IN THE SUPREME COURT OF FLORIDA

KIMBERLY S. SULT,

Petitioner,

vs.

CASE NO.: SC03-542
Lower Tribunal No.: 2D01-5013

STATE OF FLORIDA,

Respondent.
___________________________________/

PETITIONER'S INITIAL BRIEF

John H. Trevena, Esq.
Fla. Bar No. 527653
801 West Bay Drive
Largo, Florida 33770
(727) 581-5813 Phone
(727) 581-7758 Fax
Attorney for Petitioner Kimberly S. Sult

CALCUTT & CALCUTT
Patrick B. Calcutt
Fla. Bar No. 869971
Kathleen M. Calcutt
Fla. Bar No. 909998
702 Bay Street NE
St. Petersburg, Florida 33701
(727) 898-4198 Phone
(727) 823-6353 Fax
Co-Counsel for Petitioner Kimberly S. Sult

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REQUEST FOR ORAL ARGUMENT

Petitioner, Kimberly S. Sult, hereby requests Oral Argument based upon the certification of this cause from the Second District Court of Appeal as a matter of great public importance.

STATEMENT OF THE CASE

This is an appeal to review the decision of the Second District Court of Appeal rendered on February 28, 2003 in Sult v. State, 839 So.2d 798 (Fla. 2d DCA 2003). The District Court of Appeal's decision is within the discretionary jurisdiction of the Florida Supreme Court pursuant to Fla.R.App.P. 9.030(a)(2)(A), subsections (i) (expressly declaring valid a state statute) and (v) (passing upon a question certified to be of great public importance). The Second District Court of Appeal expressly declared valid section 843.085, Florida Statutes, and has certified the following question raised in this matter as being a question of great public importance:

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

Kimberly S. Sult was convicted on July 18, 2001 in the County Court for the Sixth Judicial Circuit, in and for Pinellas County, for violating Florida Statute Section 843.085, "Unlawful Display of Police Badges or Other Indicia of Authority," a misdemeanor of the first degree. (R-238).

On July 26, 2001, Ms. Sult timely moved for a New Trial (R-240). On August 29, 2001, the Trial Court denied the Motion for New Trial, but certified to

the Second District Court of Appeal Ms. Sult's direct appeal as a matter of Great Public Importance. (R-278). On September 21, 2002, Ms. Sult filed a timely Notice of Appeal to the Second District Court of Appeal, including a statement of judicial acts to be reviewed. (R-278-287).

On October 27, 2001, the Trial Court entered an amended order certifying to the Second District Court of Appeal Ms. Sult's direct appeal of the Judgment on the Jury Verdict as a matter of Great Public Importance pursuant to Rules 9.030(b)(4) and 9.160, Fla.R.App.P. (R-288-296). On November 16, 2001, the Second District Court of Appeal accepted the case for direct appeal. Oral arguments were held on November 26, 2002. On February 28, 2003, the Second District Court of Appeal issued its opinion affirming Ms. Sult's conviction and certifying to the Florida Supreme Court the aforementioned question of great public importance.

On March 28, 2003, Ms. Sult timely filed a Notice To Invoke Discretionary Jurisdiction of this Court.

STATEMENT OF THE FACTS

On June 14, 2001, at approximately 9:15 p.m., Kimberly Sult, a blonde female, along with two female friends, Tracy Harmon and Jeanie Martin (T83), were sighted by Corporal Jerry Davis of the Pinellas County Sheriff's Department entering a Race Trac convenience store located on 26th Street and 54th Avenue North, in St. Petersburg, Pinellas County, Florida. (T40,63). Ms. Sult was dressed in a black T-shirt on which was printed a large star and five inch letters spelling "SHERIFF." Ms. Sult was also wearing denim shorts and sandals. (T40,63).

