IN THE SUPREME COURT OF FLORIDA

ROBERT PEREZ,

Petitioner,

vs. Case No. 84,960

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BRAD PERMAR
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 473014

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On December 21, 1994, the Second District Court of Appeal affirmed the conviction of Petitioner Robert Perez, for aggravated stalking under Florida Statute 784.048. However, taking note of the Petitioner's "constitutionality" challenge, the Second District certified this question of great public importance:

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

The Petitioner served a timely Notice To Invoke Discretionary Jurisdiction on January 5, 1995, and on January 11, 1995, this Honorable Court entered an order postponing a decision on jurisdiction and ordering the service of briefs on the merits.

* * * * *

On August 26, 1992, the state charged the Petitioner, Robert Perez, with aggravated stalking under §784.048, Florida Statutes. (R4) The offense allegedly occurred between July 1 and July 31, 1992. (R4) On May 21, 1993, Mr. Perez' attorney filed a motion to dismiss and to declare §784.048 unconstitutional, and on August 4, 1993, the prosecution filed a memorandum of law opposing the motion to dismiss. (R28-50)

On August 20, 1993, the Honorable Stanley Mills, Circuit Judge, conducted a hearing on the motion to dismiss, at the end of which he denied the motion. (R56-7,69) On October 27, 1993, Mr. Perez entered a plea of no contest to the charge, and was sentenced to twenty-four months prison. (R58-66) Mr. Perez filed a timely notice of appeal on November 17, 1993. (R67)

* * * * *

Mr. Perez was represented by Assistant Public Defender Robin L. Kester, Esquire, while the State of Florida was represented by Assistant State Attorney Robert Perry. (R69)

The motion to dismiss said §784.048 was unlawfully vague because the terms "repeatedly," "harasses," "course of conduct," "legitimate purpose," "substantial emotional distress," "series of acts," and "evidencing a continuity of purpose" were insufficiently defined. The motion cited a similar case-analysis (under the "hate crime" statute) in Richards v. State, 608 So. 2d 917 (Fla. 3d DCA 1992). (R28-30) Accordingly, the defense moved to dismiss the Information against Mr. Perez. (R30-32)

In its memorandum opposing the motion the prosecution said, among other things, that to a person of common intelligence, "repeated is to do again," or in the alternative, that the word *repeated* means "more than one time." (R34-6)

Judge Mills conducted a hearing on the motion on August 20, 1993. (R69) The defense began by conceding that the Legislature had a "legitimate purpose" in creating a stalking law, but said the statute was defective as written. (R70-1) The defense gave Judge Mills copies of several county-court cases in which the statute was struck down, then went on to say the statute as worded gave police officers "unbridled discretion" to determine, at the scene and on a case-by-case basis, the "applied" meaning of subjective terms such as "emotional distress" and "legitimate purpose." (R71-5)

Judge Mills and defense counsel discussed a "hypothetical."

In that hypothetical case, a man at a party approached a woman and asked her to dance, but was rebuffed, and thereafter said - "a number of times" - at that dance, "I'm going to kill you if you don't dance with me." (R75-80) Judge Mills said that, to him, such conduct could be aggravated stalking. (R80)

He then recited an example in which he "beat the snot out of" a dog he once owned. He said he was trying to break the dog of the habit of running out into the street. (R80-5) Judge Mills said his dog, a Labrador Retriever, had such a thick layer of fat that the blows probably didn't hurt him, and that after the beating he - the dog - never ran out in the street again. (R85) But, Judge Mills said, his neighbor came out and was "absolutely horrified." He then added that the neighbor "thought to save the dog's life. I thought I was trying to save the dog's life too. One man's trash is another man's treasure." (R85)

Thereafter the prosecutor repeated his assertion that, to a majority of prosecutors, "repeated could mean twice," and Judge Mills denied the motion. (R86-90)

SUMMARY OF THE ARGUMENT

The stalking statute as now worded is unconstitutionally vague. "Ordinary people" may *think* they know the type of conduct targetted, but the present wording vests far too much discretion in police officers called on to make arrests under the statute.

