IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,960

ROBERT PEREZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, **ROBERT PEREZ**, was the Appellant below. The Respondent, **THE STATE OF FLORIDA**, was the Appellee below. The parties will be referred to as they stand before this Court. The symbol "R" will be used to designate the record on appeal.

The strict issue before the Court is the constitutionality of Section 784.048(3), Florida Statutes as applied to the actions of Petitioner. This statutory provisions is one aspect of the Section 784.048, Florida's Stalking Statute (the "Statute"), making stalking (as defined in the Statute) a felony when it done with a credible threat to cuase bodily injury or death. However, Petitioner has made a facial challenge to the entire Statute.

The facial constitutionality of the Statute, in a whole variety of contexts, has now been upheld by all of the District Courts of Appeal.[1] Two of these decisions, that of the

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[1] The Fifth District upheld the Statute in Bouters v. State, 634 So.2d 246 (Fla. 5th DCA 1994) review granted No. 83,558 (Fla. June 21, 1994). The Third District upheld it in Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994) and Folsom v. State, 638 So. 2d 591 (Fla. 3d DCA 1994). The Fourth District did so in State v. Kahles, 644 So. 2d 512 (Fla. 4th DCA, 1994). The First District did so in Varney v. State, 638 So. 2d 1063 (Fla. 1st DCA 1994). The Second District did so in State v. Trammel, 644 So. 2d 102 (Fla. 2d DCA 1994).

Third District in Pallas and that of the Fourth District in Kahles, read together, consider and dispose of every argument made by Petitioner here attacking the facial constitutionality of the Stalking Statute. In that sense, this Answer Brief is almost redundant.

STATUTE AT ISSUE

Florida Stalking Statute, Section 784.048, Florida Statutes (1992) provides:

784.048.Stalking; definitions; penalties

> (1) As used in this section:
>
> (a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such a 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.
>
> (c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.
>
> (2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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

(4) Any person who, after 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 s. 775.084.

(5) Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case and facts as a substantially accurate account of the proceedings below.

POINT ON APPEAL

WHETHER SECTION 784.048, FLA. STAT. (1992) IS UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

SUMMARY OF THE ARGUMENT

Section 784.048 in its entirety, Florida's Stalking Statute (the "Statute"), and Section 784.048(3) thereof, specifically, are constitutional. This statute is constitutional, and totally complies with the First or Fourteenth Amendments of the United States Constitution. It is neither overbroad nor vague.

The Statute proscribes stalking and harassing generally. Stalking and harassing are forms of conduct, regardless of whether the conduct may, in part, be evidenced through speech. As such, the proscribed conduct in the Statute is not susceptible to a First Amendment overbreadth challenge. Operation Rescue v. Women's Health Center, 626 So. 2d 664 (Fla. 1993), *aff'd in part and rev'd in part,* sub nom; Madsen v. Women's Health Ctr., 512 U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); State v. Stalder, 630 So. 2d 1072 (Fla. 1994); Wisconsin v. Mitchell, 508 U.S. ___, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). Furthermore, the Statute, judged in relation to legitimate sweep, is not overbroad. Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994).

Furthermore the Statute is not subject to a vagueness challenge. No portion of the Statute is "vague" to the degree required to violate the First or Fourteenth Amendments. Rather, the statutory provisions provide explicit guidelines for determining which conduct is proscribed.

In all, Petitioner's arguments have all been considered and disposed of by the decisions of the Fourth District in Kahles the Third District in Pallas. The Stalking Statute is facially constitutional.

ARGUMENT

SECTION 784.048, FLA. STAT. (1992) IS NOT UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

INTRODUCTION

This case addresses the strict issue of whether Section 784.048(3) of the Florida Statutes is constitutional as it applies to the actions of Petitioner. Petitioner has also made a broad facial challenge to Section 784.048, Fla. Stat. (1992) in its entirety. The Petitioner's challenge to the Statute is based on asserted overbreadth and vagueness.

Petitioner was charged with violating Section 784.048(3) of the Statute, stalking with a credible threat to do bodily injury or cause death. Since there is no First Amendment protection for malicious conduct, Petitioner's overbreadth challenge must be rejected out of hand. His vagueness claim can only relate to that portion of the Statute that affects him. Parker v. Levy, 47 U.S. 733, 757, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974).

Nevertheless, the State will address additional aspects of the Statute beyond Section 784.048(3) should this Court, in the interest of judicial economy, wish to review the entire Statute in one case.

Sections (2), (3) and (4) of the Statute prohibit the same conduct, to wit: willfully, maliciously and repeatedly following

or harassing another person. Section (2) is a misdemeanor of the first degree since that Section only prohibits the willful, malicious and repeated following or harassing of another.

Section (3) of the Statute elevates such conduct to the third degree felony of aggravated stalking when the willful, malicious and repeated following or harassing conduct is accompanied by a credible threat with the intent to place that person in reasonable fear of death or bodily injury. The credible threat" placing a person in "reasonable fear" parallels the "well founded fear in other persons" element in the crimes of assault, aggravated assault and robbery. See §§784.011, 784.021 and 812.13 Fla. Stat. (1991).

Section (4) likewise elevates willful, malicious and repeated following or harassing to the third degree felony of aggravated stalking when the following or harassing conduct is in knowing violation of a previous court order prohibiting such conduct.

STANDARD OF REVIEW

The Statute's opponent must establish that the Statute is invalid beyond, and to the exclusion of, every reasonable doubt. See Bunnel v. State, 453 So. 2d 508 (Fla. 1984); State v. Kinner,398 So. 2d 1360 (Fla. 1981). See also New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101

L.Ed.2d 1 (1988). (Burden of showing statute to be unconstitutional is on the one challenging it, not the one defending it).

