IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 94,800

THERESA SIENIARECKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO, BUREAU CHIEF
Florida Bar No. 656879

ETTIE FEISTMANN
Assistant Attorney General
Florida Bar No. 0892830
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellee and Petitioner was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol “T” will be used to denote the transcripts of the trial, and “R” will be used to denote the record on appeal to the Fourth District.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief and in the district court's opinion.

Petitioner was charged by information with one count of aggravated manslaughter of a disabled adult (R 4). Petitioner was tried by a jury and was found guilty of neglect of the disabled person, a lesser included offense (R 48).

The record shows that petitioner and her family lived in a dilapidated house, from which the family had to move out. Prior to moving out of the house, petitioner's father died and the mother had to undergo two hip surgeries, after which she could not walk on her own (T 213). Because petitioner did not work, petitioner and her brothers reached an agreement that petitioner would care for the mother (T 156-157). Each family member moved to a different location. Petitioner's three younger brothers moved out of the house to live with friends, and petitioner moved into an apartment with her mother (T 156-157). The brothers took care of the financial needs of petitioner and their mother while petitioner was to take care of her mother in the apartment into which they moved.

Petitioner's mother, the victim, was a sick and frail woman. The victim became sicker and weaker after her surgeries. She was not eating well, and her weight dropped to 68 pounds while her height was 5'3" (T 249). The victim was seen mumbling to herself in an incomprehensible manner, and often asked about her husband, long after he was dead (T 188, 189).

The victim, who could not walk on her own, was carried up the stairs to the apartment, was placed in her bedroom, and was never seen outside (T 153, 190, 191, 238, 481). The apartment did not have electricity, and thus obviously no air conditioner or a refrigerator (T 153). Petitioner stored her food in an ice box (T 156).

Petitioner's mother was bedridden and depended on her daughter for everything (T 470). Petitioner knew that she was the only one to take care of her mother: changing the mother's diapers, cleaning her, dressing her, providing her food and drinks, calling for medical assistance, and just about every other need (T 463, 470). The mother could not do anything for herself. Except for occasional visits, none of the three brothers helped in the daily care of the mother (T 158, 220, 225, 470).

Petitioner testified that she was never concerned about her mother not eating (T 479). Petitioner did not notice that her mother's eyes were sunken in and that she had sores, and

petitioner did not call a doctor when her mother was sick (T 478-479). Although petitioner knew that her mother was bedridden, and depended on her, petitioner did not go to see her before her death for twelve hours.

Some of the witnesses testified that they heard the victim state that she did not like doctors ever since her hip surgeries, but no one heard the victim mention that she wanted to die (T 160).

The physician, who performed the autopsy, gave detailed testimony of the mother's serious health problems. The doctor testified that the mother was found dead laying on a soiled mattress covered with human feces all over (T 238). The mother's skin was peeled off, her eyes were sunken in, and she had no teeth in her mouth (T 244-246). The mother suffered from acute abnormality to her bladder and vagina, caused by a severe infection (T 259-260, 290-291, 294, 319). Doctor Price opined that the bladder infection probably caused the mother's death, and that the poor hygiene was a factor in causing the infection (T 265-266). The victim's poor muscle mass was caused due to malnutrition, and she suffered from dehydration (T 169-271). The doctor went into detailed testimony about her skin slippage, her hemorrhages and her diaper rash and other skin sores due to pressure.

SUMMARY OF THE ARGUMENT

Section 825.102(3), Florida Statutes (1997) is constitutionally valid facially and as applied. Petitioner had a legal duty to care for the victim and breached it. Petitioner had a legal duty to act because she assumed the responsibility to do so. Further, the statute is not unconstitutional due to the alleged failure to have mens rea, because it requires the state of mind of general intent of wilfulness or culpable negligence.

The statute is not vague, because a person with common intelligence could understand his legal duty as proscribed by the statute. The legislature's failure to define some statutory terms does not, in and of itself, render the statute unconstitutionally vague when the statute is written in a language which is understood by today's society. Further, because petitioner was convicted with violating the specific conduct for which the statute was designed to prohibit, petitioner does not have standing to question the vagueness as applied to the hypothetically innocent conduct of others.