That is, an officer "at the scene" must now make subjective judgments that would try the expertise of accomplished jurists, such as whether a particular person's acts are "constitutionally protected" or, in the alternative, whether the conduct in question "serves no legitimate purpose." Then too, the officer at the scene may be called on to determine - without guidance from the Legislature - whether the particular "victim" is either too sensitive or perhaps too subject to a personal "agenda."

To cite one word - "repeatedly" - is to show how vague the statute is. To the prosecutor below, for example, "repeatedly" could be as few as two acts of misconduct, but the word "several" is defined specifically as encompassing *more* than two. Despite the fact that most "ordinary people" would define repeatedly as at least more than several, the prosecutor's *liberal* interpretation of the word would have the force of law - at least in terms of arrest and preliminary detention - even though it is at odds with the definition presumed by "ordinary citizens." Thus, this one word cannot be understood the same way throughout the state.

Because the statute can and will be applied in an arbitrary, discriminatory and widely-divergent manner throughout Florida, it is unconstitutional on its face.

ARGUMENT

JUDGE MILLS ERRED IN DENYING THE MOTION TO DISMISS.

When the stalking-statute is properly and strictly construed under the criterion of "fair warning," there can be no doubt it was and is facially and unconstitutionally void for vagueness:

> The modern reason for the rule of strict construction is said to be that criminals should be given fair warning, *before* they engage in a course of conduct, as to what conduct is punishable and how severe the punishment is. [A] fair warning should be given to the world in language that the *common world* will understand, of what the law intends to do if a certain line is passed.

LaFave and Scott, Handbook on Criminal Law, Hornbook Series, 1972, page 72, emphasis added.

On this issue, the analysis in State v. Caraway, 1 Fla. L. Weekly Supp. 407 (Fla. Hernando County Ct. 1993), is compelling. By that analysis, Mr. Perez' motion to dismiss should be granted.

That is, under the current "stalking" statute, the line which must be passed is so vague that lawful conduct in one situation and by one citizen could be seen in a different way, in another situation, by another officer - male or female - subject to varying degrees of pressure to be "politically correct." Accordingly, that second citizen - conducting himself the same way as the first, but in a different location, on a different day, or confronted by different officers - could find himself arrested, convicted, and deprived of liberty and property, even if "only" for a few hours.

In construing a criminal statute challenged as "vague," any

doubts must be resolved in favor of the citizen and against the state. See, Lamont v. State, 610 So. 2d 435 (Fla. 1992), and also §775.021, Florida Statutes (1993). To avoid unconstitutional vagueness, the Legislature must provide reasonably clear guidelines in the statute. These guidelines serve both police officers who may arrest and juries which may convict under that statute. This is because both entities are given the power - "by law" - to deprive an individual citizen of *his* right to both liberty and due process of law.

That is, under state and federal constitutions, neither a police officer nor a jury may have the leeway to apply the statute in an arbitrary or discriminatory fashion; if there *is* such "leeway," the statute is unconstitutional. See, Smith v. Goguen, 415 U. S. 566, 94 S. Ct. 1342 (1974). Put another way, neither a police officer, prosecutor nor jurors may be free to "pursue their personal predilictions." See, Kolender v. Lawson, 461 U. S. 352, 103 S. Ct. 1855 (1983).

By its own definition, §784.048 cannot be used to infringe constitutionally-protected activity such as the rights of free speech, privacy, and "travel.[1]" But that same statute is unconstitutionally vague because it permits the "arbitrary and discriminatory enforcement" against activities that are *not* constitutionally protected. (Then again, as will be seen, §784.048 requires officers at the scene to make such "constitutional" decisions that would try the expertise of learned jurists.)

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[1] See, §784.048(1)(b).

