FILED
SID J. WHITE
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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TERRY HUFFINE, :

Petitioner, :

vs. : Case No. 84,962

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

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TABLE OF CITATIONS

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On November 24, 1992, the State of Florida charged Petitioner, TERRY MICHAEL HUFFINE, with aggravated stalking, section 784.048(3), Florida Statutes (Supp. 1992), and trespass, section 810.09, Florida Statutes (1991) (R5-7). Petitioner moved to dismiss the aggravated stalking charge based on the vagueness and overbreadth of 784.048 (R13-14).

After considering argument at two hearings on the alleged unconstitutionality of section 784.048, the trial court denied Petitioner's motion to dismiss (R60-61, 63). Petitioner then renewed his motion to dismiss at trial (T215). On March 11, 1993, a jury convicted Petitioner of the lesser included offense of stalking and acquitted him of trespass (T265).

At trial, the alleged victim, Petitioner's ex-wife, testified that Petitioner called her and attempted to visit her on several occasions (T27-28, 46). She also testified that while Petitioner was outside her house, he was yelling "you will die, you will die, you will die" (T28). In addition, she stated that she was afraid of Petitioner (T46).

The State also attempted to prove that Petitioner violated an injunction for protection against domestic violence (T34, 190). Additionally, the ex-wife's mother testified to records she had made of Petitioner's numerous attempts to contact his ex-wife (T70-116). As a result, the Lakeland Police Department filed a complaint affidavit on Petitioner (T169). Finally, the State offered evidence that Petitioner said he would smash his ex-

wife's face in due to what she had done to him (T197).

Throughout the alleged stalking period, July 1, 1992, to November 20, 1992, Petitioner was to have limited custody of his child, who lived with the ex-wife. The custody arrangement provided that Petitioner would have custody every other weekend, every other holiday, every other Wednesday, and thirty days during the summer (T53). The ex-wife, however, would not allow Petitioner to take the child (T53). It is also to be noted that during part of the alleged stalking period, Mr. Huffine and Ms. Huffine lived together in Lakeland. Even though they had divorced in May 1991, they were living together on July 1, 1992 (T25, 47). They stopped living together in July 1992 when Mr. Huffine, Ms. Huffine, and their son took a trip to Atlanta and Ms. Huffine had Mr. Huffine arrested (T47-49).

Petitioner was sentenced on April 6, 1993, to one year in the county jail on the stalking conviction (R88-99). A notice of appeal was timely filed on April 20, 1993 (R100). In that appeal Petitioner attacked the constitutionality of the stalking statute. In its opinion issued on December 21, 1994, the Second District certified the following question as being of great public importance:

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

SUMMARY OF THE ARGUMENT

The Florida stalking statute, section 784.048, Florida Statutes (Supp. 1992), is unconstitutional on its face and as applied to Petitioner. Said statute is void for vagueness and violates the overbreadth doctrine. This stalking statute also violates substantive due process of law. Thus, the trial court's decision declaring section 784.048, Florida Statutes (Supp. 1992), constitutional should be reversed.

ARGUMENT

ISSUE I

WHETHER SECTION 784.048, FLORIDA STATUTES (SUPP. 1992), IS UNCONSTITUTIONALLY OVERBROAD, VAGUE, AND/OR IN VIOLATION OF SUBSTANTIVE DUE PROCESS?

This case not only involves a facial challenge to section 784.048, Florida Statutes (Supp. 1992), but also an attack as applied to Terry Huffine. Mr. Huffine not only facially attacked the constitutionality of the stalking statute, but he specifically attacked its application to his situation based on the facts.

A. Overbreadth--First Amendment

The statute at issue[1] does regulate action and/or speech

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[1]The state in its entirety states:

> (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 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.

which are protected by the guarantees of the First Amendment which protects the freedoms of speech and association; and it does so in a manner that is not merely ancillary to conduct not protected by the First Amendment.

The First and Fourteenth Amendments and Article I, Sections 3 and 4, of the Florida Constitution imposes limitations upon governmental abridgement of freedom to associate and privacy in one's associations. NAACP v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The

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> (2) Any person who willfully, maliciously, and repeatedly follows or harasses another person, commits the offense of stalking, a misdemeanor of the first degree....
>
> (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....
>
> (4) Any person who, after an injunction for protection against repeat violence pursuant to section 784.046, or an injunction for protection against domestic violence pursuant to section 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeated follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree....
>
> (5) Any law enforcement officer may arrest, without warrant, any person he or she has probable cause to believe has violated the provisions of this section.

Section 784.048, Florida Statutes (Supp. 1992) (emphasis supplied).

instant statute prohibits any person from "willfully, maliciously, and repeatedly [harassing]" another. § 784.048(2), Fla. Stat. (Supp. 1992).

The overbreadth doctrine allows a defendant to attack a statute because of its effect on conduct other than conduct for which the defendant is being punished. Dombrowsky v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); Broaddrick v. Oklahoma, 413 U.S. 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Florida Supreme Court has held that the "overbreadth doctrine applies only if legislation 'is susceptible of application to conduct protected by the First Amendment.'" Southeastern Fisheries Association, Inc. v. Dept. of Natural Resources, 453 So. 2d 1351 at 1353 (Fla. 1984). The constitutionally protected conduct here is the First Amendment freedom to associate and privacy in one's association. This criminalization of the "following" of another individual without touching or harassing said person clearly violates one's right to associate and privacy in a citizen's choice of association.

In W.J.W. v. State, 356 So. 2d 48 (Fla. 1st DCA 1978), the First District struck down a city curfew ordinance. The court found that the curfew ordinance infringed on basic constitutional rights:

> Restraining children under the age of sixteen years from freely walking upon the streets or other public places when no emergency exists is incompatible with the freedoms of speech, association, peaceful assembly and religion secured to all citizens of Florida by Article I of the Florida Constitution.

Id. at 50. See also K.L.J. v. State, 581 So. 2d 920, 921 (Fla. 1st DCA 1991) (Jacksonville curfew ordinance declared unconstitutional even though it contained "legitimate business" exception).

In S.W. v. State, 431 So. 2d 339, 340 (Fla. 2d DCA 1983), the Second District struck down a city ordinance which provided for a curfew for children under 17 years of age unless "[the minor] if properly attended by or is in the company of such minor's parent...or if such minor child shall have written permit therefore from the chief of police...." The Court found that the ordinance "prohibits minors participating in a myriad of legitimate activities" and "bristles with the potential for selective enforcement," thereby finding the city ordinance to be both vague and overbroad. Id. at 341.

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

that legally/criminally means--see section B) would be subject to prosecution unless that person could convince a police officer that the conduct in question had a "legitimate purpose" as required under section 784.048(1)(a), Florida Statutes (Supp. 1992).

The instant statute is also constitutionally defective on its face in that it is overbroad and regulates communicative conduct that is protected by the First Amendment. State v. Elder, 382 So. 2d 687 (Fla. 1980); State v. Keaton, 371 So. 2d 86 (Fla. 1979). Because the anti-stalking statute does not sufficiently define or enumerate the "constitutionally protected activity" that is exempted from the statute, the vagueness of the statute merges with its overbreadth and violates both constitutional precepts.

