IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. **JAMES E. BRAKE, JR.,** Respondent.	**FSC. NO. SC00-119**

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

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

All references to the record on appeal shall be designated by the letter "R," followed by the page number. Petitioner shall be referred to as the State or Petitioner and Respondent shall be referred to as Respondent or defendant.

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

On January 8, 1998, Detective E. Fitzpatrick, executed a probable cause affidavit setting forth the allegations against Respondent regarding the violation of section 787.025, Florida States. (R 17-19)

On January 23, 1998, the State Attorney for the Twelfth Judicial Circuit, in and for Sarasota County, filed an information charging the Respondent, James E. Brake, Jr., with a violation of section 787.025, Florida Statutes (1997), stating in pertinent part:

> [Respondent] [A] person over the age of eighteen, having previously been convicted of a violation of chapter 794 or section 800.04 Florida Statutes, or a violation of a similar law of another jurisdiction, on December 26, 1997, [Respondent] did intentionally lure or entice M.C., a child under the age of twelve into a structure, dwelling or conveyance for other than a lawful purpose, in such case made, and provided and against the peace and dignity of the State of Florida.

(R 31) On March 28, 1998, Respondent filed a Motion To Find Florida Statute 787.025 Unconstitutional/Motion To Dismiss Information. (R 37-38) On April 20, 1998, a hearing was held on Respondent's Motion. At that hearing the trial judge declared section 787.025 constitutional, specifically relying upon the general concepts of law set forth in Hankin v. State, 682 So.2d 602 (Fla. 2d DCA 1996). (R 7) On May 1, 1998, The Honorable Bob

McDonald entered an Order Finding Florida Statute 787.025 Constitutional, denying Respondent's Motion. (R 43)

On June 22, 1998, Respondent entered a negotiated plea of nolo contendere to the charged violation of 787.025, Florida Statutes (1997), reserving his right to appeal the trial court's denial of his Motion to declare that statute unconstitutional. (R 3-6, 50-51) Respondent was sentenced to nine months in county jail with credit for time served and five years probation. (R 6)

A Notice of Appeal was filed on July 15, 1998. On December 10, 1999, the Second District Court of Appeal entered its Opinion finding section 787.025, Florida Statutes (1997), unconstitutionally vague, reversing Respondent's conviction. Brake v. State, 746 So.2d 524 (Fla. 2d DCA, December 10, 1999).

On January 6, 2000, Petitioner filed its Notice of Appeal pursuant to Rule 9.030(1)(A)(ii), Florida Rules of Appellate Procedure, appealing the Opinion of the district court to this Honorable Court. On February 8, 2000, Petitioner filed a Motion For Extension Of Time to file its initial brief. This appeal follows.

SUMMARY OF THE ARGUMENT

Petitioner argues that the Second District Court of Appeal erred by finding section 787.025, Florida Statutes, unconstitutional. Further, Respondent had no standing to bring the constitutional challenge below since his conduct fell squarely within the prohibitions of the statute and such conduct is not constitutionally protected.

ARGUMENT

ISSUE

WHETHER SECTION 787.025, FLA. STAT. (1997), WHICH PROSCRIBES LURING AND ENTICING A CHILD TO ENTER A DWELLING, STRUCTURE OR CONVEYANCE IS UNCONSTITUTIONALLY VAGUE?

The district court below found that the term "lawful purpose" within section 787.025 was constitutionally vague. Petitioner respectfully argues that the district court was in error.

The court conducts a lengthy analysis regarding any ability to define the term "lawful purpose" within the statute, or failing that, to incorporate some specific definition by reference to another section of the statutes. The court's analysis is flawed.

A statute "must provide fair warning to persons of ordinary intelligence of the persons covered and the conduct prohibited and must provide ascertainable standards of guilt to protect against arbitrary, erratic, and discriminatory enforcement." Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972); Florida Business for Free Enterprise v. The City of Hollywood, 673 F.2d 1213 (11th Cir. 1982). It is the Petitioner's position that the statute is written in language definite enough to provide adequate notice of prohibited conduct and is capable of understanding by a person of ordinary intelligence.

