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IN THE SUPREME COURT OF FLORIDA

WILLIAM HERMANSON and
CHRISTINE HERMANSON,

Petitioners,

v.

Case No. 77,067

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The Second District Court of Appeal On Motion for Rehearing and Clarification denied rehearing but certified the following question to this Court.

> IS THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985)?

Respondent has addressed this question as issue one in the Brief of the Respondent on the Merits.

Respondent has also addressed the other four (4) issues argued by the petitioners. However, these issues are not included in the certified question. *See,* Gould v. State, ____ So.2d ____ (Fla. 1991, Case No. 75,833, Opinion filed March 21, 1991), footnote 2.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as outlined in petitioners' brief, and the facts contained in the opinion of the district court found in Hermanson v. State, 570 So.2d 322 (Fla. 2d DCA 1990).

SUMMARY OF THE ARGUMENT

The Second District properly had that Section 415.503(7)(f), Florida Statutes (1985), is not a defense to a criminal prosecution under Section Section 827.04(1), Florida Statutes (1985). Despite the fact that this spiritual treatment proviso was originally a part of Chapter 827, the spiritual treatment proviso pertained only, by its very terms, to the section of 827 concerning with the reporting, investigating and preventing of child abuse. It was never made applicable to that section concerned with felony child abuse.

Petitioners' claim that they were denied due process because they had no notice that their conduct was criminal is meritless. The fact that petitioners' conduct may not have been violative of one noncriminal statute does not authorize them to ignore the general criminal laws and allow their child to die.

A judgment of acquittal is properly denied where all of the evidence adduced at trial and the logical inferences therefrom establish a *prima facie* case of guilt of the criminal charges. *Sub judice,* all of the elements of felony child abuse and third degree murder were proven. Even assuming, *arguendo,* that Section 415,503 (7)(f) was available to the defendants, it was not incumbent upon the State to come forward with evidence of any affirmative defense; that duty lies with the party claiming the defense.

Petitioners' constitutional right to freedom of religion was not violated by this criminal prosecution. The right to freedom

of religion or the practice thereof does not permit one to commit murder. One's constitutional rights under the religion clause of the Constitution must give way to the State's interesting in protecting the health, safety, welfare and life of minor children. Furthermore, any scrutiny of the defendants religion was invited by the affirmative defense presented by them.

The trial court correctly denied the motion for mistrial since the comments by the prosecutor concerning the Christian Science use of conventional medicine was a fair comment on the evidence and reasonable inferences therefrom. The testimony at trial indicated the Christian Science nurse sought permission from the practitioner to call an ambulance. The practitioner in turned called Boston, the church headquarters. After the call, the practitioner gave the nurse permission, and an ambulance was paramedics were called. It is, therefore, implicit in this scenario that the church sanctioned medical treatment under these circumstances.

ARGUMENT

ISSUE I

THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), DOES NOT PROVIDE A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985).

The Second District held, after a lengthy analysis of the applicable statutes that the only error presented in Petitioners' direct appeal was a pretrial ruling that Petitioners were entitled to a statutory defense for the criminal charges against them in accordance with Section 415.503(7)(f), Florida Statutes (1985). That subsection provides, in the definition of "harm" as used in Sections 415.502-415.514, that

> a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone...

After a careful review of the purpose and legislative history behind this statute, the second district concluded that it should not have been available as a statutory defense to the criminal child abuse statute which Petitioners were charged with and convicted of violating.