In State v. Kahles, 644 So. 2d 512 (Fla. 4th DCA 1994), the Court reiterated the proper analytical framework, as established in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed. 362 (1982) to be utilized when a criminal statute is alleged to be facially unconstitutional for overbreadth and vagueness. This proper analytic framework is for the court to first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If not, the overbreadth challenge must fail. Secondly, the court should examine the vagueness challenge and, if there is no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.[2] Kahles, supra.

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[2] In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that isclearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. Kahles, 644 So. 2d 512 (Fla. 4th DCA 1994) (footnotes omitted).

THE STATUTE IS NOT OVERBROAD

Overbreadth is a doctrine limited to statutes involving restrictions on First Amendment rights. If a statute does not contravene the First Amendment, then an overbreadth challenge fails. In a facial challenge to the overbreadth of a law, the Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected speech. If it does not, then the overbreadth challenge must fail. State v. Kahles, supra; Village of Hoffman Estates v. Flipside Hoffman Estates, supra.

This case involves harassment constituting threats to kill. This Court held that it is constitutionally permissible to regulate the "violent or harassing nature of Operation Rescue's expressive activity." Operation Rescue v. Women's Health Center, 626 So. 2d 664, 671 (Fla. 1993), **aff'd in part and rev'd in part,** sub nom Madsen v. Women's Health Ctr., 512 U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Additionally, the United States Supreme Court upheld this Court's holding which restricted picketing around the clinic against a First Amendment challenge when it "threatens" the psychological and physical well-being of the victim. Id. The United States Supreme Court specifically held that, "[c]learly, threats to patients or their families, however communicated, are proscribable under the First Amendment." 129 L.Ed.2d at 612. (emphasis added). Threats, therefore, are not protected speech under the First Amendment.

Likewise, a violation of the domestic violence injunction is not protected speech.

The Statute generally deals with stalking and harassing. Stalking, in the normal sense of the word, is pure conduct. Harassing may well include a speech component. This is irrelevant here where we are dealing with a threat of death. But harassing in general is conduct which may, in part, be articulated by speech. This speech survives any overbreadth challenge, nevertheless, as the Statute regulates only words used as a method to harass which, of itself, is conduct, even when mixed with speech.

Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994), clearly articulated the correct rule. The Third District there upheld the constitutionality of the Statute against both an overbreadth and a vagueness challenge. The Third District rejected the overbreadth challenge to the Statute, even where the method by which the defendant harassed the victim was in a series of harassing telephone calls made by defendant. The Court held that the Statute survives an overbreadth challenge since the Statute does not proscribe conduct unless: 1) the conduct is willful, malicious, and repeated; 2) there must be a course of conduct which would cause substantial emotional distress to a reasonable person in the position of the victim; and 3) the conduct must serve no legitimate purpose. Id. at 1363. For aggravated

stalking, there must also be a credible threat made with the intent to place the victim in reasonable fear of death or bodily injury, or, as in this case, the violation of a domestic violence injunction.

That this conduct may be effected in part through speech does not invalidate the Statute on freedom of speech grounds where the use of words as the method with which to harass involves conduct mixed with speech. The controlling constitutional considerations differ substantially from those applied to pure speech. Pallas, 636 So. 2d 1363 (citing the decision of this Court in State v. Elders, 382 So. 2d 687, 690 (Fla. 1980)). The applicable test that applies when conduct and not merely speech is involved is that the overbreadth must not only be real, but substantial as well, judged in relation to the statute's legitimate sweep. Id. The Third District in Pallas concluded that the overbreadth challenge was not real and substantial judged in relation to the Statute's legitimate sweep. The State submits that the Pallas court correctly dealt with an overbreadth challenge to the Statute.

In a related line of cases, this Court upheld Section 785.085(1), Florida Statutes (1989), commonly referred to as Florida's Hate Crimes Statute. In so doing this Court followed the United States Supreme Court's holding as to the Wisconsin Hate Crimes Statute in Wisconsin v. Mitchell, 508 U.S. ___, 113

S.Ct. 2194, 124 L.Ed.2d 436 (1993). This Court held the Florida Hate Crimes Statute does not violate the First Amendment because the statute punishes bias-motivated criminal conduct rather than the expression of ideas. State v. Stalder, 630 So. 2d 1072, 1075 (Fla. 1994). This Court held that the Hate Crimes Statute punishes the conduct that evidences the prejudice, even when speech is a primary component of the conduct. The Stalder analysis, a fortiorari, applies to the Statute since hate crimes almost invariably involve a speech component, while often stalking through harassing has no such speech component.

In summary, the Statute is not overbroad. Stalking, whether by word or deed, done with the requisite specific intent to cause harm or threat to the victim is not protected by the First Amendment. The Stalking Statute regulates the conduct that causes threat or harm, not the content of a message that may accompany it. Lastly, the Statute by its terms ("course of conduct") excludes constitutionally protected activity. This type of exclusion has saved statutes from overbreadth challenges. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 162, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). In this case, the exclusion is unnecessary to protect against the overbreadth challenge.

THE STATUTE IS NOT VAGUE

Petitioner's vagueness claim can only relate to that portion of the Statute that affects him. Parker v. Levy, 47 U.S. at 757.