That is, the statute ostensibly requires "substantial emotional distress" on the part of the victim, and that the conduct of the accused "serves no legitimate purpose,[2]" though without further definition. These statutory terms permit (if not require) an officer at the scene of a complaint to make highly subjective judgments. Such "judgments" may evolve around whether the victim, usually a woman, is emotionally distressed *substantially* - rather than somewhat less than substantially[3] - or whether the conduct of the accused, usually a man, "serves no legitimate purpose."

Generally speaking, male police officers can be expected to be more likely to see that the conduct of a fellow male serves *some* legitimate purpose, perhaps because he has been in the position of the accused some time in his life. On the other hand, female officers can be expected to take more of a "hard line," again according to the vagaries and variances of personal and perhaps bitter experience. As a current song asks, "What part of no don't you understand?" And so, to many female police officers, any "offensive" conduct after that first "no" could be deemed to serve "no legitimate purpose."

On the other hand, there will be the fear-of-being-branded-biased-because-of-my-sex factor. According to this factor, some "sensitive" male officers will fear being gender-biased, and so will be more prone to arrest under the statute than some female

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[2] §784.048(1)(a).

[3] And if so, how *much* less than substantially will suffice, under the law, to spell the difference between freedom on the one hand, and arrest and incarceration on the other?

officers, while some sensitive female police officers, fearing they will be seen as gender-biased, will be more prone *not* to arrest than the "typical" male officer.

The bottom line is that the statute as presently worded (*ideally*) requires different police officers - male and female, urban and rural, liberal or conservative - to make such highly subjective value judgments "at the scene," and yet all arrive at the same or similar decision to arrest or not to arrest. Again *ideally*, an accused in an urban county, confronted by a "liberal" and dedicated-feminist police officer, should be subject to the same likelihood of arrest as an accused in a rural county, confronted by a member of an all-male, highly conservative police force. Under the statute as worded, that "ideal" cannot be met.

Among other things, it is not only the police officer's *gender* that will impact on the decision "at the scene." There is also the degree of "political correctness" - mandated by a particular police department - that will also impact on these already-subjective judgments. And since the degrees of "political correctness" will vary widely throughout the state Florida, the number of arrests under the statute will vary just as widely.

Again (generally speaking) a woman officer would be expected to find substantial-emotional-distress and no-legitimate-purpose more often than a male officer. But *also*, in a highly urban setting - where departmental "political correctness" is desired if not mandated - such findings of "distress" will generally be made far more often than in a rural setting or county.

That is, in a rural county there are generally fewer organized "pressure groups" who will demand "greater protection," which in turn will be translated, per statute, into a demand for more arrests. Then too, in a rural setting there will generally be a greater likelihood of an all-male police force. Thus, the statute could - and no doubt will - be enforced far differently in rural counties than in urban counties.

Again, within Florida's urban counties there will likely be more of a premium on "political correctness" and "political sensitivity" than in rural counties. Accordingly - without more definitive statutory guidelines - there will be extreme variations in enforcement in those *urban* counties as well, depending on a particular officer's "political sensitivity," gender, and/or the degree of "backlash" to the very idea of political-correctness.

For example, a more politically-sensitive male officer, fearing he might be perceived as *in*sensitive, would in case of doubt (as to the victim's "distress," or other criteria) resolve those doubts in favor of arrest. This male officer - perhaps politically sensitive for reasons related to promotion and higher pay - would "resolve his doubts" not because the accused is guilty, but rather to avoid being characterized, by his peers or by his supervisors, as "politically insensitive." And again, such a characterization by his superiors might well result in demotion or career stagnation.

In other words, in Florida's urban counties, the degree of political sensitivity might well impact an officer's ability to

rise in both rank and in pay. But in rural counties, an excess of zeal in enforcing the statute could subject the officer to opprobium and ridicule. Thus even more factors - unrelated to "actual guilt" - will affect an individual officer's subjective judgment as to both the alleged victim's "emotional distress" and the alleged culprit's "legitimate purpose."

