**IN THE SUPREME COURT OF FLORIDA**

**KIMBERLY S. SULT,**

**Petitioner,**

**v.** **FSC No. SC03-542**
**Lower Ct. No. 2D01-5013**

**STATE OF FLORIDA,**

**Respondent.**

________________________________/

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

**BRIEF OF RESPONDENT ON THE MERITS**

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## STATEMENT OF THE CASE AND FACTS

Petitioner was charged and convicted by jury trial of violating §843.085, Unlawful use of police badges or other indicia of authority, a first degree misdemeanor. The County Court certified a question of great public importance to the Second District Court of Appeal regarding the constitutionality of the statute.

> IS [SECTION] 843.085 VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF FLORIDA IN THAT IT CRIMINALIZES WHAT COULD BE INNOCENT CONDUCT, SPECIFICALLY THE WEARING OF PARAPHERNALIA THAT CAN BE PURCHASED THROUGH COMMERCIAL CHANNELS BY THE PUBLIC AND COULD BE MISCONSTRUED AS INDICIA OF AUTHORITY?

The Second District affirmed and certified a question of great public importance to this Court.

> IS SECTION 843.085, FLORIDA STATUTES(2001), UNCONSTITUTIONAL AS OVERBROAD, VAGUE, OR A VIOLATION OF THE RIGHT TO SUBSTANTIVE DUE PROCESS?

On June 14, 2001, at 9:15 p.m., Corporal Jerry Davis of the Pinellas County Sheriff's Office noticed Sult entering a convenience store in St. Petersburg. She was wearing shorts and sandals. Sult was also wearing a black T-shirt on which was printed a large star and five-inch letters spelling "SHERIFF." The large star depicted a crest and said "Pinellas County Sheriff's Office." At trial, Detective Frank Davis identified the T-shirt Sult had been wearing as an official shirt of the

Pinellas County Sheriff's Office and testified that the shirt was used in emergency response situations. Sult v. State, 839 So. 2d 798, 801 (Fla. 2d DCA 2003).

Corporal Davis and Deputy Jeff McConaughey approached Sult, and Corporal Davis asked, "Do you work for us?" Sult replied, "Yes," she opened her wallet, and the officers saw a Pinellas County Sheriff's Office identification card clipped to her wallet. Corporal Davis believed she was in violation of their office policy by wearing only part of a uniform. The officers discovered several minutes later that Sult was not an employee of the sheriff's office, and she was charged with a violation of §843.085. Id.

Sult had previously been employed by the Pinellas County Sheriff's Office as a criminal justice specialist and as a detention deputy recruit. When she left her employment with the sheriff's office in October 2000, she did not return her identification card. Sult purchased the T-shirt at Americana Uniforms, a store open to the public. Sult testified that when she purchased the T-shirt she was not in uniform and was not asked for identification. Id.

Corporal Jerry Davis testified that after he asked Sult if she worked for them, she immediately showed ID which he quickly recognized as a Pinellas Sheriff’s office member ID card. His ID

card was exactly the same type. (V. 4: T. 234). During trial, Detective Frank Davis testified he recognized the shirt worn by Sult as a uniform shirt which members of the sheriff's office wear to make them highly visible based on the design of the shirt with large lettering and the dark star. The t-shirt was designed as a result of the earlier civil disobedience in St. Petersburg. This particular shirt was designed so officers could be easily identified. (V. 5: T. 373). Moreover, there is a written policy from the sheriff's office which regulates the circumstances wherein the uniform shirt may be worn. (V. 5: T. 374). Moreover, to his knowledge, the Pinellas County Sheriff's Office does not sell said shirts over the internet. (V. 5: T. 377).

Herman Vincent, director of personnel for the Pinellas County Sheriff's Office testified that it would be a violation of department policy to wear part of a uniform with street clothes. All employees are provided manuals discussing such rules. (V. 5: T. 395-396). Mr. Vincent further testified Sult was hired as a criminal justice specialist in December 1998, and terminated October 25, 1999. He personally met with her for an exit interview. Sult informed him that she lost her ID card and manual, and therefore could not relinquish them at the time of her dismissal. (V. 5: T. 399). Mr. Vincent further stated Ms. Sult was not required to pay the $50.00 fee for losing her ID

since they were glad to get rid of her. (V. 5: T. 410). He denied she was terminated because of her sexual harassment allegations. (V. 5: T. 411). Rather she was terminated for missing 39 consecutive days of work, including 4 in a row with no phone call. Such action by an employee results in termination. (V. 5: T. 412).

Sult testified at trial and contradicted Mr. Vincent's testimony. She testified that at her exit interview, Mr. Vincent declined her offer to return her ID card since he already had one which was returned with her billfold. (V. 6: T. 512-513). Sult was further asked why she carried around the ID card. She responded that she carries all of her credentials, that "you never know what you might need them for." (V. 6. 558). Sult testified that the t-shirt in question was purchased at Americana Uniforms, a public store. Although she was employed with the Sheriff's Dept. at the time of purchase, no ID was requested. (V. 6: T. 516). She further testified she was aware of the department uniform policy that you had to wear the entire uniform, not only part of the uniform. (V. 6: T. 538). Defense witness William Gange, a purchasing agent for the sheriff's office testified that Uniform places such as Americana are supposed to check for proper Id when selling authorized items. (V. 7: T. 640, 641).

