possible claim by Respondent-State that a heightened *mens rea* element saves this vague criminal statute must fail.

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

It seems likely that the definition for "harasses" was taken from Title 18, United States Code, Section 1514, which (as a civil action) allows the United States government to obtain an injunction to prohibit the "harassment" of a Federal witness. There, the

definition of the term "harassment" was to be used to allow the government to obtain an injunction and was not used to define a crime. However, in the criminal context, as defined in Section 784.048(1), *Fla. Stat.* (Supp. 1992), the term is so poorly defined as to be vague in the constitutional sense.

Take the following concept under the statute: "...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 or extremely sensitive 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. This is a major failing in the Florida Statute. The court and citizens at large are not given guidance as to where such definitions should be found. The lack of definition of these terms in conjunction with the lack of an objective standard or specific prohibitive acts leaves the ordinary citizen to guess not only what acts constitute "stalking" but what level of distress must be reached before the statute may be invoked.

California, for example, which apparently promulgated the first "stalking statute," in pertinent part, defines misdemeanor stalking as:

> (a)ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in ***reasonable*** fear of death or great bodily injury or to place that person in reasonable fear of the death or great bodily injury of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment. [*California Penal Code* § 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 Statutes* § 18-7905(a), as added by 1992, ch. 227, s.1, page 677; *Kentucky Statutes* § 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. *Hawaii 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 apparent that the 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 in Florida's stalking statute. 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. In addition, 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 state and because law enforcement officers are the initial arbiters of the statute.

As noted above, "substantial emotional distress" was not defined by the legislature. Florida's courts and citizens are not given guidance as to where such definitions should be found (e.g.

Black's Law Dictionary, Webster's Collegiate Dictionary, tort law, etc., etc.). The lack of definitions of these terms in conjunction with the lack of an objective standard or specific prohibitive acts leaves the ordinary citizen to guess not only what acts constitute "stalking" but what level of distress must be caused before the statute is invoked.

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

The Court in *People v. Norman*, 703 P. 2d 1261 at 1267 (Colo. 1985), ruled that the phrase "no legitimate purpose" had no defined

meaning under the statute and *no* objective meaning outside of the statute; thus, the statutory language invited subjective evaluations of what behavior was prohibited by law. See also *K.L.J. v. State*, 581 So. 2d 920, 921 (Fla. 1st DCA 1991) (Jacksonville curfew ordinance declared unconstitutional even though it contained "legitimate business" exception). Judge Maloney in *Wallace v. State*, No. 93-087 CF (Fla. 10th Cir. May 19, 1993), found the decision in *Norman* compelling and cited it in holding that the Florida Stalking Statute was unconstitutional.

It is to be noted that the decision in *Norman* was revisited in Colorado in deciding the unconstitutionality of an ordinance on harassment. In *People v. Gomez*, 843 P.2d 1321 (Colo. 1993), the defendant mailed a ten-page letter to his former wife replete with profanity and negative assessments of her character and conduct. A police officer filed a complaint charging the defendant with violation of the Longmont harassment ordinance.[4] The Colorado

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

> Harassment. A. A person commits harassment if, with intent to harass, threaten or abuse another person he:
>
> 1. Strikes, shoves, kicks or otherwise touches a person, or subjects him to physical contact; or
>
> 2. In public place, directs obscene language or makes an obscene gesture to or at another person in such manner as is likely to create an immediate breach of the peace; or
>
> 3. Follows a person in or about a public place; or

Supreme Court held that the provision of this harassment ordinance, subsection (A)(5) was unconstitutionally vague under the due process clause of the State constitution. The Court explained:

> Subsection (A)(5) of the Longmont ordinance prohibits all conduct not previously defined therein intended to harass, threaten or abuse another that in fact produces certain results. The subsection does not in any manner limit the vast range of activity to which it refers. As in *Norman*, the requirement of a particular mental state does not sufficiently limit the broad sweep of this subsection. Because a person of ordinary intelligence cannot determine in advance whether particular conduct would result in criminal prosecution under subsection (A)(5) of the Longmont ordinance, that subsection violates the notion of fundamental fairness embodied in the due process clause of the Colorado Constitution.

*Id.* at 1326.

The list of vague terms in this statute goes on and 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 "reasonable" person, this

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> 4. Repeatedly insults, taunts or challenges another in a manner likely to provoke an immediate violent or disorderly response;
>
> 5. Engages in any other conduct that in fact harasses, threatens or abuses another person.

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 may be).

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, objective 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" 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 is a law enforcement officer, then it is a judge or is it the jury? If it is 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?

