IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96,766
	)	
GWENDOLYN FUCHS,	)	
	)	
Respondent.	)	
_____	)	

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

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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	)	
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_____	)	

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statements of the Case, and Statement of the Facts presented in the Petitioner's Merit Brief, with the following additions and/or clarifications:

At the hearing on the defendant's motion to dismiss, and in the order granting said motion, the trial court made a factual finding that by omitting the phrase "under the laws of Florida" from the latest version of the subject statute, the Legislature had expressed its' intent to preclude any reference to other statutes in defining a delinquent or dependent child, or a child in need of services. (R 11, 12,50-52)

At the hearing on the defendant's motion to dismiss, and in the order granting said motion, the trial court considered and made reference to the earlier enactments and judicial interpretations of the subject statute. (R 11,12,30,31,50-52)

The Arrest Affidavit indicates the defendant was arrested under the authority of § 827.03 of the Florida Statutes.(R 24) The Information in this case charges the defendant with violations of § 827.04 of the Florida Statutes.(R 20-22) The arrest affidavit states that the officer "believed at the time [...] [that the defendant] violated Fla. State Statute 827.03 child abuse".(R 26) The affidavit also indicates that in the opinion of the arresting officer, it was "conceivable [...] that something could have happened to the children" if they had been left alone indefinitely. (R 27)

SUMMARY OF ARGUMENT

The State's present argument; (that this Court should revive "by implication" the former enactment of the subject statute); is without merit because the Legislature has clearly expressed its' intent to preclude revival by implication. As both the trial court and the District Court concluded, the operative terms of § 827.04 Fla. Stat. (1997), are virtually indefinable to ordinary citizens. The Legislature deliberately precluded any incorporation by reference that would have allowed the consideration of other statutes in defining those terms. Section 827.04, as it is presently worded, does not inform ordinary citizens as to the nature of the conduct the statute proscribes. And, the present statute gives law enforcement officers unbridled discretion to make arrests based entirely upon their subjective conclusion that a crime has been committed. Indeed, the range of conduct that could be interpreted as criminal violation under the subject statute is limitless, because the "definition" of the conduct proscribed under the act is without limit. The question is not, as the State suggests, whether the Respondent's actions in this case constitute a violation of the subject statute. Rather, the question is, whether there is ***any*** conduct which could ***not*** be construed as a violation thereof. The answer to that question is in the negative, and that is why the subject statute is facially infirm.

The State has not shown that the ruling now challenged will operate to deprive

the State of its' "substantial rights", or of any rights at all. In contrast, should the ruling of the lower courts be reversed, every parent in this State would be subject to arrest and criminal prosecution for engaging in conduct that is not criminal.

ARGUMENT

THE DISTRICT COURT AND THE TRIAL COURT RULED CORRECTLY IN FINDING SECTION 827.04 OF THE FLORIDA STATUTES IS UNCONSTITUTIONAL.
(Restated)

It is now the State's burden to show that the ruling of the District Court deprived the State of its "substantial rights". § 924.33 Fla. Stat. (1999) Petitioner submits that the only "right" at stake for the Petitioner in this case is the right to arrest citizens for violations of the law. That right has not been usurped by the District Court's ruling. What would be in jeopardy, if § 827.04 were to be enforced as it now reads, is the right of the Respondent, and of every other citizen, to be free from unreasonable seizure, and to be informed of the precise nature of any conduct which is proscribed as criminal. Comparing the "rights" at stake in this case, it becomes clear that those at stake for the Petitioner must yield to the rights of ordinary citizens, including the Respondent, who has already suffered the usurpation of her constitutional rights. The Respondent will show that the State has offered no legal or factual basis for a reversal of the District Court's ruling.

In the instant case, when the Legislature deliberately struck the phrase "under the laws of Florida" from § 827.04(1), they gave no indication that they intended to revive any prior version of that statute. Indeed, it is contrary to the law, (§ 2.04 Fla.

Stat.), and to logic, to assume as the State suggests, that by striking the reference to the "laws of Florida", the Legislature meant citizens were to look to other "laws of Florida" for the definition of a "delinquent" or "dependent child", or a "child in need of services". In essence, the State now asks this Court to assume the Legislature's actual intent was precisely the opposite of its' expressed intent. Both of the lower courts have rejected the State's argument, and the State has offered no authority for its' acceptance now.

When the Legislature amended § 827.04(1), to redact the phrase "under the laws of Florida", the Legislature made clear its' intent to foreclose any reference to other Florida laws in defining the operative terms of § 827.04. (A 8-10) There can be no revival by implication in this case, because the Legislature's intent was ***express, not implied***: The Legislature meant to bar any reference to other sections of the Florida Statutes in defining the conduct that would constitute a violation of § 827.04.

