

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

THERESA SIENIARECKI,)
)
 Petitioner,)
)
vs.) CASE NO. 94,800
)
)
STATE OF FLORIDA,)
)
 Respondent.)

)

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

JOSEPH R. CHLOUPEK
Assistant Public Defender
Florida Bar No. 434590

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and was the appellant in the District Court of Appeal, Fourth District. She will be referred to by name and as Petitioner in this brief.,

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 petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New Type, a font that is not spaced proportionately.

STATEMENT OF THE CASE

Petitioner was charged with aggravated manslaughter of a disabled person, Florida Statutes, Section 782.07 (2) (1995) (R4). Prior to trial, defense counsel filed a motion to dismiss Florida Statutes, Sections 782.07 (2) and 825.102 (3)(1995) as unconstitutional, both facially and as applied (R 25-34). This motion was denied by the trial court (R 39). Thereafter, Petitioner was found guilty of the lesser-included offense of neglect of a disabled person (R 48-49, 572). Petitioner was then sentenced to 22 months prison (R 57,60,582). Petitioner's appeal to the Fourth District Court of Appeal, based on the same argument as presented in her pretrial motion to dismiss, was denied by that court via written opinion, Sieniarecki v. State, 724 So.2d 626, 628 (Fla. 4th DCA 1998). This appeal follows.

STATEMENT OF THE FACTS

John Albright lived with Petitioner, her mother, Patricia Sieniarecki, and Petitioner's brothers Al and David Sieniarecki, in North Miami until 1996; Albright was no longer Petitioner's boyfriend at the time of trial (R 142-143). According to Albright, Patricia Sieniarecki was "very, very skinny" when he first met her, and appeared to be "in [her] sixties," rather than her correct age of 52 (R 143). Since Albright worked as a long distance truck driver, he was not consistently in the presence of the Sieniarecki family (R 144, 165). Although Patricia Sieniarecki "occasionally" ate in Albright's presence, he noted she was "a very light. . . [and] picky" eater; however, Albright noted, she did drink "two six packs" of beer per day (R 145).

Albright noted that the family home in North Miami was in bad condition, with a hole in the roof and a "shot" electrical system (R 147, 169). Neither Petitioner or Patricia Sieniarecki worked at that time; instead, the Sieniarecki brothers either worked or went to school (R 147). Subsequently, all family members moved out of the North Miami home after it was sold to avoid foreclosure; according to Albright, after the sale of this residence, Patricia Sieniarecki appeared "despondent. . . [and] very quiet" (R 149, 168, 172). Thereafter, Petitioner, Albright, and Patricia Sieniarecki moved to an apartment in Dania; this property had no electricity or air conditioning (R 150-151, 169). Albright carried

Patricia Sieniarecki into the upstairs apartment, since she was "too tired to walk" (R 153). The only food kept inside the premises was for upcoming meals; at that time, Patricia Sieniarecki continued to be a "very finicky" eater, except for chili dogs and Kentucky fried chicken products brought to her by her son, David Sieniarecki (R 154, 324, 331). Albright was unsure as why Patricia Sieniarecki continued to live with Petitioner, but felt that Petitioner's brothers wanted to live on their own; Petitioner was still unemployed at this time (R 156-157). Albright noted that Petitioner purchased diapers for Patricia Sieniarecki, and that neither he nor Petitioner's brothers helped feed or bath Petitioner's mother (R 157-158). Albright testified he saw no bed sores on Patricia Sieniarecki, nor did Petitioner mention this to him (R 159). Albright recalled once hearing Patricia Sieniarecki "yell out" that she did not want to see a doctor, since she did not like doctors subsequent to her hip surgery; however, Albright did not hear Patricia Sieniarecki indicate she wanted to die (R 159, 167). Although Albright thought that Patricia Sieniarecki changed her own diapers, then threw them on the floor, he was never present when she either ate or bath (R 160). The last time Albright recalled Patricia Sieniarecki being alive was when she called out from her room at 11:30 p.m. the evening prior to the time Petitioner discovered her dead (R 153, 161).