In Spears v. State, 337 So. 2d 977 at 980 (Fla. 1976), this Court stated:

> Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech. If this possibility were the only evil of overbroad statutes, it might suffice to review convictions on a case by case basis. But the mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

The failure to define or list the "constitutionally protected activity" that is exempted causes the ordinary citizen to either have to guess at what is exempt and protected or become a constitutional scholar. This results in a chilling of First Amendment freedoms. The above-described vagueness and overbreadth

becomes even more troublesome when coupled with constitutionally insufficient guidelines for law enforcement officers, more particularly described below. The law as it relates to criminal legislation that can be interpreted to encompass protected speech is clear. "Because First Amendment freedoms need breathing room to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 at 338 (1963). When a statute punishes only spoken words, it can withstand attack upon its facial constitutionality only if it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendment. Gooding v. Wilson, 405 U.S. 518 at 520, 92 S.Ct. 1103, 31 L.Ed.2d 408 at 413 (1972). Statutes regulating speech must "punish only unprotected speech and not be susceptible of application to protected expression." Id. at 405 U.S. 522. Where a legislative enactment "is susceptible of application to protected speech . . ., it is constitutionally overbroad and therefore facially invalid." Lewis v. New Orleans, 415 U.S. 130 at 134, 94 S.Ct. 970, 39 L.Ed.2d 214 at 219 (1974).

The right to obtain an abortion is a woman's constitutionally protected right. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The right to oppose an abortion is secured by the right of free speech. If a potential mother who has announced her intention to obtain an abortion and her husband, heatedly and angrily, demands that she not abort the fetus in such a manner which causes her substantial emotional distress in an

attempt to persuade her to abandon her plan, has he committed the crime of stalking? If the mother persists in calling the father to persuade him and enroll him in her decision, has she, in turn, committed the crime of stalking?

Judge Maloney, the lower court judge in State v. Wallace[2], held the stalking statute to be both unconstitutionally vague and overbroad (See Appendix B). In discussing the over-breadth of the statute, Judge Maloney stated:

> Third, in defining "harasses" the legislature used the phrase "course of conduct" and went on to define "court of conduct" in subsection 1(b), to mean the following:
>
> > "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.
>
> It is one thing to say that constitutionally protected activity cannot be the basis for an arrest under this statute, but it is quite another thing to expect the ordinary citizen or the police to know what activities are constitutionally protected. The failure to define or list the exempted "constitutionally protected activities" requires the citizen or police officer to be a constitutional scholar. It also requires the citizen to think twice before saying or doing something which may or may not be a crime depending upon a judge's later decision that the activity was or was not constitutionally protected. As such, the statute is not only vague, but it is

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[2]This case was pending in the Second District in case number 93-1905 until the State voluntarily dismissed the appeal. The order dismissing the appeal was entered on July 13, 1993.

overbroad.

Judge Maloney then went on to quote from Spears, which has already been quoted above.

In another circuit court case, Judge Wright in State v. Kahles, Case No. 92-22819 MM10A (Broward County Ct., 17th Cir. March 10, 1993) (See Appendix C) ruled that section 784.048 is "unconstitutionally overbroad because it regulates conduct other than that which its purports to regulate." Judge Wright explained:

> Since section 748.048 [sic] does not anywhere specifically exempt protected speech from it scope, it is unconstitutionally overbroad. See State v. Elder, 382 So. 2d 687 (Fla. 1980); State v. Keaton, 371 So. 2d 86 (Fla. 1979).
>
> The potential of section 748.048 [sic] to have a chilling effect on the First Amendment freedoms is present because it lacks guidelines for law enforcement officers. Specifically, this Court notes that the already difficult job of the police officer is rendered impossible by this statute because the officer, whose job is to enforce the law, must also be a psychologist in order to determine the existence of, as well as the level of emotional distress, without any guidelines or definitions to help them. The officer must also be a constitutional scholar in order to determine whether conduct is exempted from the statute as "constitutionally protected activity" or otherwise has a "legitimate purpose," again without definitions of those terms or guidelines to make said determination. As a result this law is overbroad and violative of both the U.S. and Florida Constitutions.

And, of course, Circuit Court Judge Behnke, in her order finding the stalking statute to be both vague and overbroad, agreed with Petitioners' argument that the statute is unconstitutionally overbroad in that it regulates protected rights to free speech and

freedom to associate:

> The failure to define "constitutionally protected activities" requires the citizen or police officer to be well-read in the area of Constitutional Law and that is unreasonable. As this court inquired of the Assistant State Attorney during argument "How does the law enforcement officer know what constitutionally protected conduct means." Therein, lies the problem. This makes the statute constitutionally overbroad.

(R52, 53).

The Florida stalking statute should be declared unconstitutional under the United State's Constitution Fourteenth Amendment overbreadth doctrine. The statute purports to criminalize conduct which clearly is constitutionally protected by the First Amendment.

B. Vagueness

The due process vagueness doctrine (1) requires notice to citizens and (2) prevents discriminatory enforcement, but the latter purpose is more important.

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-358 (1983) (citations omitted).

Florida law also emphasizes this necessity for guidelines to prevent selective prosecution.

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

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

Section 784.048(2) is unconstitutionally vague in that it fails to reasonably inform a citizen of the conduct which is prohibited. As such, section 784.048 violates the Due Process Clauses of the Fifth Amendment and the Florida Constitution because "men of common intelligence must necessarily guess at it's meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385 at 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The Legislature, in composing section 784.048, used both a confusing sentence structure and words whose definitions fail to dispel the vagueness.

The statute throughout states that "Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking." Subsections (2), (3), and (4). This wording is ambiguous based on the construction of the sentence. Based on the punctuation and structure there is no

single meaning which can be taken from this sentence. There are three equally plausible ways to interpret this section, each with distinct and difference meanings.

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

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

> 1. Any person who willfully, maliciously, and repeatedly:
>
> 1) follows or,
> 2) harasses
>
> another person commits...
>
> 2. Any person who
>
> 1) willfully, maliciously, and repeatedly follows, or
> 2) harasses
>
> another person commits...
>
> 3. Any person who willfully, maliciously, and
>
> 1) repeatedly follows, or
> 2) harasses
>
> another person commits...

In other words, the current sentence structure is ambiguous because the extension of the modifiers "willfully, maliciously, and repeatedly" is indeterminate. This ambiguity is fatal due to the fact that the intentional component of the crime is determined by the application of the modifiers. Under example (2), for instance, stalking-by-harassment is a strict liability offense. Under example (1) however, it is a general intent crime. Both interpretations are supported by the text.

The problem of dealing with a poorly constructed sentence is similarly exemplified in McCall v. State, 354 So. 2d 869 (Fla. 1978), wherein this Court invalidated a statute restricting the use of abusive language. The statute stated, in pertinent part:

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

§ 231.07, Fla. Stat. (1975) (Emphasis supplied). This Court rejected the state's contention that the first part of the statute related to speech which was disruptive of school functions, and thus constitutional. This Court refused to read the two disjunctive parts together asserting that:

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

McCall, 354 So. 2d at 872, n.3. It is, therefore, unclear whether the disfunction separating "follows" and "harasses" signifies that

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

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

As noted above, example (2) takes all the scienter element out of the word "harasses." The argument that a means rea requirement can save an otherwise unconstitutional statute cannot be sustained here. For the terms "willfully" and "maliciously," combined, do not necessarily mean that the conduct must be intentional with an evil purpose, i.e. with a specific intent. The big question is whether this statute is a general intent crime or a specific intent crime. The case law does not support the higher degree of mens rea for a specific intent crime.