The vagueness doctrine, rooted in the Due Process Clause of the Fourteenth Amendment of the federal constitution focuses on whether the law in question affords a "person of ordinary

intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." Grayned v. City of Rockford, 408 U. S. 104, 108-109, 92 S. Ct. 2294, 2298-2299.

First, the legislature's failure to define the terms does not automatically render the statute unconstitutional. *See* Brown v. State, 629 So.2d 841, 843 (Fla. 1994). Secondly, in the absence of statutory definition, resort may be had to case law or related statutory provisions which define the term and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense. State v. Hagan, 387 So. 2d 943 (Fla. 1980).

Moreover, an individual who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed. 2d 362 (1982)[Hereinafter referred to as Flipside]. The courts will examine a law only as it was applied to the particular person challenging its constitutionality. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973); Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979)(court will not consider hypothetical acts in determining statute's constitutionality).

In the instant case the Respondent lured M.C., a child under the age of 12, to his home by promising her a toy. The Respondent

gave the child a stuffed toy, put her on his bicycle and took her to his home. Upon arriving at his home the Respondent proceeded to kiss and hug the child. The district court's determination that "[t]he kiss and the hug appear to have been consensual," appears to totally disregard the circumstances in which the kiss and hug were accomplished. This Respondent approached the child while she was playing in her own front yard, enticed her with a toy, removed her from familiar surroundings and then instigated improper physical behavior in the seclusion of his home. The district court further fails to recognize that this conduct of enticing, luring and transporting a child to his home was forbidden by law. Appellant strenuously argues that this is the very conduct clearly prohibited by the statute, falling squarely within the dictates of State v. DeLaLlana, 693 So.2d 1075, 1077 (Fla. 2d DCA 1997), where this "record establishes that the [Respondent] engaged in some conduct clearly prohibited by the plain and ordinary meaning of the statute. . .[and] is foreclosed from mounting a successful vagueness challenge to the statute and from complaining, because of a lack of standing, of its vagueness as applied to the hypothetical conduct of others."

Immediately upon finding their child missing M.C.'s parents sought the help of neighbors to search for the child. An hour and a half later the child was found with Respondent. At no time did the Respondent have the parents' permission to take their child.

(R 22-23) Clearly there is no ambiguity that Respondent's actions fall squarely with the prohibited conduct of section 787.025(2)(b), Florida Statutes:

> For purposes of this section, the luring or enticing, or attempted luring or enticing, of a child under the age of 12 into a structure, dwelling, or conveyance without the consent of the child's parent or legal guardian shall be prima facie evidence of other than a lawful purpose.

Even should this Court find that Respondent had proper standing to challenge the constitutionality of the statute, the district court erred in finding that the term "lawful purpose" was unconstitutionally vague. The court below relied upon Cuda v. State, 639 So.2d 22 (Fla. 1994) to support its finding that the phrase "other than a lawful purpose" is too vague and fails to define the parameters of the term. The State respectfully, but strongly, disagrees. Unlike the statute in question in Cuda, section 787.025, Florida Statutes (1997) contains ample language that clarifies and narrows the scope of the term at issue. Section 787.025(2)(b), Florida Statutes (1997) in pertinent part indicates that "[f]or purposes of this section, the luring or enticing. . .of a child under the age of 12 into a . . .dwelling. . .without the consent of the child's parent or legal guardian shall be prima facie evidence of other than a lawful purpose."

The statute further clarifies the term by stating three affirmative defenses to a prosecution. These affirmative defenses are, as follows:

> (a) The person reasonably believed that his or her action was necessary to prevent the child from being seriously injured.
>
> (b) The person lured or enticed, or attempted to lure or entice, the child under the age of 12 into a structure, dwelling, or conveyance for a lawful purpose.
>
> (c) The person's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the child.