But in any case, no portion of this Statute is "vague" in the sense of violating the First or Fourteenth Amendments. In order to succeed on a vagueness challenge, Petitioner must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates, supra. However, perfection of language is not the rule, rather whether it violates constitutional mandates. Kahles, supra; Pallas, supra; Stalder, supra.

Petitioner challenges a number of terms of the Statute as "vague". These terms will be addressed in turn.

Knowingly

"Knowingly," in criminal law, means actual consciousness, or actually having knowledge of the facts at issue. United States v. United States Gypsum Co., 438 U.S. 422, 444-45, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), United States v. Warren, 612 F.2d 887 (5th Cir. 1980). See also, Sec. 409.920(2)(c) Fla. Stat. (1993) ("Knowingly" means done by a person who is aware of, or should be aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result). Accordingly, "knowingly" as applied in this case means that the defendant knew that the injunction had been issued and acted in contravention thereof.

Willfully

The United States Supreme Court defined the term "willful" as "when [willful is] used in a criminal statute it generally means an act done with a bad purpose." Screws v. United States, 395 U.S. 91, 101, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1985) (upholding the vagueness challenge to 18 U.S.C. 52). The Court stated further that willfulness requires more "than the doing of an act proscribed by statute" and that "[a]n evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." Id. As to vagueness the Court held:

> ...the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid...But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Id. at 101-102.

Florida has defined "willful" similarly to the United States Supreme Court's definition. "Willful" means intentionally, knowingly and purposely. Paterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987). The Statute contains the necessary scienter element, since in all sections it punishes only that perpetrator who willfully, maliciously and repeatedly follows or harasses

another person. A person of ordinary intelligence can understand that he will have violated a statute if he followed or harassed another intentionally and with a bad purpose. It is the perpetrator's mental state which is the measure of his criminality.

The Statute requires not only that the act be intentional and with a bad purpose (maliciously). It also has to be done repeatedly. Each of these terms adds limitations to the Statute, curing any vagueness as to what conduct is prohibited. This position was adopted in State v. Sanders, No. S-94-0177 (Okla. Crim. Nov. 29, 1994) citing with approval to Pallas v. State, supra. (Attachaed as Exhibit A).

Maliciously

"Maliciously" is a term well-defined in criminal law. It isdefined as "wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person." Fla. Std. Jury Instr. (Crim.) 130, 109. See also, State v. Gaylord, 356 So. 2d 313 (Fla 1978) ("maliciously" means ill will, hatred, spite, an evil intent). The term maliciously, in combination, with the term "willful", clearly requires the perpetrator's conduct to be done intentionally, with an evil purpose and without legal justification. The terms "willfully" and "maliciously" are legal terms defined in familiar

legal terms. Bradley v. United States, 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973). As such, these terms delineate what conduct is proscribed.

Repeatedly

The plain and ordinary meaning of "repeatedly" can be determined by referring to a dictionary. Green v. State, 604 So. 2d 471 (Fla. 1992). "Repeated" means: "1: renewed or recurring again and again: constant, frequent." Webster's Third New International Dictionary; 1924 (1986 Ed.). Applying this definition to the term "repeatedly" further clarifies the proscribed conduct in the Statute. The perpetrator must act intentionally with an evil purpose and such act must be more than an isolated incident.

Harasses

The Statute in Section (1)(a) defines "harasses" as follows:

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

Petitioner challenges this statutory definition on the individual terms and not on the whole statutory definition. Petitioner alleges that the terms "substantial emotional distress" and "no legitimate purpose" are not sufficient to prevent arbitrary enforcement.

The Statute's definition of "harass" was modelled after the definition of "harass" in federal criminal statutes. The United States Congress enacted the Victim Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, which included 18 U.S.C. §§ 1512, 1513 and 1514. These statutes related to the intimidation of or retaliation against witnesses and informants, and §1514 permits the Government to obtain an injunction to prohibit harassment of a federal witness. "Harassment" is defined in §1514(c) as follows:

> (c) As used in this section --
>
> (1) the term "harassment" means a course of conduct directed at a specific person that --
>
> (A) causes substantial emotional distress in such a person; and
>
> (B) serves no legitimate purpose; and
>
> (2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

The Florida Stalking Statute mirrors in virtually identical language the Federal definition of "harassment". See Fla. Stat. §784.048(1)(a) and (b), supra.

The Eleventh Circuit upheld this model for the definition of the "harassment" in the Florida Stalking Statute, although the Statute's constitutionality was not in issue. United States v. Tison, 780 F.2d 1569 (11th Cir. 1986).

The Statute's reference to "substantial emotional distress" is analogous to the definition of "severe emotional distress," as set out in Section 46, Restatement (Second) of Torts (1965) and approved by this Court in Metropolitan Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985). This definition is:

> §46 Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

This Court also adopted the comments explaining the application of Section 46:

> d. **Extreme and outrageous conduct**
>
> ...It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim. "Outrageous.!"
>
> .....
>
> g. The conduct, although it would otherwise be extreme and outrageous, may be privileged

> under the circumstances. The actor is never liable, for example where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

The Statute's requirement of "substantial emotional distress" and the Restatement's definition of "severe emotional distress" are analogous. Both exempt intentional acts if the act attempts to enforce a legal right in a lawful way. As such, this aspect of the Statute's definition of "harasses" has established roots in the legal system and therefore provides the necessary guidance to avoid arbitrary enforcement. This position has been adopted in Woolfolk v. Virginia, No. 73-93-2 (Va. Ct. App. August 23, 1994)(Attached as Exhibit B), when the Court upheld its stalking statute against the same challenge.