Finally, petitioner does not have standing to assert her mother’s right to privacy, because constitutional rights are personal in nature and may not be asserted vicariously.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT SECTION 825.102(3) FLORIDA STATUTES IS CONSTITUTIONALLY VALID.

Petitioner was charged by information with one count of aggravated manslaughter of a disabled adult in violation of sections 782.07(2) & 825.102(3), Florida Statutes (Supp. 1996), arising from the death of her mother (R 4-5).[1] Petitioner was convicted of the lesser included offense of neglect of a disabled person pursuant to section 825.102(3)**(c)**, Florida Statutes (Supp. 1996).[2]

The Fourth District Court of Appeal found sections 782.07(2) and 825.102(3)**(a)**, to be constitutionally valid. The district court found that the statute is not void for vagueness, that it does not violate petitioner's right to privacy, and that although section 782.07(2) does not contain a specific intent requirement, it is constitutionally valid. Sieniarecki v. State, 724 So. 2d

---

[1]Aggravated manslaughter is a felony of the first degree. See Section 782.07(2), Florida Statutes (Supp. 1996), which provides:

> A person who causes the death of any elderly person or disabled adult by culpable negligence under § 825.102(3) commits aggravated manslaughter of an elderly person or disabled adult, a felony of the first degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

[2]Petitioner was convicted of an offense which is a third degree felony. § 825.102(3)(c), Florida Statutes (Supp. 1996).

626 (Fla. 4th DCA 1998). This was not error.

Now, petitioner apparently is attacking the constitutionality of section 825.102(3)**(c)**, Florida Statutes (Supp. 1996), the statute under which petitioner was convicted.[3]

I. Due Process Challenge

First, petitioner contends that section 825.102(3), Florida Statutes (Supp. 1996), is facially unconstitutional because it violates due process by "imposing an affirmative duty to act, or penalizes her failure to act, without requiring specific intent" (AB 19-20). Respondent disagrees.

Section 825.102(3), Florida Statutes, provides:

> (3)(a) "Neglect of an elderly person or disabled adult" means:
>
> 1. A care giver's failure or omission to provide an elderly person or disabled adult with the care, supervision, and services necessary to maintain the elderly person's or disabled adult's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the

[3]The state believes petitioner does not have standing to challenge section 782.07(2) on appeal because she was convicted of the lesser included offense in violation of section 825.102(3)(c). See State v. Bojorquez, 88 N.M. 154, 156, 538 P. 2d 796, 798 (1975)(where the defendant was convicted of lesser included offense of crime charged in indictment, defendant did not have standing to challenge constitutionality of statute under which he was charged). In any event, now in this brief petitioner has abandoned the attack on section 782.07(2), and only argues that section 825.102(3) is unconstitutional.

> well-being of the elderly person or disabled adult; or
>
> 2. A care giver's failure to make a reasonable effort to protect an elderly person or disabled adult from abuse, neglect, or exploitation by another person. Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or a substantial risk of death, to an elderly person or disabled adult.
>
> (b) A person who willfully or by culpable negligence neglects an elderly person or disabled adult and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.
>
> (c) A person who willfully or by culpable negligence neglects an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

In order to evaluate whether section 825.102(3)(c) is constitutionally valid, it must be read in pari materia with subsections 825.102(3)(a) and 825.101, Florida Statutes (Supp. 1996). See City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1994)(principle of *pari materia* requires that law be construed together with any other law relating to the same

purpose); WFTV, Inc. v. Wilken, 675 So. 2d 674, 677 (Fla. 4th DCA 1996)(statute should be construed to give effect to evident legislative intent). When these statutes are read in pari materia, it is clear that petitioner had a legal duty to care for the victim, which she breached by failure to act. Further, petitioner had notice that a legal duty to take affirmative action existed before her conviction for violating this duty, because she assumed care of the victim. Compare Lambert v. California, 355 U.S. 225 (1957)(because "circumstances which might move one to inquire as to the necessity of registration are completely lacking" the result is an "absence of an opportunity either to avoid the consequences or the law or to defend any prosecution brought under it").