The jury convicted Petitioner as charged. The County Court withheld adjudication and certified a question of great public importance to the Second District Court of Appeal. The Second District affirmed and certified a question of great public importance to this Court.

## SUMMARY OF THE ARGUMENT

§ 843.085, Florida Statutes (2001) is not overbroad. The statute does not restrict First Amendment conduct. Moreover, the statute is not void for vagueness since the statute employs a reasonable person standard. Further, the statute does not violate due process. The state has a legitimate interest in preventing crimes committed by people posing as law enforcement officers. The statute is rationally related to that goal.

## ARGUMENT

IS SECTION 843.085, FLORIDA STATUTES(2001), UNCONSTITUTIONAL AS OVERBROAD, VAGUE, OR A VIOLATION OF THE RIGHT TO SUBSTANTIVE DUE PROCESS?

Petitioner argues that Section 843.085, Florida Statutes (2001) is unconstitutional. She claims the statute is unconstitutional as overbroad, vague, or in violation of substantive due process. Respondent strongly disagrees.

Section 843.085, entitled Unlawful use of police badges or other indicia of authority, reads as follows:

> It is unlawful for any person
>
> (1) Unless appointed by the Governor pursuant to chapter 354, authorized by the appropriate agency, or displayed in a closed or mounted case as a collection or exhibit, to wear or display any authorized indicia of authority, including any badge, insignia, emblem, identification card, or uniform, or any colorable imitation thereof, of any federal, state, county, or municipal law enforcement agency, or other criminal justice agency as now or hereafter defined in s. 943.045, **which could deceive a reasonable person** into believing that such item is authorized by any of the agencies described above for use by the person displaying or wearing it, or which displays in any manner or combination the word or words "police," "patrolman," "agent," "sheriff," "deputy," "trooper," "highway patrol," "Wildlife Officer," "Marine Patrol Officer," "state attorney," "public defender," "marshal," "constable," or "bailiff," which could deceive a reasonable person into believing that such item is authorized by any of the agencies described

above for use by the person displaying or wearing it.

(2) To own or operate a motor vehicle marked or identified in any manner or combination by the word or words "police," "patrolman," "sheriff," "deputy," "trooper," "highway patrol," "Wildlife Officer," "Marine Patrol Officer," "marshal," "constable," or "bailiff," or by any lettering, marking, or insignia, or colorable imitation thereof, including, but not limited to, stars, badges, or shields, officially used to identify the vehicle as a federal, state, county, or municipal law enforcement vehicle or a vehicle used by a criminal justice agency as now or hereafter defined in s. 943.045, which could deceive a reasonable person into believing that such vehicle is authorized by any of the agencies described above for use by the person operating the motor vehicle, unless such vehicle is owned or operated by the appropriate agency and its use is authorized by such agency, or the local law enforcement agency authorizes the use of such vehicle or unless the person is appointed by the Governor pursuant to chapter 354.

(3) To sell, transfer, or give away the authorized badge, or colorable imitation thereof, including miniatures, of any criminal justice agency as now or hereafter defined in s. 943.045, or bearing in any manner or combination the word or words "police," "patrolman," "sheriff," "deputy," "trooper," "highway patrol," "Wildlife Officer," "Marine Patrol Officer," "marshal," "constable," "agent," "state attorney," "public defender," or "bailiff," which could deceive a reasonable person into believing that such item is authorized by any of the agencies described above, except for agency purchases or upon the presentation and recordation of both a driver's license and other identification

showing any transferee to actually be a member of such criminal justice agency or unless the person is appointed by the Governor pursuant to chapter 354. A transferor of an item covered by this subsection is required to maintain for 2 years a written record of such transaction, including records showing compliance with this subsection, and if such transferor is a business, it shall make such records available during normal business hours for inspection by any law enforcement agency having jurisdiction in the area where the business is located.

> (4) Nothing in this section shall prohibit a fraternal, benevolent, or labor organization or association, or their chapters or subsidiaries, from using the following words, in any manner or in any combination, if those words appear in the official name of the organization or association: "police," "patrolman," "sheriff," "deputy," "trooper," "highway patrol," "Wildlife Officer," "Marine Patrol Officer," "marshal," "constable," or "bailiff."
>
> (5) Violation of any provision of this section is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. This section is cumulative to any law now in force in the state. (Emphasis added)

In the instant case the circuit court upheld the constitutionality of the statute and certified the following question:

> IS [SECTION] 843.085 VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF FLORIDA IN THAT IT CRIMINALIZES WHAT COULD BE INNOCENT CONDUCT, SPECIFICALLY THE WEARING OF PARAPHERNALIA THAT CAN BE

PURCHASED THROUGH COMMERCIAL CHANNELS BY THE PUBLIC AND COULD BE MISCONSTRUED AS INDICIA OF AUTHORITY?

The Second District Court of Appeal accepted jurisdiction and upheld the statute. The District Court held the statute was not overbroad or vague, and did not violate the right to substantive due process. The Second District certified the following question of great public importance to this Court in Sult v. State, 839 So. 2d 798 (Fla. 2d DCA 2003):

> IS SECTION 843.085, FLORIDA STATUTES(2001), UNCONSTITUTIONAL AS OVERBROAD, VAGUE, OR A VIOLATION OF THE RIGHT TO SUBSTANTIVE DUE PROCESS?

