IN THE SUPREME COURT OF FLORIDA

CASE NO. 04-390

STATE OF FLORIDA,

Appellant,

-vs-

ALBERTO RODRIGUEZ,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF APPELLANT ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, ALBERTO RODRIGUEZ, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court, except that Petitioner may also be referred to as the "State," and Respondent may also be referred to as "Defendant". The symbol "R" denotes the original record on appeal, and the symbol "T" denotes the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by Amended Information in Case Number 01-8689 with resisting an officer without violence, fleeing or attempting to elude a law enforcement officer/high speed, unlawful display of authorized indicia of law enforcement authority, and reckless driving. The date of the offenses was March 16, 2001. (R:1-6). Defense counsel moved to dismiss the unlawful display of authorized indicia of law enforcement authority count, arguing the statute which made such illegal, section 843.085(1), was unconstitutional because it was so vague it could not be envisioned the black tee shirt Defendant was

wearing with POLICE written in blocked letters was included within the statute. (T:166-68). The trial court denied the motion on the basis it was untimely. (T:187).

With regard to the motion to suppress statements, Officer Johnson of the Miami-Dade Police Department testified he was on patrol in an unmarked police car when he heard a BOLO that a motorcycle was fleeing from an officer who was traveling southbound on 826, approaching 874. The person on the motorcycle was a white Latin male. (T:188-90). Officer Johnson was going southbound on 874 when the motorcycle came up from behind and passed his vehicle, and went over onto the shoulder to pass another vehicle. (T:191-93). At this point, Officer Johnson and his partner were doing about 90 m.p.h. and when Defendant passed the other vehicle, that vehicle swerved into their lane. When that happened, Officer Johnson and his partner swerved to avoid that driver and in doing so they lost control and struck the retaining wall. (T:193-94). The patrol vehicle then bounced off the retaining wall, went into the outside lane, and came to rest northbound in the southbound lane of 874. (T:194).

Later, Officer Johnson saw Defendant handcuffed and sitting on the embankment. When Officer Johnson told Defendant he looked familiar, Defendant said they worked out at the same gym.

(T:200). Officer Johnson asked Defendant why he didn't stop. Defendant said he didn't want to and that if his bike didn't blow up he probably would have outrun them. (T:201).

Detective Rodriguez testified he attempted to stop Defendant when he saw Defendant doing wheelies and cutting in and out of traffic, and going in excess of 100 miles per hour. (T:202). Detective Rodriguez pursued Defendant but lost him. The next time he saw Defendant, Defendant already was handcuffed and was being brought back to where he had ditched his motorcycle. (T:203). He and other officers who had responded to the scene were gathered in the area where the motorcycle was. They were talking among themselves, wondering if the motorcycle was stolen and if that was why Defendant was fleeing. (T:203-04).

Defendant spontaneously said the only reason they caught him was because he blew the engine on his motorcycle. Defendant also said he knew doing a wheelie was considered reckless driving. **Defendant's last statement was he didn't pull over because he didn't think he would be pulled over because he was wearing a police shirt.** (T:205). No questions were directed to Defendant; he just joined in the conversation with the officers. (T:206).

On cross, Detective Rodriguez said he never *Mirandized* Defendant because he never asked him any questions. (T:209).

Detective Rodriguez did not believe he asked Defendant where he got the shirt he was wearing, but that Defendant offered the shirt could be bought at a ninety-nine cent store. (T:213-14).

Detective Smith testified it was he who stopped Defendant. (T:216). Detective Smith was the passenger in his partner's vehicle and saw when Defendant took the exit ramp and then jump off his bike. The officers followed Defendant and were about thirty yards away from the motorcycle when they came to a complete stop. Detective Smith immediately exited the passenger side of the vehicle, yelled "police," and yelled for Defendant to stop. Detective Smith and his partner took Defendant into custody. (T:217).

The State rested. (T:220). After hearing argument, the trial court ruled on defense's motion to suppress as follows: The motion was granted as it related to Defendant saying the shirt he was wearing could be purchased at a ninety-nine cent store, but denied as to the other statements Defendant made. (T:228-31).

At trial, Detective Javier Rodriguez testified he was headed southbound on the Palmetto when he saw a motorcycle fly by the unmarked police vehicle he was in. (T:243). Detective Rodriguez was doing about 105 m.p.h. but could not catch up with

the motorcycle. The motorcycle eventually slowed down as the driver was doing wheelies as he was cutting in and out of traffic. (T:244, 246). Detective Rodriguez finally caught up with the motorcycle and saw the driver had on a black shirt with police written on the front and the back. (T;246). Detective Rodriguez was able to see the tag number. Because he did not know what the driver was going to do, rather than activate his emergency equipment, Detective Rodriguez called for assistance. (T:246).

