**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

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| FRANCIS DUFRESNE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. SC01-246 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Respondent | ) | |
| _____ | ) | |

# PETITIONER"S INITIAL BRIEF ON THE MERITS

On Review from the Fourth District Court of Appeal

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**PRELIMINARY STATEMENT**

Petitioner, was the defendant in the criminal division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, and the appellee in the Fourth District Court of Appeal. Petitioner, the state, was the prosecution in the trial court and the appellant in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appeared before the trial court.

A copy of the decision below is attached to Appellant's Initial Brief.

The following symbols will be used:

R = Record on Appeal

T = Transcript of proceedings held on April 13, 1999

SR= Transcript of proceedings held on November 4, 1998

All emphasis in this brief is supplied by appellant unless otherwise supplied.

## STATEMENT OF THE CASE AND FACTS

On August 25, 1997, the State of Florida filed a five-count Information alleging child abuse against the Defendant, in violation of Section 827.03(1) Florida Statutes (1997) ( R 01-02). On November 2, 1998, on the very eve of trial, the State of Florida filed an Amended Information, which changed the alleged dates of occurrence of the alleged child abuse, so as to bring the case within the ambit of Section 827.03(1) Florida Statutes (Supp. 1996) (R 9-10), and otherwise again charged the Defendant with five counts of child abuse. Defendant immediately filed a Motion To Dismiss the Amended Information, claiming procedural defects in the manner in which the Amended Information was filed and also raising substantive grounds for dismissal (R 139-142).

The lower tribunal held a hearing on the Defendant's Motion To Dismiss on November 4, 1998 (SR 1-29). The lower tribunal disposed of the procedural infirmities in the manner of amendment by denying the motion on procedural grounds, but granting a continuance to the Defendant to prepare for the eleventh hour changes in the charging instrument (SR 21-24). The lower tribunal entertained argument on the Motion , and gave both the State and the defense a full opportunity to be heard (SR 8-26), As to the substantive grounds, the motion raised the issues of overbreadth and vagueness (R 139-144). After hearing argument, the lower tribunal invited the State

and the defense to submit additional written memoranda (SR 25-26). The State of Florida submitted a written response to the motion on March 29, 1999 (R 114-119). The State did not request additional oral argument.

On April 13, 1999, the parties appeared before the Court with regard to other matters concerning the case, and at that time, the lower tribunal presented its Order granting the Motion To Dismiss the Amended Information, which had until then been pending (T 2-3, R 129-136). The Court's written Order reiterated the denial of the motion on procedural grounds, but found Section 827.03(1)(d) Florida Statutes (Supp. 1996), to be unconstitutionally overbroad and also to be void for vagueness (R 129-136).

The State filed a timely Notice of Appeal (R 147). On September 13, 2000, the Fourth District Court Of Appeal filed its original opinion in this case, which it withdrew the following day, when this Court issued its opinion in Fuchs v. State, 769 So.2d 1006 (Fla. 2000). After requesting supplemental briefs addressing Fuchs, on January 24, 2001, the Fourth District Court Of Appeal issued the decision on review, which relied on Fuchs and determined that the statute at issue was not unconstitutionally vague. In so finding, the Fourth District Court Of Appeal certified the following question as one of great public importance:

IS THE TERM "MENTAL INJURY" IN SECTION 827.03(1)(b) FLORIDA

STATUTES (1966) UNCONSTITUTIONAL BECAUSE IT IS VAGUE?

This appeal follows.

## SUMMARY OF ARGUMENT

Section 827.03(1)(d) Florida Statutes (Supp. 1996), is unconstitutionally vague in that its language does not adequately inform people of common understanding of that conduct which is proscribed. The "reasonable expectation" of mental injury language contained within the statute is not defined, and cannot be commonly understood. Unlike the statute at issue in this court's case of State v. Fuchs, the constitutional infirmities in the statute cannot be remedied by reference to other statutes.