Statutes must be presumed constitutional, even where a lower court has found otherwise, *e.g.*, In re Estate of Caldwell, 247 So. 2d 1 (Fla. 1971), and they must be given the interpretation that will permit them to be upheld rather than one which would render them unconstitutional where such a choice exists, *e.g.*, Russo v. Akers, 724 So. 2d 1151, 1153 (Fla. 1998); Florida State Board of Architecture v. Wasserman, 377 So. 2d 653 (Fla. 1979); Leeman v. State, 357 So. 2d 703 (Fla. 1978); Caldwell. "When the constitutionality of a statute is questioned, and it is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, a court must adopt the interpretation that will render the statute valid."

Wasserman, 377 So. 2d at 656 (Fla. 1979); Brewer v. Gray, 86 So. 2d 799, 802 (Fla. 1956).

The rule in Florida has long been that when the constitutional validity of a statute is under attack, "the statute stands unless it conclusively appears that there are or can be no conceivable circumstances upon which it can validly operate or that under no circumstances can it operate or be effective to accomplish the intended purpose, without violating organic rights." Hunter v. Owens, 80 Fla. 812, 828, 86 So. 839, 844 (1920); Knight & Wall Co. v. Bryant, 178 So. 2d 5 (Fla. 1965), *cert. denied*, 383 U.S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966)." State v. Garner, 402 So. 2d 1333, 1335 (Fla. 2d DCA 1981), review denied, 412 So. 2d 465 (Fla. 1982).

"It is well established that all doubt will be resolved in favor of the constitutionality of a statute, *Bonvento v. Board of Public Instruction of Palm Beach County*, 194 So. 2d 605 (Fla. 1967),...and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Knight and Wall Co. v. Bryant, 178 So. 2d 5 (Fla. 1965), *cert. denied* 383 U.S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966)." State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981); Burch v. State, 558 So. 2d 1, 3 (Fla. 1990).

Not only does the burden rest on the defendant as the party

making the constitutional challenge, but the court must also apply the accepted judicial principle of construing the wishes of the legislative body in a manner that would make the legislation constitutionally permissible. State v. Ecker, 311 So. 2d 104, 109 (Fla.), *cert. denied*, 423 U.S. 1019, 96 S. Ct. 455, 46 L. Ed. 2d 391 (1975). "Whenever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment." *Firestone v. News-Press Publishing Co.*, 538 So. 2d 457, 459-60 (Fla. 1989) (citations omitted), quoted in State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994).

> It is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *See Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 883 (Fla. 1983). In fact, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994) (quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)).

St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961, 972 (Fla. 2000); State v. Stepansky, 761 So. 2d 1027, 1030 (Fla.), cert.

denied, 531 U.S. 959, 121 S. Ct. 385, 148 L. Ed. 2d 297 (2000); State v. Keaton, 371 So. 2d 86 (Fla. 1979); White v. State, 330 So. 2d 3 (Fla. 1976). Moreover,

> It is a cardinal rule of statutory construction that a statute must be construed in its entirety and as a whole. State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61 (1920); *see also* *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977) (finding that the entire statute must be considered, and effect must be given to every part of the provision under construction); *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist.*, 274 So. 2d 522 (Fla. 1973) (holding that legislative intent should be gathered from consideration of the statute as a whole rather than from any one part thereof)....Where there is ambiguity and uncertainty in the words employed in a statute, we must look to the legislative intent for guidance.

*Id*. at 967-968. Here, the legislative intent clearly is to promote public safety. [1] §843.085 was enacted to promote public safety. "The legislative history indicates that the intent was to prevent individuals from committing crimes while posing as

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[1] Session Law 91-163 expresses the legislative intent for Section 843.081 involving the prohibition of the use of blue lights by non-authorized law enforcement in conjunction with Section 843.085. The legislature found that "citizens are vulnerable to becoming the victims of criminal acts through the illegal use of blue lights by the criminal elements. It is the intent of the Legislature to reduce this vulnerability to injury and loss of life and property by prohibiting the use of certain blue lights by any person other than an authorized law enforcement officer."

police officers. See Fla. H.R. Comm. on Crim. Just. CS/HB 457 (1991) Staff Analysis 5 (final May 13, 1991) (on file with Florida State Archives) (com- menting that, based on information from the Metro-Dade Police Department, "robberies and kidnappings in which the offenders pose as police officers are occurring with alarming frequency")." Sult v. State, 839 So. 2d 798, 802 (Fla. 2d DCA 2003).

Where the decision rests either on a pure matter of law that can be evaluated equally well by the appellate and trial courts, the standard of review is de novo. The constitutionality of a state statute is reviewable on appeal by the de novo standard. Ocala Breeders' Sales Company v. Florida Gaming Centers, 731 So. 2d 21 (Fla. 1st DCA 1999); Department of Insurance v. Keys Title and Abstract Co., Inc., 741 So. 2d 599 (Fla. 1st DCA 1999).

**OVERBREADTH**

Petitioner challenges Section 843.085 as being overbroad, claiming it encroaches upon First Amendment rights. She claims the statute criminalizes constitutionally protected forms of expression. The trial court determined that "the statute is not overbroad as no constitutionally protected guarantees of free speech or free association are affected." Sult, 839 So. 2d at 802. The Second District Court of Appeal held that the statute does not prohibit an expression of support or disdain for law

enforcement.