Sometimes the driver would stop doing wheelies and drive in excess of 100 m.p.h. (T:247). Detective Rodriguez could not believe a police officer would drive like that. It was too reckless and it put a lot of people in danger. A lot of cars would swerve out of the way to avoid hitting the motorcycle or avoid being hit by the motorcycle. (T:248-49). Detective Rodriguez was shown and identified the shirt Defendant was wearing; the shirt was admitted into evidence. (T:247-48). As far as Detective Rodriguez knew, you had to be a law enforcement officer to be able to buy a shirt like that. (T:249).

When Detective Rodriguez was confident enough backup was present, he activated his lights and siren. (T:250). Defendant immediately looked back. Detective Rodriguez pointed for Defendant to go to the shoulder but Defendant continued to drive

southbound. (T:256). **Defendant then tugged on his shirt, pointed to the back of his shirt, and mouthed the word "police".** (T:256-57). Detective Rodriguez thought Defendant was trying to tell him he was a police officer but he didn't know for sure. (T:257). Because Defendant was driving like a "maniac," Detective Rodriguez decided he was going to stop Defendant and so he continued to press his siren. When Detective Rodriguez tried to pass Defendant on the right, **Defendant again mouthed the word "police" and pulled at his shirt**. (T:257).

Defendant finally slowed down and moved over to the right. With Detective Rodriguez directly behind him on the shoulder, Defendant looked back, waived, and took off going over 100 m.p.h. (T:258). Detective Rodriguez took off after Defendant and could see police lights ahead of him and behind him. (T:258-59). When Defendant passed the marked unit that was ahead of them, the marked unit got directly behind Defendant. Defendant suddenly made a quick turn to the right and got off the expressway. The marked unit wasn't able to turn off but a couple of them were able to turn off and they followed Defendant. Defendant ran the red light, continued across the intersection and got back on the expressway still headed southbound. (T:259-60).

Detective Rodriguez followed Defendant but wasn't able to

keep up and Defendant was pulling away from him. (T:260-61). As Defendant was driving he almost hit a police vehicle, causing it to turn and hit the median. (T:261). Detective Rodriguez continued to follow the motorcycle and saw other marked units also following the motorcycle. Eventually, Defendant exited and dropped the motorcycle. (T:262). Detectives Ruiz and Smith were the ones who physically arrested Defendant. (T:262-63). Detective Rodriguez came upon the scene about a minute after Defendant was arrested and was being brought back to where the motorcycle was. (T:263-64). Detective Rodriguez ran the VIN number on the motorcycle and learned it wasn't stolen. (T:264). Detective Rodriguez put the shirt Defendant was wearing into an evidence bag and sealed it. (T:268).

Defendant said the only reason he was captured was because he blew the engine on the motorcycle. He also **said he thought because he had the police shirt on he was not going to be pulled over.** (T:265). Defendant also said he knew that by doing a wheelie it was automatically reckless driving and he was going to jail for that and that is why he didn't stop. (T:265).

Detective Charlie Johnson testified he was riding with Detective John in an unmarked vehicle when Detective Rodriguez' request for backup came over the radio. From their position they knew the pursuit was coming up from behind them. (T:286-

87). When they saw the motorcycle coming up on them, they got in position to get in the pursuit. The motorcycle passed a little white car, scaring the driver who swerved into their lane, cutting them off. (T:288-89). When Detective John swerved to avoid hitting the white car they spun out, hit the inside retainer wall, then bounced off the outside retainer wall. They came to a rest in the middle of 874, pointing north in the southbound lanes. (T:289-90).

Detective Jarnel Ruiz testified he was in an unmarked unit with his partner Jason Smith when a BOLO came over the radio. Seconds after they heard the BOLO they saw the motorcycle. (T:291-93). Detective Ruiz activated his siren and lights and proceeded to follow the motorcycle. Defendant looked back at them then accelerated. (T:294-95). They continued to follow the motorcycle and when they got to Miller Drive the motorcycle exited. Defendant jumped off his bike and while Detective Ruiz was still putting his vehicle in park, Detective Smith exited and chased after Defendant. (T:297). Detective Ruiz then exited his vehicle and saw that Defendant was trying to get across the highway. Detective Ruiz drew his gun and yelled, "Stop, police," and ordered Defendant to the ground. Detective Smith grabbed Defendant and handcuffed him. (T:297).

Detective Jason Smith testified he saw Defendant drop his

bike on the side of the expressway. Defendant began to run, attempting to cross the expressway. Detective Smith exited the vehicle he was riding in and yelled “Stop, police”. (T:299-300). Within seconds after they apprehended Defendant other cars arrived at the scene. (T:311).