In Linehan v. State, 442 So. 2d 244 (Fla. 2d DCA 1983), the Second District was faced with deciding whether the arson statute was a specific or general intent crime. In defining these terms, the Court stated that the word "willfully" by itself described a general intent crime; but when it was combined with additional or different types of wording denoting a more specific intent, the crime was a specific intent crime. In looking at the arson statute, this Court noted the word "wilfully" was alone (the phrase used in the statute was "willfully and unlawfully") and, therefore, was a general intent crime. In coming to this conclusion, it is important to point out that the Second District

specifically noted that the word "maliciously" had been omitted from the statute by the legislature in 1979. Id. at 247. From the Court's opinion, it would be logical to argue that "willfully" combined with "maliciously" equals a specific intent crime. The Second District's opinion, however, was modified by this Court in Linehan v. State, 476 So. 2d 1262 (Fla. 1985). Although this Court agreed with the Second District that arson was a general intent crime, it took great pains to state that it had always been a general intent crime--despite the use of malicious in combination with willful in earlier definitions:

> Petitioner argues that the words "willfully and unlawfully" are words of specific intent and, therefore, that voluntary intoxication should be a valid defense to arson. We disagree. Arson was a general intent crime under the common law. See Burdick, The Law of Crime § 692 (1946). At common law, arson was defined as "the wilful and malicious burning of a dwelling house, or outhouse within the curtilage of a dwelling of another." Duke v. State, 132 Fla. 865, 870, 185 So. 422, 425 (1938). See also Sawyer v. State, 100 Fla. 1603, 132 So. 188 (1931); Williams v. State, 100 Fla. 1054, 132 So. 186 (1930). Under this definition, a specific intent to burn is not required. See Dorroh v. State, 229 Miss. 315, 90 So.2d 653 (1956); Crow v. State, 136 Tenn. 333, 189 S.W. 687 (1916). We find that the present statutory definition of arson does not materially vary from the common law definition with regard to the requisite intent. There is no indication that the legislature intended to change the common law intent requirement. Accordingly, we hold that arson under section 806.01 is a general intent crime and, therefore, voluntary intoxication is not available as a defense to arson.

Id. at 1264, 1265.

Based on the above, it would appear that the word

"maliciously" does nothing to add to the mens rea of the stalking statute; and the statute is--at the most--a general intent crime. Thus, the State's claim made before the lower court that a heightened mens rea saves a vague criminal statute must fail.

This lesser mens rea combined with several poorly defined words goes on to deteriorate the concept of a general intent crime to the point where the statute becomes a strict liability crime. Section 784.08 is full of undefined or unconstitutionally poorly defined terms.

For instance, as defined by the statute, "harasses":

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

The term "no legitimate purpose," included in the definition of "harasses," is not defined at all in the statute.

The term "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.

The initial "arbiter" of the definitions of these terms is "[a]ny law enforcement officer [who] may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section." § 784.048(5), Fla. Stat. (Supp. 1992). Other than excluding picketing or other organized protests, the term "constitutionally protected activity" is not

defined in the statute but, along with the rest of these vague terms, is left up to the "discretion" of the warrantless arresting officer.

It seems likely that the definition for "harasses" was taken from Title 18, United States Code, Section 1514, which (as a civil action) allows the United States government to obtain an injunction to prohibit the harassment of a Federal witness. There, the definition of the term "harassment" was to be used to allow the government to obtain an injunction and was not used to define a crime. However, in the criminal context, as defined in section 784.048(1), Florida Statutes (Supp. 1992), the term is so poorly defined as to be vague in the constitutional sense.

Take the term "...that causes substantial emotional distress in such person." The term does not require that the person harassed be a "reasonable person," which means that otherwise innocent conduct which causes substantial emotional distress in an unreasonable person triggers the criminal sanctions of the statute. This is especially so because the statute also fails to define "substantial emotional distress."

Other states have found it necessary in the definition of the term "harass" or "harassment" to require the person allegedly suffering "substantial emotional distress" to be a "reasonable" person.

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

> (a)ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury or to place that person in reasonable fear of the death or great bodily injury of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment. [California penal code section 646.9(a) (1992 amendment) Emphasis added].

Alabama Code s.13a-6-90(a) provides that the crime of stalking is committed when:

> A person who intentionally and repeatedly follows or harasses another person and who makes a credible threat, either expresses or implied, with the intent to place that person in reasonable fear of death or serious bodily harm is guilty of the crime of stalking. [Emphasis added].

The definitional section of that statute defines harasses as follows:

> [a person who] engages in an intentional course of conduct directed at a specified person which alarms or annoys that person, or interferes with the freedom of movement of that person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress. Constitutionally protected conduct is not included within the definition of this term. [Emphasis added].

Likewise, Delaware, Idaho, Kentucky, Illinois, and Louisiana require a "reasonable person" to suffer some sort of substantial emotional distress. Delaware Code Chapter 451, s.1312a; Idaho Statute 18-7905(a), as added by 1992, ch. 227, s.1, page 677; Kentucky revised Statute section 508.130 (1992); Chapter 720, Illinois Statutes, act 5/12-7.3 (1992); Louisiana Statutes,

Title 14, Chapter 1, s. 40.2(a).

Similarly, Connecticut, Hawaii, Mississippi, Massachusetts, and New Jersey all require under comparable circumstances that a person be a "reasonable" one. Chapter 711, Hawaii revised statutes, Section 711, Act 292, Senate Bill number 3354 (effective upon its approval date of June 29, 1992); Mississippi Code Section 97-3-107 (1992); Massachusetts General Law Chapter 265 Section 43 (1992); New Jersey Chapter 209, Senate number 256,(2)(b), supplementing Title 2C of the New Jersey statutes.

It is clear that the (apparently deliberate) omission of the word "reasonable" as a modifier to the word "person" in the term "...that causes substantial emotional distress in such person" is a constitutionally fatal flaw. While the Legislature may be free to amend the statute and to correct this omission, the courts are not; because it is not their function to legislate. In addition, the criminal statutes must be strictly construed. See Jeffries v. State, 610 So.2d 440 (Fla. 1992). Moreover, even if this court were to read the word "reasonable" into the statute immediately prior to the word "person," it would still not cure the constitutional deficiencies of this statute because this is not the only phrase poorly defined in the state and because law enforcement officers are the initial arbiters of the statute.

As noted above, "substantial emotional distress" was not defined by the legislature. The courts and our citizens are not given guidance as to where such definitions should be found (e.g. Black's Law Dictionary, Webster's Collegiate Dictionary, tort law,

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

The common definition of the word "substantial" as found in Webster's Ninth New Collegiate Dictionary (9th Ed. 1986) is:

> 1. a) Constituting of or relating to substance; (b) Real, True; c) Important, Essential; 2: ample to satisfy and nourish; full 3: possessed of means; Well-to-do; 4: firmly constructed; sturdy; 5: being that specified to a large degree or in the main (a victory).

The definition of "substantial" in Black's Law Dictionary (4th Ed. Rev. 1968) is:

> Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing, real; not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.

These varying definitions do not sufficiently define the quality of "emotional distress" necessary to invoke the stalking statute. Is this statute saying one is liable for merely worrying others? If so, how much crying, anxiety, stress is necessary? Additionally the statute does not sufficiently define the conduct that may cause substantial emotional distress in another. Is making another person cry substantial emotional distress? The Legislature may not establish a standard that requires an individual to act at his or her peril based upon the subjective effects of those feelings in another, especially if they do not define the

depth of the mental anguish necessary to trigger the statute. In the instant situation the legislature did not even attempt to establish an objective standard by outlining the prohibited conduct in terms of its probable effect on a reasonable person under the circumstances, but rather utilized a subjective standard with vague terms or terms not even defined such as "substantial."