> Rather, the statute prohibits the wearing or displaying of indicia of authority, or a colorable imitation thereof, of a law enforcement agency that could deceive a reasonable person into believing that the item is authorized by the agency for use by the person displaying or wearing it. The wearing of a shirt that depicts, for example, a star, the word "sheriff," and a crest that says "Pinellas County Sheriff's Office," to the extent that it is expression, is expression of an ambiguous message...
>
> Thus, we conclude that to wear an official uniform shirt of a law enforcement agency, or a replica of one, implicates only an incidental amount of expressive conduct.

Id. At 803.

In First Amendment cases, the court is concerned with the vagueness of a statute on its face because such vagueness may in itself deter constitutionally protected and socially desirable conduct. United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed 2d 561 (1963). In the instant case, any First Amendment challenge fails. See Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed 2d 372 (1988)(vagueness challenge to statutes not threatening first amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis). Here, the wearing of a Pinellas Sheriff’s office t-shirt in combination with displaying an improper and misleading

identification card do not amount to free speech. Petitioner's conduct clearly fell within the prohibitions of the statute.

Finding a statute unconstitutional under the overbreadth doctrine is to be used as a matter of last resort. See Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Here, the statute in question regulates conduct, not speech. See Schmitt v. State, 590 So. 2d 404, 412 (Fla. 1991).

The Second District properly determined that

> Individuals who wear, without authorization, full law enforcement uniforms or display law enforcement badges are not entitled to First Amendment protection for their conduct. That conduct merely conveys that the individual is an officer. Any political message on a T-shirt, such as the one Sult wore, is ambiguous and does not send an express message of support for law enforcement.

Sult, 839 So. 2d at 804. Although the wearing of a T-shirt that bears a political message may be protected speech, there is no such implication here. See, Bd. Of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 284 (1971). "When a court is confronted with a facial challenge to a law on the ground that it is overbroad, 'a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.' " State v. Shank, 795 So.2d 1067, 1070 (Fla. 4th DCA 2001) (quoting City of Houston

v. Hill, 482 U.S. 451, 458, 107 S. Ct. 2502, 96 L. Ed.2d 398 (1987)). A reviewing court must look to whether the overbreadth is substantial because " 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.' " Bd. of Airport Comm'rs, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500.

The instant case is similar to D.P. v. State, 705 So. 2d 593 (Fla. 3d DCA 1997), rev.denied, 717 So. 2d 530 (Fla. 1998), cert.denied, 525 U.S. 1028, 119 S. Ct. 564, 142 L. Ed. 2d 469 (1998), in which the court upheld the constitutionality of a Dade County ordinance forbidding the sale of spray paint cans and broadtipped markers to minors. There was no overbreadth violation since there was no fundamental right implicated in possessing spray paint or jumbo markers. Similarly, here, there is no fundamental right to wear an authorized Pinellas County Sheriff's Office t-shirt.

Clearly there is no overbreadth violation involved in the instant statute since there is no realistic danger that this statute would compromise First Amendment protections. Moreover, the statute employs a reasonable person standard. Obviously, such a standard is an evolving concept which encompasses changing social attitudes and beliefs. In June 2001, it was

reasonable for the officers to believe Sult was displaying an indicia of authority by wearing the Sheriff's t-shirt and showing the ID card.

**VAGUENESS**

Petitioner also claims § 843.085 is unconstitutionally vague. Petitioner has no standing to challenge the application of the statute to any set of facts other than those actually involved in this particular case. See Osborne v. Ohio, 495 U.S. 913, 110 S. Ct. 1691, 109 L. Ed. 2d 98 113-114 (1990); Francois v. State, 407 So. 2d 885, 889-90 (Fla. 1982); State v. Freund, 561 So. 2d 305, 307 (Fla. 3d DCA 1990). That marginal cases might exist where doubts may rise as to whether prosecution is possible under this section does not render the law unconstitutionally vague. United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, supra, 413 U.S. at 579; Sandstrom v. Leader, 370 So. 2d 3, 6, (Fla. 1979).

In McKenney v. State, 388 So. 2d 1232, 1233 (Fla.1980)this court held that a person whose conduct clearly falls within the statute's prohibition cannot reasonably be said to have been denied adequate notice. Like the defendant in McKenney, Sult lacks standing to complain of lack of notice. "A defendant whose conduct is clearly proscribed by the core of the statute has no standing to attack the statute. 'One to whose conduct a statute

clearly applies may not successfully challenge it for vagueness. Arizona v. McLamb, 932 P. 2d 266, 271 (Ariz. App. 1996), cert.denied, 522 U.S. 814, 118 S.Ct. 60, 139 L.Ed.2d 23(1997), citing Parker v. Levy, 417 U.S. 733, 756, 94 S. Ct. 2574 (1974), accord State v. Muller, 693 So. 2d 978 (Fla. 1997). Here, Petitioner was on notice where she was specifically asked to relinquish her ID card, and she falsely claimed she lost it during her exit interview. (V. 5: T. 399. Moreover, although Petitioner claims she bought the t-shirt in question without showing identification, she nonetheless was an authorized Sheriff's employee at the time of the purchase. (V. 6: T. 516). She was further aware of the department policy that you had to wear the entire uniform, not only part of the uniform. (V. 6: T. 538). Moreover, William Gange, a purchasing agent for the sheriff's office testified that uniform places such as the one used by Petitioner are supposed to check for proper identification when selling such authorized items. (V. 7: T. 640-641).