Officer Regina Dean testified she was driving a marked vehicle and joined in the pursuit with four other vehicles. (T:312). It was she who transported Defendant to headquarters. (T:314).

The State rested. (T:315). Defense moved for mistrial, arguing when Detective Rodriguez said most people pull over when they are asked to, unless they are committing or have committed a crime, it only inflamed the jury. (T:284, 316-17). The prosecutor explained the reason he asked Detective Rodriguez that question was to show that in Detective Rodriguez’ experience people would pull over when he was in an unmarked vehicle. (T:318). The trial judge did not see a manifest necessity to declare a mistrial and denied the motion. (T:319). Defense moved for a judgment of acquittal. (T:323-28). The motion was denied as to all counts. (T:332, 334-38, 341).

A jury found Defendant guilty of resisting an officer without violence, guilty of fleeing or attempting to elude a law enforcement officer, guilty of unlawful display of authorized

indicia of law enforcement authority, and guilty of reckless driving. (T:442-43; R:29-32).

Respondent filed an appeal in the Third District Court of Appeal, 3dDCA Case No. 01-2332 challenging, *inter alia*, the constitutionality of section 843.085, Florida Statutes. The verbatim point on appeal was:

> SECTION 843.085, FLORIDA STATUTES (1999) IS UNCONSTITUTIONAL BECAUSE IT IS IMPERMISSIBLY CONTENT-BASED AND PROSCRIBES CONDUCT WHICH IS PROTECTED BY ARTICLE 1, SECTIONS 4 AND 9 OF THE FLORIDA CONSTITUTION AND THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent's argument was because section 843.085 forbids the expression of certain protected speech it is content-based and therefore unconstitutional. Respondent also argued section 843.085 was overbroad.

Respondent's position was this issue was not preserved for review as while trial counsel stated the statute was vague and overbroad, counsel did not make the particular arguments that were being made on appeal. In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985).

Nevertheless, without abandoning its lack of preservation argument, Respondent addressed the merits of this issue.

On July 23, 2003, the Third District Court agreed Defendant's conviction and sentence for the unlawful display of authorized indicia of law enforcement authority pursuant to section 843.085(1) must be vacated because the statute was impermissibly content-based and overbroad. (Opinion p.10). The Third District believed section 843.085(1) was content-based in that it focused only on the content of the speech or expression and the direct impact it had on the viewer. (Opinion pp.11-12). The district court further found section 843.085(1) was overbroad because it banned the wearing of any indicia of law enforcement authority regardless of the intent of the non-official. (Opinion p.12).

The district court noted Defendant's conduct of pointing to his shirt and mouthing the word "police" to the officers clearly came within the proscription found in section 843.085(1), but he nevertheless had standing to interpose and maintain an overbreadth challenge to the statute. (Opinion p.13).

The court determined its opinion was buttressed by the U.S. Supreme Court's recent decision in Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536 (2003), which held because the Virginia statute made no distinction between cross burning done with the

intent to intimidate or threaten from a cross burning not done with such an intent, the provision was unconstitutional on its face. (Opinion p.13-14). The court stated that in the absence of an intent or scienter requirement, section 843.085(1) did mot make the distinction between the innocent wearing or display of law enforcement indicia from that designed to deceive the reasonable public into believing such display was official. (Opinion p.14). The court thus concluded the statute must be narrowly tailored with an intent requirement so as not to run afoul of the rights guaranteed by the First Amendment, and held Defendant's conviction and sentence for violation of section 843.085(1) must be vacated. (Opinion p.15). The court affirmed Defendant's convictions and sentences on all remaining counts. (Opinion p.19).

Defendant and the State both moved for rehearing. The State argued section 843.085(1) was not content-based nor overbroad. The State distinguished Virginia v. Black, *supra*, and pointed out the inclusion of an intent provision in the Virginia statute rendered that statute invalid because it treated any cross burning as prima facie evidence of intent to intimidate, whereas here, the district court found the absence of an intent requirement rendered section 843.085(1) constitutionally infirm. (State's Motion for Rehearing p.12). The State argued when

Defendant was pointing to his shirt and mouthing the words "police" to the police officers who were in pursuit of him, it was clear his intent was to convey he was "one of them" and he should not be stopped. Hence, the intent here was evidenced by Defendant's conduct, not by a provision in the statute. (State's Motion for Rehearing p.14).