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 vague terms, therefore, will result in discriminatory, arbitrary enforcement; for the legislature has failed to set forth minimal guidelines to govern law enforcement. This failure makes the statute unconstitutionally vague.

Also undefined is the term "repeatedly." The statute is not only vague on the type of behavior that is prohibited but the number or duration of the acts required. The statute provides:

> Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking....

The Webster's Collegiate Dictionary defines the word "repeatedly" as: "said, made, done, or happening again and again."

The citizen, therefore, is not informed as to when a "course of conduct" crosses the line delineating the scope of illegal conduct. See *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992). Because Section 784.048(2) defines one form of stalking as a "knowing and willful course of conduct by any person who willfully, maliciously, and repeatedly follows" (another person), it is conceivable that television and newspaper reporters who carry out their professions repeatedly run afoul of this statute as well as other citizens whose behavior were not intended to be regulated by this statute. Surely the legislature did not intend to criminally penalize all conduct occurring once more. This could mean as little as twice. For example, honking a horn twice at the car in front of you in a traffic jam where the driver of the car cannot move and when the honking causes the driver in front "substantial emotional distress" could arguably result in criminal behavior. It is unclear whether honking twice would be a violation or whether one would have to honk 50 times for the crime to result.

In *State v. Knodel*, 1 Fla. Law Weekly Supp. 542 (Fla. Escambia Cty. Ct. Sept. 2, 1993), the court declared that the stalking statute was unconstitutionally vague with respect to the term "follows," but held that the use of "harassment" was sound.[5] The court, without explanation, also concluded that the words

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[5] Confusion in the lower courts about the constitutionality of a statute is itself evidence that the law is unconstitutionally vague. *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). This confusion is further exemplified by lower court decisions rendered in *Wallace* and *State v. Kahles*, 19 Fla. L. Weekly D 1778 (Fla. 4th DCA August 24, 1994).

"willfully, maliciously, and repeatedly" modify both "follows" and "harasses." The primary reason for the court's finding that the statute's use of "follows" was vague is that the legislature set no spatiotemporal boundaries to limit the term's application: "and so one might, for example, question whether the statute prohibits 'following' another into the same area of town one, two or twenty four hours later." *Id.* at 543. What the court did not consider, however, is that this temporal indefiniteness applies to "course of conduct," as used in the definition of "harasses," which involves an unspecified series of acts occurring within any time period. Albeit the drafters devoted a few extra sentences to the definition of "harasses," they failed to provide a frame of reference so that an individual could reasonably predict what sorts of acts are prohibited.

The ultimate conclusion to be drawn from all of the above noted vague terms and subjective standards used in the anti-stalking statute is that the statute fails to warn a citizen of ordinary intelligence what conduct constitutes a crime under this statute and fails to provide minimal guidelines to law enforcement, prosecutors, judges, and juries so as to prevent selective, discriminatory enforcement. Many trial court judges have come to the conclusion when faced with having to deal with the Florida Stalking Statute that it is unconstitutionally vague: Judge White in *Knodel* (as to the term "following" only), Judge Maloney in *Wallace*, Judge Wright in *Kahles*. *But see Pallas v. State, supra; Bouters v. State, supra.*

Recently, this Court was faced with trying to determine the legal meaning of just one simple phrase - "public housing facility." Although the concept sounded easy enough and at least two District Court of Appeals (the First and Third) had no problems with the meaning of the phrase, the Second District in *State v. Thomas*, 616 So.2d 1198 (Fla. 2d DCA 1993), and ultimately this Court in *Brown v. State*, 629 So. 2d 841 (Fla. 1994), did have problems with defining this phrase. This Court held that the phrase was vague and the statute was void for vagueness. In so holding, this Court stated:

> We find no need to resort to dictionaries or to present a parade of hypothetical horribles in reaching our conclusion that Section 893.13(1)(i) is void for vagueness. The statute presents a due process problem because the phrase "public housing facility" gives virtually no notice to Florida citizens of the type of conduct banned. Art. I, § 9, Fla. Const. No matter what goals the Legislature had in mind when enacting Section 893.13(1)(i), statutes nonetheless ***must include sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions.*** When the Legislature fails to provide guidelines, this Court cannot step in and guess about legislative intent. Such a practice would constitute judicial legislating, a practice neither our Constitution nor this Court allows. Art. II, § 3, Fla. Const.; *Brown v. State*, 358 So. 2d 16 (Fla. 1978). The precision required of statutes must come from the Legislature.
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> *Id.* at 843 [Emphasis Added].