In Fuchs, the statute challenged was alleged to be unconstitutionally vague for failure to define the terms "delinquent," "dependent child," or "child in need of services." Prior versions of the statute had directed reference to these terms "as defined under the laws of Florida." This Court found that the simple deletion of that phrase did not render the statute unconstitutionally vague, because the terms at issue were specifically defined in only place within Florida's legislative scheme and that statutes relating to the same or closely related subjects should be read in pari materia even where they are not referenced.

The statute at issue in Fuchs differed from the statute before this Court in that the term "mental injury" is not a term of art, and there is no Florida statute specifically addressing the term and defining it as part of a statutory scheme. Neither the Circuit

Court Judge, the assistant state attorney in the lower tribunal, the Assistant Attorney General involved in the appeal before the Fourth District Court Of Appeal, nor that Court itself, ever suggested that the term "mental injury" was defined in another statute, until this court's decision in Fuchs, was issued. Certainly, where the most knowledgeable and trained persons dealing with the meaning of statutes and prohibited conduct cannot determine the relationship between the statute before the court and that statute where definition exists, the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

## ARGUMENT

### POINT I

**THE TERM "MENTAL INJURY" IN SECTION 827.03 (1)(b), FLA. STAT. (1996), IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE.**

The Supreme Court of the United States has described the void for vagueness doctrine as "requir[ing] that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983).

In its well-reasoned Order entered in this case, which found the statute at issue to be unconstitutionally vague, the trial judge explained:

> Were the statute limited to the expectation of physical injury, it might pass constitutional muster. But to require ordinary persons to be knowledgeable as to the likelihood of whether their words or actions would result in "mental injury" asks too much. There are no statutory guidelines regarding such conduct and the term "mental injury" is left undefined. (R. 129-136, 133).

The decision on review quoted the trial judge's hypothetical examples of innocent and innocuous conduct which could possibly fall under the vague boundaries of this statute. The trial judge explained that under the statute as written, those parents who have ever criticized or insulted their children, as well as the overzealous Little league

coach who benched a player for poor performance, would be subjected to criminal prosecution because such actions were likely to demean the child or cause him to suffer humiliation, a loss of confidence or self esteem.

In State v. Riker, 376 So.2d 862 (Fla. 1979), this Court upheld a prior version of the child abuse statute. However, that version of the statute specifically defined the term "mental injury." Section 827.07(i) Fla. Stat. (1977). The instant statute does not include any definition of "mental injury." That removed definition has been relocated within different statutes over time. In 1983, the definition was moved to Chapter 415 (reporting , investigating, and preventing child abuse); and, in 1998, it was moved to Chapter 39 (delinquency and dependency proceedings relating to children). The definition of mental injury relied upon by the Fourth District in the order under review, was located in Section 39.0015 (4)(iv) Florida Statutes (Supp. 1998). It was the existence of that definition that the Fourth District found to compel the result on review, based on this court's decision in State v. Fuchs, 769 So.2d 1006 (Fla. 2000). However, the decision in Fuchs is readily distinguishable from the situation in this case.

In Fuchs, supra, this Court found that the simple deletion of the phrase "as defined under the laws of Florida" did not render the statute there at issue constitutionally infirm. The terms which were not defined in the statute challenged

in that case were the terms "delinquent," "dependent child,' and "child in need of services." This Court pointed out that the terms at issue in that case were defined in Chapter 39 (Proceedings Relating to Children); Chapter 984 (Child and Families in Need of Services); and Chapter 985 (Delinquency, Interstate Compact on Juveniles) of the Florida Statutes. Fuchs v. State, supra.. This Court pointed out that "[T]here is only one place within Florida's legislative scheme were a child may be adjudicated delinquent (Chapter 985), or dependent (Chapter 39), or in need of services (Chapter 984)." Id. It was therefore found that although the phrase "as defined under the laws of Florida" was deleted from the challenged statutory provision, the Legislature clearly intended that the terms be defined by Chapters 39, 984, and 985. The terms involved in Fuchs are terms of art, which have specific meanings within statutes designed to define them. As the District Court noted in Fuchs, "[T]here is little doubt that these terms in Section 827.04(1) are intended to be understood as terms of art as described in Chapters 39, 984, and 985 and not used in the ordinary way these words are sometimes used." State v. Fuchs, 751 So.2d 603, 607 (Fla. 5th DCA 1999).