On January 21, 2004, the Third District granted rehearing and clarification, withdrew their previous opinion, and issued a substitute opinion. The court again agreed Defendant's conviction and sentence for unlawful display of authorized indicia of law enforcement authority pursuant to section 843.085(1) should be vacated. (2d Opinion p.12). The court again found section 843.085(1) was content-based and overbroad. (2d Opinion pp.12-15). Again, citing to Virginia v. Black, *supra*, the court concluded the absence of an intent or scienter requirement rendered section 843.085(1) constitutionally infirm because it made no distinction between the innocent wearing or display of law enforcement indicia from that designed to deceive the reasonable public into believing such display was official. (2d Opinion p.16). The convictions and sentences on the other counts were affirmed. (2d Opinion p.22). The court certified conflict with Sult v. State, 839 So. 2d 798 (Fla. 2d DCA 2003), *rev. granted*, 852 So. 2d 862 (Fla. 2003). (2d Opinion p.14,

n.2; p.22).

This appeal follows.

QUESTION PRESENTED

WHETHER SECTION 843.085(1), FLORIDA STATUTES (2001) IS NOT IMPERMISSIBLY CONTENT-BASED OR OVERBROAD AND IS THEREFORE CONSTITUTIONAL.

SUMMARY OF THE ARGUMENT

Preliminarily, statutes must be presumed constitutional, even where a lower court has found otherwise. Content-based regulations are presumptively invalid; however, restrictions have been permitted upon the content of speech in a few limited areas categorized as "not within the area of constitutionally protected speech". One exception which permits content-discrimination is when the content discrimination "does not threaten censorship of ideas". Section 843.085(1), Florida Statutes (2001) does not threaten the censorship of ideas as it does not prohibit the wearing of a shirt bearing the word "POLICE" because the shirt neither expresses support nor disdain for the police. As such, section 843.085(1) does not violate any First Amendment principles.

As section 843.085(1) does not violate the First Amendment, the overbreadth argument is an irrelevancy. Moreover, in order for a defendant to maintain a challenge to a statute on the ground of overbreadth as applied to his or her own case, the defendant is required to establish his or her conduct was wholly

innocent and its proscription is not supported by any rational relationship to a proper governmental objective. The protection of the public from persons impersonating a law enforcement officer, as well as persons openly committing crimes and intending to deceive law enforcement into believing they should not be stopped or apprehended because they are “one of them,” is a substantial or compelling governmental interest that would justify any incidental limitation that Appellee could craft with respect to free speech limitations. This being the case, the statute here is not overbroad.

In addition, where there is no violation of the First Amendment, as here, there is no requirement of intent. Finally, a violation of section 843.085 is a misdemeanor offense. Seeing someone in what looks like an authorized or colorable imitation of official indicia of authority does not automatically give an officer probable cause to arrest. Rather, it gives the police officer the authority to investigate the situation.

ARGUMENT

SECTION 843.085(1), FLORIDA STATUTES (2001) IS NOT IMPERMISSIBLY CONTENT-BASED OR OVERBROAD AND IS THEREFORE CONSTITUTIONAL.

This case is before the Court on appeal of the Third District Court of Appeal's decision finding section 843.085(1), Florida Statutes (2001) is content-based and overbroad. The Third District also found because section 843.085(1) lacks an intent or scienter requirement, it is unconstitutional because it makes no distinction between the innocent wearing or display of law enforcement indicia from that designed to deceive the reasonable public into believing such display is official.

PRESUMPTION OF CONSTITUTIONALITY

Statutes must be presumed constitutional, even where a lower court has found otherwise. *See, e.g.*, In re Estate of Caldwell, 247 So. 2d 1 (Fla. 1971). Moreover, where such a choice exists, statutes must be given the interpretation that will permit them to be upheld rather than one which would render them unconstitutional. Russo v. Akers, 724 So. 2d 1151, 1153 (Fla. 1998); In re Estate of Caldwell, *supra*. When the constitutionality of a statute is questioned and it is reasonably susceptible of two interpretations, one which would be unconstitutional and the other which would be valid, a court must adopt the interpretation that will render the statute

valid. Florida State Board of Architecture v. Wasserman, 377 So. 2d 653 (Fla. 1979).

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 there are or can be no conceivable circumstances upon which it can validly operate or be effective to accomplish the intended purpose without violating organic rights. Knight & Wall Co. v. Bryant, 178 So. 2d 5 (Fla. 1965); *cert. denied*, 383 U.S. 958 (1966). It is well established 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 an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt, Knight & Wall Co. v. Bryant, *supra*; 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 (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." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994), *citing* Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459-60 (Fla. 1989) (citations omitted).

Here, the legislative intent in enacting section 843.085 was to promote the public safety.[1] The legislative history of section 843.085 indicates the intent was to prevent individuals from committing crimes while posing as 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), commenting 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

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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."