The argument in Petitioners' brief as to this issue does not address the reasoning of the district court, but in fact is more devoted to the claim that, if the court was wrong in its conclusion that this statute was not available as a defense, then Petitioners' motion to dismiss the charges should have been

granted by the trial court. Petitioners' only real contention to support the availability of subsection 415.503(7)(f) as a defense is the fact that the subsection was initially contained in Chapter 827, which contains the criminal prohibitions against child abuse and neglect. In presenting this contention, Petitioners fail to point out several salient facts which were obviously critical to the decision below. As noted by the second district

> It is true that the spiritual treatment proviso was first enacted in chapter 75-185, Laws of Florida, and made a part of section 827.07(2). It thus became part of the 1975 statutory scheme for reporting and investigating child abuse. By the specific terms of section 827.07(2), the spiritual treatment proviso was limited to the stated purposes of section 827.07, reporting, investigating and prevention of child abuse, and did *not* form part of section 827.04(1), the section which defines the crime of felony child abuse. That entire reporting and investigative scheme, now including the spiritual treatment proviso, was later moved, enlarged and renumbered sections 415.502-415.514, where it continues to be found today. Like the original spiritual treatment proviso when it was contained in section 827.07, the same spiritual treatment proviso, appearing today in section 415.503, is still limited to those same reporting, investigative, and prevention purposes of sections 415.502-415.514. In contrast to its inclusion of the spiritual treatment proviso for purposes of sections 415.502-415.514, the legislature chose *not* to include the spiritual treatment proviso in the statutes creating the crime of child abuse, section 827.04(1), the crime of third degree murder, section 782.04, and the crime of manslaughter, section 782.07. The specifically limited application of section 415.513 is also in contrast to the recognized statutory affirmative defenses the

> legislature has chosen to include in, for example, chapters 776 and 782.

Hermanson v. State, 570 So.2d 322, 330-331 (Fla. 2d DCA 1990).

The second district also relied on the fact that the statutory scheme of sections 415.503-415.514 is primarily administrative in nature, and does not provide any criminal penalties for actual child abuse or neglect. Thus, the court limited the applicability of section 415.503(7)(f), consistent with the express mandate of the legislature, to investigations by the Department of Health and Rehabilitative Services in carrying out the preventive functions required by chapter 415.

The holding of the second district on this issue is consistent with that of courts in other jurisdictions considering similar statutory schemes. For example, in Walker v. Superior Court, 763 P.2d 852, *cert. denied,* 491 U.S. 905, 109 S.Ct. 3186, 105 L.Ed.2d 695 (1988), the California Supreme Court held that neither the provision in the child welfare statutes (Cal. Welf. & Inst. Code §18950 *et seq.* (West 1980)) that a child receiving treatment by prayer could not be considered abused "for that reason alone" nor the provision in the misdemeanor child neglect statute exempting parents who utilize prayer treatment in lieu of medical care from that statute provided a defense to charges of involuntary manslaughter and felony child endangerment brought against a mother whose child died of meningitis.

The Superior Court of Pennsylvania addressed a similar situation concerning an attempt to use that state's protective

services law in a criminal prosecution. *See,* Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985), *cert. denied,* ____ U.S. ____, 109 S.Ct. 55, 102 L.Ed.2d 34 (1988). In this case the court considered a claim by the parents of a child who had died of a brain tumor which had been treated by "God" to the exclusion of modern medicine. The Pennsylvania court held that the parents' attempted reliance on the child protective services law, Pa. Stat. Ann. tit. 11, §2201 *et seq.*, was misplaced, although that law specifically excluded cases where spiritual treatment was used from the requirements of reporting suspected child abuse, since the failure to report was not an issue in that case. 497 A.2d at 628.

Similarly, in Hall v. State, 493 N.E.2d 433 (Ind. 1986), the Supreme Court of Indiana found that the parents of a boy who died of pneumonia and who convicted of reckless homicide could not rely on language in the child neglect statute to overturn their criminal conviction. The child had not been treated medically for his illness, instead the parents relied on spiritual treatment. Ind. Code Ann. §35-46-1-4 (Burns 1985 Repl.) exempts parents from responsibility when spiritual treatment is provided instead of medical care. However, the court noted that the homicide statute did not include any such defense and that therefore the legislature had distinguished between neglect resulting in serious bodily injury and neglect resulting in death.