On cross-examination, Albright noted that he met Petitioner

and Patricia Sieniarecki in a bar in 1995; at that time, he was unaware that Patricia had needed hip surgery (R 163-165). Albright testified that Patricia Sieniarecki took care of herself at this time (R 166). When Albright saw Mrs. Sieniarecki prior to her death, he detected no foul smell inside her room, which appeared clean, since Petitioner would "wipe down" the room periodically after changing Patricia Sieniarecki's diapers (R 170). Albright also noted that Petitioner offered her food and juice, but Mrs. Sieniarecki "always turned it down" (R 170-171). Likewise, Mrs. Sieniarecki regularly declined Albright's offer to help her bathe, since she preferred to stay in her room (R 173). When Albright recommended to Petitioner in Patricia Sieniarecki's presence that she see a doctor, Patricia responded "no" in a "very firm" manner (R 173). Finally, Petitioner appeared to Albright to be "obedient" to Patricia Sieniarecki's wishes (R 174).

Lloyd Fountain managed an apartment complex on Griffin Road in Davie in October, 1996 (R 178). In September, 1996, Fountain met Petitioner and John Albright, who were looking for an apartment (R 181-182). Both Petitioner and Albright sought a downstairs apartment, citing their parking needs (R 183). Albright told Fountain that he would carry Patricia Sieniarecki up into the apartment, but she would not be carried downstairs "any more" (R 184). While speaking with Petitioner and Albright, Fountain noted Patricia Sieniarecki speaking with his children as if she knew

them, which she didn't; Mrs. Sieniarecki also spoke nonsensically with Fountain's wife, then "mumbled to herself" while sitting in Petitioner's car(R 185-186, 188). Eventually, Petitioner moved into the apartment with Albright and Patricia Sieniarecki on September 26, 1996 (R 190). From his vantage point as the apartment complex's live-in manager, Fountain noted that Petitioner and Albright left their apartment once or twice daily, but never in the company of Patricia Sieniarecki (R 191, 205). Although this apartment had central air conditioning, the electricity was not turned on for two weeks after Petitioner moved into the premises (R 196). Fountain noted that he occasionally entered Petitioner's apartment subsequent to September, 1996, never noticing the smell of urine or feces inside the premises (R 204-205).

Al Sieniarecki, Petitioner's brother, lived with Petitioner, Patricia Sieniarecki, his brother David, and John Albright in a home in North Miami until 1996 (R 208, 210-211). Al noted that this home was eventually sold to avoid foreclosure, and that Patricia Sieniarecki had suffered a hip injury requiring two surgeries (R 212-213). Patricia Sieniarecki's husband died before Patricia left rehabilitation after the second surgery (R 213). Patricia had quit her long-time job due to her hip injuries, subsequently needing a walker, then a wheelchair (R 214-215). Al Sieniarecki noted that his mother "didn't ordinarily like doctors" after her surgeries, and drank whiskey "nightly" (R 215-216,228). Nor could she drive

after her surgery, instead needing help to leave her home (R 217). Al Sieniarecki noted that his mother's children brought her food, since she couldn't cook after her surgery; specifically, she "ordered" chili dogs from her son David Sieniarecki (R 218-219). Al thought that "some times" his mother would go to the bathroom by herself; if not, Petitioner would help her (R 219).

After the family's home was sold, Al and David Sieniarecki lived together with a family friend, Jeff Gowan; additionally, the brothers paid for an apartment for Petitioner, Patricia Sieniarecki, and John Albright (R 221-222, 224). Al said that Petitioner took care of her mother because the brothers were either working or in school at this time (R 222). Al Sieniarecki saw his mother once after her move with Petitioner to Dania; he would occasionally bring diapers, which his mother sometimes refused to wear (R 225). Al admitted not helping to bathe, wash, feed, or change his mother at any time (R 226).

On cross-examination, Al Sieniarecki admitted that when he and his brothers were working while family lived in Miami, they occasionally left their mother alone (R 230). He found Patricia Sieniarecki to be a "very, very picky eater," often refusing to eat food offered by Petitioner (R 231-232). Al Sieniarecki also found that his mother displayed no "unawareness" in his presence (R 232). Finally, Patricia Sieniarecki once refused to go to the doctor even after complaining of pain after her second hip surgery (R 234).