Section 787.025(3), Fla. Stat. (1997). This statute meets the Cuda standard since the term "other than a lawful purpose" is accompanied by another reference to clarify it. Hankin, 682 So. 2d at 604. The second district's finding that this logic is circular is not well founded because the Respondent has the ability to expand the definition in his defense, and it is not expanded to the point of vagueness as applied against him in determining a violation of the statutory prohibitions. Consequently, the use of the term "lawful purpose," when applied in context of the statute is clear and unambiguous but does not unduly limit the availability of defense claims based upon the circumstances of the underlying act(s). The court's finding is also in error when the court states that:

> "The legislature has thus determined that the State may prove the mens rea portion of the

> offense, that the defendant had an other than lawful purpose, by proving that the defendant did not have the guardian's or the parent's permission to thus 'lure' or 'entice' the child."

The act of "luring" and/or "enticing" requires mens rea to be proven. It is not simply the "unlawful purpose" that must be proven. It is the act of luring or enticing that must be proven by the State to establish a violation under section 787.025(2)(a) or (b). Consequently, the second district's logic is incomplete.

Several criminal statutes use the word "unlawful" or the term "lawful purpose" and these statutes were not void for vagueness. See Alexander v. State, 477 So. 2d 557 (Fla. 1985); State v. Sweet, 616 So. 2d 114 (Fla. 2d DCA 1993); State v. S.R., 607 So. 2d 511 (Fla. 5th DCA 1992). Although the term "unlawful purpose" in some instances might be construed as not charging a violation of a positive law, the words as used in the statute must be construed in the light of its context as part of chapter 787 where "unlawful purpose" means a purpose to violate a criminal law. *Compare* Mixon v. State, 226 Ga. 869, 178 S.E.2d 189 (Ga. 1970).

"'Lawful' is defined by Black's Law Dictionary as 'warranted or authorized by the law ... not contrary to nor forbidden by the law.' It is distinguished from 'legal' in part by an ethical, moral quality inherent in 'lawful' but absent in 'legal.' 'Legal' involves technical adherence to the law whereas 'lawful' embodies social mores as well." Select Creations, Inc. v. Paliafito

America, Inc. v. Miryoung, 911 F. Supp. 1130 (E.D. Wis. 1995); Black's Law Dictionary pp. 885-886 (6th ed. 1990). The use of the term "lawful purpose" in a statute intended to protect minors from sexual predators is apparent since the State of Florida has an ethical and moral obligation to protect its children from sexual exploitation.

Further, "[a] scienter or specific intent requirement may save certain statutes from a vagueness challenge. Specifically, a scienter requirement may save a statute from the objection that it punishes without warning an offense of which the accused was unaware. [citation omitted]. It will save a statute from this objection, however, only where the statute forbids a clear and definite act. The definition of the act need not be derived directly from the statute." State v. Mark Marks, P.A., 698 So. 2d 533 (Fla. 1997). The statute in the instant case requires a specific intent to lure or entice.

Respondent can not claim he was unaware of the forbidden conduct since this statute requires a previous conviction under chapter 794 or section 800.04, Florida Statutes, or a violation of a similar law of another jurisdiction. Because the statute only can be attacked as applied to Respondent, Respondent was placed on notice by his previous indecency with a child conviction.[1] (R. 18). In Florida, anyone convicted under chapter 794 or section. 800.04

[1]This conviction was from Houston, Texas and the statute is similar to Section 800.04(1), Florida Statutes.

is subject to the conditions set forth in section. 948.03(5)(a). One of the conditions prohibits any contact with **a child** without court-approved adult supervision.[2] The court must impose these conditions in addition to all other standard and special conditions.

A person whose conduct clearly falls within a statute's prohibition cannot be said to be denied adequate notice. McKenney v. State, 388 So. 2d 1232, 1234 (Fla. 1980), citing Broadrick v. Oklahoma, 413 U. section. 601, 37 L. Ed. 2d 830, 93 section. Ct. 2908 (1973). In the instant case, Respondent, who was previously convicted under a statute similar to section 800.04, Florida Statute, picked up the victim on his bike and took her back to his residence. Respondent had no parental consent to do so. Respondent showed her the bedrooms and gave her a soda. While inside Respondent's residence, Respondent asked and received a hug and a kiss from the victim. Respondent also touched a mark on the victim's left inner thigh.