The Florida legislature, unlike those of California and Indiana, has not seen fit to absolve parents of any criminal liability when spiritual treatment is provided in lieu of conventional medical care. And unlike Pennsylvania, Florida has not exempted those situations from the statutorily mandated requirement that suspected child abuse be reported to and investigated by the Department of Health and Rehabilitative Services. Therefore, the petitioners' argument that Section 415.503(7)(f), provides an absolute defense to a criminal charge of child abuse is even less compelling in Florida than in those states which have refused to recognize a "religious exception" defense when a child dies following spiritual treatment to the exclusion of medical treatment.

Since the definition of "harm" provided in Section 415.503(7)(f), is specifically limited to the statutes governing the reporting and investigation of suspected child abuse, and the criminal prohibition against child abuse contained in Section 827.04 obviously serves a different purpose than Section 415.503 and requires a jury to find "physical or mental injury to the child [which] causes great bodily harm, permanent disability, or permanent disfigurement", it is respectfully submitted that the district court's ruling that

> ..., the spiritual treatment proviso in the statutory scheme for protecting children and preventing child abuse by way if reporting and investigating allegations of child abuse is not a statutory defense to, or an immunity or exemption from, prosecution for felony child abuse, third degree murder or manslaughter.

Hermanson v. State, 570 So.2d at p. 331.

The certified question presented to this Court, *i.e.*, Is the spiritual treatment proviso contained in Section 415.503(7)(f), Florida Statutes (1985), a statutory defense to a criminal prosecution under Section 827.04(1), Florida Statutes (1985)?, should be answered in the negative.

ISSUE II

THE PETITIONERS WERE NOT DENIED DUE PROCESS.

The Second District Court of Appeal addressed the petitioners' due process issue and concluded that Sections 827.04 and 782.07 comply with the requirements of due process, *i.e.*, notice of the proscribed conduct. The district court relied in part on Walker v. Superior Court, *supra*, which addressed the identical issue and found no due process violation. Walker was charged with involuntarily manslaughter and felony child endangerment stemming from her daughter's death from meningitis after Walker treated her with spiritual treatment rather than medical care. Walker argued that, because the California misdemeanor child neglect statute includes an exemption for parents who provide spiritual treatment in lieu of medical care, the statutory scheme as a whole deprived her of her due process right to fair notice, "by allowing punishment under Sections 192(b) and 273(1) for the same conduct that is assertedly accommodated under Section 270". *Id.* at 872. In rejecting this claim, the court noted that the purposed of the statutes were clearly distinguishable, and, in light of the different objectives, the statutes could not be said to constitute "inexplicably contradictory commands" with respect to their respective requirements.

It is interesting that, like the petitioners herein, Walker also framed her due process argument in the form of a rhetorical

question: "Is it lawful for a parent to rely solely on treatment by spiritual means through prayer for the care of his/her ill child during the first few days of sickness but not for the fourth or fifth day?"[1] Both the Second District and the Walker court relied on language from Mr. Justice Holmes which said:

> "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree...'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor." (*Nash v. United States,* (1913) 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232; see also *Coates v. City of Cincinnati*, (1971) 402 U.S. 611, 614. 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214.) The "matter of degree" that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more. (*Burg v. Municipal Court,* 35 Cal.3d at p. 270, 198 Cal.Rptr. 145, 673 P.2d 732).

Accord, Commonwealth v. Barnhart, *supra.*, which rejected a similar due process/notice argument because testimony indicated that parents knew or should have known their son's death was imminent.

Any reliance by petitioners on Minnesota v. McKown, 461 N.W.2d 720 (Minn. App. 1990), is not well-founded. As petitioners acknowledge, the spiritual treatment exception is contained in the criminal child abuse statute in Minnesota. It

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[1] The Hermansons' question is phrased as, "How were the Hermansons to know at what point their reliance on prayer alone lost the express statutory approval, and became culpable negligence evincing a reckless disregard for human life equivalent to an intentional act?"

is clearly not in the Florida child abuse statute. The Florida legislative history is not, in petitioners' words, ambiguous. The fact that the spiritual treatment exception was a part of one section of the child abuse statute but was later moved to the reporting and investigative statute on child abuse evidences a clear intent that the exception has no part in the criminal statutes. The two statutes are separate and distinct and desisgned to address separate ills.

