IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

PETITIONERS REPLY BRIEF ON THE MERITS

On Review from the Fourth District Court of Appeal

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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 one 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.

Respondent's Brief On The Merits correctly points out that 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 (Fla. 1997). It is this failure to adequately advise and warn persons of common intelligence and understanding that renders the statute at issue constitutionally infirm.

In support of its argument that statutes relating to the same or to a closely related subject or object are to be read in *pari materia* and should be construed together and supplement each other, Respondent cites to the case of State v. Ferrari, 398 So.2d 804 (Fla. 1981). In that case, this Court considered the constitutionality of Section 713.34(3) Florida Statutes. That statute proscribed a person from using, with the intent to defraud, proceeds of any payment made to him on account of improving certain real property for any other purpose than to pay for labor or services performed on or materials furnished for that specific improvement, while there remained unpaid any amount for which that person might become liable relating to the

specific real property. The statute did not precisely define when a bill became due and owing, and it was suggested that the failure to define that term rendered the statute unconstitutional. However, this Court pointed out that the statute had to be read in *pari materia* with Florida's version of the Uniform Commercial Code, which is the national standard by which commercial transactions, sales, and similar dealings are governed. Additionally, this Court found that the definition of when a bill becomes due and owing can also be determined by reference to Florida contract law. Certainly as to those statutes, there is a rational relationship between the statutes and the subject matter. As this Court pointed out, "[S]uch a reading allows consideration of variable factors such as prior dealings between the contractor and the creditor and usage of trade, simultaneously solving any vagueness problems." Id. at 807.

In this case, the statutes are not closely related or otherwise connected. While it is true that Chapter 39 is entitled "Proceedings Relating to Children," review of that statute makes clear that Chapter 39 concerns delinquencies, dependencies and children in need of services. It concerns crimes committed by children and the failure of parents to protect children, rather than crimes against children. Unlike the case in Fuchs, where the terms left undefined were terms of art which specifically related to the subject matter of Chapter 39, there is no reason for a person of common

intelligence and understanding to turn to Chapter 39 for a definition of the terms in the statute at bar.

While Respondent attempts to give short shrift to the fact that neither the trial court prosecutor, the Assistant Attorney General assigned to this case, nor the Fourth District Court of Appeal itself, initially suggested reference to Chapter 39 to define "mental injury" until after the decision in Fuchs, that fact cannot be ignored. Certainly, those most trained in the law and those with the greatest desire to uphold the constitutionality of the statute, should have been able to point to the definition in a related statute if persons of common intelligence and understanding are to know of the crucial definition contained therein.

Respondent also cites to the case of Miami Dolphins, LTD., v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981), for support of its position that related statutes must be read in *pari materia*. Again, while there is no disagreement with that general concept, it is the lack of relationship between the statutes that distinguishes this case from that one. In Miami Dolphins, it was alleged that Section 125.0104, Florida Statutes, failed to provide adequate guidelines of criteria as to who was subject to the tourist tax. This Court found that the subject section should be read in *pari materia* with Chapter 212, Florida Statutes, the state transient rentals tax. Clearly, there is a direct relationship between a tourist tax and a transient rental tax.

Additionally, the statute itself, at Section 125.0104(2), specifically provided that the provisions of Chapter 212 were to apply the administration of taxes levied under the tourist tax statute. Thus, not only were the two statutes directly related to subject matter and topic, but the one to be read in *pari materia* was referenced in the other. No such connection nor reference exists in this case.

This court's ruling in Fuchs cannot mean that a person of common intelligence must find definition of terms in unrelated statutes and the vagaries of case law. The Fuchs holding was limited, and should remain limited to those statutes which are of common subject matter, and which clearly and directly define terms at issue. In Fuchs, this court pointed out that "[T]here is only place within Florida's legislative scheme where a child may be adjudicated delinquent (Chapter 985), or dependent (Chapter 39), or in need of services (Chapter 984)." State v. Fuchs, 769 So.2d 1006 (Fla. 2000). It cannot be said that there is only one place within Florida's statutory scheme where one might find the definition of mental injury. Were one seeking the definition of mental injury, that person, like the prosecutor, the Assistant Attorney General, and the Fourth District Court of Appeal (prior to Fuchs) would have no reason or warning to examine Chapter 39.

While the District Court of Appeal felt constrained to determine this case pursuant to this Court's decision in Fuchs, its certification of a question of great public

importance makes clear that it had doubts and concerns as to the whether Fuchs extends the law. The Fuchs decision should not extend the law so far as to make a person of common intelligence play "hide and seek" with terms defining proscribed conduct. Requiring a person to do so renders the statute before this court unconstitutionally vague.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments, as well as those previously cited before this Court, Petitioner respectfully urges this Court to disapprove the decision of the District Court of Appeal issued in the case at bar and determine that Section 827.03 Florida Statutes is unconstitutionally vague because the term "mental injury" is undefined.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing has been furnished by U.S. Mail this 23rd day of May, 2001, to Celia Ferenzio, Assistant Attorney General, and Georgina Jimenez-Orosa, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401-2299.

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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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