Corporal Davis and Deputy Jeff McConaughey each was parked in his respective patrol vehicle in the parking lot of the store. (T48). Each officer exited his vehicle after approximately two minutes and entered the store. (T42,49). The officers observed Ms. Sult paying for her purchase at the counter (T49), and at the conclusion of the transaction proceeded to walk up to Ms. Sult from behind and bracket her, one officer standing on either side of her. (T49, 50). Corporal Davis testified that, "Administratively, she [Ms. Sult] was not free to go." (T120). Officer Davis further testified that he would have seized Ms. Sult had she attempted to flee, and that he was not going to let her go. (T120). Jeanie Martin, a state witness who was standing near Ms. Sult at the time the officers approached, also testified that it appeared to her that Ms. Sult was not free to leave. (T52).

Corporal Davis approached Ms. Sult from behind and, without preamble, asked her in a "strict" voice (T51,56) "Do you work for us"? (T50), to which she quickly replied "yes." Ms. Sult then proceeded to open her wallet and the officers observed a Sheriff's Department employee identification card with a clip at the top of her wallet. (T54,56). Corporal Davis told Ms. Sult "we need to speak outside," (T119) at which point he physically escorted her from the store by placing his right hand on her shoulder and walking her out the door. (T50,55,85). The officers had not witnessed Ms. Sult showing the employee identification card to anyone prior to their initial questioning of her. (T53).

Once outside, Ms. Sult was allowed to place her items into her car but was told by the officers that she had to go down by their cruiser because they needed to talk with her. (T85). Subsequently, Ms. Sult was interrogated further without Miranda (T120), and was issued a Notice To Appear for violating Section 843.085, Florida Statutes, entitled "Unlawful use of Police Badges or other Indica of Authority." A single count Misdemeanor Information formally charging Ms. Sult for this offense was filed on July 6, 2001. (R-4-5).

1. <u>The employee identification card and the T-shirt</u>: Ms. Sult had been employed previously by the Pinellas County Sheriff's Office as a CJS (T-508), and later, as a detention deputy recruit. (T-509). Upon her initial hire, she had an employee identification card. (T-509). At the time she was promoted to detention

deputy recruit, she was given a new wallet-style identification in a black billfold. (T-509). When she resigned, she turned in the wallet-style ID as well as all of her issued uniforms. (T-510, 512). She was advised that she did not have to turn in her original identification card. (T-513).

Ms. Sult had purchased the “Sheriff” T-shirt in question from Americana Uniforms at a time and place different from where she received her issued uniforms. (T-95-96). She actually bought three shirts and gave two away to relatives. (T-516). At the time she purchased the T-shirts, she was wearing shorts and a T-shirt; no one asked her for law enforcement identification. The uniform store was open to the public. (T-514). Ms. Sult had worn the “Sheriff” T-shirt around the house, mowing the lawn, at Wal-Mart, and shopping, and in the presence of law enforcement officers. She was never challenged or questioned about the T-shirt. (T-525).

2. Commercial Availability: The Defense made a proffer of evidence that a large amount of other law enforcement insignia and paraphernalia is available for purchase by the general public, including introducing evidence that actual Sheriff’s Office patches from actual uniforms were given away by the Pinellas County Sheriff’s Office, and that baseball caps, pins, and T-shirts emblazoned “U.S. Marshal” and “Trooper -- Florida Highway Patrol” were available elsewhere (T-601-644; 700-705; R-244-307).

3. Constitutional Challenge: At the close of the State's case, Ms. Sult moved for a Judgement of Acquittal and, among other grounds, challenged the constitutionality of the statute. (T-447). Ms. Sult renewed her constitutional challenge at the close of all the evidence. (T-715-727). The Trial Court denied the aforementioned motions and affirmed the constitutionality of the statute. (T 727).

4. Instruction on The Law: There is no Standard Jury Instruction on the statute for which Ms. Sult was charged. Both parties argued the law, and specifically, what kind of intent was required to convict.

On the issue of criminal intent, in closing argument, the State argued :

> And he can say the word "intent" until he's blue in the face. This is a general intent crime. And there's nothing on that piece of paper, there's nothing from what the Judge is going to read you that's going to require the State to prove that she intentionally deceived anybody . . . .