Appellant's challenge is similar to that in State v. Hill, 372 So. 2d 84 (Fla. 1979). Hill involved a constitutional challenge by a fisherman who was cited for fishing within Florida waters but argued the statute was vague because it tried to regulate shrimping waters outside its territorial boundaries.

The Florida Supreme Court held that the defendant did not have standing to make such argument since he was fishing within Florida's territorial waters. The Court in Hill, held:

> statutory regulation may, consistently with organic law, be applied to one class of cases in controversy, and may violate the Constitution as applied to another class of cases. This does not destroy the statute; but imposes the duty to enforce the regulation when it may be legally applied.

Hill, 372 So. 2d at 85.(Fla. 1979). *See* State v. Darynani, 774 So. 2d 855 (Fla. 4th DCA 2000) (statute proscribing manufacture, sale, possession, or use of self-propelled knives was not unconstitutionally vague as applied to switchblade knife vendor). *See also* *State v. Fuchs*, 769 So. 2d 1006 (Fla. 2000) (Section 827.04(1)(a), Florida Statutes (1997), which prohibits contributing to the delinquency or dependency of a child, is not unconstitutionally vague even though the prohibited conduct is not defined; even though the statute does not define the terms "delinquent," "dependent child," or "child in need of services"; and even though the phrase "as defined under the laws of Florida," which had modified these terms in prior versions of the statute, were deleted in 1996).

In *Fuchs*, our supreme court stated:

> The legislative intent, while seemingly well-intentioned, appears to have produced at least some question. Nevertheless, while

> section 827.04(1)(a) may not be "a paradigm of legislative drafting," *L.B.* [*v. State*], 700 So. 2d [370] at 371 [(Fla. 1997)], (citing State v. Manfredonia, 649 So. 2d 1388, 1390 (Fla. 1995)), well settled principles of statutory construction adequately respond to the alleged vagueness challenge.

*Id*. at 1011. Similarly, a common sense reading of the statute coupled with the application of well-settled principles of statutory construction are sufficient to render Section 843.085 not unconstitutionally vague. Petitioner lacks standing to challenge the statute on a claim that her wearing of the Sheriff's Department t-shirt is void for vagueness since appellant's conduct as applied to her consisted most significantly of the displaying of an identification card which clearly violated the statute.

A statute is void for vagueness where because of imprecision, it fails to give adequate notice of the conduct that is prohibited, thereby inviting arbitrary and discriminatory enforcement. Wyche v. State, 619 So. 2d 231, 236 (Fla. 1993). Sult claims that no-one is on notice that it is a crime to wear the t-shirt that is available to the public or displaying the identification card. Here, Appellant's illegal conduct was not exclusive to merely wearing a Pinellas Sheriff's t-shirt. Rather her wearing of the t-shirt combined with her displaying a

fraudulent identification card constitutes the conduct which this statute prohibits and what the state prosecuted.

"A statute may be worded so loosely that it leads to arbitrary and selective enforcement by vesting undue discretion as to its scope in those who prosecute. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972)." *McKenney* at 1234. Here, however, as in *McKenney*, there is no evidence of arbitrary or capricious enforcement. Absent such a showing, the language of the statute in question is precise enough to guide law enforcement officials in determining what conduct constitutes prohibited conduct. Accordingly, this Court should uphold the constitutionality of Section 843.085.

The instant statute does not involve First Amendment issues, so the statute must be examined as applied. Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); see State v. Barnes, 686 So.2d 633 (Fla. 2d DCA 1996). Sult flashed her identification card, demonstrating that she was trying to deceive the officers, and the officers believed that she was an employee of the sheriff's office who had committed a uniform violation. As applied, the statute is not vague.

"[C]ourts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided." Moreover, a statute should not be deemed

facially invalid unless it is not readily subject to a narrowing construction by the court. In fact, in order to save a law from constitutional invalidity, a court has a judicial obligation to interpret the law to avoid the problem if reasonably possible. *E.g.*, Doe v. Mortham, 708 So. 2d 929, 934 (Fla. 1998); State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997); Erznoznick v. City of Jacksonville, 422 U.S. 205, 216, 95 S. Ct. 2268, 2276, 45 L. Ed. 2d 125 (1975); State ex rel. Ervin v. Cotney, 104 So. 2d 346, 349 (Fla. 1958).

> [I]f the phraseology of the act is ambiguous or is susceptible of more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject," Curry v. Lehman, 55 Fla. 847, 47 So. [18,] 20 [(1908)], and give that construction to the act which comports with the evident intention of the legislature. If the language of a particular part of a statute imports an intent which leads only to absurdity or to an evil result the strict letter of the law might be required to yield to the obvious intent of the legislature as determined by use of the foregoing formula for statutory construction.

Foley v. State ex rel. Gordon, 50 So. 2d 179, 184 (Fla. 1951), *followed*, City of Daytona Beach v. Del Percio, 476 So. 2d 197, 200 n. 1 (Fla. 1985).

Ordinary rules of construction "require that a statute be read so as to avoid unconstitutional results." State v. Olson, 586 So. 2d 1239, 1243. 5 (Fla. 1st DCA 1991).