As the district court held, the petitioner's argument on this issue should be rejected. Since the statute upon which the petitioners claim to have relied clearly serves a different purpose than the criminal child abuse statute under which they were convicted, no inextricably conflicting commands are presented. And since petitioners knew or should have known that their daughter was seriously ill or dying, the "matter of degree" in which they relied upon spiritual care rather than conventional medical treatment presented a question for the jury as to whether the petitioners were culpably negligent in their treatment of Amy.

No due process violation has been demonstrated. The judgments and sentences should be affirmed.

ISSUE III

THE TRIAL COURT PROPERLY DENIED PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE STATE HAD ESTABLISHED A PRIMA FACIE CASE OF CHILD ABUSE AND THIRD DEGREE MURDER.

Petitioners' counsel, at the conclusion of the State's case, made a motion for judgment of acquittal alleging the State had failed to prove all of the essential elements of the crimes charged and had failed to prove that a religious exemption did not exist. The State argued an affirmative defense must be demonstrated by the defense not disproven by the State. The trial court denied the motion. The Second District affirmed this denial stating, "...; the evidence presented was sufficient for the jury to find that they [the Hermansons] had acted in reckless disregard of Amy's health, and ultimately, her life." Hermanson v. State, 570 So.2d at 337.

In moving for a judgment of acquittal, a defendant admits not only the facts that are stated and the evidence that is adduced but also every conclusion that is favorable to the adverse party which the jury might fairly and reasonably infer from the evidence. Peacock v. State, 498 So.2d 545 (Fla. 1st DCA 1986); Codie v. State, 313 So.2d 754 (Fla. 1975); Lynch v. State, 293 So.2d 44 (Fla. 1974) and Smith v. State, 63 So. 138 (Fla. 1913). The questions presented in this case are whether the State proved the elements of child abuse by willfulness or culpable negligence, and whether the State proved the elements of third degree murder, child abuse plus death.

The evidence at trial clearly demonstrated all of the elements of child abuse and third degree murder. Felony child abuse as defined in Section 827.04(1), Florida Statutes, involves four elements: (1) that the defendants willfully or by culpable negligence, deprived a child of necessary medical treatment, (2) causing great bodily harm, (3) that the defendants are the parents of the victim, and (4) the victim was under the age of eighteen years. There is no doubt in this case but that the victim was a child of seven years of age. There is also no doubt that the defendants are the parents of the deceased child. Thirdly, the State demonstrated that the child is dead; there certainly can be no greater bodily harm. Thus the only real question was willfulness or culpable negligence. The jury was later instructed (R1248-1249) on the meaning of culpable negligence:

> Culpable negligence: Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

The evidence, *sub judice,* established culpable negligence on the part of the petitioners.

As all parties have agreed, it became apparent on or about September 22, 1986 that the deceased child, Amy Hermanson, was ill. Dr. James Wilson, the doctor who performed the autopsy, testified that he spoke to the parents. They indicated to him that they had begun to notice changes in Amy as early as late August or early September. These changes included lethargy, sleepiness and weight loss. (R817-820) The parents called in a Christian Science practitioner for consultation and treatment on the 22nd of September. The treatment consisted of prayer and working on the victim's "identity" problem. On or about the 25th of September the parents left town to attend a Christian Science conference, and they left Amy in the care of a fellow Christian Scientist. The Hermansons did not return home until September 29, 1986. On the 29th Mr. Hermanson talked with Amy's grandfather who suggested that Amy had diabetes.

On September 30, 1986 the parents called in a Christian Science nurse for treatment of Amy. Amy's condition had worsened, and the nurse called an ambulance. The ambulance was called after the Christian Science practitioner called Boston. However, by the time the ambulance arrived Amy had died.