Moreover, section 784.048 requires that the recipient of the proscribed behavior suffer "substantial emotional distress" but does not define emotional distress. No such term or definition exists in the Diagnostic and Statistical Manual of Mental Disorder (3d Ed. Rev.) or any other psychological text. It may be a novel species of the historical emotional distress concept that has evolved in civil tort law. Emotional distress, under tort theory, is generally actionable only when the plaintiff has suffered a physical impact which is the proximate cause of the distress. See Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Claycomb v. Eichles, 399 So. 2d 1050 (Fla. 2d DCA 1981). The Florida courts have cautiously expanded this doctrine to allow recovery in certain, narrowly drawn circumstances. Most significantly, in Champion v. Gray, 478 So. 2d 17 (Fla. 1985), this Court carved out an exception to the impact rule in cases where the plaintiff manifests "significant discernible physical injury" resulting from the psychological trauma of seeing a close family member suffer a negligent injury.[3] Id. at 18-19. See Eastern Airlines, Inc., v.

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[3]The Court stated that:

Mental distress unaccompanied by such physical

King, 557 So. 2d 574 (Fla. 1990) (airline passenger could not recover for emotional distress where plane's engines failed during flight). The only other recognized exceptions to the impact-rule are: (a) the tortious interference with dead bodies, Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950), and (b) the intentional infliction of emotional distress, Metropolitan Life Ins. Co., v. McCarson, 467 So. 2d 277 (Fla. 1985). Where intentional infliction of emotional distress is claimed, however, it must be shown that the defendant's conduct was so reprehensible that it rises to the level of being outrageous.[4]

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. 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.

Metropolitan Life, 467 So. 2d at 278-279 (emphasis supplied)

> consequences, on the other hand, should still be inadequate to support a claim; nonphysical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action.

Champion, 478 So. 2d at 19, n. 1.

[4]Only when the defendant's conduct is outrageous is there no requirement that the plaintiff prove physical injury arising from the psychic trauma. Williams, 575 So. 2d at 693-694.

(quoting § 46 RESTATEMENT (SECOND) OF TORTS (1965)); see also Williams v. City of Minneola, 575 So. 2d 683 (Fla. 5th DCA 1991) (conduct outrageous where police privately viewed autopsy video of plaintiff's son in party-atmosphere).

Stalking by harassment entails more than mere emotional distress. Since the Legislature added the adjective, "substantial," this implies that either a greater degree of distress must exist or that a greater quantum of proof of psychological trauma must be shown (or both) than is called for in tort cases.[5] If the traditional meaning of "emotional distress" has been incorporated into the stalking law, it would seem that in order to convict someone of stalking, where harassment is an element of the offense charged, the state must establish that the victim's psychological trauma registered somatically or that the defendant's conduct was outrageous. The statute's defectiveness is made apparent by the fact that this question eludes an answer. For the statute has introduced an entrenched legal concept into a novel context without indicating if it has revised the emotional distress doctrine by either abrogating the physical manifestation criterion or the outrageousness criterion or whether it has created a new, more stringent variant of its civil counterpart.

If an individual approaches another in a social function and asks them to dance, they decline, next offers them a drink,

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[5]It is also unclear whether "substantial" is equivalent in degree to the term "severe" in "sever emotional distress." If there is a distinction between the two concepts, the stalking statute offers no clues.

asks for a phone number, and continues to engage that person in conversation, at what point does this behavior violate the stalking statute and become criminal? Some individuals may find this flattering and exciting, yet to others this behavior would rise to the level of causing "substantial emotional distress." Again the statute requires the citizen to guess at what point his conduct crosses the line and becomes a course of conduct that is criminal. The lack of a clear-cut line delineating where behavior ceases to be legal and become criminal renders this statute void for vagueness.

Another problematical and unconstitutionally vague term in the definition of the word "harasses" is the phrase "and serves no legitimate purpose." As the term "no legitimate purpose" is not defined in the statute, a person of ordinary intelligence is not placed on fair notice of what conduct is forbidden.

What is a "legitimate purpose"? Does this mean the purpose carried out by an alleged violator of this statute has to violate another statute or ordinance? Is it only determined by the circular reasoning that the alleged violator's conduct violates all the other sections of the statute and is therefore (ipso facto) illegitimate? Black's Law Dictionary, 6th Edition (West Publishing Company, 1990) defines the verb "legitimate" as:

> To make lawful; to confer legitimacy; e.g., to place a child born before marriage on the legal footing of those born in lawful wedlock.

That same dictionary defines "legitimate" as an adjective as:

> That which is lawful, legal, recognized by law, or according to law; as legitimate chil-

> dren, legitimate authority, lawful power, legitimate sport or amusement. People v. Commons, 64 Cal.App.2d Supp. 925, 148 Pacific 2d 724, 731. Real, valid, or genuine. United States v. Schenck, C.C.A.N.Y., 126 F.2d 702, 705, 707.

These definitions are not helpful. Take, for instance, the following scenario. Spouse A suspects spouse B of cheating, and divorce proceedings have either been filed or are contemplated. Spouse A hires a private detective to servile spouse B. Spouse B notices the surveillance and believes the detective to be engaged in a course of conduct directed at him or her which causes substantial emotional distress in him or her; and as far as he or she is concerned, this course of conduct serves no legitimate purpose. Spouse B complains to law enforcement officials, who are left to guess as to whether this conduct serves a legitimate purpose. It certainly doesn't serve a legitimate purpose to spouse B, particularly if spouse B is innocent of the conduct spouse A believes that he or she is guilty of. At any rate, the initial arbiter of this vague phrase is the arresting police officer, who is afraid to do otherwise under this statute.

The Court in People v. Norman, 703 P. 2d 1261 at 1267 (Colo. 1985), ruled that the phrase "no legitimate purpose" had no defined meaning under the statute and no objective meaning outside of the statute; thus, the statutory language invited subjective evaluations of what behavior was prohibited by law. See also K.L.J. v. State, 581 So. 2d 920, 921 (Fla. 1st DCA 1991) (Jacksonville curfew ordinance declared unconstitutional even though it

contained "legitimate business" exception). Judge Maloney in Wallace found the decision in Norman compelling and agreed with it in finding the Florida stalking statute unconstitutional. In this case Judge Behnke also found the undefined and insufficient objective meaning to the phrase "no legitimate purpose" fatal to the stalking statute.

It is to be noted that the decision in Norman was revisited in Colorado in deciding the unconstitutionality of an ordinance on harassment. In People v. Gomez, 843 P.2d 1321 (Colo. 1993), the defendant mailed a ten-page letter to his former wife replete with profanity and negative assessments of her character and conduct. A police officer filed a complaint charging the defendant with violation of the Longmont harassment ordinance.[6] The Colorado Supreme Court held that the provision of this

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

> Harassment. A. A person commits harassment if, with intent to harass, threaten or abuse another person he:
> 1. Strikes, shoves, kicks or otherwise touches a person, or subjects him to physical contact; or
> 2. In public place, directs obscene language or makes an obscene gesture to or at another person in such manner as is likely to create an immediate breach of the peace; or
> 3. Follows a person in or about a public place; or
> 4. Repeatedly insults, taunts or challenges another in a manner likely to provoke an immediate violent or disorderly response;
> 5. Engages in any other conduct that in fact harasses, threatens or abuses another person.

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

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

Id. at 1326.

The list of vague terms in this statute goes on. Although the term "course of conduct" is "defined" in the statute, its definition is not helpful. What is "a series of acts over a period of time, however short, evidencing a continuity of purpose"? If one person follows another out into the parking lot but stops each time the followed person stares at him or her, is this "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose"? If the person allegedly "followed" is not a "reasonable" person, this harmless activity may cause that person "substantial emotional distress" and that person may think that such conduct does not serve a "legitimate purpose" (whatever that is).