The Petitioner contends, however, that the definition of "harasses" is impermissibly vague since it contains a subjective standard. The subjective standard suggested is that the term "that causes substantial emotional distress in such person and serves no legitimate purpose" introduces the concept of the "eggshell plaintiff" into criminal law. As such the Petitioner argues that a defendant does not know if his conduct offends until after the stalking occurred, since in some situations a normal person would not suffer substantial emotional distress while a highly sensitive person would.

This claim was rejected by the Pallas court, which upheld the statute using a "reasonable person" standard. The Third District held the Statute was similar to the assault statutes, where a "well-founded fear" is measured by a reasonable person standard, not a subjective standard. Under the Statute, the definition of "harasses" proscribes willful, malicious, and repeated acts of harassment which are directed at a specific person, which serve no legitimate purpose, and which would cause substantial emotional distress in a reasonable person. Pallas, 636 So. 2d at 1361 (emphasis added). See also Woolfolk v. Virginia, supra.

The Statute does not use a subjective standard to determine if the victim suffered substantial emotional distress, therefore the Petitioner's argument that the term "substantial emotional distress" is vague fails. Because "substantial emotional distress" is measured by a reasonable person standard, the term gives fair notice of what conduct is prohibited.

"Serves a Legitimate Purpose" and "Constitutionally Protected Activity"

The Statute excludes from criminal prosecution conduct which "serves a legitimate purpose" or which is "constitutionally protected activity." The Petitioner contends that the failure to define these terms is fatal. The State submits the fact that the Statute fails to define these terms is of no moment because the terms are surplusage. American Radio Relay League v. F.C.c., 617

F.2d 875 (D.C. Cir. 1980) (A statute should be construed so that effect is given to all its provisions, but courts will not give independent meaning to a word where it is apparent from the context of the statute the word is surplusage). As previously stated, stalking can only be charged if a perpetrator harasses another maliciously, to wit: wrongfully, intentionally, and without legal justification or excuse. Therefore, conduct is only proscribed if done without legal justification or excuse, which under the Statute, would equate to "without a legitimate purpose." If the conduct is constitutionally protected, then it is done with "lawful justification," and then does not fall within the Statute.

Petitioner contends that the failure to define "legitimate purpose" renders the statute vague since it leaves to the arresting officer the total discretion as to what is a legitimate purpose. This position misses the mark since the Statute is violated only when the conduct is done willfully, maliciously, and repeatedly. These terms appear in other criminal statues and have already provided the needed guidance to law enforcement to determine when a statute has been violated.

Section 782.04(2), Florida Statutes (1993), provides that the unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated

design to effect the death of any particular person, is second degree murder. These terms, "imminently dangerous to another" and "evincing a depraved mind" are not defined, but, this has caused no vagueness problem. Rather, the terms have been defined by the courts as an act which a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another done from ill will, hatred, spite or an evil intent, and is of such a nature that the act itself indicates an indifference to human life. Marasa v. State, 394 So. 2d 544 (Fla. 4th DCA 1981).

Section 806.13, Florida Statues (1993), provides that a person commits the offense of criminal mischief if he willfully and maliciously injures or damages by any means, any real or personal property of another. This Statute also has withstood constitutional scrutiny since the courts have defined "willful" as intentional, and "malicious" as an act done voluntarily, unlawfully, and without justification. Williams v. State, 92 Fla. 648, 109 So. 505 (1926).

Course of Conduct

The term "course of conduct" is defined by the Statute as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." The terms of the definition are clear and unequivocal. A "series of acts" by its plain and ordinary meaning, is more than one act in sequence. This term must be read in conjunction with the term "a period of time" and together they mean that a linked series or otherwise defined actions taking place over even a brief period of time is criminal activity that may subject the perpetrator to prosecution. See 18 U.S.C. 1514, supra.

Following

The term "following" when read as par of the whole and not in isolation, limits arbitrary enforcement. Following only become criminal when done willfully, maliciously and repeatedly. Thus, a perpetrator can be charged with stalking if he intentionally, knowingly, purposely and without legal justification or excuse, follows another person with the knowledge that injury or danger will or is likely to be caused to such person or the person's property. This certainly meets constitutional muster.

CONCLUSION

Based on the foregoing, the State respectfully prays that this Court affirm the district court and the trial court and hold that Section 784.048 Florida Statutes (1992) and Section 784.048(3) thereof, to be constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to **BRAD PERMER,** Assistant Public Defender, Public Defender's Office, Pinellas County Courthouse, 5100 144th Avenue North, Clearwater, Florida 34620 on this 21 day of February, 1995.

MICHAEL J. NEIMAND
Assistant Attorney General

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IN THE SUPREME COURT OF FLORIDA

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APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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The STATE of Oklahoma, Appellant,
v.
Homer E. SAUNDERS, Appellee.
No. S-94-0177.
Court of Criminal Appeals of Oklahoma.
Nov. 29, 1994.

LUMPKIN

ACCELERATED DOCKET ORDER

*1 Appellant was charged by Information in Tulsa County, Case No. CM793-1515 with Stalking. On November 22, 1993, Appellee filed a Motion to Dismiss before trial alleging 21. O.S.Supp.1993, s 1173 is unconstitutional. A hearing on the motion to dismiss was held on November 30, 1993. Judge Musseman granted the Appellee's motion to dismiss finding that the statute is "unconstitutional in that it violates the due process clause, as well as the fifth amendment, presumption of innocence, and that it is vague, overbroad, and cannot be reasonably interpreted by anyone subject to the statute with common knowledge and understanding." From this decision, the State has perfected this appeal.