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).

FIRST AMENDMENT/CONTENT-BASED

As previously stated, the Third District Court found section 843.085(1), Florida Statutes (2001) was content-based and overbroad and therefore unconstitutional.

Section 843.085(1), provides, in pertinent part:

> It is unlawful for any person:
>
> ...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, ...**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," ...**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.

The First Amendment generally prevents government from proscribing speech or even expressive conduct because of

disapproval of the ideas expressed. R.A.V. v. City of St. Paul Minn., 505 U.S. 377, 382 (1992) (citations omitted). Content-based regulations are presumptively invalid; however, restrictions have been permitted upon the content of speech in a few limited areas categorized as "not within the area of constitutionally protected speech". Id. at 382-83 (citations omitted). Three exceptions to the prohibition against content-based discrimination have been recognized by the Supreme Court in R.A.V.. It appears the Third District did not consider the third exception, which permits content-discrimination **when the content discrimination "does not threaten censorship of ideas."** Id. at 393.[2] See City of Bellevue v. Lorang, 963 P. 2d 198, 202 at n.7 (Wash. App. 1998)(summarizing the three exceptions).

As will be demonstrated, a statutory prohibition against placing terms such as "police" on one's clothing does not threaten censorship of ideas, and does not involve any realistic possibility that "official suppression of ideas is afoot," and thus does not constitute a violation of the First Amendment. For this very reason, the Second District Court of Appeal, in

[2] The same principle was described by the Court as permitting content discrimination "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390.

Sult v. State, 839 So. 2d 798 (Fla. 2d DCA 2003), rejected the same First Amendment challenge to the statute.

The United States Supreme Court has held that defamation, obscenity and "fighting words" are not within the area of constitutionally protected speech. However, these areas of speech must be taken in context and they are not entirely invincible of protection. That is, while the government may proscribe libel it may not make the further content discrimination of proscribing only libel critical of the government, and while a city council can enact an ordinance prohibiting obscene works, it cannot prohibit only those legally obscene works that contain criticism of the city's government. 505 U.S. at 383-84.

It has long been held nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses. For example, burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Id. at 385 (citations omitted). In other words, the government may not regulate use based on hostility or favoritism toward the underlying message expressed. Id. at 386. The rationale of the general prohibition of content discrimination is that it "raises the specter that the

Government may effectively drive certain ideas or viewpoints from the marketplace." Id. at 387 (citations omitted). Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation. Id. at 390. The reason why fighting words are categorically excluded from the protection of the First Amendment is not because their content communicates any particular idea, but because their content embodies a particularly intolerable mode of expressing whatever idea the speaker wishes to convey. Id. at 393.

In R.A.V. the United States Supreme Court reasoned "fighting words" in the Minnesota statute that did not invoke race, color, creed, religion or gender could be usable in the placards of those arguing in favor of tolerance and equality, but they could not be used by such speakers' opponents. The Court therefore held the ordinance was unconstitutional because it went beyond mere content discrimination to actual viewpoint discrimination, and it did not come within any of the specific exceptions to the First Amendment prohibition, nor the more **general exception for content discrimination that did not threaten censorship of ideas**. See Id. at 393 (emphasis added).

The Third District found section 843.085(1) is not properly categorized as defamatory, obscene, or as "fighting words," but

that it is content-based. In that section 843.045(1) makes it unlawful for any person to wear or display any authorized indicia of authority, or wear or display in any manner the word or words “police,” etc., which could deceive a reasonable person into believing that such item is authorized by any of the agencies cited in the statute, it is not content-based. Moreover, because section 843.085(1) does not threaten the censorship of ideas, it falls within the general exception enunciated in R.A.V., *supra*.

It is a legitimate state interest that the persons wearing any indicia of authorized law enforcement authority are, indeed, law enforcement personnel. The legislature enacted section 843.085(1) to promote public safety, and the legislative history indicates the intent was to prevent individuals from committing crimes while posing as police officers. See Fla. H.R. Comm. on Crim. Just. CS/HB 457 (1991) Staff Analysis 5 (final May 13, 1991).

The Second District Court of Appeal in Sult v. State, 839 So. 2d 798 (Fla. 2d DCA 2003), rejected the claim that section 843.085(1) violates the First Amendment. Sult purchased from a store open to the public a T-shirt on which was printed the word “SHERIFF” and a large star which depicted a crest and read “Pinellas County Sheriff’s Office”. Sult was seen wearing the

shirt and was approached by two officers. When questioned, Sult said she worked for the sheriff's office. The officers discovered Sult was not an employee of the sheriff's office and charged her with a violation of section 843.085(1).