On the other hand, a *less*-sensitive male officer, in that same urban setting, or a male officer who personally and vehemently disagrees with the whole concept of "political correctness" in the first instance, would resolve such doubts in favor of *not* arresting the accused person; again, usually a man. Thus, in the same urban setting and with the same demands "from above" for political sensitivity, one male officer might arrest an accused, while in that same situation and with the same "accused," another male officer, with different attitudes about "political correctness," would *not* make the arrest.

On the "other" other hand, some female officers might follow "political correctness" to resolve doubts in favor of arrest, while other female police officers - fearing *they* might be seen as inherently biased because of their gender - would resolve their doubts in favor of *not* arresting a male suspect, much as the politically-insensitive male officer might do.

Thus, depending on only these three factors,[4] there will be

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[4] That is, (1) rural-and-less-politically-correct versus urban-and-more-politically-correct counties and settings, (2) the gender of the police officer "at the scene," and (3) the degree of "political sensitivity" of the officer, as affected by the degree of "backlash" or fear-of-accusation-of-bias that the officer - male

wide variations in the way the statute will be enforced.

In light of the foregoing, arrests under this statute will depend not so much on guilt as much as on the scene-officer's gender, the degree of "political sensitivity" demanded by his or her department, and the existence or degree of "backlash" to that pressure by the individual officer, male or female. In short, the lack of guidance from the Legislature as to the terms "substantial emotional distress" and "serves no legitimate purpose" will foster arbitrary and discriminatory enforcement by both the officer and, in due course, the jury.

To avoid such varied enforcement and the attendant *likelihood* of arbitrary and discriminatory enforcement, the Legislature - when delegating part of its "police power" to an executive agent - may do so only *if* it "announces adequate standards to guide the agency in the execution of the powers delegated." Dickinson v. State, 227 So. 2d 36, 37 (Fla. 1969):

> [W]hen statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection could easily have been provided, the reviewing court should invalidate the legislation. In other words, the legislative exercise of the police power should be so clearly defined, so limited in scope, that nothing is left to the unbridled discretion or whim of the administrative agency charged with the responsibility of enforcing the act.

See also, Delta Truck Brokers v. King, 142 So. 2d 273 (Fla. 1972): "It is essential that the act which delegates the power ... defines with reasonable certainty the standards which shall guide

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or female - might fear, either personally or professionally.

the agency in the exercise of its power."

Particularly in this day and time, "political correctness" is advanced vehemently by some, while it is challenged and resisted with equal vehemence by others. In light of the foregoing, it is patently unfair - as well as unconstitutional - to require police officers, juries, and citizens themselves, to have such emotionally-charged and subjective decisions left to those individuals - jurors and police officers - without any guidance from the Legislature whatsoever. See, e.g., Delta Truck: "it is obvious that the legislative delegation of power ... is totally devoid of any standards whatsoever." 142 So. 2d, at 275.

This is especially true because the statute affects constitutional freedoms even though it tries not to. That is, individual citizens ostensibly have the constitutional right to "associate" with whom they will,[5] and the statute itself ostensibly tries to protect such "constitutionally protected activity."[6] But by necessity, an officer at the scene will have to make the subjective judgment of whether the accused's conduct either "serves no legitimate purpose" or, on the other hand, is some kind of constitutionally-protected activity such as "association."

Again, on a case-by-case basis the officer on the scene will be called on to make subjective judgments that would try the abilities of learned and experienced jurists. In further words, to

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[5] Sawyer v. Sandstrom, 615 F. 2d 311, 316-18 (5th Cir. 1980).

[6] §784.048(1)(b).

make such subjective judgments (in a non-arbitrary and non-discriminatory way throughout the state of Florida), the individual officer must both become learned in the vagaries of "constitutionally protected activities," and respond without bias and prejudgment caused by: 1) that officer's gender, 2) his or her department's "demand" for political sensitivity, and 3) the officer's desire to avoid being "branded" as either politically insensitive or gender-biased.