The identical problems exist with the Florida Stalking Statute.

James C. Wickers in his recent article, *Comment: Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry*, 1994 Det. C.L.

Rev. 157 (1994), detailed a number of proposed changes to Michigan's Stalking Statute "to cure the overbreadth and vagueness flaws of Michigan's stalking laws." He further noted: "Proponents of the current law will argue that such changes will render the statute less effective against some types of stalkers, especially delusional lovers. The point must be conceded; however, as the laws currently exist, they are unconstitutional and therefore offer no protection." *Id.* at 208.

Section 784.048, Florida's Stalking Statute, suffers from the same overbreadth and vagueness flaws outlined by Mr. Wickers in his excellent law review article. After all the dictionary definitions and hypothetical scenarios have been scrutinized, the ultimate conclusion remains that Section 784.048 is void for vagueness because the Florida Legislature failed to provide essential guidelines to put the citizens of Florida on notice and to provide guidelines for law enforcement and the courts on enforcing this vague and ambiguous law. See *Kolender v. Lawson, supra*. The courts of our state cannot step in and rewrite the statute to cure the problems inherent in this statute; thus, the statute should be found void for vagueness and declared unconstitutional on its face.

## POINT II

## SECTION 784.048 IS OVERBROAD.

The Florida Stalking Statute regulates speech and conduct which are protected by the guarantees of the First Amendment. The First Amendment and Article I, Section 3 and 4 of the Florida Constitution impose limitations upon governmental abridgement of freedom to associate and privacy in one's associations. *NAACP v. State of Alabama*, 357 U.S. 449, 462, 78 S. Ct. 1163 (1958); *Katz v. United States*, 389 U.S. 347 (1967); *See also* Article I, Section 23, Fla. Const. (Right of Privacy).

The overbreadth doctrine is separate and distinct from the vagueness doctrine. An overbreadth challenge is triggered where a law is susceptible of application to conduct protected by the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Southeastern Fisheries Assn' Inc. v. Department of Nat. Resources*, 453 So. 2d 1351, 1353 (Fla. 1984) (citations omitted). Both the First Amendment and the Florida Constitution[6] protect freedom of expression, which includes "conduct intended to communicate." *Wyche v. State*, 619 So. 2d 231, 234 (Fla. 1993)(citations omitted). In *Spears v. State*, 337 So. 2d 977, 980 (Fla. 1976), the Florida Supreme Court articulated the danger of failing to delineate between protected and unprotected expression:

> Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising [the] right of free speech. If this possibility were the only evil of over-

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[6] Art. I, § 4, Fla. Const. (1968).

> broad statutes, it might suffice to review convictions on a case by case basis. But the mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

A defendant may challenge on First Amendment grounds a statute capable of being constitutionally applied in that defendant's case if the law in its present form "would tend to suppress constitutionally protected activity." *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S. Ct. 1103 (1972) (citation omitted). The Supreme Court has permitted facial challenges to statutes that seek to regulate "only spoken words," or that might burden "innocent associations," or that might create prior restraints on speech based upon "delegated standardless discretionary power" provided to local functionaries. *Broadrick*, 413 U.S. at 612-613. The court has also countenanced facial challenges where a statute "threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokana Arcades, Inc.*, 472 U.S. 491, 503 (1985); *see also Wyche*, 619 So. 2d at 235.

The U.S. Supreme Court demands a higher standard of precision in drafting legislation affecting individual rights because citizens will ""steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.'" *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S.

489, 494 n.6, 102 S. Ct. 1186, 71 L. Ed. 2d 362, 369 (1982) [quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)].

The constitutionally protected conduct here is the freedom to associate and privacy in one's association. The criminalization of "following," an alternative means of violating the stalking statute, without touching or harassing said person violates one's right to associate and privacy in a citizen's choice of association. The First District in *W.J.W. v. State*, 356 So. 2d 48, 50 (Fla. 1st DCA 1978), struck down a city curfew ordinance because it infringed on basic constitutional rights including the freedom of speech and association.

More recently in *Wyche v. State*, 619 So. 2d 231 (1993), a Tampa loitering for prostitution ordinance was determined to be unconstitutionally overbroad and vague by this Court. Despite the detailed language of the ordinance, the statute was flawed in that it encompassed innocent conduct. This Court's finding of overbreadth was supported by the fact that the ordinance did not require *mens rea* as an element of the offense. For example, if an individual who had been recently arrested for prostitution exhibited the behavior outlined in the ordinance, yet lacked the intent to commit prostitution, they would be subject to prosecution, unless they could convince a police officer that their conduct had a *legitimate purpose*.