There was testimony from an employee of Mrs. Hermanson's, Helen Falb, that she noticed changes in Amy as early as August, 1986. (R843-846) She noticed circles under Amy's eyes and a dramatic weight loss; she indicated the child looked emaciated, like a skeleton. (R847) Victoria Neuhaus, who took piano lessons from Mrs. Hermanson, testified she saw Amy on the Wednesday

before she died. Ms. Neuhaus indicated Amy was obviously ill, and she told Mrs. Hermanson they could skip the lesson and take Amy home. (R871-873) Mrs. Hermanson chose to continue with the lesson, during the course of which, Amy crawled into the room on all fours asking to go home. (R874) Ms. Neuhaus told Mrs. Hermanson that she thought Amy was ill and should be taken to a doctor. (R875)

There was also other testimony from Amy's teachers, Nancy Strand and Laura Kingsley, concerning Amy's deteriorating condition during the three weeks prior to her death. (R897-927) Gary Christman worked in a store next door to the Hermanson's music academy. (R931-932) He began to notice a change in Amy from 4 to 6 weeks prior to her death. He notice she had a bluish tint to her skin, her arms were small and she had lost so much weight her clothing would not fit, even her socks would not stay up. (R933) He observed Amy balled up on the floor of the music academy and sleeping in the backseat of the car. (R935-936) Gale Whitmire, who worked for the Hermansons, also noticed changes in Amy. She saw Amy sleeping on the floor of the room where her mother was teaching. She also saw that Amy was noticeably thinner, her spine could be seen through her clothing. (R963)

The Second District summarized this testimony as follows:

> In the month or so before her death Amy was having a marked and dramatic weight loss, that she was almost skeletal in her thinness and this was a big change in her appearance. There were great dark circles under her eyes that had never been there before. Her behavior was very different from the usual;

she was lethargic and complaining whereas previously she had been bubbly, vivacious, and outgoing. She was seen lying down on the floor to sleep during the day when accompanying her mother to visit music students and lying down on the floor after school at her mother's fine arts academy. She often complained of not feeling well, that her stomach hurt and that she wasn't sleeping well. She was too tired during the day to participate in gym class at school. There was a bluish tint to her skin. Her breath smelled funny, one observer called it a "fruity" odor.

The pathologist who performed the autopsy testified to Amy's skeletal appearance, that her vertebrae and shoulder blades were prominent and her abdomen distended as if she were undernourished. Her eyes were quite sunken, due to the dehydration, although her parents had told the pathologist that on the day before her death she was drinking a lot of fluids by urinating frequently too. They also told him that they had noticed changes in Amy starting about a month previously. Amy had complained of constipation during the last week of her life but at no time seemed feverish although there was intermittent vomiting. The pathologist opined that the illness was chronic, not acute. According to her parents' talk with the pathologist, Amy seemed incoherent on the evening before her death although the next morning she seemed better. The pathologist also testified that vomiting and dehydration are compatible with flu-like symptoms but these, added to a four-week-long history of weight loss with the more severe conditions reported, would not be indicative of flu.

Finally, the jury was shown photographs of Amy taken shortly after she died before her body was removed from the home by the paramedics as well as some taken before the autopsy was performed. These provided a very graphic illustration of her deteriorated condition. (570 So.2d at 336-337)

This evidence demonstrates that it was obvious something was wrong with Amy. The parents had called in a faith healer without results. Without any visible change, the parents knew or should have known that without medical assistance great bodily harm or death would result. The trial court properly submitted that question to the jury for resolution, and the district court correctly affirmed the trial court's denial of the motion for judgment of acquittal.

Petitioners' argument that the judgment of acquittal should have been granted because the State did not prove the lack of a religious exemption is not well-founded. As was stated under Issue I above, Section 415.503(7)(f), Florida Statutes, is not an exemption to criminal prosecution under the child abuse or murder statutes. Section 415.503(7)(f) is simply an exemption, if at all, to the reporting requirements of Chapter 415.