Even more troubling is the latter part of the definition of "course of conduct" which states that: "constitutionally

protected activity is not included within the meaning of 'course of conduct.'" Guess who initially decides that? Not a neutral and detached magistrate, but a law enforcement officer. But the phrase is far more vague and far more troubling than this.

A law enforcement officer is ill-equipped to decide the mixed question of law and fact as to what exactly constitutes constitutionally protected activity. It is not clear from the statute whether this helps to define the offense of "stalking" and "aggravated stalking" or whether it is an affirmative defense. At any rate, this is not a term designed or calculated to place a person of ordinary intelligence on fair notice of what conduct is forbidden.

It is, however, a term that should trouble this court, just as what constitutes constitutionally protected activity has troubled lots of courts, both state and federal. It is unclear who makes the decision as to what is constitutionally protected activity and what guidelines are used by the arbiter in order to determine constitutionally protected activity. Initially, it's a law enforcement officer; then is it a judge or is it the jury? If it's a jury, how is the jury to be instructed by the court on what constitutionally protected conduct is without the court (improperly) commenting on the evidence? Will the court read a constitutional text to the jury? Will the court allow the jury to take back legal opinions and determine the law?

In the context used here, the phrase "constitutionally protected conduct" is vague and serves no guidepost providing a

"definite warning of what conduct" is required or prohibited, "measured by common understanding and practice." Whether or not this phrase appears in the statute, the legislature cannot outlaw constitutionally protected conduct no matter how much it wants to do so.

Just as an alleged violator or ordinary intelligence is not placed on fair notice of what conduct is forbidden, neither is any law enforcement officer who may arrest (without a warrant) any person that he or she "has probable cause to believe has violated the provisions of this section." The vague terms, therefore, will result in discriminatory, arbitrary enforcement; for the legislature has failed to set forth minimal guidelines to govern law enforcement. This failure makes the statute unconstitutionally vague.

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

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

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

The citizen, therefore, is not informed as to when a "course of conduct" crosses the line delineating the scope of illegal conduct. See Hermanson v. State, 604 So. 2d 775 (Fla. 1992). Because 784.048(2) defines one form of stalking as a "knowing and willful course of conduct by any person who willfully,

maliciously, and repeatedly follows" (another person), it is conceivable that television and newspaper reporters who carry out their professions repeatedly run afoul of this statute as well as other citizens whose behavior were not intended to be regulated by this statute. Surely the legislature did not intend to criminally penalize all conduct occurring once more. This could mean as little as twice. For example, honking a horn twice at the car in front of you in a traffic jam where the driver of the car cannot move and when the honking causes the driver in front "substantial emotional distress" could arguably result in criminal behavior. It is unclear whether honking twice would be a violation or whether one would have to honk 50 times for the crime to result.

In State v. Knodel, 1 Fla. Law Weekly Supp. 542 (Fla. Escambia Cty. Ct. Sept. 2, 1993), the court declared that the stalking statute was unconstitutionally vague with respect to the term "follows," but held that the use of "harassment" was sound.[7] The court, without explanation, also concluded that the words "willfully, maliciously, and repeatedly" modify both "follows" and "harasses." The primary reason for the court's finding that the statute's use of "follows" was vague is that the legislature set no spatiotemporal boundaries to limit the term's application: "and so one might, for example, question whether the statute prohibits

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[7]Contra, State v. Pallas, 1 Fla. Law Weekly Supp. 442 (Fla. 11th Cir. Ct. May 14, 1993). Confusion in the lower courts about the constitutionality of a statute is itself evidence that the law is unconstitutionally vague. United States v. Cardiff, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). This confusion is further exemplified by lower court decisions rendered in Wallace and Kahles.

'following' another into the same area of town one, two or twenty-four hours later." Id. at 543. What the court did not consider, however, is that this temporal indefiniteness applies to "course of conduct," as used in the definition of "harasses," which involves an unspecified series of acts occurring within any time period. Albeit the drafters devoted a few extra sentences to the definition of "harasses," they failed to provide a frame of reference so that an individual could reasonably predict what sorts of acts are prohibited. To borrow the court's analogy, just as one might question whether following someone into the same area of town within a given time-frame is illegal, it is equally impossible to determine how many times, or within what time-period, one can telephone another before the conduct is covered by the statute. A single phone call during which the caller intentionally inflicts substantial emotional distress by, for instance, threatening the listener (even after the issuance of an injunction) is not prohibited under the statute. There must occur a series of acts over an unspecified time-period. How many acts are a "series of acts"? How much time must elapse between the acts? Moreover, what action must a defendant take to commit an act? If the caller hangs up on the listener three times in ten minutes, then calls again five days later and says, "You'll get yours!" has he committed aggravated stalking? Is hanging up on someone an act, or must some form of communication take place? Does the five-day period that separates the three calls, during which the caller hung up, from the fourth call imply that we have one series of acts followed by

a separate, single act?

Finally, the court suggests that the harassment part of the statute can sustain a constitutional attack because in the definition of "harasses" it states that the activity in question must have "no legitimate purpose," thus furnishing a "sweeping last defense" to the accused. Id. at 543. It is, however, the use of such broad language that undermines procedural due process; for now a citizen has to (besides all the other conjectures he must make) prophesy about what constitutes a "legitimate purpose" and calculate whether what seems legitimate to him will ring true to the authorities. As noted above, "no legitimate purpose" is hardly a well-defined concept.

The ultimate conclusion to be drawn from all of the above-noted vague terms and subjective standards used in the anti-stalking statute is that the statute fails to warn a citizen of ordinary intelligence what conduct constitutes a crime under this statute and fails to provide minimal guidelines to law enforcement, prosecutors, judges, and juries so as to prevent selective, discriminatory enforcement. Many trial court judges have come to that conclusion when faced with having to deal with the stalking statute involving real people and have found the statute unconstitutionally vague: Judge Behnke in the cases sub judice, Judge White in Knodel (as to the term "following" only), Judge Maloney in Wallace, Judge Wright in Kahles.

Recently, this Court was faced with trying to determine the legal meaning of just one simple phrase--"public housing

facility." Although the concept sounded easy enough and at least two District Court of Appeals (the First and Third) had no problems with the meaning of the phrase, this Court in Brown v. State, 629 So. 2d 841 (Fla. 1994), did have problems with legally defining the phrase. In finding the phrase was vague and the statute was void for vagueness, this Court stated:

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

Id. at 843. The same statement can also be made in regards to the stalking statute. After all the dictionary definitions have been examined and hypothetical horribles have been paraded, the ultimate conclusion is that section 784.048 is void for vagueness because several phrases used in the statute (not just one like that at issue in Brown) give no notice to Florida citizens of the type of conduct banned. The legislature failed to provide essential guidelines to put the people of Florida on notice and to guide law

enforcement and the courts on enforcing this law. The courts cannot step in and cure the problems with this statute; thus, the statute has to be found void for vagueness.

C. Substantive Due Process

The State's "police power" to enact laws for the protection of its citizens is confined to those acts which may be reasonably construed as expedient for the protection of the public health, safety, welfare, and morals. State v. Saiez, 489 So. 2d 1125 (Fla. 1986). Substantive due process is violated, however, when irrational legislative means have been adopted to realize a legislative goal. State v. Walker, 444 So. 2d 1137 (Fla. 2d DCA 1984), affirmed, 461 So. 2d 108 (Fla. 1984). "In other words, a due process violation occurs if a criminal statute's means is not rationally related to its purposes and, as a result, it criminalizes innocuous conduct. Art. I, § 9, Fla. Const." Schmitt v. State, 590 So. 2d 404 (Fla. 1991). In the final analysis, the question is whether or not the criminal statute in question has outlawed innocent conduct along with the criminal conduct it sought to render illegal. Some examples of statutes found to have violated Florida's guarantee of due process are as follows:

In Schmitt the State sought to eliminate child sexual exploitation in section 827.071(5), Florida Statutes (1987), by making it illegal to knowingly possess depictions of a child involving sexual conduct. "Sexual conduct" was then broadly defined so as to include innocent photographs of a parent bathing a baby. This Court held there could be no rational basis for

criminalizing such innocent conduct and found the statute lacked a rational relationship to its obvious purpose. The statute was found void under the guarantee of due process.

