IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-246

FRANCIS DUFRESNE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Francis Dufresne, was the Defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellee and Respondent 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 "A" will be used to denote the appendix attached hereto.

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

STATEMENT OF THE CASE AND FACTS

On August 25, 1997, the State filed an Information charging Petitioner with five counts of child abuse (R. 1-2). On November 2, 1998, the State of Florida filed an **amended** information alleging violation of Section 827.03(1) Florida Statutes (Supp. 1996) (R. 9-10).

On or about Nov. 3, 1998, Appellee filed a Motion to Dismiss Amended Information on procedural and substantive grounds (R. 139-142). On "substantive grounds" the motion to dismiss alleged:

> Florida Statute 827.03(1) is over broad and void for vagueness as no person can determine what actions could "reasonably be expected to result in physical or mental injury." See, Schmitt v. State, 590 So. 2d 404 (Fla. 1991) and State v. Rochelle, 609 So. 2d 613 (Fla. 4th DCA 1992).
>
> Florida Statute 827.03(1) outlaws "bad thoughts" accompanied by any intentional act which a person could reasonably expect to result in physical or mental injury even if no physical or mental injury occurs.
>
> Florida Statute 827.03(1) outlaws entirely lawful action on the part of individuals. Two examples are shown below:
>
> A. On Halloween, a parent dresses in a frightening costume. A child gets frightened by this costume. The individual has done an intentional act (dressing in the costume), which might reasonably be expected to result in mental injury.
>
> B. An individual drives his car in a school zone

> and a child runs out in front of the car and safely gets out of the way before the car could hit the child. The driver did an intentional act (drove the car), which could reasonably be expected to result in physical or mental injury to the child.
>
> Under the facts of the case at bar, FRANCES DUFRESNE is charged with shouting at autistic children, degrading them and slapping the children. While she denies that these allegations are true, how could Ms. Dufresne or any teacher know what conduct could "reasonably be expected to result in physical or mental injury" to these children.

(R. 139-142).

After holding a hearing on November 4, 1998 (SR 1-27), reviewing the motion and the State's March 9, 1999, **written** response (R. 114-119), on April 13, 1999, the trial court presented the parties with his **prepared** order **granting** the motion to dismiss the amended information (T. 2-3). The court's written order denied Petitioner's motion to dismiss on procedural grounds, but found Section 827.03(1)(b) unconstitutionally overbroad and void for vagueness (R. 129-136).

The State sought review of the trial court's order dismissing the information before the Fourth District Court of Appeal. On January 24, 2001, the Fourth District Court of Appeal issued the opinion now before the Court (Appendix A). In its opinion, the District Court concluded "the statute is not facially invalid under

the overbreadth doctrine, because it can be narrowly construed so that it does not apply to speech." State v. Dufresne, 26 Fla. L. Weekly D288 (Fla. 4th DCA Jan. 24, 2001). Then after noting that "mental injury" is defined in section 39.0015(4)(iv), Florida Statutes (Supp. 1998), relying on State v. Fuchs, 769 So. 2d 1006 (Fla. 2000), the District Court **reversed** the trial court's conclusion that section 827.03 is vague because the term "mental injury" is undefined. State v. Dufresne, 26 Fla. L. Weekly D288 (Fla. 4th DCA Jan. 24, 2001). The District Court, however, certified the following question as one of great public importance:

> IS THE TERM "MENTAL INJURY" IN SECTION 827.03(1)(b), FLORIDA STATUTES (1996) UNCONSTITUTIONAL BECAUSE IT IS VAGUE?

Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of Supreme Court. By its order **postponing decision on jurisdiction** of February 7, 2001, the Court established a briefing schedule. Petitioner filed the Initial Brief on the Merits, and the Respondent's Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

The district court specifically stated the outcome of this case was controlled by this Court's decision in Fuchs. Applying the proper rules of statutory construction Section 827.03(1)(b) is not unconstitutionally vague. Therefore, this Court should either decline to accept jurisdiction as no question of great public importance has been posed, or answer the question in the negative, and approve the decision rendered by the District Court.

ARGUMENT

IS THE TERM "MENTAL INJURY" IN SECTION 827.03(1)(b), FLORIDA STATUTES (1996) UNCONSTITUTIONAL BECAUSE IT IS NOT DEFINED THEREIN?

JURISDICTION

This Court should decline to take jurisdiction in this case since the District Court resolved the issue by applying the proper rules of statutory construction, and found the outcome controlled by this Court's recent opinion in State v. Fuchs, 769 So. 2d 1006 (Fla. 2000).

It is important to note the history of the District Court's opinion issued in this case: The District Court filed its original opinion in this case on September 13, 2000. In that opinion the District Court held that because the term "mental injury" was undefined, a statute making it a felony to commit an intentional act which could reasonably be expected to result in mental injury to a child was unconstitutionally vague. The very next day, September 14, 2000, this Court issued State v. Fuchs, 769 So. 2d 1006 (Fla. 2000). On that very day, September 14, 2000, the District Court withdrew the opinion issued the previous day, and ordered the parties to file supplemental briefs addressing Fuchs. On January 24, 2001, the District Court issued a new opinion stating:

> We are unable to distinguish the present case from Fuchs. In the present case, as we noted earlier, "mental injury" is defined in

> section 39.0015(4)(iv), Florida Statutes (Supp. 1998), ...
>
> The trial court's conclusion that section 827.03 is vague because the term "mental injury" is undefined is contrary to Fuchs.