Ariston Ann Price, a forensic pathologist with the Broward County Medical Examiner's Office, was called to the scene of Patricia Sieniarecki's death on October 12, 1996 (R 236-237, 240). Price found Patricia Sieniarecki dressed only in a shirt, with no sheets on her bed, which was covered with feces; additionally, Mrs. Sieniarecki had feces on her legs and hands, and the mattress where she laid was soiled with urine and feces under her body (R 242-245). To Price, Mrs. Sieniarecki appeared "much older" than her correct age of 50 (R 246). Price noted that Patricia's mouth was sunk in her teeth, her teeth were rotted out, and her hair was matted (R 246). Price testified that the shrinking eyes were caused by "very severe dehydration" (R 246). Finally, Price noted maggots on her buttocks and back (R 248). At the time of her death, Patricia Sieniarecki stood 5 feet 3 inches tall and weighed 68 pounds (R 249). She had bed sores on her back, buttocks, and feet, which Price opined could have been caused by either laying in the same position or by poor skin care (R 249-251, 253). Mrs. Sieniarecki's legs, thighs, and buttocks were all red from irritation caused by urine and feces (R 248).

After conducting an autopsy, Price determined that Mrs. Sieniarecki suffered from "acute abnormality" of her bladder and vagina, caused by a severe infection (R 259-260). Price felt that this bladder infection "probably" caused Mrs. Sieniarecki's death, and that hygiene was a "factor" in causing the infection (R 265-

266). Price noted that Mrs. Sieniarecki also had "poor muscle mass," due to malnutrition, and that a lack of food particles or fluids inside her "intestines" indicated dehydration (R 269-271). Price also found Patricia Sieniarecki suffered from cirrhosis of the liver, itself caused by long-term alcoholism, but that this disease did not contribute to her death (R 272-276). In sum, Price opined, Patricia Sieniarecki died from a blood and bladder infection caused by dehydration and malnutrition, rendering her death "natural" (R 290-291, 294, 319). Price could not state with certainty the time of her death, but noted that she could have been alive at 11:30 p.m. the evening before being found dead (R 297-298, 320). Price admitted that Mrs. Sieniarecki had no bruises on her body, and that her brain displayed no abnormality suggesting senility (R 277-280, 304, 311-312).

David Sieniarecki, Petitioner's brother and Patricia Sieniarecki's son, testified that the family home in North Miami was sold in 1996 (R 324, 327). Patricia Sieniarecki had stopped working after her two hip surgeries, but continued drinking whiskey (R 328-329). She couldn't walk much after her surgeries, and was a "picky eater" who basically only consumed chili dogs and spaghetti (R 330-331). He also noted that she typically refused to bath (R 342). David noted that the family home was sold to avoid foreclosure, that his mother did not appear to want to deal with the situation due to her husband's death, and that she appeared to

"give up" subsequent to his death (R 331, 333-334). Both David and Al Sieniarecki wanted Petitioner to take care of their mother because they were at work or school, and hence was not at home often enough to do so themselves (R 335). After Petitioner and Patricia Sieniarecki moved to Dania, David saw them once or twice a week, bringing his mother's "favorite foods" to eat (R 336-337,347). At this, Petitioner did not tell David that their mother had problems eating or bathing (R 338). David admitted not helping to change or bath his mother at any time (R 338-339). Like John Albright and Al Sieniarecki, David testified that his mother refused to see doctors, and refused to do anything physical after her husband died (R 339-340, 344-345). Indeed, Mrs. Sieniarecki got angry when the subject of going to the doctor was repeatedly raised by her children (R 345). David also noted that his mother was "not always interested" in the food he brought to her (R 347).

On cross-examination, David admitted that Petitioner lived "only sporadically" in the family home, but that the brothers lived there "constantly" (R 342-343). Patricia Sieniarecki had applied for SSI benefits post-surgery, which were denied prior to the house being sold due to tax liens (R 343).