Similarly, for the statute at bar, a person lacking intent to "harass" (whatever that legally/criminally means) would be subject to prosecution unless that person could convince a police officer

that the conduct in question had a "legitimate purpose" as required under Section 784.048(1)(a), *Fla. Stat.* (Supp. 1992).

However, the "legitimate purpose" phrase fails to insulate the statute from violating basic First Amendment freedoms.

In *K.L.J. v. State, supra*, the First District declared a city curfew ordinance unconstitutional even though it contained a "legitimate business" exception which the court found to be virtually meaningless. The First District explained:

> A New Jersey court in *Allen v. City of Bordentown, supra*, interpreted an ordinance which, like Jacksonville's, provided for an exemption for minors on "legitimate business." That court found the term "legitimate business" did not provide sufficient guidance to parties as to what conduct was prohibited.
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> > The word "legitimate" is not defined. Does it mean business permitted by law? Is business "legitimate" because the minor so believes? Who is to say what is "legitimate business"? Again, his definition will be supplied on a subjective basis permitting the discriminatory enforcement of the ordinance.
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> *Id.*, 524 A. 2d at 482. The New Jersey court found the Bordentown ordinance to be both vague and overbroad.
>
> The Jacksonville ordinance suffers from the same infirmities as the Bordentown ordinance. The trial court's construction of the term "legitimate business" as "legitimate purpose" does nothing to cure the defects concerning vagueness identified by the New Jersey court in *Allen*. The ordinance may also be applied in a manner which would infringe on the basic rights guaranteed by the United States and Florida Constitutions as identified in *W.J.W. v. State, supra*. We, therefore, determine that the Jacksonville ordinance is both unconstitutionally vague and overbroad.

*Id.*, at 922.

Further, the stalking statute does not sufficiently define or enumerate the "constitutionally protected activity" that is exempted from the statute. This glaring deficiency leaves an ordinary citizen to either guess at what is exempt and protected or become a constitutional scholar. Likewise, the police officer called to the scene must not only be a psychologist to gauge the "severe emotional distress" of the complainant but determine on the spot what activity is "constitutionally protected" and thus not proscribed by the stalking statute. This is an extremely difficult undertaking in the abstract and all but impossible in reality. This results in a chilling of First Amendment freedoms of speech and conduct. Statutes regulating speech must "punish only unprotected speech and not be susceptible to application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 1106 (1972). Where a penal statute "is susceptible of application to protected speech...it is constitutionally overbroad and therefore facially invalid." *Lewis v. New Orleans*, 415 U.S. 130, 134, 94. S.Ct. 970 (1974).

Judge Maloney, the lower court judge in *State v. Wallace*[7], held the anti-stalking statute to both unconstitutionally vague and overbroad. In discussing the overbreadth of the statute, Judge Maloney said:

> Third, in defining "harasses" the legislature used the phrase "course of conduct" and went

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[7] Pending before the Second District Court of Appeal in DCA Case No. 93-1905.

on to define "course of conduct" in subsection 1(b), to mean the following:

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

It is one thing to say that constitutionally protected activity cannot be the basis for an arrest under this statute, but it is quite another thing to expect the ordinary citizen or the police to know what activities are constitutionally protected. The failure to define or list the exempted "constitutionally protected activities" requires the citizen or police officer to think twice before saying or doing something which may or may not be a crime depending upon a judge's later decision that the activity was or was not constitutionally protected. As such, the statute is not only vague, but it is overbroad.

The Florida Stalking Statute should be alternatively declared unconstitutional under the overbreadth doctrine. The statute purports to criminalize conduct which is clearly protected by the First Amendment.

## POINT III

**SECTION 784.048 VIOLATES SUBSTANTIVE DUE PROCESS OF LAW.**

The Florida Stalking Statute should also be declared unconstitutional on the related basis that it violates substantive due process under Article I, Section 9, *Florida Constitution*. The state's "police power" to enact laws for the protection of its citizens is confined to those acts which may be reasonably construed as expedient for the protection of the public health, safety, welfare and morals. *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986). A law violates substantive due process when it "unjustifiably transgresses the fundamental restrictions on the power of government to intrude upon individual rights and liberties." *State v. Walker*, 444 So. 2d 1137, 1138 (Fla. 2d DCA), *adopted*, 461 So. 2d 108 (Fla. 1984). As the Florida Supreme Court clarified in *Wyche*, substantive due process is violated where a law "may be used to punish entirely innocent activities." 619 So. 2d at 237 (citations omitted).