In the Instant case, the trial court asked the prosecutor for legal authority that would allow the court to ignore the obvious intent of the Legislature expressed in the redaction of the phrase, "under the laws of Florida". (R 11,12, 51,52) The State offered no such authority; and, indeed, there is none, as indicated by Section 2.04 of the Florida Statutes, and by other authorities.

In 1977, this Court annunciated the following legal doctrine, which must be applied in this case:

> Inference and implication cannot be substituted for clear expression. [...][...] when the Legislature reenacted the statute [...] it excluded the venue provision. The change clearly evidences an intention on the part of the Legislature not to waive the common law privilege in the 1975 statute. (Citations omitted)
>
> ***
>
> The rule of construction [...] is to assume that the Legislature by the amendment intended it to serve a useful purpose. [...] Likewise, when a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment.
>
> ***
>
> In making material changes in the language of a statute, the Legislature is presumed to have intended some objective or alteration of the law, unless the contrary is clear from all the enactments on the subject. The Courts should give appropriate effect to the amendment. The omission of a word in the amendment of a statute will be assumed to have been intentional. And, where it is apparent that substantial portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential.
>
> Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362,364,365 (Fla. 1977)

The ***implied*** revival of the former enactments of § 827.04 is impossible in this case, because the Legislatures' ***express*** intent was to preclude any such revival. A

more recent decision of this Court affirmed this principle:

> When the legislature amends a statute by omitting words, the general rule of construction is to presume that the legislature intended the statute to have a different meaning from that accorded it before the amendment.
>
> Aetna Cas. and Sur. Co. v. Buck, 594 So.2d 280,283 (Fla. 1992)

Significantly, and perhaps in anticipation of the State's present argument, the District Court expressed doubt that even revival by implication would suffice, in today's legal climate, to save Section 827.04 from constitutional attack[1]. (A 10) That portion of the District Court's Opinion proves the District Court saw the intent of the Legislature in redacting the phrase "under the laws of Florida", and saw that the intent was to end of any reference to other sections of the Florida Statutes when interpreting § 827.04. The District Court did not consider revival by implication, because in this case, there is no factual or legal basis for it, and because even if revived, the subject statute could not withstand constitutional scrutiny.

Nevertheless, State insists that the lower courts failed to consider the policy concerns underlying earlier enactments of the subject statute, and argues that the protection of children is justification for ignoring the express intent of the Legislature.

[1] The District Court stopped short of announcing this as a legal conclusion.

That argument, too, was rejected by the lower courts. Both the District Court and the trial court considered the earlier enactments and "policy goals" of the subject statute, but found them irrelevant in the face of the Legislature's most recent action. (A 3- 10); (R 51-53) All of the earlier enactments contained a reference to other statutes for a definition of the conduct that § 827.04 was intended to prohibit. See, Sections 827.04(3) Fla. Stat. (1977); 828.21 Fla. Stat. (1971); and 828.19 Fla. Stat. (1971). As the District Court noted, (A 8-10), the deliberate redaction of that incorporation by reference, in 1996, was an amendment of the definition of proscribed conduct in a penal statute, and that the amendment precluded reference to any definitions formerly enacted. At this point, it can only be assumed that this was the Legislature's intent. The rulings of the trial court and the District Court were thus well founded, as they were grounded upon the patent facial invalidity of the subject statute. (A 8-10);(R 51-53)

In further argument based on policy concerns as a reason for reversal, the State recounts the particular facts of this case in detail, perhaps to suggest the Respondent's culpability, to suggest the need to revive the former § 827.04, and to thereby implement the perceived intent of the Legislature to protect minors from abuse. (Petitioner's Brief, Pp. 3,4,18,19) But, again, these facts and argument are irrelevant, as the State well knows. (R 48,49) Moreover, to the extent the

Respondent's conduct is relevant, it is exculpatory. That is, apparently the agency that investigated Ms. Fuchs found there was no basis for the initial complaint. (R 48)

In any event, it is not a proper function of the courts to attempt to "save" faulty statutes by interpreting them so as to reflect perceived "policy" concerns. Badaracco v. C.I.R., 464 U.S. 386,398 (1984); State v. DiGuilio, 491 So. 2d 1129,1133 (Fla. 1986)

Having demonstrated that revival by implication is not appropriate in this case, The Respondent will show that the latest enactment of Section 827.04 of the Florida Statutes is unconstitutionally vague.

The Legislature chose to redact the phrase "under the laws of Florida" from § 827.04(1). Given the omission of that incorporation by reference, the meaning of the terms "delinquent", "dependent" and "in need of services", ***cannot*** be determined by looking elsewhere in the Florida Statutes. Section 827.04 must now stand or fall according to the meaning that ordinary citizens would ascribe to its' wording; and when analyzed in that light, Section 827.04 is revealed as unconstitutional. The District Court in this case, like the trial court, was bound by the United States Constitution to rule as it did. That is, § 827.04 so vague in its' definition of proscribed conduct that it cannot stand.