A. Petitioner's duty to act.

In order for an individual to be guilty of a crime he or she must commit a voluntary act and have a guilty state of mind. Wayne R. LavFave & Austin W. Scott, Criminal Law, § 1.2 (2d ed. 1986). Further, although to commit a criminal offense there must be a requirement of an act and most crimes are committed by affirmative action, an offense may be committed by failure to act under circumstances giving rise to a legal duty to act. See generally Wayne R. LavFave & Austin W. Scott, Criminal Law, §§ 2.12(d), 3.1, 3.3 (2d ed. 1986). The actus reus element of the crime can be satisfied by non action, and the criminal law has

long recognized that omission can rise to the level of criminal culpability. See generally Melody J. Stewart, How Making the Failure to Assist Illegal Fails to Assist: an Observation of Expanding Criminal Omission Liability, 25 Am. J. Crim. L. 385, 386 (1998); Id. Petitioner is correct that a person generally has no legal duty to rescue or aid a person in peril. LaFave & Scott, § 3.3. However, there are some exceptions to the general no-duty common law rule: statutory imposed duty, special status relationship, duty by contract, and voluntary assumption of care. Id.

In this case, petitioner had a dual duty for which she had notice: statutory and common law (voluntary assumption of care).[4] First, section 825.102(3) imposes a general duty to assist a disabled adult in specific circumstances, which is narrowly defined to require action only within specific parameters. The statute in this case specifically states that the act of neglect of the disabled adult is committed by the caregiver's[5] "failure

---

[4]In this case it could be argued that there was also an implied contract, because before petitioner moved into the apartment with her mother the children divided the proceeds from the mother's house and petitioner enjoyed a portion of that money (T 224).

[5]Section 825.101(2), Florida Statutes (1997), defines:

> "Caregiver" means a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult. "Care giver" includes, but is not limited to,

or omission to provide ... with the care... that a prudent person would consider essential for the well-being of the ... disabled adult...[e.s.]" § 825.102(3)(a). This statute provides that an omission is an offense. Under this statute, as in child neglect cases for example, petitioner was under a legal duty to take a positive action under the circumstances surrounding this case. E.g. Nicholson v. State, 600 So. 2d 1101, 1103-1104 (Fla. 1992)(child abuse statute which defines 'torture' includes "willful acts of omission"). This is not a novel concept and is certainly not constitutionally unsound, because it has been recognized as an exception even in common law no-duty-to-act. Therefore, under the statute applicable to the instant case, it is clear that a conviction may be based on an omission, especially in light of the specific definition given for "caregiver," which defines caregiver as a person who "has been entrusted" or "assumed responsibility."[6]

---

relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care providers, and employees and volunteers of facilities as defined in subsection (7).[e.s.]

See also section 827.01(1), Florida Statutes (1997) and section 415.102(4), Florida Statutes (1997).

[6] It should be noted that Section 415.503(3), Florida Statutes, on abuse and neglect, for example, defines abuse **or** neglect as harm to a child's health or welfare by "acts or omissions." E.g. Phelps v. State, 439 So. 2d 727, 734 (Ala. Cr. App. 1983)(defendant convicted based on her failure to remove the

The duty to act is found in the express language of the statute.[7] The statute provides that a caregiver has a legal duty to act only when the caregiver has voluntarily assumed the responsibility to care for the disabled adult. The reason for this statutory requirement is that by assuming the responsibility to care, the caregiver has secluded the helpless person so as to prevent others from rendering aid. See (Rest. 2d Torts, §§ 316-319, pp. 123-130); Jones v. U.S., 308 F. 2d 307, 308 (C.A.C. 1962); LaFave & Scott, Criminal Law, § 3.3 (2d ed. 1986); 2

---

child from an abusive situation, because child abuse statute prohibiting torture, willful abuse, cruel beating, or other willful maltreatment, encompassed "acts of omission"); See also State v. Morrison, 437 N.W. 2d 422, 426 (Minn. App. 1989) (defendant's failure to protect her daughter from abuse or to seek timely medical attention was "something more - than mere inaction").