> It is obviously unrealistic to require that criminal statutes define offenses with extreme particularity. For one thing, there are inherent limitations in the use of language; few words possess the precision of mathematical symbols. Secondly, legislators cannot foresee all of the variation of facts situations which may arise under statute. While some ambiguous statutes are the result of poor draftsmanship, it is apparent that in many instances, the uncertainty is merely attributable to a desire not to nullify the purpose of the legislation by the use of specific terms would afford loopholes through which many could escape.

W.R. LaFave and A.W. Scott, Substantive Criminal Law, Void for Vagueness Doctrine, Section 2.3, Id. at. 127 - 128 (1986); See also Southeastern Fisheries Association v. Department of Natural Resources, 453 So. 2d 1351, 1351, 1353 (Fla. 1984) "[C]ourts can not require the legislature to draft laws for such specificity that the intent and purpose of the law may be easily avoided."

The question presented by a vagueness challenge is whether the language of the statute is sufficiently clear to provide definite warning of what conduct will be deemed a violation; that is, whether ordinary people would understand what the statute requires or forbids, measured by common understanding

and practice. State v. Bussey, 463 So. 2d 1141 (Fla. 1985); Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Zachary v. State, 269 So. 2d 669 (Fla. 1972); Brock v. Hardie, 114 Fla. 670, 154 So. 690 (1934); State v. Wilson, 464 So. 2d 667 (Fla. 2d DCA 1985). The function or purpose of the void-for-vagueness doctrine is to assure that people are given fair notice of what conduct is prohibited by a specific criminal statute and to curb the discretion afforded to law enforcement officers and administrative officials in initiating criminal prosecutions. Powell v. State, 508 So. 2d 1307, 1309 (Fla. 1st DCA 1987), rev. denied, 518 So. 2d 1277 (Fla. 1987).

A statute will be held void-for-vagueness if the conduct forbidden by it is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Company, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926), as quoted in Powell, 508 So. 2d at 1309-10. Therefore, a statute which gives people of ordinary intelligence fair notice of what constitutes forbidden conduct is not vague.

The fact that several interpretations of an ordinance or statute may be possible does not render the law void-for-vagueness. Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985); Schmitt v. State, 563 So. 2d 1095, 1100 (Fla. 4th

DCA 1990). "Words inevitably contain germs of uncertainty," but when regulations "are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, [there is no] sacrifice to the public interest." Broderick v. Oklahoma, 413 U.S. 601, 608, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973) (quoting United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 578-79, 93 S. Ct. 2880, 2897 37 L. Ed. 2d 796 (1973)). In fact, in order to save a law from constitutional invalidity, a court has a judicial obligation to interpret the law to avoid the problem. Erznoznick v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); State v. Cotney, 104 So. 2d 346 (Fla. 1958); Foley v. State, 50 So. 2d 179 (Fla. 1951), as cited in Del Percio, supra, 476 So. 2d at 200, n. 1.

The United States Supreme Court has explained the doctrine of “vagueness”:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and

> discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful ones'... than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972).

> A government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926).

Bouters v. State, 659 So. 2d 235, 238 (Fla.), cert. denied, 516 U.S. 894, 116 S. Ct. 245, 133 L. Ed. 2d 171 (1995). Furthermore, "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 714, 42 L. Ed. 2d 706 (1975); State v. Barnes, 686 So. 2d 633 (Fla. 2d DCA 1996), review denied, 695 So. 2d 698 (Fla.), cert. denied, 522 U.S. 903, 118 S. Ct. 257, 139 L. Ed.

2d 184 (1997). Additionally, "[t]here is a presumption of constitutionality inherent in any statutory analysis." Scullock v. State, 377 So. 2d 682, 683-684 (Fla. 1979); Barnes.

The test for vagueness of a statute is "whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice," Zachary v. State, 269 So. 2d 669, 670 (Fla. 1972), or whether "the statute 'is so vague and lacking in ascertainable standards of guilt that, as applied [to him], it failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden...."' Palmer v. City of Euclid, Ohio, 402 U.S. 544, 545, 91 S. Ct. 1563, 1564, 29 L. Ed. 2d 98 (1971) (quoting United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954))." *Barnes, supra* at 636.

> **A person whose conduct clearly falls within the statute's prohibition cannot reasonably be said to have been denied adequate notice, however.** Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

McKenney v. State, 388 So. 2d 1232, 1233-1234 (Fla. 1980) (emphasis supplied).

It is also important to emphasize that a statute which does not purport to regulate any constitutionally protected activity is unconstitutional on its face only if it is so vague that it

fails to give adequate notice of *any* conduct that it proscribes. Travis v. State, 700 So. 2d 104, 105 (Fla. 1st DCA 1997), review denied, 707 So. 2d 1128 (Fla. 1998); Dickerson v. State, 783 So. 2d 1144 (Fla. 5th DCA 2001).

> The traditional rule is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." Sieniarecki v. State, 756 So. 2d 68, 74-75 (Fla. 2000) (citations omitted). Thus, the instant vagueness claim must first be examined in light of the facts at hand. State v. Barnes, 686 So. 2d [at] 637...."If the record demonstrates that the [defendant] engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute, then he cannot successfully challenge it for vagueness nor complain of its vagueness as applied to the hypothetical conduct of others." *Id.*

Dickerson, 783 So. 2d at 1147 (Fla. 5th DCA 2001). Here, the Second District determined on an applied analysis that the statute was not vague. "By flashing the sheriff's identification card, Sult showed that she was trying to deceive the officers, and the officers believed that she was an employee of the sheriff's office who had committed a uniform violation." Sult, 839 So. 2d at 804.