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

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

Section 784.048(2), Florida Statutes (Supp. 1992), suffers from the same infirmity. While the ostensible goal, elimination of "stalking" as it has been defined by a few public, high-profile cases, is laudable, criminalizing all conduct that

comes under "willfully, maliciously, and repeatedly follows or harasses" is to include innocent albeit obnoxious conduct. The attentions of a newspaper/television reporter trying to uncover an unsavory story about a person would be one example, as noted above. The fact that the supposed victim need not be aware of the "stalking" or suffer "reasonable" fear adds to the argument that this statute has been too broadly defined so as to lack a rational basis of protecting the public's health, safety, and welfare. What rational basis does the State have in using its police powers to protect people who have no idea they need protection (keeping in mind that parts of this statue don't require any threat of harm) or in protecting people who are not "reasonably" being caused emotional distress.

There is also the additional consideration that there is relief available to people who justifiably fear further contact with specific individuals. An injunction issued by a Court in an impartial, judicial proceeding can offer relief when that injunction is violated. In addition, there are other criminal statutes available. (For example, in this case a charge of harassing telephone calls could have been pursued under section 365.16, Florida Statutes (1991) T86-98, 102-116).

D. Unconstitutional as Applied to Petitioner

In addition to the above-stated arguments attacking the stalking statute facially, Mr. Huffine attacked the statute as it applied to his case (R13, 14, 23-27, 47-60). The trial court also denied this aspect of Mr. Huffine's motion (R60, 61).

The undisputed facts in this case showed that Mr. Huffine had court-ordered shared parental responsibility and that Ms. Huffine was not allowing Mr. Huffine to take the child from the yard of her home (T52, 53). Mr. Huffine's calls and letters pertained to his son and his visitation rights (T40-45, 86-98, 102-116). The stalking statute describes "harasses" as a course of conduct that causes substantial emotional distress in a person and serves "no legitimate purpose." § 784.048(1)(a), Fla. Stat. (Supp. 1992). One of the issues the jury had to decide was whether or not Mr. Huffine's conduct served "no legitimate purpose." Such a vague phrase could not forewarn Mr. Huffine that his attempts to see his son pursuant to a court-ordered custody agreement would amount to "no legitimate purpose" in the eyes of a jury. Under the facts of this case, the stalking statute could easily be turned around against Ms. Huffine. Her course of conduct in repeatedly refusing Mr. Huffine access to his son pursuant to the court order and then calling the police constituted a course of conduct causing Mr. Huffine substantial emotional distress and served "no legitimate purpose."

This factual scenario exemplifies the vagueness of this stalking statute. Of course, the main argument is that the statute is so vague as to be unconstitutional on its face; but Mr. Huffine's situation demonstrates the vagueness with respect to his factual situation. Should this Court hold that the statute is not "impermissibly vague in all of its applications"; i.e., facially vague, then Mr. Huffine has standing to attack the vagueness of

this statute as applied. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362, 369 (1982).

CONCLUSION

Wherefore, based on the above-stated arguments and authorities, this Court should reverse the trial court's finding that the stalking statute is facially constitutional in that it is overbroad and vague. This Court should also hold that the statute violates one's constitutional right to substantive due process. Should this Court disagree with the above, then it should still find the statute vague as applied in Mr. Huffine's case.

APPENDIX

state presented no evidence about how the fingerprints were obtained to establish that the prints on the cards were Louis's.

Section 90.901, Florida Statutes (1991), requires authentication of evidence as a condition precedent to its admissibility. The state failed to authenticate these fingerprint cards and the trial court, therefore, erred in admitting them. Without the cards, there was insufficient proof that Louis was the perpetrator of the predicate offenses. *Ruth*; *Miller*. Accordingly, we reverse his sentence and remand for resentencing. If the state can prove Louis's identity as the perpetrator of the predicate crimes at the new sentencing hearing, the trial court may again sentence him as a habitual violent felony offender.

Reversed and remanded. (RYDER, A.C.J., PATTERSON and FULMER, JJ., Concur.)

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Criminal law—Stalking statute not unconstitutionally vague or overbroad—Question certified

TERRY MICHAEL HUFFINE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-01387. Opinion filed December 21, 1994. Appeal from the Circuit Court for Polk County; Charles B. Curry, Judge. Counsel: Thomas D. Wilson, Lakeland, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael J. Neimand, Miami, Assistant Attorney General, and Parker D. Thomas and Carol A. Licko, Special Assistant Attorneys General, Miami, for Appellee.

(RYDER, Acting Chief Judge.) Terry Michael Huffine challenges the trial court's order upholding the constitutionality of section 784.048, Florida Statutes (Supp. 1992), the stalking statute. Huffine was convicted by a jury and adjudicated guilty of stalking, a first degree misdemeanor.

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.)

* * *

Criminal law—Counsel—Ineffectiveness

PATRICK A. GUY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-01023. Opinion filed December 21, 1994. Appeal from the Circuit Court for Hillsborough County; Diana M. Allen, Judge. Counsel: Detria J. Liles of Williams & Associates, Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Katherine V. Blanco, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm without prejudice for the appellant to raise the issue of ineffective assistance of counsel in the trial court pursuant to Florida Rule of Criminal Procedure 3.850. *Healey v. State*, 556 So. 2d 488 (Fla. 2d DCA 1990). (RYDER, A.C.J., and CAMPBELL and PARKER, JJ., Concur.)

* * *

Criminal law—Judgment—Correction

ANTHONY JONES, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-01833. Opinion filed December 21, 1994. Appeal from the Circuit Court for Manatee County; Paul E. Logan, Judge. Counsel: James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant. Appellant, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's judgment and sentence for possession of cocaine. However, we remand for correction of the judgment to reflect that the appellant was tried by a jury.

Affirmed. (FRANK, C.J., and PATTERSON and LAZZARA, JJ., Concur.)

* * *

Criminal law—Search and seizure—Motion to suppress evidence which was allegedly wrongfully seized presents issues solely for trial court to determine, and jury has no part in the matter—When state relies upon consent to conduct search, state must prove consent was freely and voluntarily given in order to prevail in motion to suppress

SANDRA MOORE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-03629. Opinion filed December 21, 1994. Appeal from the Circuit Court for Lee County; William J. Nelson, Judge. Counsel: James Marion Moorman, Public Defender, and Diane Buerger, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellee.

(FRANK, Chief Judge.) Sandra Moore pleaded no contest to charges of possession of cocaine and drug paraphernalia after the trial court denied her motion to suppress the smoking device and crack cocaine found in her possession. The trial court applied the wrong standard in ruling on the motion and we reverse.

Moore was approached by three Lee County Sheriff's Deputies as she stood on a residential street while holding a small handbag. The key issue emerging from the encounter is whether the authorities, without a founded suspicion of criminal activity, ordered Moore to reveal the contents of her handbag or whether she voluntarily disclosed its contents. In any event, the authorities found a crack pipe and a small amount of crack cocaine. In denying the motion, the trial court thought it proper to view the evidence "in the light most favorable to the state." Then, when pressed by the defense to resolve the question of whether Moore had given her consent to search, the trial court announced, "That's something the jury is going to have to decide."