Long ago, the United States Supreme Court recognized that it would be dangerous to allow arrests upon "suspicion", or upon vague assumptions of future

wrongdoing.

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.
>
> U.S. v. Reese, 92 U.S. 214,221 (1875)

In Lanzetta v. New Jersey, 306 U.S. 451,453 (1939), the United States Supreme Court declared that citizens cannot be left to speculate, at their peril, as to meaning of penal statutes. They are all entitled to know what conduct the state commands or forbids.

The definition of vagueness was refined, and in 1972, the nation's highest court again ruled that the discretion to define and determine criminal conduct cannot be granted to police officers. All citizens; the Court said, are entitled to be informed of the exact nature of that conduct which would subject them to arrest and prosecution. In 1972, the particular laws in question were Jacksonville ordinances prohibiting vagrancy. But the standard announced by the Supreme Court then, governs the construction of all criminal laws to this day. Any criminal statute is unenforceable if it exhibits the following qualities of vagueness:

> Definiteness is designedly avoided so as to allow the net

> to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.
>
> ***
>
> [Such an] ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions.
>
> ***
>
> The [...] average householder [...] would have no understanding of [these laws] their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act. [Such] ordinance[s] make[] criminal activities which by modern standards are normally innocent.
>
> Papachristou v. City of Jacksonville, 405 U.S. 156,161,162 (1972)

The Papachristou Court gave the following poignant illustration of how poorly drafted laws allow the police to sweep up the innocent with the guilty:

> Luis Munoz-Marin, former Governor of Puerto Rico, commented once that 'loafing' was a national virtue in his Commonwealth and that it should be encouraged. It is, however, a crime in Jacksonville. Id., at 164

Certainly, Jacksonville's city commissioners acted upon valid policy concerns when they enacted strict vagrancy laws. Indeed, it may well be that when the "net" was cast, many true criminals were apprehended. But the potential for even one

arrest upon anything less than probable cause doomed the well-intentioned vagrancy laws to constitutional failure. But in that failure, who was harmed? Certainly not the Jacksonville constabulary or the city commission - they could not have been harmed by the application of fundamental constitutional principles. And certainly the citizens of Jacksonville were not harmed - they benefitted through the preservation of their civil liberties. It could fairly be said that the only "harm" done to any of the litigants in Papachristou was that visited upon the innocent and unfortunate citizens wrongfully apprehended in the sweeping "net" of law enforcement. So it is in the instant case. The District Court's ruling does no harm, while it protects the Respondent and countless others from wrongful arrest and prosecution.

The trial court and the District Court both found that the operative terms of § 827.04 vague, making that enactment unconstitutional. One need look no further than the police report in this case to see that the lower courts were correct. The report indicates the defendant was arrested under the authority of § *827.03* Fla. Stat., (R 24), while she was formally charged with a violation of § *827.04* Fla. Stat. (R 20-22) The arrest affidavit states that the officer "believed at the time [...] [that the defendant] violated Fla. State Statute 827.03 child abuse". (R 26) The affidavit also indicates that in the opinion of the arresting officer, it was "conceivable [...] that something could have happened to the children" if they had been left alone

indefinitely. (R 27) Thus, in his own words, the officer has said the Respondent was arrested upon the presumption that her conduct ***might have*** resulted in the commission of a completed criminal offense. Moreover, according to the officer, the Respondent did not violate the statute under which she was ultimately charged. This illustrates basis of the constitutional protection against vague statutes. The police cannot be allowed to make arrests on the assumption that past criminality will eventually be proven; or that future criminality may occur. If the arresting officer was unable to determine what conduct is proscribed by § 827.04 Fla. Stat., then ordinary citizens cannot be presumed to be capable of making that determination. Indeed, the District Court made the specific finding that for ordinary citizens, the terms "delinquent", "dependent" and "child in need of services" are open to such varied interpretation as to have no meaning at all. Those terms were never intended to be understood by ordinary citizens. (A 8,10) The arresting officer and the prosecutor in this case acted upon their subjective determinations as to what sort of conduct constitutes a violation of Section 827.04. That is wrong; that is why the lower courts ruled as they did; and that is why the District Court's ruling is correct, and should be affirmed.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Respondent respectfully requests that the District Court's ruling be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, in his basket, at the Fifth District Court of Appeal, and mailed to: Ms. Gwendolyn Fuchs, 3500 Michigan Avenue **#B**, St. Cloud, Florida 34769, on this _____, day of November, 1999.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____

NOEL A. PELELLA
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