As noted, the constitutional freedom of association is not limited to those associations which are "political in the customary sense;" this right also relates to those associations which provide a "*social*, legal, and economic benefit" as well. Sawyer v. Sandstrom, 615 F. 2d 311, 316 (5th Cir. 1980), emphasis added:

> "The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others" are implicit in the first and fourteenth amendments.

The Respondent will probably hasten to say that the stalking-statute is *aimed* at men who "interfere with the personal liberty of others," usually women and their families, but that is precisely the point. As Judge Mills himself pointed out, "One man's trash is another man's treasure." (R85)

That is, what might be unconstitutional "interference" to a woman that Rush Limbaugh would call a "femi-nazi," could well be simply a flattering display of "old-fashioned" or "courtly" love to a more traditional, conservative and generally Republican woman

such as Phyllis Schafly. Again, not only will an individual police officer - and jury - be called on to make the value judgments already mentioned, they will also have to take into account the alleged victim's political and social sensibilities. Again, what would be "harassment" to a liberal feminist could be flattering to an "old-fashioned" woman.

At any rate, a statute may not - under the First and Fourteenth Amendments - criminalize associational or "rights of assembly" simply because one person's exercise of such rights "may be 'annoying' to some people." Sawyer, 615 F. 2d, at 316.

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

615 F. 2d, at 317. What more "fundamental" personal liberty could there be than the endless varieties of "courtship" in the human species? Accordingly, where such a fundamental and primal activity is concerned, the circumstances under which agents of the state can intrude must be so narrowly defined that there is no room for doubt "at the scene." At bar, as in Sawyer, the statute in question could achieve the same laudable ends, but without allowing arbitrary and discriminatory enforcement, if only it were "more artfully" or more carefully drawn. See, 615 F. 2d, at 317.

That is, to pass constitutional muster the statute must provide better guidelines that take into account (for example) the political sensibilities of both the scene-officer and the alleged victim, as well as the varying degrees of "political sensitivity"

by varying police departments within this state, and the degree of "backlash" within this state's several police departments.

Again, as to the due process doctrine of vagueness:

> The doctrine incorporates notions of fair notice and warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Smith v. Goguen, 415 U. S. 566, 572-3, 94 S. Ct. 1242, 1247 (1974). See also, Kolender v. Lawson, 461 U. S. 352, 357, 103 S. Ct. 1855, 1858 (1983): as generally stated, the void-for-vagueness doctrine requires a penal statute to define the criminal offense, "*and* in a manner that does not encourage arbitrary and discriminatory enforcement." Emphasis added.

Some Florida courts have said the anti-stalking statute defines the offense sufficiently to be understood by "ordinary people." But the fact remains that even if the average citizen *thinks* he knows what the statute proscribes, it provides insufficient guidelines for a jury as trier of fact or, more importantly, for the officer at the scene. Those officers and those juries are and will be called upon by the statute to define on a case-by-case basis the legal definitions of "emotional distress" and "no legitimate purpose." Then too, the individual officers will also be called on to decide "instantaneously" whether an accused's "purpose" and conduct is actually protected by the

Constitutions of the state and nation.

> Although the doctrine focuses on both 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.*" [Citation omitted.] 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 predilictions.

Kolender, 461 U. S. 357, 103 S. Ct. 1858. Again, a State Attorney or chief of police in a given county or municipality may have a personal "agenda" (or choose to crusade for votes), through both "political correctness" and the punishment of alleged male "stalkers." If so, male citizens in that district will be far more likely to be arrested under the statute than those male citizens in a different district, where a different "agenda" may apply. In a word, the same statute will be applied in disparate ways throughout the state, depending more on the political agenda of "higher ups" than on the guilt of an individual accused.

The statute in Kolender said police could arrest a citizen who couldn't provide "credible and reliable" identification, defined by law as identification paper(s) which carried "reasonable assurance that the identification is authentic" and provided "means with later getting in touch with the person who has identified himself." 461 U. S. 357, 103 S. Ct. 1858.