The trial court's remarks reveal its confusion as to the proper standard for resolution of the motion to suppress. A motion to suppress presents issues solely for the trial court to determine and a jury has no part in the matter. *Carter v. State*, 428 So. 2d 751 (Fla. 2d DCA 1983); *Brown v. State*, 352 So. 2d 60 (Fla. 4th DCA 1977). Moreover, when the state relies upon consent to conduct a search, it shoulders the burden of proving that the consent was freely and voluntarily given. *Louis v. State*, 567 So. 2d 38 (Fla. 3d DCA 1990). There is no evidentiary presumption favoring the state in this setting. The trial court erroneously relieved the state of its burden. *Chesnut v. State*, 404 So. 2d 1064 (Fla. 1981); *Denehy v. State*, 400 So. 2d 1216 (Fla. 1980).

We remind the trial court of its duty to announce whether reserved issues are dispositive. *Everett v. State*, 535 So. 2d 667 (Fla. 2d DCA 1988). The trial court failed in this instance to make such a finding and the parties did not stipulate that the issue was dispositive. On remand, should the issues be resolved in favor of the state and should Moore again decide to plead nolo contendere reserving the right to appeal, the trial court is to determine whether the issue surrounding the motion to suppress is dispositive.

We reverse and remand for proceedings consistent with this opinion. (CAMPBELL and PARKER, JJ., Concur.)

* * *

Civil procedure—Stay—Landlord-tenant—Trial court did not abuse its discretion in eviction action in conditioning stay of proceedings on defendant's payment of rent into registry of court even though plaintiffs were not seeking money judgment

REWJB GAS INVESTMENTS, a Florida general partnership; F.S. CONVENIENCE STORES, INC., as general partner of REWJB Gas Investments; and TONI GAS AND FOOD STORES, INC., as general partner of REWJB Gas Investments, Petitioners, v. C'STORE REALTY, LTD., a Florida limited partnership, by and through its general partner C'STORE MANAGEMENT CORPORATION, Respondents. 2nd District. Case No. 94-01821. Opinion

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR HARDEE COUNTY

STATE OF FLORIDA

VS. CASE NUMBER: 93-087 CF
93-104-31 MM

THOMAS JUDSON WALLACE
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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter came before the court on Defendant's Motion to Declare Florida Statute 784.048 (Florida Stalking Law) Unconstitutional on its Face and Dismiss the Charge. A hearing was held in Wauchula on April 27, 1993. The state was represented by Assistant State Attorney Hardy O. Pickard and the defendant was represented by Assistant Public Defender John T. Kilcrease, Jr.

The defendant argues that the statute is unconstitutional because it is vague and overbroad. The Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States requires that a criminal statute be declared void if it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Company, 269 U.S. 385, 392 (1926). A fundamental requirement of due process is that a criminal statute must clearly delineate the conduct it proscribes. Grayned v. City of Rockford, 408 U.S. 104 (1974). In other words, penal statutes must define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory law enforcement. Kolander v. Lawson, 461 U.S. 352 (1983).

In Florida, the functional void-for-vagueness test is limited to: (1) assuring that people are given fair notice of what conduct is prohibited, and (2) curbing the discretion afforded to law enforcement officers and administrative officials. Powell v. State, 508 So.2d 1307 (Fla. 1st DCA 1987). It is not necessary that a criminal statute furnish a detailed explanation of what acts are proscribed. It is sufficient if "men of common intelligence" can read and understand what conduct would subject them to criminal sanctions. But, "where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep (that) allows policemen, prosecutors, and juries to pursue their personal predilections.' " Kolander, supra at 358 (quoting Smith v. Goguen, 415 U.S. 566 at 575 (1974)) For the following reasons, this court finds section 784.048, Florida Statutes, unconstitutionally vague and overbroad.

B

Even though this statute is referred to as the "anti-stalking law," the operative verb throughout is "to harass." It is defined as follows:

> 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 person and serves no legitimate purpose.

This definition is vague for at least three reasons. First, it defines harassment as engaging in a course of conduct "that causes substantial emotion distress" to another person. Thus, the triggering mechanism which converts noncriminal communicative conduct into criminal conduct is the subjective reaction to the conduct of another person. A maliciously motivated series of telephone calls from Citizen A, which produces irritation and annoyance in Citizen X, may produce substantial emotional distress in Citizen Z. If so, the Citizen A has committed a crime against Citizen Z, but as against Citizen X his conduct is not criminal. Indeed, specific intent to cause substantial emotional distress does not appear to be an element of this crime. In the absence of some objective standard, Citizen A's otherwise legal behavior would be criminal if the recipient of that behavior is emotionally sensitive. This problem is compounded by the legislature's failure to define "substantial emotional distress." Logically, by using the term "emotional distress," the legislature must have contemplated a mental status distinguishable from fear, anger, depression, rage, etc. However, it is unclear what is meant by the term. The Diagnostic and Statistical Manual of Mental Disorder, Third Edition, Revised, the current edition of the American Psychiatric Association's official classification of mental disorders, makes no reference to the term. "Substantial" is an easily defined adjective, but it adds little when used to modify "emotional distress." Certainly it means more than mild or moderate emotional distress. The question is at what point does emotional distress become substantial and, thus, criminal? By providing no objective standard, the legislature presumably felt that an ordinary citizen is quite capable of recognizing emotional distress in another, determining if it is substantial, and identifying the conduct that caused it.

Second, the legislature has written an exception into the statute by adding the phrase "and serves no legitimate purpose" to the definition of harasses. This language indicates that conduct which is criminal in one situation may be decriminalized if the person engaging in the conduct has a "legitimate purpose." Again, the legislature leaves an ordinary citizen to guess at what

is and what is not a "legitimate purpose." In People v. Norman, 703 P.2d 1261 (Colo. 1985), the Supreme Court of Colorado reviewed a statute which created the crime of harassment when a person, with intent to harass, annoy, or alarm another person, engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and serves no legitimate purpose. The Court found the statute unconstitutional because it was facially overbroad, but also because the phrase "without any legitimate purpose" injected further uncertainty into the statute. As with the Florida statute, the Colorado statute contained no definition for "legitimate purpose." When such a term is not clearly defined in the statute and has no objective meaning outside the statute, it invites subjective evaluations of what behavior is prohibited by law.

Third, in defining "harasses" the legislature used the phrase "course of conduct" and went on to define "course of conduct" in subsection 1(b), to mean the following:

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

It is one thing to say that constitutionally protected activity cannot be the basis for an arrest under this statute, but it is quite another thing to expect the ordinary citizen or the police to know what activities are constitutionally protected. The failure to define or list the exempted "constitutionally protected activities" requires the citizen or police officer to be a constitutional scholar. It also requires the citizen to think twice before saying or doing something which may or may not be a crime depending upon a judge's later decision that the activity was or was not constitutionally protected. As such, the statute is not only vague, but it is overbroad. In Spears v. State, 337 So.2d 977 (Fla. 1976), the Supreme Court of Florida stated:

> The mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in the need of.

Furthermore, the example of "organized protest" as a constitutionally protected activity would seem to make conduct protected if done in an organized group but may subject a person acting alone to criminal prosecution for engaging in the same conduct. An organized group of protestors at an abortion clinic would be protected. If the group disperses or abandons the protest, does a sole protestor with deep convictions who remains to carry on the cause alone subject himself or herself to criminal prosecution? An individual with the courage to act alone would be forced to do so at his or her peril.