The Defense argued on the intent issue as follows:

> "One of the things I want to talk to you about is intent. There are different types of criminal offenses. This is a criminal offense and it is a general intent criminal offense. It requires intent. It requires mens rea, a guilty mind, a guilty intent. It is not what is known in the law as a strict liability offense. (T-746). This T-shirt, mere possession of this T-shirt si not a criminal offense. You have to have a guilty intent, a combination thereof. (T-747)

Defense counsel asked for the following special instruction: Before you find the Defendant guilty of Unlawful use of police badges or other insignia of authority, the State must prove the following 3 elements beyond a reasonable

doubt:

1. The Defendant wore or displayed a black T-shirt bearing the word "Sheriff" and a five- point star with the phrase "Pinellas County Sheriff's Office,

2. With intent to deceive a reasonable person into believing that such item was authorized by the Pinellas County Sheriff's Department: and

3. By displaying the T-shirt, the Defendant knowingly and intentionally gave a false impression that she possessed the authority of the Pinellas County Sheriff's Department, intending another person or persons to rely on that false impression to their detriment. (R-79).

The State submitted a proposed instruction that tracked somewhat the language of the statute, but included a paragraph stating that "it is not necessary for the Defendant to have intended to deceive anyone into believing she was authorized to display or wear the item in question." (R-127)

The Trial Judge ultimately instructed the jury as follows with his own special instruction on "Unlawful use of Police Badges or other Indica of Authority":

> Before you can find the defendant guilty of Unlawful Use of Police Badge or Other indicia of Authority, the State must prove the following four elements beyond a reasonable doubt: Kimberly Sult wore or displayed any authorized indicia authority of any colorable imitation of any authorized indicia of authority; the item or items worn or displayed referred to a federal, state, county or municipal law enforcement agency; the item or items were badges and /or insignia

> and /or emblems and /or identification cards and /or uniforms; the manner in which the items were displayed – was or were displayed could have deceived a reasonable person into believing that Kimberly Sult was authorized by an appropriate law enforcement agency to wear or display the item. (T-701-792).

Thus instructed, the Jury retired and began deliberations.

5. <u>The Jury Question</u>: Several hours later, the foreperson of the Jury returned with a question: "Is the statute that Defendant is accused of violating a general intent crime which requires criminal intent on the part of the Defendant, and if so, can the Jury consider this in answering and considering the four elements?" (R-77; T-804). The Defense urged the Trial Court to answer the question "in the affirmative." (T-804). The State urged the Trial Judge to advise the Jury to rely on the instruction previously given. (T-805). The Trial Judge declined to answer the Jury's question, and the Jury was advised "to rely upon the instruction" that the Trial Judge already had given. (T-807-808). Shortly thereafter, the Jury returned a verdict of guilty. (T-820). As outlined in the Statement of the Case, a direct Appeal followed to the Second District Court of Appeal which affirmed Ms. Sult's conviction and certified the following question raised in this matter as being a question of great public importance:

> IS SECTION 843.085, FLORIDA STATUTES (2001), UNCONSTITUTIONAL AS OVERBROAD, VAGUE, OR A

VIOLATION OF THE RIGHT TO SUBSTANTIVE DUE PROCESS? Sult v. State, 839 So.2d 798, 806 (Fla. 2d DCA 2003)

This appeal follows.

SUMMARY OF ARGUMENT

Section 843.085, Florida Statutes violates the constitutional rights to free speech and due process afforded under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. The statute prohibits any individual from wearing or displaying indicia of authority, or colorable imitation thereof, of any law enforcement agency, if a reasonable person could be deceived into believing that the depicted law enforcement agency authorized the individual to wear or display the item. The statute is overbroad in its application because it is not limited to Florida or even United States law enforcement agencies, it does not require that any other person be actually deceived or otherwise rely upon the item worn or displayed, nor does it require the "offender" to act with intent to deceive. The statute, therefore, encroaches upon an individual's First Amendment freedoms.

The statute is also unconstitutionally vague and invites arbitrary and selective enforcement. The language of the statute is so open-ended that the potential violations are limitless, with no guidelines for law enforcement to follow when enforcing the statute. Additionally, the statute is not narrowly tailored to achieve the legislative goal in enacting the statute. The Legislature sought to prevent individuals from committing crimes while posing as law enforcement officers. However, the sale of the items is not illegal; only the wearing or

displaying of them is criminal. Furthermore, the statute is not limited to individuals acting with the intent to commit any crime. Instead, it applies to any individual, regardless of her intent in wearing or displaying the item. The statute broadly covers innocent activity, thereby violating an individual's right to substantive due process. Accordingly, the statute should be struck down.