Broward Sheriff's Office homicide detective John Palmer met Petitioner on October 12, 1996, in response to a radio report of the death of Petitioner's mother (R 351-352). Palmer noted that the apartment was "sparsely furnished," and had no electricity or food

inside the refrigerator (R 353-354). Patricia Sieniarecki's bedroom included a mini refrigerator, television, and bed covered with a single sheet (R 355). Mrs. Sieniarecki was unclothed except for a shirt (R 356). Later, Palmer took a taped statement from Petitioner, which was published to Petitioner's jury as state exhibit 17 (R 359). In this statement, Petitioner admitted that her mother lived with her in the apartment, and had lived there for two weeks prior to her mother's death (R 361-362). Petitioner told Palmer that Patricia Sieniarecki had last seen a doctor one year prior to October, 1996 (R 364, 366). Petitioner explained that the lack of electricity in the apartment was due to her lack of money (R 365). Although Petitioner told Palmer she brought her mother food, she was unsure if her mother ate the food (R 366). Despite being unemployed at the time, Petitioner told Palmer that she was Patricia Sieniarecki's "sole provider," except for the chili dogs brought to Patricia by David Sieniarecki (R 366). Petitioner noted that she occasionally had to place food in her mother's mouth, otherwise her mother "wouldn't eat nothing" (R 367-368). Petitioner admitted not contacting any social service agency concerning her mother's lack of appetite (R 368). Petitioner reported last seeing her mother at midnight the previous evening, "bitching" and/or "yelling" for Petitioner to get her water (R 369). Petitioner testified that she put a new diaper on her mother, then gave her water (R 369). Petitioner explained the feces on the

wall in her mother's room as being caused by Patricia Sieniarecki rubbing feces on her body, then on the wall (R 370). Thereafter, the taped statement ended (R 371). Palmer noted that when the body was discovered, it contained bed sores, as well as maggots in the vagina (R 372). Palmer also noted that Patricia Sieniarecki's body was covered with feces (R 370-374).

After the state rested, the defense presented two witnesses during its case-in-chief, including Petitioner, who was 28 years old at the time of trial (R 454). Petitioner's parents were Patricia and Albert Sieniarecki (R 454). She testified that both drank "too much" (R 455). Patricia had been twice hospitalized due to hip injuries; Albert died while Patricia was in rehabilitation after the second surgery (R 455-457). Petitioner was living in the family home in Miami only "off and on" at this time (R 457). While living at home, Patricia Sieniarecki was able to bathe, and use the bathroom alone (R 458). Eventually, David Sieniarecki sold the home to avoid foreclosure (R 459). Later, Patricia Sieniarecki quit walking when living in Petitioner's apartment (R 459). Petitioner testified that her mother smoked and drank whiskey until David Sieniarecki stopped bringing her alcohol and cigarettes (R 460). Petitioner's mother would only eat chili dogs and spaghetti (R 461). Petitioner had attempted to get her mother to walk and go to the bathroom alone, as well as go to the doctor; however, Patricia would respond by yelling that Petitioner "couldn't make her," and

would not "be her daughter" if Petitioner did so (R 462-463). Petitioner felt she couldn't force her mother to do anything she didn't want to do, including eat (R 463).

After the move to Dania, Petitioner began dressing her mother in diapers because she was "too lazy" to go to the bathroom (R 463-464). Petitioner admitted only she changed these diapers (R 464). Patricia Sieniarecki would habitually take the diapers off, complaining that they itched, then throw them against the wall in her bedroom (R 464). Petitioner attempted to clean up the mess her mother made in the bedroom (R 465). Petitioner testified that she had no medical training (R 466-467). She noted that her mother did not complain of any medical problems prior to her death (R 467). Petitioner tried to take care of her mother because her brothers refused to do so; however, since Petitioner was not working, she was constantly without money to purchase food or other necessities (R 468-470). Three or four times, Petitioner asked her mother to go to the doctor after their move to Dania (R 474). Since Mrs. Sieniarecki refused to do so, Petitioner did not call any doctors on her behalf (R 477). Petitioner's mother refused to eat "homemade" food (R 476). Petitioner did not notice any bed sores or diaper rash on her mother, claiming to clean Patricia Sieniarecki "regularly" (R 477-478).

Lorraine Wincor, a clinical psychologist, gave Petitioner a series of I.Q. tests (R 409, 411-412, 414, 416). Petitioner had told

Wincor that she was "raised by alcoholic parents," that her mother was "severely depressed" by the loss of her husband and house, and that Patricia Sieniarecki refused to see doctors (R414-415). Wincor found Petitioner's I.Q. of 79 to be "below borderline to normal" (R 418). However, according to Wincor, Petitioner "scored low" in various subtests for "understanding, common sense, [and] problem solving," as well as her store of "general information" (R 418-419, 421). Wincor testified that Petitioner was a "typical" child of alcoholic parents who was "compliant [and] eager to please" concerning her mother's wishes (R 423-424). Thus, according to Wincor, Petitioner was unlikely to take her mother to the doctor over her mother's objections (R 424-426).