Pursuant to 22 O.S.Supp.1993, Ch.18, App., Rules of the Court of Criminal Appeals, Rule 11.3, Appellant made application for this case to be assigned to the Accelerated Docket of this Court. No objection was filed by Appellee. The propositions or issues were presented to this Court in oral argument October 20, 1994, pursuant to Rule 11.5(c). At the conclusion of oral argument, the parties were advised of the decision of this Court.

Appellant raised three propositions of error on appeal:

I. Statutes are presumptively constitutional;

II. 21 O.S. s 1173 is not unconstitutionally vague; and

III. Subsection E does not unconstitutionally shift the burden of proof.

e case before us does not involve a question of fact, but instead presents ter of law. We begin with the basic rule of statutory construction that ry presumption must be indulged in favor of the constitutionality of an ac of he Legislature, and it is the duty of the courts, whenever possible, to ha onize acts of the Legislature with the Constitution." See State v. Pr t, 816 P.2d 1149, 1151 (Okl.Cr.1991).

Ap ellant argues that Section 1173 of Title 21 is not vague. The standards whi h we are to determine the constitutionality of a challenged statute are cle r. The United States Supreme Court has said, "As generally stated, the voi -for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). The United States Supreme Court ha stated, "(W)e have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last

resort." ' Broadrick v. [redacted]te, 413 U.S. 601, 613, 93 [redacted].Ct. 2908, 2916, 37 L.Ed.2d 830 (1973).

Additionally, this Court has stated that "It is fundamental that statutes creating criminal offenses must be drawn in language sufficient to apprise the public of exactly what conduct is forbidden. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Hayes v. Municipal Court of Oklahoma City, 487 P.2d 974, 976 (Okl.Cr.1971). We have no difficulty in concluding that 22 O.S.Supp.1993, s 1173 gives fair notice of the proscribed activity and is not void for vagueness on its face.

*2 The legislature has responded to the increased public awareness and media attention devoted to the stalking of an individual. A careful balance must be achieved for a statute addressing stalking to be effective. Stalking statutes must be defined as broadly as possible to maximize victim protection,. but narrowly enough to prevent serious abuse. We believe 21 O.S.Supp-1993, s 1173 provides ample clarity and notice. The word "repeatedly" adds to the specific intent required to commit the offense as well as the restraint law enforcement officers and prosecutors must follow. Not until a perpetrator follows or harasses a victim more than once does the conduct rise to a criminal level. Additionally, by using the words, "willfully and maliciously," the legislature has provided that it is the perpetrator's intent which triggers this statute. This construction is consistent with the decisions in other jurisdictions. See Pallas v. State, 636 So.2d 1358 (Fla.App. 3 Dist.1994); People v, Heilman, 30 Cal.Rptr.2d 422 (Cal.App. 4 Dist.1994).

Appellant also argues that contrary to the District Court's finding, this statute does not unconstitutionally shift the burden of proof to the defendant. A rebuttable presumption created by the legislature will not be sustained if there is no rational connection between the fact proved and the ultimate facts presumed. Baledge v. State, 536 P.2d 13291 1330 (Okl.Cr-[redacted]5). Judge Musseman found that in this case the rebuttable presumption created in Section 1173(E) provided "no rational connection between the facts proved and the ultimate facts presumed." We find a rational connection does exist between the facts proved (which are (1) a course of conduct by the perpetrator; (2) a request by the victim for the perpetrator to cease this conduct; and (3) a continuation of the course of conduct); and the fact presumed (that the victim actually felt terrorized, frightened, intimidated, threatened, harassed, or molested.) Clearly, the victim would not have requested the perpetrator to stop the conduct if the conduct was not causing a problem, i.e. causing the victim to feel harassed or frightened. The continuation of such conduct would naturally lead the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested. The fact presumed is not the guilt of the perpetrator, but rather the feeling of the victim. We therefore find this proposition to be without merit.

IT IS THEREFORE THE ORDER OF THIS COURT, by a five (5) to zero (0) vote, after hearing oral argument and after a thorough consideration of Appellant's proposition of error, the dismissal of Case No. CM-93-1515 is REVERSED.

IT IS SO ORDERED.

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Present: Chief Judge Moon, Judge Fitzpatrick and
Retired Judge Hodges*

Argued at Richmond, Virginia

ANDERSON L. WOOLFOLK, JR.

v. Record No. 1173-93-2

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE JOHANNA L. FITZPATRICK
AUGUST 23, 1994

PUBLISHED

FROM THE CIRCUIT COURT OF LOUISA COUNTY
Lloyd C. Sullenberger, Judge

Franklin P. Hall (Hall & Hall, on briefs), for appellant.

Margaret Ann B. Walker, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

Anderson L. Woolfolk, Jr. (appellant) was convicted in a jury trial of stalking in violation of Code § 18.2-60.3 (1992). On appeal, he argues that the statute is unconstitutionally vague and overbroad. In addition, appellant contends that even if the statute is valid, there is insufficient evidence to sustain his conviction. For the reasons set forth below, we find Code § 18.2-60.3 (1992) valid and the evidence sufficient to convict. Accordingly, we affirm.

BACKGROUND

Under well-established principles of appellate review, we restate the evidence in the light most favorable to the Commonwealth. Jane Woolfolk, the victim in this case, divorced appellant in June 1991, after fifteen years of marriage. Ms.

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*Retired Judge William H. Hodges took part in the consideration of this case by designation pursuant to Code § 17-116.01.