It should also be noted that child neglect codified in section 827.03(3)(a), Florida Statutes (Supp. 1996), which almost mirrors the elder neglect statute, was revised by the legislature on the same date and in the same chapter. See Ch. 96-322, §§ 8, 30, Laws of Florida. Some child abuse/neglect portion of the statute have been reviewed by this court and have been held constitutional.

[7]In Bilingslea v. State, 780 S.W. 2d 271 (Tex. Crim. App. 1989), the court found that because there was no familial support statute requiring adult children to provide for their elderly parents, there was no statutory legal duty to care for elderly parents. The court reversed the conviction, holding that common law alone, without a statutory duty to care for an elderly person, cannot be a source of a legal duty in Texas. The Texas legislature subsequently changed the dependent adult and elder abuse statute, explicitly indicating those under a legal duty to act. See Joann Blair, "Honor Thy Father and Thy Mother" - But For How Long? - Adult Children's Duty to Care for and Protect Elderly Parents, 35 U. Louisville J. Fam. L. 765, 57 (Fall 1996-1997).

Charles E. Torcia, Wharton's Criminal Evidence, § 173 (15th ed. 1994).

As correctly stated by petitioner, generally there is no duty "to provide care, supervision, or services to another person" (AB 20), or to rescue a stranger in peril, for example. However, once a person undertakes to become a "caregiver," he or she may have "a duty to see the job through." See Wayne R. LaFave, Substantive Criminal Law, § 3.3 (1986 ed.). Thus, petitioner had a statutory duty to act, and a voluntary assumption of care duty to complete the assistance to the victim.

In Davis v. Commonwealth, 230 Va. 201, 335 S.E. 2d 375 (1985), the Virginia Supreme Court affirmed the defendant's conviction for involuntary manslaughter, based on her failure to provide for her elderly mother, with whom she lived, the necessities of life. 335 S.E. 2d at 375. The victim's body was found dehydrated, with low body temperature, bilateral pneumonia, bloodstream infection, and multiple rib fractures. The defendant argued that she did not have a legal duty to care for her mother. The court disagreed, and held that the defendant's legal duty to care was based on the facts that she assumed responsibility for the total care of her mother and that she benefitted from her mother's income and home. The court said that the defendant had an implied contract which the defendant breached. 335 S.E. 2d at 378.

In this case, petitioner's mother was mentally and physically disabled. The mother was seen mumbling to herself, and often asked about her husband, long after he had died (T 188, 189). The victim was sick and frail, and unable to walk on her own. She suffered from bed sores, serious infections, malnutrition, and dehydration (T 153, 190, 191, 238, 249, 259-266, 290-291, 319, 294, 481). Petitioner's father was dead, and petitioner's brothers relied on petitioner's representation to them that she would take care of the mother. Except for occasional visits, the victim's sons did not help to care for the mother (T 158, 220, 225, 464, 470). Petitioner's brothers had a verbal agreement that they would provide for petitioner financially while petitioner took care of the victim (T 470-471).

Petitioner was a "caregiver," because she had been entrusted with and *had assumed responsibility* to care for her mother. The victim and petitioner moved into an apartment, whereby petitioner volunteered to take care of her mother. By doing so, petitioner secluded the victim so as to prevent others from rendering aid and undertaking the care. The victim's deterioration of health (which later resulted in her death) was caused by an omission to perform a legal duty. Petitioner then assumed these responsibilities voluntarily.

Additionally, petitioner was well aware of the responsibilities she had assumed. Petitioner knew that she had

been entrusted with the care of her mother's daily needs, such as changing her diapers, cleaning her, dressing her, providing her food and drink, calling for medical assistance, and virtually every other need for survival (T 463, 470-471). The mother could not survive without petitioner's care, and petitioner knew it.