Dufresne, slip opinion, Appendix, page 5. The District Court therefore reversed the dismissal of the information, but certified the question to this Court as one of great public importance.

The State submits that when applying the proper rules of statutory construction as instructed by Fuchs, the District Court properly decided the issue. As such no question of great public importance has been posed to this Court, and thus the Court should decline to accept jurisdiction to answer the question as framed. See State v. Brown, 476 So. 2d 660, 661 (Fla. 1985).

MERITS

Section 827.03(1) provides:

> **827.03 Abuse, aggravated abuse, and neglect of a child; penalties.--**
> (1) "Child abuse" means:
> (a) Intentional infliction of physical or mental injury upon a child;
> (b) **An intentional act that could reasonably be expected to result in physical or mental injury to a child;**
> or
> (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.
>
> A person who **knowingly or willfully** abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, ...

In assessing a statute's constitutionality, courts are bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)); State v. Fuchs, 769 So. 2d at 1008 (where reasonably possible, a statute will be interpreted in a manner that resolves all doubts in favor of its constitutionality.)

Further, "[w]henever possible, a statute should be construed so as not to conflict with the constitution. Just as federal

courts are authorized to place narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment." State v. Stalder, 630 So. 2d at 1076 (quoting Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459-60 (Fla. 1989) (citations omitted)).

In order to withstand a vagueness challenge, a statute must be specific enough to give persons of common intelligence and understanding adequate warning of proscribed conduct. State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997). However, the failure of the Legislature to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. Id.; State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980).

It is a basic rule of statutory construction that statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and should be construed together and compared with each other. Ferguson v. State, 377 So. 2d 709, 710 (Fla. 1979). The courts should view the entire statutory scheme to determine legislative intent. Id. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another. T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996)(quoting Forsythe v. Longboat Key Beach Erosion Control, 604 So. 2d 452, 455 (Fla. 1992))(citations omitted)(emphasis in original).

This Court has repeatedly held that statutes may be read in pari materia without such being specifically directed, because "(l)aws should be construed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws in pari materia, though they contain no reference to each other." Miami Dolphins, LTD., v. Metropolitan Dade County, 394 So. 2d 981, 988 (Fla. 1981)(quoting American Bakeries Co. v. Haines City, 131 Fla. 790, 180 So. 524, 528 (Fla. 1938)). Thus, while the legislature may direct that statutes be read in pari materia, the absence of that directive does not bar such a reading. Id. See also Holmes County School Bd. v. Duffell, 651 So. 2d 1176, 1179 (Fla. 1995).

For example, this Court has rejected a vagueness claim to a penal statute and applied this rule of construction, referring to the definitions in another chapter to define a particular statutory term even when that statute makes no reference to that outside definition. See State v. Ferrari, 398 So. 2d 804, 807 (Fla. 1981).

There, the defendant challenged section 713.34(3) of the Florida Statutes (1979) on the ground that it was vague. Section 713.34(3) was designed to attach criminal liability for embezzlement to contractors who misappropriated construction funds. In construing the statute, this Court acknowledged that the statute did not precisely define when a bill becomes due and owing for purposes of proving the embezzlement, but held that no such

definition was necessary. Id. Instead, this Court determined that section 713.34(3) was to be read in pari materia with Florida's version of the Uniform Commercial Code, chapter 672, and Florida contract law, and that such a reading shed light on the terms utilized in section 713.34(3), "simultaneously solving any vagueness problems." Id. See also Miami Dolphins, 394 So. 2d at 987-988 (when reading section 125.0104 of the Florida Statutes (1977) in conjunction with chapter 212, particularly section 212.03 of the Florida Statutes (1977) even though section 125.0104 does not refer to chapter 212, the pari materia construction makes § 125.0104 complete and remedies any vagueness problem).

This Court's holding in Ferrari makes clear that the fact that the text of a statute does not direct that it should be read in pari materia with other statutes is not controlling, and the failure of the State attorneys to so argue does not void the necessity to apply the appropriate rules of statutory construction to properly resolve the constitutionality of a statute.

Applying these accepted rules of statutory construction, different facets of the same subject matter should be read in pari materia. See e.g., Wooten v. State, 332 So. 2d 15, 17 (Fla. 1976). Likewise, in the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term. Mitro, 700 So. 2d at 645, Hagan, 387 So. 2d at 945. Moreover, when different statutes employ exactly the same words or

phrases, the legislature is assumed to have intended the same meaning. Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989)(citing Goldstein v. Acme Concrete Corp., 103 So.2d 202, 204 (Fla. 1958)).

