IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,962

TERRY HUFFINE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, **TERRY HUFFINE**, 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(2) 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.

SUBSTANTIVE DUE PROCESS

The Petitioner next contend that the Statute violates substantive due process because, by its vague and uncertain

terms, it criminalizes activity that is inherently innocent. His argument is the same one on which he bases his vagueness challenge. The vagueness challenge fails because of the narrowing construction this Court must impose upon the Statute. The Statute is only directed at unlawful conduct and therefore innocent and legitimate conduct does not come within its ambit. Therefore, Petitioner's substantive due process challenge must also fail.

UNCONSTITUTIONAL AS APPLIED

The issue of whether the statute is unconstitutional as applied was presented to the trial court and the District Court of Appeal. However, the District Court did not rule on this issue. As such, the issue is not properly before this court for review Hand v. State, 334 So. 2d 601 (Fla. 1976). Therefore, if this Court reverses and finds the Stalking Statute constitutional, then the cause should be returned to the District court of determination of its constitutionality as applied.

On the merits, this claim still lacks substance. The Petitioner contends that the Statute is unconstitutional as applied because it leaves to the jury the determination of whether he was on legitimate business. This position is meritless since the Statute's terms are well defined and it is within the jury's scope to determine if the Petitioner committed the stalking with the requisite specific intent to cause the harm.

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 **DEBORAH K. BRUECKHEIMER,** Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831 on this 6 day of February, 1995.

MICHAEL J. NEIMAND
Assistant Attorney General

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IN THE SUPREME COURT OF FLORIDA

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TERRY HUFFINE,

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APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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