Thus, petitioner's failure to provide basic food, shelter, clothing and medical needs, after she voluntarily assumed such responsibility, constitutes breach of a legal duty proscribed by statute. Petitioner certainly had a legal and statutory duty to act and failed to do so. E.g. Cornell v. State, 159 Fla. 687, 32 So. 2d 610 (1947)(grandmother who took over care of grandchild from mother, and then got so drunk she let the child smother to death, was guilty of manslaughter); People v. Simester, 287 Ill. App. 3d 420, 678 N.E. 2d 710, 222 Ill. Dec. 838 (1997)(defendants were criminally guilty of neglect of an elderly person because the defendants were the care givers of the victim who was an elderly person who resided with them); People v. Manis, 12 Cal. Rptr. 2d 619 (Ct. App. 1992), overruled on other grounds, People v. Heitzman, 886 P. 2d 1229 (Cal. 1994)(defendant had a legal duty to provide for her elderly mother because she assumed the duty of caring for her when residing together and failing to provide the mother with food and water).[8] Contra People v.

[8]Manis was disapproved by Heitzman only to the extent that the Manis court held the constitutionality of the statute valid absent the construction made in Heitzman.

Heitzman, 886 P. 2d 1229, 1241 (Cal. 1994)(where the defendant did *not* reside with her dependent father at the time of his death and had not assumed care of her father, the court found that the language in the California statute imposing a duty on "any person" to be vague because it failed the constitutional requirement of certainty; the court refused to find that a legal duty existed solely based on the special filial relationship between adult daughter and victim).[9]

B. The mens rea

A defendant can be found guilty under § 825.102(3)(c) only if he or she neglects a disabled adult wilfully or by culpable negligence. The statute requires general intent for the commission of the crime of neglect. Subsection 825.102(3)(c), under which petitioner was convicted, requires omission of an act which is either done "wilfully" or by "culpable negligence." Although statutes defining criminal conduct employ words which indicate bad-mind requirements such as "knowingly" or "wilfully," some require negligence. LaFave & Scott, Criminal Law, §

---

[9] Parental duty to protect a child is similar to the voluntary assumption of care exception, and failure to protect the child constitutes a breach of duty. E.g. State v. Mason, 18 N.C. App. 433, 197 S.E. 2d 79 (1973)(a parent has a legal duty to provide medical care to a minor child and violation of such duty may render him guilty of homicide); Leet v. State, 595 So. 2d 959, 963 (Fla. 2d DCA 1991)(boyfriend of child's mother had a duty to protect child from abuse because he "had temporarily assumed responsibility for Joshua's well-being when he established a family-like relationship with Joshua ....").

3.3(a)(1). Here, since the statute requires a mental fault, the statute is constitutionally valid. See generally Frey v. State, 708 So. 2d 918, 919 (Fla. 1998).

In State v. Joyce, 361 So.2d 406, 407 (Fla. 1978), in response to a similar attack on the constitutionality of neglect of a child statute, this court held that section 827.04(2), Florida's simple criminal child abuse statute, which prohibits the willful (scienter) or culpably negligent deprivation of necessary food, clothing, shelter or medical treatment, is not constitutionally defective. The court said the following:

> the term "culpable negligence" does not suffer from the constitutional infirmity of vagueness. See State v. Greene, 348 So.2d 3 (Fla.1977). Further, the United States Supreme Court has often upheld a statute claimed to be unconstitutionally vague because scienter was an element of the offense. See United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). The requirement of willfulness (scienter) or culpable negligence in Section 827.04(2), therefore, avoids the infirmity found in [State v.]Winters[, 346 So. 2d 991 (Fla. 1977)] with respect to Section 827.05 that unintentional acts or conduct which is not the product of culpable negligence might be proscribed by the statute.

State v. Joyce, 361 So. 2d 406, at 407. See also State v. Marks, 698 So. 2d 533, 534 (Fla. 1997)(a scienter requirement may save a statute from the objection that it punishes without warning of an

offense of which the accused was unaware where the statute forbids a clear and definite act).