The language in the instant statute is sufficiently clear. As applied to the defendant, the wearing of the Pinellas t-shirt

combined with displaying a fraudulent identification card which resulted in an attempt to deceive the investigating officers into believing she was a department employee indicate the clear purpose of this statute; namely to deter individuals from portraying themselves as law enforcement.

This Court in State v. Buckner, 472 So. 2d 1228 (Fla. 2d DCA 1985) has held:

> Obviously, if we demanded precise definition of every statutory word to shield against the void for vagueness doctrine our codified laws would fill endless shelves and the result would be obfuscation rather than clarification of our organic law. Instead, in the absence of a statutory definition, we shall assume the common or ordinary meaning of a word.

Buckner, 472 So. 2d at 1229. "Lack of precision is not itself offensive to the requirements of due process." State v. Hodges, 614 So. 2d 653 (Fla. 5th DCA 1993).

The holding in Arizona v. McLamb, 932 P. 2d 266, (Ariz. App. 1996) is similar to the instant case. In McLamb, the court upheld the constitutionality of a city ordinance that barred the unauthorized use of a public officer's insignia. Section 23-21 makes it unlawful for any person to wear a fireman's or policeman's badge or insignia... or badge or insignia of any public officer, when not properly authorized to wear such badge or insignia. The ordinance was not overbroad and did not violate

the First Amendment since it was not directed to suppress free expression. The ordinance was not unconstitutionally vague. The city had a legitimate interest in regulating its official insignia. The ordinance sufficiently defined the prohibited behavior: wearing the insignia of any city officer when not properly authorized to wear such insignia. Therefore, there was no constitutional infirmity. §843.085 similarly passes constitutional muster.

The Second District further determined that although the statute involved some incidental First Amendment interests, it nonetheless passed constitutional muster on a facial challenge. Id. Since Respondent would assert that there is no First Amendment right to speech or association involved in this case, the statute is not unconstitutional on its face.

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The fact that Section 843.085 might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since the courts have not recognized an "overbreadth" doctrine outside the limited context of the First

Amendment. Schall v. Martin, 467 U.S. 253, 269, n. 18, 104 S.Ct. 2403, 2412, n. 18, 81 L.Ed. 2d 207 (1984). Petitioner has failed to shoulder her heavy burden to demonstrate that the statute is "facially" unconstitutional. Salerno, 481 U.S. at 746, 107 S. Ct. at 2100.

In a facial challenge, the courts must look at applications under which the statute would not be vague, and not be concerned with hypothetical applications of the statute to marginal prosecutions. State v. Giamanco, 682 So. 2d 1193 (Fla. 4th DCA 1996). As long as the statute is not impermissibly vague in all its applications, this Court must uphold its constitutionality. In the instant case, the plain language of Section 843.085 clearly sets forth what the legislature intended to target; persons wearing any authorized indicia of authority or colorable imitation, which could deceive a reasonable person into believing that the person wearing such item is authorized by said agency described. Sult's factual situation applies to the statute. Thus, she has failed to meet this heavy burden.

Here, §843.085 creates a reasonable person standard. Therefore, the statute does not create a subjective standard.

> An analogous situation are those penal statutes which measure conduct by a "reasonable person" standard. See, e.g., State v. Manfredonia, 649 So.2d [1388, 1391 (Fla.1995) ] (rejecting a vagueness challenge to a statute imposing a duty upon

> any adult in control of an open house party to "take reasonable steps" to prevent the possession or consumption of alcohol or drugs by a minor at that party). Like statutes which impose a "reasonable person" standard upon the citizenry, the Legislature's use of the modifier "common" in section 790.001(13), while perhaps not a "model of clarity," see id., does appeal to the norms of the community, which is precisely the gauge by which vagueness is to be judged.

Sult, 839 So. 2d at 805. Accordingly, under the reasonable person standard, the statute withstands even a facial challenge on vagueness grounds.

**Substantive Due Process**

Petitioner claims this statute violates substantive due process in that the statute is unreasonable, arbitrary or capricious. Petitioner claims the legislature here has chosen a means which is not reasonably related to achieving it's legitimate legislative purpose. Petitioner claims the statute violates due process by criminalizing the mere possession of a widely available, commercially bought T-shirt and civilian employee ID card. First, the state would point out that the record belies the defense claim, and this Pinellas Sheriff's t-shirt was not widely available to the public. Authorized uniforms were to be sold only upon showing proper identification.

The standard of review for consideration of whether a statute is violative of due process is as follows:

> In considering the validity of a legislative enactment, this Court may overturn an act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose.

Dep't of Insurance v. Dade County Consumer Advocate's Office, 492 So. 2d 1032, 1034 (Fla. 1986). Petitioner misapplies the holding of State v. Alicea, 692 So. 2d 263 (Fla. 5th DCA), rev.denied, 699 So. 2d 1371 (Fla. 1997). Petitioner states that Alicea held that "simply pretending to be a law enforcement officer is not criminal." However, the Fifth District upheld the constitutionality of Section 843.08, a statute involving falsely pretending to be a deputy sheriff. The Court determined such statute was not vague or overbroad. "Simply pretending to be a law enforcement officer is not criminal. However, someone who takes it upon himself to act as such is criminal." Alicea, supra. The statute in Alicea required specific intent while the instant statute is a general intent statute. Moreover, 843.08 required two steps; first pretending to be an officer, and second, acting as such. No such requirement is present in 843.085. Therefore, Petitioner's intent to deceive while displaying her indicia of authority is not relevant to this

crime.