In summary, the inclusion of the terms "substantial emotional distress," "no legitimate purpose" and "constitutionally protected activity" in the definition of "harass" creates a criminal statute with no limiting standards to assist citizens, law enforcement officers, prosecutors or judges to understand what conduct is and is not criminal. Since the terms are not defined in the statute and there exists no sufficient objective meaning outside the statute, this court concludes that the statute fails to provide particular standards which ordinary citizens can understand and thereto conform their conduct.

Section 784.048 establishes three separate crimes: one misdemeanor and two felonies. In order to be convicted of any of the three, however, one must "harass" another person. Since that word is not sufficiently defined, the entire statute is unconstitutional. Therefore, it is ADJUDGED:

1. That the defendant's Motion to Declare Florida Statute 784.048 Unconstitutional on its Face and Dismiss the Charge is GRANTED.

DONE AND ORDERED this 19 day of May, 1993.

Dennis P. Maloney
Circuit Judge

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,)
vs.)
ROBERT KAHLES,)
Defendant.)

Case No. 92-022819MM10A
Judge: WRIGHT

AMENDED
ORDER ON DEFENDANT'S MOTION TO DECLARE F.S. 748.048 UNCONSTITUTIONAL AND MOTION TO DISMISS THE CHARGE

THIS CAUSE coming on to be heard upon the Defendant's Motion To Declare Florida Statute 748.048 (Florida's Stalking Law) unconstitutional on its face and to Dismiss the Charge, and the Court having considered said Motion and being otherwise fully advised in the premises, makes the following findings:

A. Section 1, Section 748.048, Florida Statutes, is created to read:

748.048 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 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.

2. Any person who willfully, maliciously, and repeatedly follows or harasses another person

C

commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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

B. The Supreme Court of Florida has consistently held that legislative acts are presumed to be constitutional and that Courts must avoid declaring a statute unconstitutional if the statute can be fairly construed in a constitutional manner. Firestone v. News-Press Pub. Col, Inc., 583 So.2d 457 (Fla. 1989); Bunnell v. State, 453 So.2d 808 (Fla. 1984). Furthermore, all doubts as to the validity of a statute are to be resolved in favor of constitutionality whenever reasonably possible. The Court has an affirmative duty to avoid constructions of statutes that would render them invalid. Dept. of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991); Dept. of HRS of Fla. v. Crossdale, 585 So.2d 481 (Fla. 4th DCA 1991).

C. After hearing arguments of counsel and carefully considering each memorandum of law submitted, this Court hereby GRANTS defendant's motion and declares Florida Statute 748.048 and more particularly 1(a)(b), 2 and 5 unconstitutional on its face due to vagueness and overbreadth. In support of this order this Court reasons:

I. 1A. Florida Statute 748.048 is unconstitutionally vague in that it fails to reasonably inform a citizen of the conduct which is prohibited. As such, section 748.048 violates the Due Process clause of the Fifth Amendment and the Florida Constitution because "men of common intelligence must necessarily guess at it's meaning and differ as to its application". Connelly v. General Construction Company, 269 U.S. 385, 391 (1926).

B. The legislature, in composing Section 748.048, used words whose definitions fail to dispel the vagueness. Specifically, 748.048(1)(a) defines "harass" as engaging in conduct directed at a specific person that causes substantial emotional distress in such person. The citizen, therefore, must measure the effect of his or her conduct by the subjective response of another. In the absence of an objective standard, a person acts at his own peril and potentially violates F.S. 748.048 if the alleged victim is emotionally sensitive while the same conduct may not violate the statute if the alleged victim is not emotionally sensitive. The legislature did not establish an objective standard outlining the prohibited conduct nor limit it to the probable effect on a reasonable person. As a result an ordinary citizen is not put on notice as to what behavior constitutes stalking behavior.

C. Furthermore, the legislature has not defined "substantial" and "emotional distress". The Court and the citizen are not given guidance as to where such definitions should be found (e.g. Black's Law Dictionary, Webster's Collegiate Dictionary, or tort law). The lack of definitions of these terms in conjunction with the lack of an objective standard or specific prohibitive acts leaves the ordinary citizen to guess not only what acts constitute stalking but what level of distress must be caused before the statute is invoked.

D. Also undefined, is the term "repeatedly". The citizen therefore is not informed as to when a "course of conduct" crosses the line delineating the scope of illegal conduct. See Hermanson v. State, 604 So.2d 775 (Fla. 1992). Because F.S. 748.048 defines

one form of stalking as a 'knowing and willful course of conduct by any person who willfully, maliciously, and repeatedly follows' (another person) it is conceivable that T.V. and newspaper reporters who carry out their normal job description run afoul of this statute as well as other citizens whose behavior were not intended to be regulated by this statute.

E. Finally, under the Florida Stalking Law, conduct that "serves no legitimate purpose" and otherwise fits within the definition of 'harasses' is prohibited by F.S. 748.048(1)(a). Since this phrase has no defined meaning within the statute and no sufficient objective meaning outside of the statute, the phrase invites subjective evaluation of what is prohibited or exempted by the statute and tends to inject uncertainty into the law. See People v. Norman, 703 P. 2d 1261 (Colo. 1985) (Striking down a harassment statute for containing the phrase "no legitimate purpose".

II. (a) Section 748.048 is unconstitutionally overbroad because it regulates conduct other than that which it purports to regulate. Because the statute does not sufficiently define or enumerate the constitutionally protected activity (i.e. speech) exempted from the statute by F.S. 748.048(1)(b), the vagueness of the statute merges with its overbreadth and violates both constitutional precepts. Where a legislative enactment "is susceptible of application to protected speech..., it is constitutionally overbroad and facially invalid". Lewis v. New Orleans, 415 U.S. 130, 134 (1974). Since section 748.048 does not anywhere specifically exempt protected speech from its scope, it is

unconstitutionally overbroad. See State v. Elder, 382 So.2d 687 (Fla. 1980); State v. Keaton, 371 So.2d 86 (Fla. 1979).

b. The potential of section 748.048 to have a chilling effect on the First Amendment freedoms is present because it lacks guidelines for law enforcement officers. Specifically, this Court notes that the already difficult job of the police officer is rendered impossible by this statute because the officer, whose job is to enforce the law, must also be a psychologist in order to determine the existence of, as well as the level of emotional distress, without any guidelines or definitions to help them. The officer must also be a constitutional scholar in order to determine whether conduct is exempted from the statute as 'constitutionally protected activity' or otherwise has a 'legitimate purpose', again without definitions of those terms or guidelines to make said determination. As a result this law is overbroad and violative of both the U.S. and Florida Constitutions.

CONCLUSION

Defense counsel concedes and this Court recognizes the legislature's legitimate interest in providing victims of stalking behavior with the protection that heretofore has not been afforded by Florida law. However, this protection must conform to constitutional requirements in order to protect all citizens. Florida Statute 748.048 and more particularly 1(a) (b), 2 and 5 does not so conform in that it is both vague and overbroad and consequently must be struck down for the above cited reasons.

Additionally this Court finds and hereby certifies the following question as being of great public importance. "Whether Florida Statute 794.011 is unconstitutionally vague and overbroad".

Further, this Court also certifies that the issues set forth in paragraphs C I.(A,B,C,D,E) and II. (A,B) are of great public importance.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 10th day of March, 1993.

EDDEE WRIGHT
County Court Judge

TRUE COPY

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michael J. Neimand, Suite 921N, P. O. Box 013241, Miami, FL 33101, on this 3d day of February, 1995.

Respectfully submitted,

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