EXHIBIT "A"

telephone call from a male caller who stated, "if you don't stop seeing her, I'm going to shoot both your asses." At trial, Mr. Carter testified that he was dating only Ms. Woolfolk during this period of time and that he recognized the caller's voice as appellant's. After Mr. Carter received the call, he contacted Ms. Woolfolk and informed her of appellant's threat. The next day, Mr. Carter saw appellant drive through his, Mr. Carter's, Fredricksburg apartment complex, forty miles from appellant's Louisa County residence.

On September 21, 1992, at approximately 10:00 p.m., two days after the threatening telephone call, Ms. Woolfolk saw appellant's unoccupied car parked near her home. Charlta H. Richardson, one of Ms. Woolfolk's neighbors, testified that she saw appellant drive down the street several times that night. Ms. Woolfolk became upset and feared that appellant was somewhere near her home on foot. Throughout the following week, appellant continued to park near or in sight of Ms. Woolfolk's home. He was within view of her residence every day from September 24 until the date of his arrest on September 28, 1992.

The evidence established that in response to appellant's threat and course of conduct, Ms. Woolfolk carried tear gas in her purse, had motion detector lights installed on the outside of her home, and "slept with a hammer" beside her bed. She watched for appellant everywhere she went and, on one occasion, she obtained a police escort when she drove Mr. Carter's car back to Fredricksburg.

Appellant denied making the threatening telephone call to Mr. Carter. He stipulated at trial that he was frequently within view of Ms. Woolfolk's home, that he followed Mr. Carter and that drove through Mr. Carter's apartment complex on September 20, 1992. However, appellant argues that he engaged in all these activities to monitor his children's environment and prepare for a future custody hearing.

SUFFICIENCY OF THE EVIDENCE

Generally, we decide constitutional questions only when necessary to the appropriate disposition of the case. Accordingly, we first address appellant's challenge to the sufficiency of the evidence to support his conviction. See Bissell v. Commonwealth, 199 Va. 397, 400, 100 S.E.2d 1, 3 (1957). "When considering the sufficiency of the evidence on appeal of a criminal conviction, we must view all the evidence in light most favorable to the Commonwealth and accord to the evidence all reasonable inferences fairly deducible therefrom. The jury's verdict will not be disturbed on appeal unless it is plainly wrong or without evidence to support it." Traverso v. Commonwealth, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988)(citations omitted). Further, "[t]he weight which should be given to evidence and whether the testimony of a witness is credible are questions which the fact finder must decide." Bridgeman v. Commonwealth, 3 Va. App. 523, 528, 351 S.E.2d 598, 601-02 (1986).

Appellant argues that the Commonwealth failed to prove that

he acted with the intent to cause emotional distress, and that "[a] fair reading of the record in this case reveals nothing more than a father who was worried and concerned about his children."

We reject this contention. The jury was entitled to disbelieve appellant's explanation that he acted only out of concern for his children. See Speight v. Commonwealth, 4 Va. App. 83, 88, 354 S.E.2d 95, 98 (1987)(en banc). Further, "[t]he mere possibility that the accused might have had another purpose than that found by the fact finder is insufficient to reverse the conviction." Bell v. Commonwealth, 11 Va. App. 530, 534, 399 S.E.2d 450, 452-53 (1991).

The Commonwealth proved beyond a reasonable doubt that appellant acted with a specific intent when he engaged in his pattern of "stalking" conduct. See Code § 18.2-60.3 (1992). "'[S]pecific intent may, like any other fact, be shown by circumstances. Intent is a state of mind which can be evidenced only by the words or conduct of the person who is claimed to have entertained it.'" Bell, 11 Va. App. at 533, 399 S.E.2d at 452 (quoting Banovitch v. Commonwealth, 196 Va. 210, 216, 83 S.E.2d 369, 373 (1954)). "A person's conduct may be measured by its natural and probable consequences. The finder of fact may infer that a person intends the natural and probable consequences of his acts." Campbell v. Commonwealth, 12 Va. App. 476, 484, 405 S.E.2d 1, 4 (1991)(citation omitted).

The evidence proved that appellant stalked his ex-wife. From mid-summer 1992 until his arrest in September 1993, he

persistently followed Ms. Woolfolk. He watched her in her home at all hours of the day and night, and even began to follow her boyfriend, Mr. Carter, who lived in Fredricksburg. Appellant threatened to shoot Ms. Woolfolk and Mr. Carter. He followed this threat by driving through Mr. Carter's apartment complex and repeatedly driving by Ms. Woolfolk's residence. Ms. Woolfolk testified that appellant's threat, combined with his persistent course of conduct, "terrified" her. In addition, she believed that appellant wanted to shoot or kill her.

From these facts and circumstances, the jury could properly find that appellant, on more than one occasion and with no legitimate purpose, engaged in conduct intended to cause his ex-wife to suffer the specific emotional distress generated by placing her in reasonable fear of death or bodily injury. See Ridley v. Commonwealth, 219 Va. 834, 836, 252 S.E.2d 313, 314 (1979)("[i]ntent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case"). Whether appellant acted with the requisite specific intent was a question for the jury. In evaluating the jury's decision in the light most favorable to the Commonwealth, based on the evidence presented in this case, we cannot say that the verdict was plainly wrong or without evidence to support it. Hancock v. Commonwealth, 12 Va. App. 774, 783, 407 S.E.2d 301, 306 (1991)(citations omitted). Accordingly, we find the evidence sufficient to convict.

Appellant next argues that Code § 18.2-60.3 (1992) is unconstitutionally vague. The statute in effect in September 1992, provided, in part:

> Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person by placing that person in reasonable fear of death or bodily injury shall be guilty of a Class 2 misdemeanor.