The statute sufficiently places convicted sex offenders on notice. *Compare* State v. Muller, 693 So. 2d 976 (Fla. 1997)(statute not unconstitutionally vague; fact that vehicle is rendered immobile with a locking device as an alternative to impoundment should come as no surprise to one convicted of DUI);

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[2]Appellant was placed on sex offender treatment and probation in Texas which prohibited any contact with **a child** without court-approved adult supervision.

and Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995)(the statute merely places a duty on public officials to avoid certain dealings and transactions...there is no unfairness in expecting our public officials to ask themselves why something is being offered to them and to exercise some insight into the motivations of others).

Similarly, it is reasonable for the State to limit Respondent's access to children based on his prior conviction. Respondent, who was convicted of indecency with a child (who was under the age of 12), would be on notice as to the meaning of intentionally luring or enticing a child into his residence "for other than a lawful purpose." Because the statute requires scienter or culpable intent, it should be given greater leeway when challenged on vagueness grounds than those statutes aimed at regulating "purely individual behavior."

Under this less stringent standard, Section 787.025, Florida Statutes (1997) would be found constitutional so long as it establishes a "reasonably definite standard of conduct." It thus appears that the regular test for vagueness does not apply in the instant case. State v. Moo Young, 566 So. 2d 1380 (Fla. 1st DCA 1990); See also Newman v. Carson, 280 So. 2d 426, 430 (Fla.1973).

Even if the regular test for vagueness applied, "[t]o make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans

and specifications of the acts or conduct prohibited. Impossible standards are not required. Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices satisfies due process." Newman v. Carson, 280 So. 2d 426 (Fla. 1973). The "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." Rose v. Locke, 423 U.S. 48, 96 section. Ct. 243, 46 L. Ed. 2d 185 (1975).

The statute must be sufficiently definite in language to tell persons of reasonable intelligence the kind of conduct that is proscribed. State v. Greco, 479 So. 2d 786 (Fla. 2d DCA 1985); State v. Buckner, 472 So. 2d 1228 (Fla. 2d DCA 1985). This Court in Buckner, has held:

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

Buckner, 472 So. 2d at 1229.

"Lack of precision is not itself offensive to the requirements of due process." State v. Hodges, 614 So. 2d 653 (Fla. 5th DCA 1993). "All that is required is that the people to whom the statute is addressed will, if they are of common intelligence, be placed on notice as to what the law forbids."

High Ol' Times v. Busbee, 673 F. 2d 1225 (11th Cir. 1982); *see also* State v. Peters, 534 So. 2d 760 (Fla. 3d DCA 1988).

Thus, applying the facts of the case at hand, Section 787.025, Florida Statutes (1997) provides sufficient guidance to Respondent to enable him to determine whether his conduct falls within the proscriptions of the statute. This same logic applies to all individuals who are subject to the provisions of section 787.025, having garnered the requisite knowledge from their previous experience with the prohibited act which resulted in a prior conviction, thus triggering the provisions of the statute. Section 787.025(2)(a), Fla. Stat. (1997).

Certainly the applications of the challenged statute pass constitutional muster. As long as the statute is not impermissibly vague in all its applications, this Court must find the statute to be constitutional.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Court find section 787.025, Florida Statutes (1997), constitutional. That the ruling of the district court be reversed, and that trial court's ruling determining that section 787.025, Florida Statutes (1997) is constitutional be reinstated, upholding the conviction and sentence of Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Ronald J. Filipkowski, Esq., Counsel for Respondent, Filipkowski and Haynes, P.A., 240 N. Washington Blvd., Suite 470, Sarasota, Florida 34236, this ____ day of February, 2000.

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