After the trial court denied defense counsel's renewed motion for judgment of acquittal, Petitioner was found guilty of the lesser-included offense of neglect of a disabled adult (R 43, 572). This appeal follows.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

Florida Statutes, Section 825.102 (3) (1995) violates the due process provisions of the United States and Florida Constitutions for three (3) distinct reasons. First, the imposition of an affirmative duty to act on Petitioner as a "caregiver" vis-a-vis her mother, a competent adult, a duty nonexistent at common law, transforms Petitioner's otherwise innocent conduct into criminal liability in violation of substantive due process limitations on the state's police power. Second, various terms used in the definitional portion of Chapter 825 are vague, preventing a person of ordinary intelligence from conforming her conduct to the statutes purported limitations. Finally, Section 825.102 (3) improperly imposes a duty of medical and hygienal care on Petitioner towards her mother, even though the evidence at trial established Patricia Sieniarecki's refusal to seek medical care, to eat nutritious meals, or cooperate in matters of personal hygiene, activities to which Mrs. Sieniarecki retained her constitutional right to privacy. Under these circumstances, due process was violated when Petitioner was criminally punished for acts or omissions of her mother in the exercise of the mother's constitutional right to privacy. Wherefore, Florida Statutes, Section 825.102 (3) must be declared unconstitutional, both facially and as applied.

ARGUMENT

POINT ON APPEAL

FLORIDA STATUTES, SECTION 825.102 (3) (1995) MUST
BE DECLARED UNCONSTITUTIONAL, BOTH FACIALLY AND AS
APPLIED.

Both the trial court and the Fourth District Court of Appeal rejected Petitioner's due process challenge to Florida Statutes, Section 825.102 (3) (1995). This was error.

The information filed below alleges that Petitioner "while in the position [of] caregiver, did then and there unlawfully cause the death of a human being, to wit: Patricia Sieniarecki, a disabled adult, by and through Petitioner's own culpable negligence. . . without lawful justification or excuse, to wit: by failing to or admitting to provide Patricia Sieniarecki with the care, supervision, or services necessary to maintain her personal health or well being, including, but not limited to failing to provide food, clothing, medicine, shelter, supervision, and medical services" (R 4). Florida Statutes, Section 825.102 (3) (1995) provides:

(a) neglect of an elderly person or disabled adult means:

1. A caregiver's failure or omission to provide an elderly or disabled adult with the care, supervision, or services necessary to maintain the elderly person or disabled adult's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the elderly

person or disabled adult. . .

The neglect of an elderly person or disabled adult may be based on repeated conduct or a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or substantial risk of death, to an elderly person or disabled adult.

Florida Statutes, Section 825.101 (2) defines caregiver as a "person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult; caregiver includes, but is not limited to, relatives, court appointed or voluntary guardians, adult household members, neighbors, health care providers, employees, and volunteers. . . a disabled adult is defined as a person 18 years of age or older who suffers from a condition of physical or mental capacity due to a developmental disability, organic brain damage or mental illness, or who has one or more physical or mental limitations that restrict a person's ability to perform the normal activities of daily life," 825.101 (4) (1995).

Petitioner first notes that Section 825.102 (3) violates due process by imposing an affirmative duty to act, or penalizes her failure to act, without requiring specific intent, see e.g. Lambert v. California, 355 U.S. 225 70 S.Ct. 240, 2 L.Ed.2d 228 (1957) (ordinance requiring convicted felon to register struck down, since ordinance punished a failure to act without requiring a showing of knowledge of duty to act); State v. Gruen, 586 So. 2d 1220 (Fla.3d

DCA 1991) (due process involved where statute imposed affirmative duty to act, then penalizes failure to act; in such circumstances, if the failure to act otherwise amounts to essentially innocent conduct, the failure of the penal statute to require some specific intent may violate due process); State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982)(culpable negligence manslaughter not an intentional crime).