Code § 18.2-60.3(A) (1992).[1] Appellant argues, inter alia, that "the statutory phrase 'intent to cause emotional distress' is hopelessly vague in that it fails to appraise a potential defendant of what sort of conduct might violate its terms." We disagree.

As a threshold matter, the Commonwealth argues that appellant lacks standing to make a vagueness challenge to former Code § 18.2-60.3 (1992) because "an allegation that a statute is constitutionally vague cannot be lodged by one who has engaged in conduct 'clearly proscribed' by the statute." We have previously considered and rejected this argument in Perkins v. Commonwealth, 12 Va. App. 7, 402 S.E.2d 229 (1991), where we held that a defendant had standing to challenge the statutes in

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[1]Code § 18.2-60.3 was amended by the General Assembly during the 1994 regular session. The current statute provides, in part:

> Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with the knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of a Class 2 misdemeanor.

question on overbreadth and vagueness grounds. Id. at 12, 402 S.E.2d at 232; see also Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983).

We reject appellant's contention that the term "emotional distress" is "hopelessly vague." "In determining whether a legislative enactment is unconstitutionally vague, the Supreme Court [of the United States] has considered whether the words used have a well-settled common-law meaning, and whether the state's case law demonstrates that the language used, while otherwise vague has been judicially narrowed." Flannery v. City of Norfolk, 216 Va. 362, 366, 218 S.E.2d 730, 733 (1975), appeal dismissed, 424 U.S. 936 (1976) (citations omitted). The term "emotional distress" is a common and well-recognized legal term that has been judicially narrowed by existing Virginia law. See Russo v. White, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991); Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

When statutory construction is required, we construe a statute to promote the end for which it was enacted, if such an interpretation can reasonably be made from the language used. VEPCO v. Board of County Supervisors, 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983); Harris v. Commonwealth, 142 Va. 620, 625, 128 S.E. 578, 579 (1925). Generally, the words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest. See Huffman v. Kite, 198 Va. 196, 199, 93 S.E.2d 328, 331 (1956).

The ordinary meaning of distress, as defined by Webster's dictionary, is as follows:

> Distress commonly implies conditions or circumstances that cause physical or mental stress or strain, suggesting strongly the need for assistance; in application to a mental state, it implies the strain of fear, anxiety, shame or the like.

Webster's Third New International Dictionary 660 (1981). In addition, Dorland's Medical Dictionary defines distress as: "physical or mental anguish or suffering." Dorland's Illustrated Medical Dictionary 398 (26th ed. 1981).

The Supreme Court of Virginia has also discussed the meaning of the term "emotional distress" in the context of civil tort actions. Former Code § 18.2-60.3 (1992) imposes criminal liability for specific conduct that, in the civil arena, could give rise to a claim for damages for the intentional infliction of emotional distress. Those cases which define the elements of the tort of the intentional infliction of emotional distress are instructive as to the intended meaning of the term "emotional distress" used in former Code § 18.2-60.3. In Russo, the Supreme Court of Virginia explained:

> The term "emotional distress" travels under many labels, such as, "mental suffering, mental anguish, mental or nervous shock. . . ." But liability arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it.

Russo, 241 Va. at 27, 400 S.E.2d at 163 (quoting Restatement (Second) of Torts § 46, comment j (1965))(emphasis added). See also Ruth v. Fletcher, 237 Va. 366, 368, 377 S.E.2d 412, 413 (1989)(liability found only where the conduct was outrageous and intolerable in that it offends against the generally accepted

standards of decency and morality). According , we construe the term "emotional distress" as used in former Code § 18.2-60.3 to mean the suffering or mental anguish that arises from being placed in reasonable fear of death or bodily injury and is so severe that no reasonable person could be expected to endure it.

"In assessing the constitutionality of a statute, we must presume that the legislative action is valid. The burden is on the challenger to prove the alleged constitutional defect." Perkins, 12 Va. App. at 14, 402 S.E.2d at 233 (citing Coleman v. City of Richmond, 5 Va. App. 459, 462, 364 S.E.2d 239, 241, reh'g denied, 6 Va. App. 296, 368 S.E.2d 298 (1988)). See also United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963); Almond v. Day, 197 Va. 782, 794, 91 S.E.2d 660, 669 (1956). Further, "we may construe our statutes to have a limited application if such a construction will tailor the statute to a constitutional fit." Coleman, 5 Va. App. at 462, 364 S.E.2d at 241.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender, 461 U.S. at 357. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Supreme Court of the United States explained that:

> [criminal] laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . A vague law impermissibly delegates basic policy matters

> to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id. at 108-09 (footnote omitted). However, "[i]f the terms of the statute, when measured by common understanding and practices, sufficiently warn a person as to what behavior is prohibited, then the statute is not unconstitutionally vague." Stein v. Commonwealth, 12 Va. App. 65, 69, 402 S.E.2d 238, 241 (1991) (citations omitted).