As was pointed out by Judge Klein in his opinion concurring specially in the decision on review,

> That the terms of a penal statute creating a new offensemust be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its

> penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the well settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

The term involved in this case is far different from the terms in Fuchs. " Mental injury" is a lay term, subject to differing definitions by the general public. Unlike the terms in Fuchs, there is no Florida Statute which specifically addresses mental injury, thereby defining that term and rendering it a term of art. As set forth above, the definition of "mental injury" existed in Chapter 827 until 1983. At that time, the definition was removed from Chapter 827, along with other provisions involving reporting, investigating, and preventing child abuse, and was moved to Chapter 415. That definition was removed from Chapter 415 in 1998, and the definition now appears within Chapter 39. It is apparent that unlike the terms of art at issue in Fuchs, there is no legislative scheme specifically designed to define the term "mental injury" in such a way as to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, supra.

The best evidence of the vague nature of the statute and lack of statutory

definition is found in the history of this case. Neither the Circuit Court Judge, the assistant state attorney prosecuting the trial of this case, the assistant attorney general handling the state's appeal in the Fourth District Court of Appeal, nor even that learned court itself, in its initial opinion, advanced the legal position that there was a definition of "mental injury" contained within Florida Statutes, but outside of the penal statute at issue herein, until this Court issued its opinion in Fuchs.. Not even those most knowledgeable, most affected, and those whose jobs and training make them most likely to have knowledge as to statutory construction and statutory schemes recognized that a definition relevant to defining the elements of child abuse might be found in Chapter 39, Florida Statutes. Unlike Fuchs, the definition of the term "mental injury" is not readily apparent as a term of art even so that a person schooled in the law is able to discern where to find that definition. To expect the normal lay person to be able to do so, is not reasonable. The statute at issue in this case fails to criminalize conduct "with a reasonable precision that does not simultaneously outlaw innocent conduct and the normal incidents of home-life." Schmitt v. State, 590 So.2d 404 (Fla. 1991).

Rather than being controlled by this Court's decision in Fuchs, supra, it is this Court's holding in Hermanson v. State , 604 So. 2d 775 (Fla. 1992), cited by Judge Klein in his specially concurring opinion, which should control. In that case, this

Court reversed the convictions for felony child abuse and third degree murder, of two Christian Science parents who failed to obtain conventional medical treatment for their child. This Court held that the provisions of the criminal and civil child abuse statutes, which authorized Christian Science spiritual healing, were ambiguous and that the parents were denied due process. In language which is particularly applicable to this case, this Court held:

> To say that the statutes in question establish a line of demarcation at which a person of common intelligence would know that his or her conduct is or is not criminal ignores the fact that, not only did the judges of both the circuit court and the district court of appeal have difficulty understanding the interrelationship of the statutes in question, but, as indicated by their questions, the jurors also had problems understanding what was required. Id. at 782.

Here, it is established in the record that persons more schooled in the law and in statutory schemes and construction could not discern the missing definition from the penal statute under consideration. Certainly that same line of demarcation found wanting in Hermanson, supra, is lacking in the statute under review herein. Here, unlike in Fuchs, supra, the statutes do not relate to the same or closely related subjects. Chapter 39 Florida Statutes neither defines nor includes provisions relating to criminal activity. Section 827.03 (1)(b), Fla. Stat. (1996), leaves undefined a crucial term, without which the statute forbids certain acts in terms so vague that persons of

common intelligence must necessarily guess at its meaning and differ as to its application.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court reverse the decision of the Fourth District Court of Appeal and answer the certified question in the affirmative.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing has been furnished by U.S. Mail this 5th day of March, 2001, to Georgina Jimenez-Orosa, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401-2299.

## CERTIFICATE OF COMPLIANCE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of

Appeals for the Eleventh Circuit, counsel for Respondent hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

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