In this case, no individual has a common law duty to provide care, supervision, or services to another person, see People v. Heitzman, 886 P.2d 1229,1243 (Cal. 1994) (adult child has no common law obligation to protect or care for aging parents); see also Rogers v. Gonzales, 654 S.W. 2d 509 (Tex. App. 1983); Estate of Chrzan, 353 N.E. 2nd 430, 41 Ill. App. 3d 270 (Ill.App. 1976) (no common law duty of child to support parents; Roth v. Roth, 571 S.W. 2d 659 (Mo. App. 1978); Welfare Commissioner v. Mintz, 280 N.Y.S. 2d 1007 (N.Y. Ad. 1967); In Re Marriage of Serdinsky, 740 P.2d 521 (Colo. 1987); Malenfant v. Melenfant, 639 A. 2nd 1249, 1252 (Pa. Super. 1994). In fact, the provision of care, supervision, and services are not household duties normally and gratuitously performed by family members, but are instead compensable by money. Indeed, this state's workers compensation statutes specifically provide for compensation for the performance of "attendant care,"see Florida Statutes, 440.13 (b) (1995). Under the statute, the First DCA in Montgomery Ward v. Lovely, 652 So. 2d 509

(Fla.1st DCA 1995) held that attendant care, as distinguished from household services, includes bathing, dressing, administering medication, and assisting with sanitary functions; see also Bass v. I.C. Fertilizer, 655 So.2d 1225 (Fla.1st DCA 1995) (attendant care includes assisting person in getting out of bed, walking to the bathroom, bathing, changing bandages, getting medication, and driving to the doctor); Dade County School Board v. Gorier, 648 So.2d 805 (Fla. 1st DCA 1995) (administration of medicine is "attendant care"). In this case, Section 825.102 (3) creates an affirmative duty, then penalizes the failure to perform that duty (care, supervision, or services) which otherwise constitutes innocent conduct. As such, the statute violates due process.

Additionally, the aforementioned statute is facially unconstitutional because it is impermissively vague in all its applications, since it fails to sufficiently define various statutory terms. In this regard, the due process clauses of the United States and Florida Constitutions requires a statute to (1) provide adequate notice to the public as to what conduct is proscribed, and (2) provide clear standards to limit law enforcement discretion in effecting arrest, to avoid arbitrary and discriminatory enforcement of the law, Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Linville v. State, 359 So.2d 450, 451-452 (Fla. 1978). A law containing vague prohibitions which fails to meet either of these requirements violates due process.

For example, in Brown v. State, 629 So. 2d 841 (Fla. 1994), this Court struck down as facially unconstitutional a statute criminalizing the sale of a narcotic within 200 feet of a "public housing facility;" this court found the challenged statutory authority vague, since the term "public housing facility" was not defined, id. at 843. As the U.S. Supreme Court held in Connally v. General Constitution Company, 269 U.S. 385, 391 (1926):

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to the statute what conduct on their part would render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differs in its application violates the first essential due process of law; it is, important elements cannot be left to conjecture, or be supplied by either the court or the jury; rather, they must be clearly defined within the statutes.

269 U.S. at 392.

Here, Section 825.102 (3) is unconstitutionally vague for first failing to sufficiently define the terms "care, supervision, [and] services". Although the statute gives a broad definition of said terms as "including, but not limited to" the enumerated items, the use of language "including, but not limited to" fails to give notice as to what type of care, supervision, or services are required, and thus violates due process, see e.g. State v. J.D., 937 P.2d 630 (Wash. 1997) (Youth curfew ordinance excepted minors

en route to or from "an activity included, but limited to, dance, theater presentations, and sporting event" was unconstitutionally vague). Likewise unconstitutionally vague under Section 825.102 (3) is the term "repeated conduct," a term previously found unconstitutional in Commonwealth v. Kwiotkowski, 637 N.E. 2d 854, 857 (Mass. 1994), where the Massachusetts Supreme Court held that "the uncertain meaning of repeated patterns of conduct or repeated series of acts presents its own constitutional vagueness[problems]"