We conclude that former Code § 18.2-60.3 gave fair notice of the proscribed activity and is not unconstitutionally vague. Appellant reads the statute as proscribing all conduct done with the intent to cause the victim to suffer any type of emotional distress. In addition, appellant contends that the statute creates a subjective standard requiring "a potential defendant to engage in sheer guesswork as to whether his actions will cause 'emotional distress' or not in each specific case." By attempting to interpret each word separately, instead of reading the statute as a whole, appellant has misconstrued the clear meaning of former Code § 18.2-60.3.[2]

In our view, the statute does not create a subjective standard, but in fact creates a "reasonable person" standard, and therefore, the proscribed conduct does not vary with the

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[2]It is a well settled principle of statutory construction that the whole body of a statute should be examined to determine the true intention of each part. "[A] statute is not to be construed by singling out a particular phrase." VEPCO v. Citizens for Safe Power, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981)(citation omitted).

particular psychological makeup of the victim. In addition, the statute prohibits only conduct engaged in with the intent to cause the specific emotional distress generated by placing a victim in reasonable fear of death or bodily injury.[3] The statute's application is further narrowed by our interpretation that the emotional distress contemplated by former Code § 18.2-60.3 must be so severe that no reasonable person could be expected to endure it. In addition, the statute requires that the Commonwealth prove that an accused engaged in such activity "on more than one occasion."

In Colten v. Kentucky, 407 U.S. 104 (1972), the Supreme Court of the United States explained as follows:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Id. at 110. Accordingly, "no more than a reasonable degree of

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[3] "[T]he maxim 'noscitur a sociis,' which translates 'it is known from its associates,' provides that the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context." Turner v. Commonwealth, 226 Va. 456, 460, 309 S.E.2d 337, 339 (1983). Here, the general words "intent to cause emotional distress" are qualified by the related phrase "by placing that person in reasonable fear of death or bodily injury." Code § 18.2-60.3. "[W]hen general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words." Commonwealth v. United Airlines, Inc., 219 Va. 874, 889, 248 S.E.2d 124, 132-33 (1978). See also Cape Henry Towers, Inc. v. National Gypsum Co., 229 Va. 596, 601, 331 S.E.2d 476, 479 (1985).

certainty can be demanded." Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). Here, the clear legislative intent of former Code § 18.2-60.3 was to stop serious threatening and harassing conduct before it escalated into violence. As Professor Tribe has noted, "the legislature confronts a dilemma: to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others." Lawrence H. Tribe, American Constitutional Law § 12-31 at 1033 (2d ed. 1988)(footnote omitted).

As a practical matter, it is impossible to draft legislation delineating every possible act of stalking that would provide adequate protection for potential victims without infringing upon our constitutional freedoms. Former Code § 18.2-60.3 struck an appropriate balance between these two concerns by requiring proof beyond a reasonable doubt that an accused acted with a specific intent. "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." National Dairy Products Corp., 372 U.S. at 33 (citation omitted). See also Parker v. Levy, 417 U.S. 733, 757 (1974). By requiring a specific intent in conjunction with more than one overt act, the statute gives a person of ordinary intelligence a reasonable opportunity to know what is proscribed. See Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1982); see also Boyce, 342 U.S. at 342 (requirement of specific intent does much to destroy any force in

argument that application of statute would be unfair or that complainant would not know his conduct is proscribed); Screws v. United States, 325 U.S. 91 (1945)(specific intent element counters vagueness challenges). Accordingly, we find that appellant failed to prove that former Code § 18.2-60.3 is void for vagueness.

OVERBREADTH

Appellant also contends that former Code § 18.2-60.3 is unconstitutionally overbroad. "An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." Hill v. City of Houston, 764 F.2d 1156, 1161 (5th Cir. 1985) (footnote omitted), cert. denied, 483 U.S. 1001 (1987). However, the overbreadth doctrine, which is designed to guard against laws that interfere with activities protected by the First Amendment, is not without limitation.

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Supreme Court of the United States ruled that "substantial overbreadth" may be required to invoke the doctrine, particularly where speech is joined with conduct:

> [The function of the overbreadth doctrine is] a limited one at the outset, [and] attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . . To put the matter another way, particularly where conduct and not merely speech is

> involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Id. at 615.

Former Code § 18.2-60.3 was designed to proscribe certain impermissible conduct and not speech.

> [T]he mere fact that one can conceive of some impermissible application of a statute is not sufficient to render it susceptible to an overbreadth challenge; . . . there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for [the statute] to be facially challenged on overbreadth grounds.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984)(citations omitted)(footnote omitted). See also Perkins, 12 Va. App. at 15-16, 402 S.E.2d at 234. No such "realistic danger" is present in this case.

Appellant argues that former Code § 18.2-60.3 is broad enough to reach constitutionally protected activities. While we do not agree with appellant's construction of the statute, it is well settled that "[i]f a statute can be made constitutionally definite by a reasonable construction, the court is under a duty to give it that construction." Pedersen v. City of Richmond, 219 Va. 1061, 1065, 254 S.E.2d 95, 98 (1979). Applying this principle, we read former Code § 18.2-60.3 as proscribing only conduct having no legitimate purpose engaged in with the intent to cause the specific emotional distress generated by placing a victim in reasonable fear of death or bodily injury. Such a narrowing construction is not strained and prevents the possibility of overbreadth. Beyond all reasonable doubt,

appellant's conduct violated the terms of the statute as herein construed. Because we find that former Code § 18.2-60.3 is directed primarily at conduct that has no legitimate purpose and, if directed at speech then without regard to its content, we conclude that appellant has not shown any overbreadth of the statute that is "substantial . . . judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. Accordingly, appellant's overbreadth challenge to former Code § 18.2-60.3 must fail.

CONCLUSION

For the reasons set forth above, we find that former Code § 18.2-60.3 is neither unconstitutionally vague nor overbroad. Also, the evidence is sufficient to prove that appellant violated the statute as we have interpreted it in this opinion. Accordingly, the judgment of the trial court is affirmed.

Affirmed.