After recognizing that wearing a T-shirt that bears a political message is protected speech, the Second District proceeded to recognize the proscribed conduct in the instant statute does not involve protected speech since it does not involve the communication of any identifiable message. That is, that court found section 843.085 does not prohibit an expression of support for law enforcement nor prohibit wearing a shirt that expresses disdain for law enforcement. Finding Sult's conduct clearly fell within the prohibitions of section 843.085(1), the Second District affirmed her conviction. The Court explained its conclusion as follows:

> Wearing a T-shirt that bears a political message is protected speech. . . . We note, however, that "the right to dress as one pleases, vis-a-vis style and fashion, has little or no first amendment implications." . . . . Here, section 843.085 does not prohibit an expression of support for law enforcement. A citizen may wear a shirt that says, for example, "I support the Pinellas County Sheriff's Office" or "Support the Police." It also does not prohibit wearing a shirt that expresses 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. Any message that may have been intended is unclear. . . . 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.

839 So. 2d at 802-803. (emphasis added).

Here, Appellant was wearing a black shirt with the word "POLICE" written on the front and back. However, section 843.085 does not involve the censorship of any ideas as it does not prohibit the wearing of such a shirt because the shirt neither expresses support nor disdain for the police. Although the Sult opinion did not expressly rely on the general exception for content discrimination in R.A.V., the Sult court clearly found the proscription in section 843.085(1) does not threaten censorship of ideas. Because section 843.085(1) does not threaten the censorship of ideas it does not violate any First Amendment principles and it therefore comes within the exception to the rationale in R.A.V. See Id. at 393. As such, the Third District misapplied R.A.V.

OVERBREADTH

The First Amendment to the United States Constitution and article I, section 5 of the Florida Constitution protect the rights of individuals to associate with whom they please and to assemble with others for political or social purposes. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, they must also be drawn as narrowly as possible. Wyche v. State, 619 So. 2d 231, 234 (Fla. 1993) (citations omitted). Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct. Id.

The Third District found appellant's conduct of pointing to his shirt and mouthing the word "police" to the officers clearly came within the proscription found in section 843.085(1), but that he nevertheless had standing to interpose and maintain an overbreadth challenge to the statute. As the statute does not violate the First Amendment, the overbreadth argument should become an irrelevancy.

Nevertheless, in order for a defendant to maintain a challenge to a statute on the ground of overbreadth as applied to his or her own case, the defendant is required to establish his or her conduct was wholly innocent and its proscription is

not supported by any rational relationship to a proper governmental objective. State v. Ashcraft, 378 So. 2d 284 (Fla. 1979). It is only where the asserted overbreadth of a law may have a chilling effect on the exercise of First Amendment freedoms that a challenge will be permitted, even by one who does not show that his own conduct is innocent and not subject to being regulated by a narrowly drawn statute. Id. *citing* Bigelow v. Virginia, 421 U.S. 809 (1975) and Dombrowski v. Pfister, 380 U.S. 479 (1965).

As set forth in Virginia v. Hicks, 539 U.S. 113, 123 S.Ct. 2191 (2003), an overbreadth challenge must be predicated on a showing that a challenged statute proscribes "substantial" protected speech before applying the "strong medicine" of overbreadth invalidation. 123 S.Ct. at 2197, *citing* Broadrick v. Oklahoma, 413 U.S. 601 (1973). The court in Sult wrote that while they maintained there is no protected speech involved in section 843.085, they found at best, the law involves minimal protected speech, not the substantial amount of protected speech required for implicating the overbreadth doctrine. Sult, 839 So. 2d at 804.

Even if a claim of unconstitutionality could be properly entertained on a hypothetical set of facts, the statute itself may not be invalidated in actual situations in which the

constitutionality of its application is not at all involved. See Virginia v. Hicks, 539 U.S. 113 (2003); and 10 Fla. Jur. 2d Constitutional Law §91, cases collected at n.47 (1997). See also State v. Ashcraft, *supra*, where this Court held because Ashcraft did not contend the introduction of a controlled substance into the county jail was innocent conduct, the trial court did not hold her to the proper standard for an overbreadth challenge.

Defendant's argument is that he had a free speech right to wear that shirt. However, there is precedent from the United States Supreme Court that directly undercuts Defendant's free speech analysis. In United States v. O'Brien, 391 U.S. 367 (1968), defendant was charged with burning his draft registration certificate in contravention of an Act of Congress making it a crime for one to forge, alter, knowingly destroy, knowingly mutilate, or in any manner change any such certificate. Id. at 370. The defendant in O'Brien argued the term "knowing mutilation" abridged his right to free speech protected by the First Amendment. The United States Supreme Court rejected that argument and noted "...when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First

Amendment freedoms." Id. at 376.