ARGUMENT

SECTION 843.085, FLORIDA STATUTES IS UNCONSTITUTIONALLY VAGUE, OVERBROAD AND A VIOLATION OF SUBSTANTIVE DUE PROCESS.

I. Section 843.085, Florida Statutes, is overbroad in that it criminalizes constitutionally protected forms of expression.

A statute is overbroad if it proscribes within its reach conduct protected under the First Amendment to the United States Constitution. E.g., Grayned v. City of Rockford, 408 U.S. 104 (1972). The statute at issue here sweeps too broadly in its application, thereby unconstitutionally encroaching upon an individual's First Amendment rights. In pertinent part, Section 843.085, Florida Statutes, makes it unlawful for any person, regardless of his or her intent, to do the following:

> (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.

It is undisputed, and the Second District Court of Appeal recognized, that this statute implicates the right to free speech guaranteed by the First Amendment. Sult v. State, 839 So.2d 798, 802 (Fla. 2d DCA 2003). A T-shirt bearing a message is a form of expression entitled to constitutional protection. Id. (citing Cohen v. California, 403 U.S. 15 (1971)). The statute at issue in the instant case fails to pass constitutional muster under the First Amendment for several reasons. First, it does not require that another person be *actually* deceived into believing the article is authorized by law enforcement. The statute merely requires the possibility that a "reasonable person" *could* be deceived. Consequently, no other person need actually view or rely upon the item for the statute to be violated. It is enough that some hypothetical, so-called "reasonable" person could erroneously perceive the item as authorized by the law enforcement agency depicted.

Additionally, the statute applies to *any* law enforcement agency. The statute is not limited to Florida agencies, nor is it limited to United States agencies. Thus, an individual wearing a T-shirt that says "Scotland Yard" or a hat or jacket that says "Hong Kong Police" could be subjected to punishment under the statute if he is not "authorized" by those agencies to wear the items.

Furthermore, the statute does not require that the "offender" act with the intent to deceive any other person. Thus, an unauthorized individual who lawfully purchases and wears a commercially available T-shirt, hat, or other garment

bearing, for example, the letters "FDNY[1]" or "NYPD[2]" risks arrest and prosecution for a criminal offense: a "reasonable person" *could* be deceived into believing that the New York Fire or Police Department authorized this individual to wear the item.[3] This is so despite the individual's innocent intent. The individual may be guilty of a crime, whether she wore the shirt for no purpose whatsoever or whether she wore it with some unlawful motive in mind, such as to facilitate a robbery. Cf. State v. Bradford, 787 So.2d 811 (Fla. 2001)(holding that because the Legislature did not include fraudulent intent as an element of unlawful insurance solicitation, the statute at issue unconstitutionally infringed upon protections afforded commercial speech by the First Amendment); see also Wyche v. State, 619 So.2d 231 (Fla. 1993).

In Wyche this Court struck down a substantially similar law, which involved an ordinance prohibiting loitering for the purpose of prostitution. The ordinance

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[1] Fire Department of New York.

[2] New York Police Department. In the wake of the terrorist attacks on September 11, 2001, "FDNY" and "NYPD" articles are widely available.

[3] An individual wearing such a shirt in the state of New York would not be guilty of violating the law because New York's false impersonation statutes require specific intent. Like Section 843.085, Sections 190.25 and 190.26 of the Laws of New York prohibit a person from wearing or displaying without authority certain indicia of law enforcement. However, the New York statutes also provide that wearing or displaying the item is only unlawful when the person "so acts with intent to induce another to submit to such pretended official authority or otherwise to act in reliance upon said pretense."