Certainly that statutory definition was as "easy to understand" as Florida's definitions of stalking, aggravated or

otherwise. Yet the Supreme Court struck down the identification law for the same reasons that §784.048 should be struck down:

> [T]he statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way... It is clear that the full discretion accorded to police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] lawmaking 'to the moment-to-moment judgment of the police*man* on *his* beat.'"[7]

Kolender, 103 S. Ct., at 1858-60. The Court recognized as "weighty" the State's concern in requiring identification, but said the law as written could not pass constitutional muster: "Although due process does not require 'impossible standards' of clarity ... this is not a case where further precision in the statutory language is either impossible or impractical." 103 S. Ct., at 1860.

In the same way, further precision in the statutory language of §784.048 is both possible, practical, and much to be desired.

To take one word from the statute - "repeatedly" - and to view it from the point of view of the prosecutor below, is to show how the statutory wording needs to be honed to a greater precision. That is, to the prosecutor below "repeatedly" meant more than once. (R86) But to an officer on the scene - and to most ordinary people - "repeatedly" would have to mean *at least* more than twice, and probably more than three or more times. Then too, certainly "repeated" attempts would be seen by most ordinary people as more

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[7] Emphasis added. Note that under current perceptions of political correctness, the Court would have to write "the police officer on his or her beat," or risk being branded politically insensitive by various and sundry pressure groups.

than "several," yet "several" is defined as "More than two, often used to designate a number greater than one."[8]

If the Legislature meant the statute to apply to as few as two incidents - as the prosecutor said - it would have said so. Yet even though the Legislature chose "repeatedly" rather than "several" (to describe the number of instances of misconduct required), an police officer at the scene of a "stalking," and who agrees with the prosecutor's liberal interpretation, could make an arrest for only two acts of misconduct, while another officer under the same circumstances would not make such an arrest, based on a common perception that "repeatedly" is more often than "several."

This is one example of the complex issues that must be decided by individual police officers under the current statute, and other examples have been cited above. As in Kolender, "this is not a case where further precision in the statutory language is either impossible or impractical." 103 S. Ct., at 1860.

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[8] Black's Law Dictionary, Fifth Edition, 1979, page 1232.

CONCLUSION

In light of the foregoing arguments and authorities, this Honorable Court should accept jurisdiction, and thereafter rule that the statute as presently worded is unconstitutionally vague, and remand with directions that Mr. Perez' conviction be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been mailed to Dell H. Edwards, Assistant Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, and Robert Perez, Inmate No. 928503, Liberty Correctional, P.O. Box 999, Bristol, FL 32321 on this 7th day of February, 1995.

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ROBERT PEREZ, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 93-04209

Opinion filed December 21, 1994.

Appeal from the Circuit Court
for Pasco County;
Stanley R. Mills, Judge.

James Marion Moorman, Public
Defender, Bartow, and Brad
Permar, Assistant Public
Defender, Clearwater, for
Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Dell H. Edwards, Assistant
Attorney General, Tampa,
for Appellee.

RYDER, Acting Chief Judge.

Robert Perez challenges the trial court's order upholding the constitutionality of section 784.048, Florida Statutes (Supp. 1992), the stalking statute. Perez was

adjudicated guilty of aggravated stalking, a third degree felony, following his nolo contendere plea.

In similar challenges, the statute has been found to be facially constitutional by all of the district courts of appeal. See Steffa v. State, 19 Fla. Law Weekly D2438 (Fla. 2d DCA Nov. 16, 1994); State v. Tremmel, 19 Fla. Law Weekly D2030 (Fla. 2d DCA Sept. 23, 1994); State v. Kahles, 19 Fla. Law Weekly D1778 (Fla. 4th DCA Aug. 24, 1994); Varney v. State, 638 So. 2d 1063 (Fla. 1st DCA 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, 640 So. 2d 1106 (Fla. 1994).

We affirm, but certify, as being of great public importance, the following question:

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

CAMPBELL and PARKER, JJ., Concur.