As such, the protection of the public from persons impersonating a law enforcement officer, as well as persons openly committing crimes and intending to deceive law enforcement into believing they should not be stopped or apprehended because they are "one of them," is a substantial or compelling governmental interest that would justify any incidental limitation that Defendant could craft with respect to free speech limitations. This being the case, the statute at issue here is not unconstitutionally overbroad. City of Erie v. Pap's A.M, 529 U.S. 277 (2000); and Barnes v. Glen Theatre, Inc., et al., 501 U.S. 560 (1991).

The Second District Court of Appeal in Sult wrote:

> [T]he purpose of the overbreadth doctrine and its requirement that the court consider hypothetical situations is to eliminate a chilling effect on the exercise of the constitutional right to free speech. ...
>
> The overbreadth doctrine... is to be used sparingly and as a matter of last resort. ...This is especially so when the challenged statute is "primarily meant to regulate conduct and not merely pure speech."... The [United States] Supreme Court has stated that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."... 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. Furthermore, subsection (4) of the statute provides an exemption with reference to fraternal, benevolent, or labor organizations or associations. Thus, a person wearing a Police Benevolent Association shirt, for example, would not be in violation of section 843.085. Also, a T-shirt that expressed clear support for (or protest against) law enforcement, such as "I support the Pinellas County Sheriff's Office," would not violate section 843.085. Therefore, we conclude that section 843.085 affects only incidental expression and is not substantially overbroad.

Sult, 839 So. 2d 803-04.

The basis of the Third District's opinion is that the statute reflects content discrimination and thus is a First Amendment violation. However, because section 843.085(1) does not involve the censorship of ideas it does not have a chilling effect on the exercise of First Amendment freedoms. Since the Third District found Appellant's conduct "clearly came within the proscription found in section 843.085(1)," he cannot challenge the statute. Virginia v. Hicks, *supra*. Accordingly, the district court misapplied the concept of overbreadth in its analysis.

INTENT

The Third District concluded the absence of an intent or scienter requirement in section 843.045(1) rendered it unconstitutionally infirm because it makes no distinction between the innocent wearing or display of law enforcement indicia from that designed to deceive the reasonable public into believing such display was official. In reaching this conclusion, the court cited to Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536 (2003) which dealt with the issue of cross burning. Black involved content discrimination without qualifying for the exception based on the absence of the censorship of ideas. Since Black implicates the First Amendment in a way our statute does not, intent would be required. However, where there is no violation of the First Amendment, as here, there is no requirement of intent.

A provision in the statute at issue in Virginia v. Black specified that any cross burning was to be prima facie evidence of an intent to intimidate. Moreover, the provision had been interpreted at trial by a jury instruction that the burning of a cross by itself was sufficient evidence from which the jury could infer the required intent. The United States Supreme Court noted the provision permitted a jury to convict in every cross burning case in which defendants exercised their constitutional right not to put on a defense and even where a

defendant presented a defense, and thus the provision made it more likely the jury would find an intent to intimidate regardless of the particular facts of the case. Id. at 1549-50. The Court therefore found the statute created an unacceptable risk of the suppression of ideas. Id. at 1551.

While the inclusion of an intent provision in the Virginia statute rendered that statute invalid because it treated any cross burning as prima facie evidence of intent to intimidate, here, the Third District found the absence of an intent requirement rendered section 843.085(1) constitutionally infirm.

At common law all crimes consisted of an act or omission coupled with a requisite mental intent or *mens rea*. Notwithstanding this common law requirement, it was long ago recognized the legislature has the power to dispense with the element of intent and thereby punish particular acts without regard to the mental attitude of the offender. State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982). The common law crimes were commonly referred to as crimes *mala in se*; as such, intent was considered to be so inherent in the idea of the offense that it was deemed included as an element even though the statute codifying the offense failed to specify an intent element. Id. In contrast, those crimes not prohibited at common law were generally classified as crimes *mala prohibita*, and the doing of

the act was considered punishable regardless of intent. Id.

The Court in Oxx thus held the legislature has the power to dispense with the element of intent in defining crimes that are *malum prohibita* and which do not chill a person's exercise of his or her First Amendment rights. Id. Since the instant offense was not prohibited at common law, it is *malum prohibita* and the legislature can therefore dispense with an intent element. Moreover, as previously shown, because section 843.085(1) does not prohibit the wearing of a shirt because the shirt says the police are good, bad, unfair or corrupt, it does not threaten the censorship of ideas. Accordingly, because section 843.085(1) does not threaten the censorship of ideas, it comes within the general exception of content-based prohibitions. See R.A.V. at 505 U.S. 393.