The legislature may forbid the doing of an act and declare its commission a crime even in the absence of a specific intent to cause the particular result. See In the matter of Welfare of A.A.F., 590 N.W. 2d 773, 776, n. 8 (Minn. 1999)(a person is guilty of manslaughter in the second degree if he or she shoots and kills another as a result of negligence in believing the other to be a deer or other animal); People v. Librie, 515 N.Y.S. 2d 302, 130 A.D. 2d 593 (1987)(it is not violative of the constitution to base a crime upon a finding that a defendant acted with criminal negligence).[10]

Further, a statute which penalizes the failure to act and which does not contain an element of specific intent will withstand a due process attack if neglecting to take action under the circumstances would alert a reasonable person to recognize the consequence of his or her deeds. State v. Gruen, 586 So. 2d 1280, 1282 (Fla. 3d DCA 1991); Scott & LaFave, Criminal Law §§ 3.3(b), 3.5(e), 3.7(b)(criminal negligence liability takes the place of criminal intent for some crimes because it is predicated upon gross carelessness and indifference of the consequences).

---

[10] Although the legislature's power in legislating such a statute is restricted when the statute would tend to chill the exercise of first amendment rights, the conduct proscribed by the statute in question does not bring the first amendment rights into play. State v. Gruen, 586 So. 2d 1280, n. 1.

Here, the statute under attack does not punish mere presence, or wholly passive conduct, or an activity which is totally unrelated to its goal of avoiding the neglect of elderly and disabled adults. Rather, the statute penalizes the failure of a person to provide basic food, shelter, clothing and medical needs, only where he or she has assumed such a duty. In this case, petitioner knew that while under petitioner's care the victim was deprived of food, medical care, and basic sanitary needs. The victim had sores on her body, her bed was soiled, she had not eaten for days, and she was not under any medical supervision. Thus, because petitioner knew of the victim's peril when the victim was in a dangerous situation and yet failed to take action to assist the victim, petitioner presumably intended the consequences of the inaction. Petitioner made a conscious decision to let her mother be neglected rather than provide for her mother or summon for assistance. Petitioner willingly or by culpable negligence failed to execute her duty to provide care for the victim. E.g. Com. v. Cardwell, 515 A. 2d 311, 313 n. 2 (Pa. Super. 1986)("evidence of intent can be derived from omission or from acts so feeble as to be ineffectual"). Therefore, because the statute requires conduct which is done either willfully or by culpable negligence, the statutes are not facially unconstitutional as violating due process.

II. Void for Vagueness Challenge

Next, petitioner argues that the above statute is unconstitutionally vague, “because it [] fails to sufficiently define various statutory terms” (AB 21-22). Specifically, petitioner claims that the statute fails to define the terms “care, supervision, services,” and “entrusted,” or “assumed responsibility” (AB 23-24). Respondent disagrees.

The legislature has the power to prohibit any act, determine the class of an offense, and prescribe the punishment. State v. Bailey, 360 So. 2d 772 (Fla. 1978). "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975).

To argue vagueness, petitioner must establish that the statute is “so vague and lacking in ascertainable standards of guilt that, as applied [to her] it failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.” State v. Barnes, 686 So. 2d 633, 636 (Fla. 2d DCA 1996)(citing Palmer v. City of Euclid Ohio, 402 U.S. 544 (1971) (quoting United States v. Harriss, 347 U.S. 612 (1954))). See also United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) ("Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that *his* contemplated conduct is proscribed.") (emphasis added); State v. Hamilton, 388 So. 2d 561, 562 (Fla.

1980) (defendant whose conduct clearly falls within statutory prohibition may not complain of the absence of notice). Thus, a defendant who only establishes that the statute "might operate unconstitutionally under some conceivable set of circumstances" fails to demonstrate that the statute is wholly invalid. Barnes.

In evaluating a vagueness claim in which First Amendment rights are not at issue, "[a] court should [first] examine the complainant's conduct before analyzing other hypothetical applications of the law." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982). "There are areas of human conduct where by the nature of the problems presented, legislatures simply cannot establish standards with great precision." State v. Manfredonia, 649 So. 2d 1388 (Fla. 1995)(Citing Smith v. Goguen, 415 U.S. 566 (1974)).

Additionally, the fact that the legislature could have chosen clearer language to achieve the desired statutory goal does not render the actually drafted statute unconstitutionally vague. United States v. Powell, 423 U.S. 87 (1975). A defendant must establish that the statute is facially unconstitutional in that there exists no set of circumstances in which the statute can be constitutionally applied. United States v. Salerno, 481 U.S. 739, 745 (1987).