In the case at bar, the trial court, without looking at the specific conduct of Petitioner, found the statute unconstitutionally vague concluding that the statute did not give persons of common intelligence and understanding adequate warning of proscribed conduct. The trial court, and at first the district court, did not proceed to consider whether the term "mental injury" was defined elsewhere in the chapter so as to make the statute constitutional. However, as stated in Fuchs, at 1009-1010:

> First, it is well settled that the "legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term. . . ." State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980), cited with approval in State v. Milo, 700 So. 2d 643, 645 (Fla. 1997); L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) (additional citations omitted). . . .
>
> Second, statutes which relate to the same or closely related subjects should be read in pari materia. See State v. Ferrari, 398 So. 2d 804, 807 (Fla. 1981) (finding that a statute which attached criminal responsibility for embezzlement to one who misappropriated construction funds was not void for vagueness despite the fact that it failed to define when a bill became due and owing because that definition could be derived from Florida's

> version of the UCC); see also State v. Espinosa, 686 So. 2d 1345, 1347 (Fla. 1996) (reading a statute which penalized resisting a lawful arrest with violence in pari materia with statute that prohibited use of force to resist an arrest so as to eliminate the element that the arrest must be lawful when resisting a lawful arrest with violence is charged). Third, and relatedly, "[a]lthough the legislature may direct that statutes be read in pari materia, the absence of that directive does not bar such a reading." Holmes County School Board v. Duffell, 651 So. 2d 1176, 1179 (Fla. 1995) (allowing injured school board employee to maintain action against coworker as well as against school board by reading section which allowed a public or private employee to sue a fellow employee when each was operating in furtherance of the employer's business and when they were assigned to unrelated tasks in pari materia with section which provided that the exclusive remedy for damages inflicted by an employee of the state shall be an action against the governmental entity even though neither statute contained reference to the other); see generally American Bakeries Co. v. City of Haines City, 131 Fla. 790, 801, 180 So. 524, 528 (1938)("Laws should be construed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws in pari materia, though they contain no reference to each other."), cited with approval in Miami Dolphins, L. v. Metropolitan Dade County, 394 So. 2d 981, 988 (Fla. 1981).

Applying these firmly grounded, and often adhered to, principles of statutory construction, the State submits that the District Court was correct in concluding that the deletion of the definition of "mental injury" from the statute in 1983 does not render section 827.03(1)(b) constitutionally infirm.

The primary purpose behind the statute involved in this case is protecting **children** from physical abuse. Also, the definition of "mental injury" was removed from Chapter 827, along with other provisions involving reporting, investigating, and preventing child abuse, and moved to Chapter 415. The definition, which was in section 415.503(8) in 1983, was moved to section 39.0015(44) in 1998. See ch. 98-403, § 19, Laws of Fla. (Now ¶39.01(44)) Chapter 39 is entitled "Proceedings Relating to Children". Since the definition contained in section 39.01(44) was the definition contained in the statute at issue in 1995, then Sec. 827.03 can be read in pari materia with sec. 39.01(44) to supply the definition for "mental injury" and respond to the alleged vagueness challenge, since the two statutes relate to the protection of **children**. The two statutes being read in pari materia, State v. Riker, 376 So. 2d 862 (Fla. 1979) is controlling here[1].

Since all doubts are to be resolved in favor of the constitutionality of Section 827.03(1)(b), applying the proper

[1]Petitioner and the District Court make much of the fact that neither the Assistant State Attorney, nor undersigned counsel, suggested to either lower court, prior to Fuchs being issued, that the vagueness could be cured by using a definition contained in a different statute. However, the State had referred both the trial court and the district court to State v. Riker, 376 So. 2d 862 (Fla. 1979), which did contain the definition of "mental injury." In any event, that two attorneys for the State did not cite to the appropriate rules of statutory construction does not relief the trial and appellate judges of their responsibility to apply the appropriate rules of statutory construction so as "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality." State v. Stalder, 630 So. 2d at 1076.

rules of statutory construction, Section 827.03(1)(b) is not unconstitutionally vague. Accordingly, the District Court, consistent with the rationale in State v. Fuchs properly reverse the order of the trial court's order declaring Section 827.03(1)(b) constitutionally vague.

The district court specifically stated the outcome of this case was controlled by this Court's decision in Fuchs. Applying the proper rules of statutory construction Section 827.03(1)(b) is not unconstitutionally vague. Therefore, this Court should either decline to accept jurisdiction as no question of great public importance has been posed, or answer the question in the negative, and approve the decision rendered by the District Court.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully urges the Court to **APPROVE** the decision of the district court issued in the case at bar **reversing** the trial court's conclusion that section 827.03 is vague because the term "mental injury" is undefined.

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: MICHAEL DUBINER, ESQ., and MARK WILENSKY, ESQ., Attorneys for Petitioner, at Dubiner & Wilensky, P.A., Northbridge Centre, Suite 325, 515 North Flagler Drive, West Palm Beach, FL 33401-4349, this ____ day of April, 2001.

_____
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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel for the State of Florida, Respondent herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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