Section 825.101 (2) is also unconstitutionally vague for failing to define the terms "entrusted, or "assumed responsibility," since the statute fails to provide any guidance as to the meanings of those terms. For example, it is questionable whether this statute applies to an individual who advises the family of an elderly disabled neighbor that he or she will check on the neighbor. Also, can one be entrusted to care for an elderly or disabled adult without that individual's consent? Or, would the statute apply to one who attempts to give monetary support, but who has no physical contact with the elderly or disabled adult? This statute also fails to define the term "responsibility," particularly in light of the lack of any common law duty to care for another. As this Court noted in Brown, statutes failing to "includes sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions" violate due process, 629 So.2d at 843. Moreover, Section 825.101

(4) is unconstitutionally vague for failing to define the terms "limitations, restrictions, [and] normal activities of daily living," since such terms do not sufficiently define the degree of restriction required before someone is labeled a disabled adult. For example, must limitations make a "normal activity" impossible, or is it sufficient if that "normal activity" is just more difficult or taxing? What would constitute a "normal activity of daily life?" Does an inability to drive render someone disabled? Does an inability to read because of poor eyesight constitute a disability? This statute does not adequately define these terms so that a person of common intelligence can determine whether another individual is disabled.

Finally, Section 825.102 (3) violates Article I, Section 23 of the Florida Constitution, Florida's right to privacy amendment, which was found by this Court in In Re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990) to include the right to refuse treatment:

An incompetent person has the same right to refuse medical treatment as a competent person. . . indeed, the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike.

Id. at 11; see also JFK Memorial Hospital v. Bludworth, 452 So. 2d 921 (Fla. 1984). As a result, an elderly or disabled adult has a constitutional right to refuse to seek medical treatment or services, and that right extends to all relevant decisions concerning one's health, 568 So.2d at 11. Moreover, that right is

not qualified depending on whether the medical procedure or decision is major or minor, id. at 11, n.6. Additionally, a patient's right to privacy may be exercised by close family members or friends id. at 13. Accordingly, Petitioner was permitted to assert Patricia's Sieniarecki's privacy right to refuse medical treatment because she was the decedent's daughter. In this case, Patricia Sieniarecki had not been declared incompetent. Because an individual is presumed competent under the law, Petitioner is being prosecuted for not interfering in the decedent's exercise of her right to refuse medical treatment or services.

Petitioner would also suggest that the aforementioned statutes are unconstitutional as applied of the facts of her case, which involved the following:

- (1) Petitioner was a natural daughter of the deceased;
- (2) Petitioner lived with the decedent on and off for one year prior to the decedent's death;
- (3) The decedent's two adult sons also lived with decedent until twelve days before her death;
- (4) Petitioner lived alone with the decedent for twelve days prior to her death;
- (5) The decedent refused any medical treatment or services; and
- (6) The decedent was competent.

Under those circumstances, Section 825.102 (3) was unconstitutional as applied because the decedent was not mentally

incompetent, yet maintained her right to refuse medical treatment or services. In fact, the decedent refused such treatment and services; in said circumstances, Petitioner cannot be prosecuted for failing to interfere with Patricia Sieniarecki's exercise of her right to privacy. Section 825.102 (3) is likewise unconstitutional as applied, because that statute imposes a duty of care while penalizing the failure to uphold that duty without requiring specific intent; Section 825.101 (2) is unconstitutional as applied, because Patricia Sieniarecki was not "entrusted" to Petitioner, and did not abdicate any of her medical decisionmaking to Petitioner as to medical services. Moreover, Petitioner was not legally responsible for the decedent, since she was not a guardian or trustee, and assumed no legal responsibility for the decedent. Finally, Section 825.101 (4) is unconstitutional as applied because the decedent did not have physical or mental limitations that restricted her ability to perform normal activities of daily life; on the contrary, the decedent freely and voluntarily chose to refuse medical treatment, to remain in her bed, and abstain from daily activity. Under said circumstances, Petitioner cannot be held criminally responsible for another competent adult's decisions.

As a result, Petitioner's conviction and sentence in this case must be reversed and remanded with directions that Petitioner be discharged for this offense, and that Florida Statutes, Sections

825.101 (2) (4), and 825.102 (3) (1995) all be declared unconstitutional, both facially and as applied.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, this cause must be remanded with proper directions.

Respectfully submitted,
RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

JOSEPH R. CHLOUPEK
Assistant Public Defender
Florida Bar No. 434590

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ETTIE FEISTMANN, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this _____ day of May, 1999.

Attorney for Theresa Sieniarecki