Petitioner argues that Section 843.085, Florida Statutes (2001), is unconstitutional as violative of substantive due process because it criminalizes otherwise innocent behavior and does not further the legislative goal of protecting citizens. The State disagrees. Clearly the government has an interest in establishing security requirements and protecting the public's health, safety and welfare, by ensuring that law enforcement officers are easily and correctly identified. Further, due process has been met here where the enforcement of this statute has a substantial relation to the aforementioned governmental interest. Moreover, the statute is violated where a reasonable person could be deceived into believing the item is authorized. This standard is proper in promoting public safety since the statute is to be read from the point of view of the citizen who is involved in an emergency situation and should be able to rely on the authenticity of a person with such indicia of authority.

In D.P., supra, the court upheld a due process challenge to a local ordinance prohibiting minors from possessing spray paint or jumbo markers. The defense argued that the statute violated due process by imposing a criminal penalty for ordinary innocent conduct. The court applied a rational basis test and upheld the ordinance. "Acts innocent and innocuous in

themselves may ... be prohibited, if this is practically made necessary to be done, in order to secure efficient enforcement of valid police regulations covering the same general field." D.P., 705 So. 2d at 596.

> Such inclusion must be reasonably required for the accomplishment of the legislative intent with respect to the ultimate object. It cannot be relied on to sustain a measure of prohibition so loosely or broadly drawn as to bring within its scope matters which are not properly subject to police regulations or prohibitions.

D.P., 705 So. 2d at 596. The ordinance in D.P. did not place an outright ban on the spray paint or markers. Rather the ordinance allowed minors to possess the items on private property with the owners consent. The minor was allowed to possess the items on public property as long as the minor was accompanied by an adult. The statutes involved in State v. Saiez, 489 So. 2d 1125 (Fla. 1986), which prohibited possession of machinery designed to reproduce instruments purporting to be credit cards, and in State v. Walker, 444 So. 2d 1137 (Fla. 2d DCA), affirmed, 461 So. 2d 108 (Fla. 1984), which prohibited possession of a lawfully dispensed controlled substance in a container other than that in which it was originally delivered, merely involved possession of otherwise innocent items. Robinson v. State, 393 So.2d 1076, 1077 (Fla.1980) similarly invalidated a statute prohibiting the wearing of a mask or hood

because "this law is susceptible of application to entirely innocent activities ... so as to create prohibitions that completely lack any rational basis."

The court in D.P. further distinguished such cases since the mere possession of such items was illegal, even though it was legal to purchase such items. In D.P. it was unlawful for a minor to purchase spray paint or jumbo markers. In the instant case, the state established that official uniform materials were to be purchased upon a showing of proper identification. Moreover, the statute requires more than merely purchasing or wearing the item. § 843.085 requires that the authorized indicia of reliability be displayed in a manner which could deceive a reasonable person into believing the defendant was an authorized officer. This deceit of a reasonable person requirement eliminates any unreasonable, arbitrary or capricious enforcement of the statute in question. Here, Sult did more than wear a Sheriff's t-shirt. She also displayed an official identification card which escalated the situation.

A statute can violate substantive due process for arbitrarily criminalizing innocent conduct. See Saiez, supra (statute which prohibited possession of machines designed to produce credit cards did not have a rational relationship to goal of preventing credit card fraud because the statute did not

require intent to put the equipment to an unlawful use). Under the rational basis test, the State has a legitimate interest in preventing robberies and kidnappings by individuals posing as law enforcement officers. The statute is rationally related to that goal.

Section 843.085(1) is a general intent crime. The defendant need not have the intent to deceive, but the defendant must have the intent to wear or display the items prohibited. See Reynolds v. State, 842 So. 2d 46 (Fla. 2002)(cruelty to animals statute was a general intent crime, and the statute survived a due process attack). "The statute may prohibit an individual from wearing a commercially available shirt or hat in public, but the statute is rationally related to its goal because it requires that a reasonable person could be deceived." Sult, 839 So. 2d at 806. Therefore, §843.085 prevents individuals from posing as law enforcement officers and prevents citizens from mistakenly relying on individuals who look like law enforcement officers. It is rationally related to a legitimate government interest and does not violate substantive due process.

The Second District opinion further held that should an intermediate scrutiny be employed, they would still hold that §843.085 is constitutional. "Preventing crimes by persons wearing or displaying law enforcement items is an important

governmental objective, and section 843.085 is substantially related to that objective." See T.M. v. State, 784 So.2d 442, 444 n. 1 (Fla.2001) (recognizing a middle/intermediate level of scrutiny in which the governmental objective must be important and the challenged law must be substantially related to that objective). Accordingly there is no substantive due process violation.

## CONCLUSION

In light of the foregoing facts, arguments, and citation of authority, Respondent respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court, and the opinion of the Second District Court of Appeal.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John H. Trevena, Esq., 801 West Bay Drive, Largo, Florida 33770 and Patrick B. Calcutt, Esq., Calcutt & Calcutt, 702 Bay Street NE, St. Petersburg, Florida 33701 and this 20TH day of May 2003.

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**JOHN M. KLAWIKOFSKY**

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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**JOHN M. KLAWIKOFSKY**