was only directed at persons previously convicted of prostitution, and it prohibited such persons from loitering "in a manner and under circumstances manifesting the purpose of" prostitution. This Court held that the ordinance was overbroad in violation of the First Amendment because it did not require proof of unlawful intent as an element of the offense. Therefore, the ordinance "allow[ed] arrest and conviction for loitering under circumstances merely indicating the *possibility of such intent*, such as beckoning to passersby and waving to motorists, which could be occurring without any intent to engage in criminal activity. Thus, the ordinance affects and chills constitutionally protected activity." Id. at 235 (emphasis added). Likewise, Section 843.085 is overbroad because it punishes the mere possibility of deceit, and it subjects a person to criminal punishment for wearing an item when (s)he has no criminal or unlawful intent. As in Wyche, the statute chills constitutionally protected activity in that individuals will shy away from wearing or displaying certain items, possibly even in support of law enforcement, for fear of violating the statute. See also Ledford v. State, 652 So.2d 1254 (Fla. 2d DCA 1995)(holding anti-begging ordinance overbroad because it did not distinguish between "aggressive" and "passive" begging); Schmitt v. State, 590 So.2d 404, 413 (Fla. 1991)(finding portion of statute, which prohibited the possession of depiction known to include sexual conduct by child, to be overbroad, stating that

". . .a chilling effect occurs because this portion of the statute directly restricts the ability to create or possess photographs or films of entirely innocent and innocuous activities involving families and children, which clearly are protected by the guarantee of free expression."), cert. denied 503 U.S. 964 (1992).

The overbreadth of the statute at issue here is at least as substantial as the ordinance challenged in Wyche. Both laws restrict an individual's freedom of expression notwithstanding the individual's lack of malicious or evil purpose. Indeed, the statute Petitioner challenges is even more egregious than the Wyche ordinance because it applies to every individual, rather than simply those persons previously convicted of a crime such as prostitution.

II. Section 843.085 also violates due process because it is unconstitutionally vague, and it is more intrusive than necessary to achieve the Legislature's stated objective. The statute at issue criminalizes entirely innocent conduct.

Consistent with principles of due process, a criminal statute must give definite warning of what conduct is subject to criminal punishment. U.S. Const. Amend. XIV; Art. I, Sec. 9, Fla. Const.; see also Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984). A statute is unconstitutionally vague if ". . . persons of common intelligence must necessarily guess at its meaning and differ as to its application." Id. at 1353. Under this legal standard, Section 843.085 is too indefinite to comport with due process. The statute prohibits a person from displaying "indicia of authority," or "any colorable

imitation thereof," of *any* law enforcement agency which "*could* deceive a reasonable person." (Emphasis added). The language is subject to interpretation, and an individual must speculate whether a particular item falls within the ambit of the statute. Cf. Brown v. State, 629 So. 2d 841 (Fla. 1994)(amorphous phrase "public housing facility" is too vague, rendering Section 893.13(1)(i), Florida Statutes facially unconstitutional).

More importantly, because the statute is so open-ended, it invites arbitrary and discriminatory enforcement. See Kolender v. Lawson, 461 U.S. 352, 358 (1983)("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."). Law enforcement officers may differ as to what "indicia of authority" of law enforcement or "colorable imitation thereof" is, and whether it *could* deceive a reasonable person. There are an infinite number of possibilities, particularly where the statute is so unlimited in scope that it applies to any law enforcement agency, whether foreign or domestic. One law enforcement officer may have a different standard for enforcement than another law enforcement officer. For instance, an individual dressed as an officer for a costume party may violate the statute. The statute leaves it entirely to the discretion of each officer as to whether he will arrest such a person. This is particularly troublesome because law enforcement officers are in a

dissimilar position to determine whether an item appears to be “indicia of authority” or an “imitation thereof” that could deceive another lay person. Under these circumstances, there is an increased danger of selective enforcement. See S.W. v. State, 431 So.2d 339, 340 (Fla. 2nd DCA 1983)(ordinance prohibiting minors from participating in a myriad of legitimate activities "bristle[d] with the potential for selective enforcement,” and, therefore, was held unconstitutionally vague). In violation of due process, the Legislature in this instance has “impermissibly delegate[d] 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.” Grayned, 408 U.S. at 108-09.

