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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2336

DCA NO. 3D11-3094

GARY DEBAUN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF

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ARGUMENT

Both the State and the Petitioner, Mr. Debuan, agree that the term, "sexual intercourse," in section 384.24 is plain and unambiguous.[1] The Petitioner has contended that the term refers to the penetration of the vagina by the penis. As evidence of that well-settled meaning, the Petitioner has relied on the Legislature and the courts, which have already resolved the issue in this case by defining the act as penetration of the female sex organ by the male sex organ.

The State argues that contrary to all definitions in Florida law, the term in section 384.24 uniquely refers to something much broader – any sexual contact that could lead to the transmission of HIV. The State cites to no statutory definitions or case law to support its claim, but nevertheless submits that it is proposing the ordinary meaning. Thus, the main question before this Court is which definition is the *true* plain and ordinary meaning based only on the language of the statute. *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) ("When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.").[2]

The State tacitly admits that the term means penile-vaginal penetration everywhere in Florida law except section 384.24. Accordingly, the State is forced

[1] "The statute [384.24] is clear and unambiguous." (AG. Brief, at 4).

[2] *See also Wilson v. State*, 288 So. 2d 480, 482 (Fla. 1974) (holding that public policy and legislative intent were inapplicable where statutory language was clear).

to argue that the rules of statutory construction *do* apply, but that all other statutes and cases discussing the term are inapplicable.

The State's primary argument is that since this statute is in the health code, it must be read in complete isolation. (AG. Brief, 11-20). The idea behind this is that health laws have a different objective than criminal laws, and so the definitions of terms in the former must be different than those in the latter. This is a false distinction. Section 384.24 imposes a serious criminal penalty – a felony – for a sexual battery that could potentially lead to the death of the victim.[3]

Further, following the State's premise to its logical conclusion would mean that prohibitions against rape, obscenity, sodomy, and other sex crimes are *not* intended to protect the general health and well-being of Florida's citizens. Yet, the first enumerated "general purpose" of the Florida's criminal code is "To proscribe conduct that improperly causes or threatens substantial harm to individual or public interests." § 775.012, Fla. Stat. (2011).[4] In line with that goal, Florida's *criminal*

[3] *See generally* ACLU Lesbian & Gay Rights Project, AIDS Project, State Criminal Statutes on HIV Transmission – 2008, available at: https://www.aclu.org/files/images/asset_upload _file292_35655.pdf.

[4] This Court has long held that "statutes which relate to the same or closely related subjects should be read in pari materia." *State v. Fuchs*, 769 So. 2d 1006, 1009-10 (Fla. 2000). As noted in *Fuchs*, this rule has been applied when comparing Florida's criminal code to non-criminal statutes: "*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

code also includes a prohibition against the willful transmission of HIV in section 796.08(4)-(5), Fla. Stat. (2011) (making it a third-degree felony or first-degree misdemeanor to engage in prostitution while knowingly infected with the disease).

Next, the State defends its interpretation by relying on the Merriam-Webster dictionary. But the State ignores that its first definition is in harmony with the Florida code and decisional law. The State instead highlights the second definition, which defines "sexual intercourse" broadly enough to support its argument. As discussed in the Initial Brief and the *Debaun* dissent, even assuming that the second definition could be considered, it would create an ambiguity that triggers the Rule of Lenity in favor of Mr. Debaun. *See State v. Debaun*, 129 So. 3d 1089, 1095-98 (Fla. 3d DCA 2013).

Application of the Rule of Lenity would not, as the State claims, thwart a clear legislative intent as to the scope of section 384.24. When it enacted the first version of the law in 1919, the Legislature selected a precise term, "sexual intercourse," and that term has not been amended since. The Legislature has, however, subsequently defined "sexual intercourse" as the penetration of the female organ by the male organ. It has also repeatedly distinguished Mr. Debaun's

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became due and owing because that definition could be derived from Florida's version of the UCC)." *Id*. at 1009-10.

alleged activity from that specific sexual act.[5] This Court's definition of "sexual intercourse" has long coincided with the Legislature's. *See, e.g.*, *Williams v. State*, 92 Fla. 125 (Fla. 1926) (defining "sexual intercourse" as penetration of the female sex organ by the male sex organ).

Although section 384.24 is aimed generally at preventing the spread of venereal disease, it is up to the Legislature to determine how and to what extent that aim is to be achieved. The Legislature has never declared a desire for section 384.24 to encompass illegal types of sexual conduct.[6] Nor has the Legislature said that the statutory language in section 384.24 has a special meaning, distinct from the rest of Florida law. It is therefore not unreasonable to assume that section 384.24 applies only to legal sexual conduct, and that its terms were intended to

[5] In 1986 – the same year that HIV was added to the venereal disease law – the Legislature also passed section 796.08(4), which prohibited prostitution through "sexual activity" when the person providing it knows he or she carries the disease. Notably, "sexual activity" was defined in the Prostitution Chapter as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another. . ." § 796.07(1)(e), Fla. Stat. (1986). An amendment to section 796.08 in 1988 broadened the scope of the statute yet further, creating a separate felony offense for engaging in "sexual activity in a manner likely to transmit [HIV]."

Thus, this statute demonstrates that where the Legislature intended for a law to cover all sexual acts that can transmit HIV, it used broad, targeted words to that effect. The language in section 796.08(4) is sufficient for that purpose. The language in section 384.24 is not.

[6] When the venereal disease law was enacted in 1919, Mr. Debaun's alleged homosexual acts were already criminalized under Florida's sodomy laws. They were still illegal in 1986, when HIV was added to Chapter 384's list of diseases.

mean what they have always meant. Accordingly, if the language of the statute is ambiguous, then the Rule of Lenity applies.

In conclusion, the State is, in effect, asking this Court to re-draft a statute. To justify that remedy, the State urges this Court to pretend that section 384.24 is not a criminal law, and to ignore everything that Florida's Legislature and courts have ever said about sexual intercourse. The proper remedy in this case, however, is not to amend the law to comport with how the State and the Third District think it should be written. Instead, this Court should give full effect to the law's clear statutory language. If the Legislature sees a problem with how the law is drafted, then it has the power to change it.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court vacate the Third District's reversal of the trial court's order granting the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF FONT AND TYPE SIZE

Undersigned counsel for petitioner certifies that this brief was typed using 14 point proportionately spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by email to Joanne Diez, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, Crimappmia@myfloridalegal.com, this **4th** day of September, 2014.

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