The United States Supreme Court in Virginia v. Black specified, "all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid." Id. at 1552. Here, section 843.085(1) does not contain a provision that wearing or displaying any authorized indicia of authority, or which displays in any manner or combination the word or words "police," etc., is evidence of intent to deceive that such was authorized by any of the agencies enumerated in

the statute. Accordingly, section 843.085(1) is not unconstitutional on its face.

The United States Supreme Court in Virginia v. Black noted it did not hold in R.A.V. that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech; rather, they specifically stated that some types of content discrimination did not violate the First Amendment where no significant danger of idea or viewpoint discrimination exists. 123 S.Ct. at 1549.

When Appellant was pointing to his shirt and mouthing the words “police” to the officers in pursuit of him, it is clear his intent was to convey he was “one of them” and he should not be stopped. Appellant thus wanted the officers to believe he was wearing a shirt that was authorized by a police agency. The intent here was evidenced by Appellant’s conduct, not by a provision in the statute. See Virginia v. Black, 123 S. Ct. at 1549-50. Appellant submits the Third District Court of Appeal misconstrued legal precedent on this point.

Here, speech was not implicated because the shirt Defendant wore did not express any views or ideas about the police. Defendant’s actions in pointing to his shirt and mouthing the word “police” were made in an attempt to represent he was a member of law enforcement, and such actions are not protected by

the First Amendment. There was no indication that if Appellee had been doing the speed limit and not disrupting traffic he would have been stopped or arrested just because he was wearing the “POLICE” T-shirt. Accordingly, it was his conduct that implicated the police powers to ensure the safety of the public, and such conduct is what is proscribed by section 843.085(1).

Moreover, a violation of section 843.085 is a misdemeanor offense. Sec. 843.085(5), Fla. Stat. (2001). Seeing someone in what looks like an authorized or colorable imitation of official indicia of authority does not automatically give an officer probable cause to arrest. Rather, it gives the police officer the authority to investigate the situation. Here, the officers in pursuit of Defendant had a reasonable suspicion to investigate to determine if Defendant was authorized to wear the “POLICE” shirt, and if his conduct was within the scope of his legal duties. Perhaps Defendant was an undercover officer, himself in pursuit of offenders or suspects.

While the State believes, for the above stated reasons, the legislature could remove intent as an element of the offense and simply base the offense on the intent to wear the proscribed item, nevertheless, this Court could still find the statute, as written, does include an intent to deceive. The critical phrase

in section 843.085(1) is **"which could deceive a reasonable person into believing that such item is authorized"** by any of the agencies named in the statute. The comments section written on March 12, 1991, to CS/HB 457 noted Metro-Dade Police confiscated thirty police badges in 1989, and that robberies and kidnappings in which the offenders pose as police officers were occurring with alarming frequency. Appellant thus submits "intent" was a requirement when this section was originally drafted. Whether the offender's intent was to commit robberies or kidnappings, or any other criminal offense, whenever the offense is done while the offender is wearing an indicia of authority, the intent clearly is to **deceive a reasonable person into believing** it is done under color of law.

The legislature has the power to dispense with the element of intent in defining crimes which do not chill a person's exercise of his or her First Amendment rights. State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982). Section 843.085(1) is a general intent crime. Hence, while a defendant need not have the intent to deceive, the defendant must have the intent to wear or display the items prohibited. As the Sult court noted, although the statute may prohibit an individual from wearing a commercially available shirt or hat in public, the statute is rationally related to its goal of preventing crimes by

individuals posing as law enforcement officers because it requires that a reasonable person could be deceived. Sult, 839 So. 805.

Should this Honorable Court believe section 843.085(1) require intent, Appellant submits section 843.085(1) although not explicitly, implicitly requires the element of intent. In the absence of explicit statutory direction, it has long been established that circumstantial evidence is competent to establish the elements of a crime, including intent. See State v. Castillo, 29 Fla. L. Weekly S167 (Fla. April 22, 2004) (citations omitted).

Section 843.085(1), Florida Statutes (2001) is neither impermissibly content-based nor overbroad. Section 843.085(1) is constitutional.

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be reversed and this Honorable Court should find section 843.085(1) is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLANT ON THE MERITS** was furnished by mail to Robert Kalter, *Esquire*, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this ____ day of May 2004.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Appellant, the State of Florida, hereby certifies this brief is printed in 12 point Courier New font as required by this Court's administrative order of July 13, 1998.

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Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 04-390

THE STATE OF FLORIDA,

Appellant,

-vs-

ALBERTO RODRIGUEZ,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO BRIEF OF APPELLANT ON THE MERITS

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INDEX TO APPENDIX

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