The ordinance in Wyche, described above, was also held unconstitutionally vague. This Court reasoned that “[t]he list of circumstances guiding law enforcement officers is not exhaustive and leaves much to the individual officers’ discretion.” 619 So.2d at 237; see also State v. DeLeo, 356 So.2d 306 (Fla. 1978)(the crime of “official misconduct” was too open-ended, as it could be used to prosecute insignificant transgressions as well as more egregious conduct; the “catch-all” nature of the statute rendered it susceptible to arbitrary application and was, therefore, unconstitutional). Likewise, Section 843.085 suffers from similar

infirmities: it is a "catch-all" statute that prohibits the mere wearing or displaying of an unlimited number of items, regardless of intent.[4]

The District Court rejected Petitioner's vagueness challenge, reasoning that the "reasonable person" standard set out in the statute saves it from constitutional attack. In so holding, the Court relied upon Bouters v. State, 659 So.2d 235 (Fla. 1995), and Pallas v. State, 636 So.2d 1358 (Fla. 3d DCA 1994), approved, 654 So. 2d 127 (Fla. 1995), which upheld the anti-stalking statute against a vagueness attack, as well as L.B. v. State, 700 So.2d 370 (Fla. 1997), which held that the term "common pocketknife" was not unconstitutionally vague. The District Court's reliance on these cases is misplaced, as the vagueness of Section 843.085 is based upon the statute in its entirety, and not simply on the "reasonable person" language. The statute is vague because it renders the wearing of *any* "indicia of authority" of law enforcement for *any* purpose whatsoever, if the item *could be,* and not *is,* erroneously perceived. The statute provides no guidelines for enforcement of such a broad, open-ended statute. This is distinguishable from L.B., where the only arguable flaw in the statute was the term "common pocketknife." It is also distinguishable from Bouters and Pallas, where the only

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[4] The only exception the statute provides for is for "fraternal, benevolent, or labor organization[s]" which use certain enumerated words, so long as those words appear in that organization's official name. Sec. 843.085(4), Fla. Stat.

portion of the statute that was arguably vague was the statutory definition of "harasses."

Moreover, Section 843.085 violates substantive due process, as it infringes upon an individual's freedom of speech more than necessary to accomplish the Legislature's objective in enacting the statute. The District Court erroneously applied the rational basis test when addressing the substantive due process challenge to the statute. Where a fundamental right, such as the right to free speech, is concerned, courts will subject the statute to strict scrutiny. See Ledford, supra (holding that "begging" is entitled to First Amendment protection, and subjecting anti-begging ordinance to strict scrutiny); T.M. v. State, 784 So.2d 442 (Fla. 2001)(reversing district court decision applying intermediate scrutiny to challenge against city's juvenile curfew ordinance, which implicated First Amendment rights, and remanding with directions to apply strict scrutiny). Under a strict scrutiny analysis, the statute must be narrowly tailored to achieve an important governmental interest. Id. Section 843.085 is not narrowly tailored to achieve the Legislature's goal of preventing robberies and kidnappings by individuals posing as law enforcement officers. The statute does not require that another person be *actually* deceived into believing the article is authorized by law enforcement, nor does it require that the "offender" act with any intent to deceive another person. An individual with no intent to use the item for any malicious

purpose could be guilty of violating the statute. In Sult, the Second District acknowledges that "[t]he statute may prohibit an individual from wearing a commercially available shirt or hat in public . . ." 839 So.2d at 806. This Court has held on numerous occasions that such a law, which criminalizes wholly innocent activity, is unconstitutional even under a rational basis standard. See State v. O.C., 748 So.2d 945 (Fla. 1999).

In O.C. this Court held that the sentence enhancement for being a "criminal street gang member" violated substantive due process because the statute required no nexus between the membership and the offense at issue. Consequently, this Court concluded that absent such a nexus the statute lacked a ". . .rational relationship to the legislative goal of reducing gang violence and thus fails to have a 'reasonable and substantial relation' to a permissible legislative objective." Id. at 950 (citation omitted); see also State v. Saiez, 489 So.2d 1125 (Fla. 1986)(statute prohibiting the mere possession of embossing machines held unconstitutional as a violation of substantive due process; absent requirement of intent to use machine for criminal purpose, statute was not rationally related to Legislature's goal); Robinson v. State, 393 So. 2d 1076 (Fla. 1980)(statute prohibiting the wearing of any mask lacked any rational basis, where it failed to include element of criminal intent). These cases demonstrate that consistent with due process, the Legislature

cannot, as it did in this case, dispense with a specific intent element where to do so would criminalize completely innocuous behavior.