In *Saiez*, the Supreme Court invalidated a statute which prohibited possession of credit card embossing machines. Though the statute was legitimately directed toward curtailing credit card fraud, the court found that prohibiting possession of the machines did not bear a rational relationship to that goal. The court explained that criminalizing the mere possession of the machines interfered with "the legitimate personal and property rights of a number of individuals who use [them] for non-criminal activities." 489 So. 2d at 1129.

Similarly, in *Walker*, a statute criminalizing possession of a prescription drug when not in its original container violated substantive due process. 444 So. 2d at 1137. Again, though the state had a legitimate interest in controlling the distribution of prescription drugs, the means chosen to achieve the goal was too broad. "In the final analysis [the statute] criminalizes activity that is otherwise inherently innocent." *Id.* at 1140; *see also Wyche*, 619 So. 2d at 237.

The stalking statute suffers from the same infirmity. While criminalizing the offense of stalking is a legitimate exercise of police power, criminalizing the "willful" "following" of another is not rationally related to that goal; nor is prohibiting the overbroad concept of "harassing." The statute criminalizes otherwise inherently innocent and protected conduct. On this basis alone the statute is void on its face and as applied under the guarantee of due process.

The State's "police power" to enact laws for the protection of its citizens is confined to those acts which may be reasonably construed as expedient for the protection of the public health, safety, welfare, and morals. *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986). Substantive due process is violated, however, when irrational legislative means have been adopted to realize a legislative goal. *State v. Walker*, 444 So. 2d 1137 (Fla. 2d DCA 1984), *affirmed*, 461 So. 2d 108 (Fla. 1984). "In other words, a due process violation occurs if a criminal statute's means is not rationally related to its purposes and, as a result, it

criminalizes innocuous conduct. Art. I, § 9, Fla. Const." *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991). In the final analysis, the question is whether or not the criminal statute in question has outlawed innocent conduct along with the criminal conduct it sought to render illegal. Some examples of statutes found to have violated Florida's guarantee of due process are as follows:

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

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

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

Section 784.048(2), *Fla. Stat.* (Supp. 1992) suffers from the same infirmity. While the ostensible goal, elimination of "stalking" as it has been defined by a few public, high profile cases, is laudable, criminalizing all conduct that comes under "willfully, maliciously, and repeatedly follows or harasses" is to include innocent albeit obnoxious conduct. The attentions of a newspaper/television reporter trying to uncover an unsavory story about a person would be one example, as noted above. The fact that the supposed victim need not be aware of the "stalking" or suffer "reasonable" fear adds to the argument that this statute has been too broadly defined so as to lack a rational basis of protecting the public's health, safety, and welfare. What rational basis does the State have in using its police powers to protect people who have no idea they need protection (keeping in mind that parts of this statute don't require any threat of harm) or in protecting people who are not "reasonably" being caused emotional distress?

There is also the additional consideration that there is relief available to people who justifiably fear further contact with specific individuals. An injunction issued by a Court in an

impartial, judicial proceeding can offer relief when that injunction is violated. In addition, there are other criminal statutes available for relief.

Thus, the statute should be declared unconstitutional because it fails to warn a citizen of ordinary intelligence of what stalking is, what conduct constitutes the crime of stalking, and where the line between protected or innocent activity and stalking exists. The potential for selective enforcement of this statute is enormous.

## POINT IV

**SECTION 784.048 IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER.**

In addition to the above-stated arguments attacking the Florida Stalking Statute facially, Petitioner also contends that the statute is unconstitutional as applied to him.

The factual situation in Mr. Saiya's case are set forth in his written Motion to Dismiss and Motion to Declare Section 784.048, Florida Statutes (1992) unconstitutional and at the subsequent motion hearing. R 37, SR 4-5, 9. The facts were not disputed by the State.

The factual scenario in Petitioner's case clearly exemplifies the ***vagueness*** of this alleged anti-stalking statute. Of course, the main argument is that the statute is so vague as to be unconstitutional on its face; but Mr. Saiya's situation demonstrates the vagueness with respect to his factual situation. See Statement of the Case and Facts, *supra*. Should this Honorable Court hold that the statute is not "impermissibly vague in all of its applications;" i.e., facially vague, then Mr. Saiya has standing to attack the vagueness of this statute as applied to him. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362, 369 (1982). Here, Petitioner's conviction should be vacated on this alternative basis.

## CONCLUSION

Based on the above-stated arguments and authorities, 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 Blvd., 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 25th day of January, 1995.

Attorney for Vincent Anthony Saiya