The particular words complained of are not vague when considered in the context of the entire statute and with “a view

to effectuating the purpose of the act." See State v. Joyce, 361 So. 2d at 408. The fact that some specific acts are not enumerated, which is "an impossible task at best, does not render the statutory standard void for vagueness." Id. "Criminal laws are not 'vague' simply because the conduct prohibited is described in general language. Id.

In McCann v. State, 711 So. 2d 1290 (Fla. 4th DCA 1998), the court summarized the vagueness standard as follows:

> A statute must be written in language which is relevant to today's society. See Warren v. State, 572 So. 2d 1376 (Fla. 1991). However, a statute need not be "a paradigm of legislative drafting" to be valid. See Jennings v. State, 667 So. 2d 442 (Fla. 1st DCA), approved, 682 So. 2d 144 (Fla. 1996). The legislature's failure to define a statutory term does not in and of itself render the statute unconstitutionally vague. See Mitro at 645. It is not the role of the courts to imagine odd scenarios that might test limits of a statute, but rather, courts should read the language of the statute from the perspective of a "normal reader." See Johnson v. State, 701 So. 2d 367 (Fla. 2d DCA 1997). Undefined words are construed in their plain and ordinary sense. See Mitro. Courts may refer to a dictionary to ascertain the plain meaning intended by the term. See L.B. v. State, 700 So. 2d 370 (Fla. 1997).

See also State v. Sailer, 645 So. 2d 1114, 1116 (Fla. 3d DCA 1994)(a court of appeal must reject a statutory vagueness challenge if the statute is susceptible of interpretation through ordinary logic and common understanding; nothing is required beyond resort to the common usage of the challenged terminology).

Legislative intent is the polestar by which the court must be guided in construing enactments of the legislature. Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997). Here, the legislature intended to criminalize and punish the behavior that amounts to neglect of the disabled adult after one assumed the responsibility to care for them. The legislature carefully defined many terms in the statute, and drafted the statute by using and comparing it to the child abuse statute. See The House Staff Analysis Report, Fla. H.R. Comm. on Crim. Just., CS/HB 189 (1996).[11] The statute was enacted to protect people who need special protection because of age and physical or mental vulnerability.

Subsection 825.102(3)(a) defines "Neglect of an elderly person or disabled adult," and subsection 825.101(2), defines the term "caregiver." Section 825.102(3), sets forth what behavior constitutes neglect of a disabled adult: failure or omission to provide a disabled adult with the care, supervision, and services necessary to maintain the disabled's physical and mental health, including food, nutrition, clothing, shelter, medicine, and

---

[11] The legislature created chapter 825, Florida Statutes, defining and providing criminal penalties for the neglect of disabled adults, and included definitions in § 825.101. This statute was revised in 1996 with an effective date of October 1, 1996. See Ch. 96-322, § 2, Laws of Fla. (codified at § 825.102, Fla. Stat. (Supp. 1996)), Senate Bill 116.

medical services. The statute also sets forth the punishment for such conduct. The statute imposes a clear and narrow duty to perform under a specific set of circumstances. There is nothing vague or ambiguous about any term or language in the statute. Petitioner in this case volunteered to care for her mother, and failed to do so. Petitioner violated the specific conduct proscribed by the statute. Because petitioner was convicted with violating the specific conduct for which the statute was designed to prohibit, petitioner does not have standing to question the vagueness as applied to the hypothetically innocent conduct of others. Bryant v. State, 712 So. 2d 781 (Fla. 2d DCA 1998); Wiburn v. State, 23 Florida Law Weekly D1544 (Fla. 4th DCA June 24), review denied, 719 So. 2d 894 (Fla. 1998).