The failure to include a specific intent element in Section 843.085 is especially troublesome in this case because the Legislature did not prohibit the *sale* of such items. Therefore, the items are lawfully sold in the marketplace, and individuals can derive financial gain from the sale of such items, yet the purchaser takes the risk that (s)he will be prosecuted for using them. Where the sale of the items is not illegal, it would be disingenuous to conclude that the statute challenged in the instant case substantially furthers the state's interest.

It is also curious that a person in Florida can falsely state to another individual that (s)he is a police officer, so long as (s)he does not "take it upon himself to act as such," yet that same individual cannot walk into a convenience store simply wearing a shirt that says, "Sheriff." See State v. Alecia, 692 So.2d 263 (Fla. 5th DCA)(upholding statute prohibiting the false personation of a law enforcement officer, and stating that "[s]imply pretending to be a law enforcement officer is not criminal"), rev. denied 699 So.2d 1371 (Fla. 1997); see also Sec. 843.08, Fla. Stat. (making it unlawful to pretend to be any enumerated law enforcement officer *only* when the individual "takes it upon himself to act as such"). If merely pretending to be a police officer, without more, is not a crime in Florida, then it follows that wearing a shirt stating, "Sheriff," without more, could

not constitutionally be a crime. The Second District ignores the Fifth District's reasoning in Alecia and creates an arguable conflict among the District Courts of Appeal over whether "[s]imply pretending to be a law enforcement officer" is - - or is not - - a crime under Florida law.

In upholding the statute against a substantive due process attack, the District Court noted that the Legislature has the authority to dispense with a specific intent element, citing Reynolds v. State, 27 Fla. Law Weekly S1050 (Fla. Dec. 19, 2002). Sult, 839 So.2d at 806. However, Reynolds is inapposite for two reasons. First, the statute at issue in Reynolds, which was a general intent statute, did not prohibit entirely innocent activity, even absent a specific intent element. Rather, the statute merely proscribed the cruel treatment of animals, regardless of the individual's intent to cause the animal's death or bodily harm. The cruel treatment of an animal is not innocuous conduct. Conversely, merely wearing an "NYPD" or "Sheriff" shirt, like wearing a mask without any malevolent intent, *is* innocuous. Second, unlike Section 843.085, the "cruelty to animals" statute in Reynolds did not implicate the First Amendment. Where, as in the instant case, a statute infringes upon First Amendment freedoms, the failure to include specific intent as an element of the offense may invalidate the statute. See Bradford, supra. For these reasons, the statute should be invalidated.

CONCLUSION

For the above-stated reasons, Petitioner requests this Court to quash the decision of the Second District Court of Appeal upholding the constitutionality of the statute, and to remand with directions to reverse Petitioner's conviction and sentence and to discharge the Petitioner. Alternatively, Petitioner requests this Court to reverse the decision of the Second District Court of Appeal, and to remand with directions to apply strict scrutiny to the challenged statute.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true original and seven copies has been furnished to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 by Federal Express on this ______ day of May, 2003.

Copies Also Furnished To:
Honorable Bernie McCabe
John M. Klawikofsky, Esq.
Honorable James Birkhold, Clerk of the Second DCA

CERTIFICATE REGARDING FONT

The undersigned further certifies that the font used herein is Times New Roman 14-point, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted,

____
John H. Trevena, Esq.
Fla. Bar No. 527653
801 West Bay Drive
Largo, Florida 33770
(727) 581-5813 Phone
(727) 581-7758 Fax
Attorney for Petitioner Kimberly Sult

____
CALCUTT & CALCUTT
Patrick B. Calcutt
Fla. Bar No. 869971
Kathleen M. Calcutt
Fla. Bar No. 909998
702 Bay Street NE
St. Petersburg, Florida 33701
(727) 898-4198 Phone
(727) 823-6353 Fax
Co-Counsel for Petitioner Kimberly Sult