The plain language of the statute mandates that a caregiver perform acts which he knows or reasonably should know are essentially necessary to maintain the disabled adult's health and well-being. Petitioner should have known that nutrition and medical care are basic needs for survival. Petitioner's contention that the statute is vague because the words entrusted, assumed, responsibility, care, supervision, services, limitations, restrictions, normal activities of daily living, are not defined, must fail. These terms have an ordinary meaning, which are commonly understood by today's society. See State v. Riker, 376 So. 2d 862, 863 (Fla. 1979)(the words "necessary food,

clothing, shelter or medical treatment" are adequate and constitutional, and the statutory language referring to material endangerment of the mental or physical health of a child was sufficient to inform persons of common understanding of the proscribed conduct). However, even *if* the terms are unclear, the plain meaning intended by the terms can be ascertained by a dictionary. Further, petitioner's conduct fell squarely within the conduct prescribed by the statute. See People v. Manis, 10 Cal. App. 4th 110, 12 Cal. Rptr. 2d at 622 (1992)((term "care" as used in statute prohibiting any person having the "care" of any elder or dependent adult person from permitting adult to suffer, was not unconstitutionally vague, at least as applied to daughter who criminally neglected her mother while mother was staying with her and was unable to care for herself due to her Alzheimer's disease); People v. Heitzman, 886 P. 2d 1229, 1240 (Cal. 1994)(despite the flaw as to the legal duty notice, the court did not regard the statute invalid due to vagueness). E.g. People v. Cochran, 62 Cal. App. 4th 826, 831, 73 Cal. Rptr. 2d 257, 260 (1998)(terms "care of custody," as used in statutes defining offense of elder abuse imply a willingness to assume duties correspondent to the role of a caregiver); People v. Heilman, 25 Cal. App. 4th 391, 400, 30 Cal. Rptr. 2d 422, 427 (1994) ("'repeatedly' is a word of such common understanding that its meaning is not vague"; because it simply means more than one

time, there “is nothing mysterious or ambiguous about the term ‘repeatedly’ to lead an actor to reasonably believe he will not be subject to the penalty under the statute if he engages in willful, malicious following on more than one occasion”).

Thus because every one of these allegedly vague terms can be ascertained by a dictionary and can be construed in their plain and ordinary sense, they are sufficient to inform people with common understanding, when read in context of the entire statute, about the acts which the statute seeks to prosecute. A person with common intelligence would know that normal activities of daily life include eating, drinking, observing basic sanitary needs, and getting medical attention. The neglect statute is not vague. See, e.g. Kerlin v. State, 573 N.E. 2d 445 (Ct. App. Ind. 1991); People v. Manis. It is clear that the statute contemplates conduct which permits the physical or mental health of an elderly person or a disabled adult to be exposed to danger.

III. Alleged violation of the victim’s right to privacy

Petitioner claims that section 782.07(2) violates her mother's right to privacy embodied in Article I, section 23 of the Florida Constitution. Specifically, petitioner asserts that her mother had the right to refuse medical treatment, and as a result petitioner cannot be convicted of neglect for failure to provide proper medical attention. Respondent disagrees.

Constitutional rights are personal in nature and generally

may not be asserted vicariously. See Broadrick v. Oklahoma, 413 U.S. 601 (1973); Sandstrom v. Leader, 370 So. 2d 3 (Fla. 1979). Thus, since petitioner may only assert her own constitutional rights or immunities, petitioner has no standing to raise this contention. Tileston v. Ullman, 318 U.S. 44, 46 (1943). Furthermore, petitioner did not present any evidence or countervailing policies to cause an exception. See Eisenstadt v. Baird, 405 U.S. 438, 444-446 (1972)(one such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves or in the area of the First Amendment). The concept of vicarious standing has been applied specifically in the right of privacy area to permit a party to assert the constitutional rights of another. Therefore, because petitioner does not fit to any of the exceptions mentioned above, petitioner has no standing to claim unconstitutionality as to the violation of privacy.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **UPHELD** and the judgment and sentence imposed by the trial court should be **AFFIRMED**.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO, BUREAU CHIEF
Florida Bar No. 656879

ETTIE FEISTMANN
Assistant Attorney General
Florida Bar No. 0892830
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
TEL(561) 688-7759
FAX (561) 688-7771
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing respondent's brief on the merits by Courier to: Joseph R. Chloupek, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this _____day of May, 1999.

Of Counsel