To the extent that this Court should find Section 415.503(7)(f) an affirmative defense, it is a criminal defendant who must demonstrate he comes within such defense. *Cf.* Teague v. State, 390 So.2d 405 (Fla. 5th DCA 1980)(defendant relying on self-defense has burden of proving or going forward with evidence) and Evans v. State, 140 So.2d 348 (Fla. 2d DCA 1962)(defendant claiming insanity has burden of establishing same). Section 415.503(7)(f) indicates a parent legitimately practicing his/her religion and who does not get medical treatment for a child cannot be considered abusive or neglectful for that reason alone. (emphasis added)

The State's case in chief demonstrated more than mere failure to get medical treatment. The deceased child was visibly ill for several weeks. The parents called in a Christian Science practitioner. The child did not get better; her condition continued to worsen. Even after there was a suggestion of a medical cause for the child's problems, the parents did not seek to find out if this could be the situation. This is not mere failure to get medical care; this is a failure to get that care under circumstances which would have led any reasonable person to know that such care was imperative!

The trial court correctly denied appellants' motion for a judgment of acquittal.

ISSUE IV

THE PETITIONERS' CONVICTIONS DID NOT VIOLATE THEIR CONSTITUTIONAL RIGHT TO FREEDOM OF RELIGION.

As the Second District pointed out in its opinion, the jury was not called on to determine the reasonableness of the defendants following their religious beliefs, rather the jury was deciding whether the defendant's behavior was reasonable. Additionally, the Second District properly held that the reasonableness of a criminal defendant's actions is a proper function for the trier of fact, the jury, even when religious beliefs are involved. The district court said, quoting from Employment Div., Dept. of Human Resources v. Smith, 494 U.S. ____, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990):

> We [the United States Supreme Court] have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Educ. v. Gobitis,* 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted) We first had occasion to assert that principle in *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879), where we rejected

> the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

If the general laws can be applied to restrict the "practice" of ones religious belief in the context of polygamy, it is even more compelling when the general law concerns murder, manslaughter and child abuse!

In the context of restricting the practice of religious beliefs other courts have also held that practice must give way to the general laws of a state enacted to protective the public health and welfare. In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166-167, 170, 64 S.Ct. 438, 442, 444, 88 L.Ed 645, 653, 654 (1944), the Supreme Court also said:

> The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.... Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

The court in Prince cited to the New York case of People v. Pierson, 68 N.E. 243 (N.Y. 1903), where parents withheld necessary medical treatment from their 16-month old child. When

charged with a criminal offense upon the child's death, the parents raised a religious treatment defense based on Constitutional grounds. In rejecting the defense, the court held that a state is authorized to legislate for the protection of children, and that religious treatment was not a defense for a "public wrong".

Other appellate decisions have likewise rejected the argument that criminal convictions obtained against parents whose children have died following spiritual treatment only violate the First Amendment. *See,* Walker v. Superior Court, *supra*; Hall v. State, *supra*; Commonwealth v. Barnhart, *supra*.

This situation is distinguishable from the one addressed by this Court in Public Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989). In Wons the third district certified this question, "Whether a competent adult has a lawful right to refuse a blood transfusion without which she may will die?" Mrs. Won had refused a blood transfusion as a part of her practice of the Jehovah Witness religion. This Court recited the criteria enunciated in Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980), which is to be used in determining whether the state's compelling interest overrides an individual's right to refuse medical treatment. Those factors are, 1) preservation of life; 2) protection of innocent third parties; 3) prevention of suicide; and 4) maintenance of the ethical integrity of the medical profession.

It was determined that Mrs. Wons, an adult, had the right to refuse medical treatment. It was further determined that the minor children's need for the nurturing of two parents did not override the mother's right to refuse the treatment. Thus, it is clear that imminent death of the children was not the issue in the Wons case.

The petitioners assert that the jury must have scrutinized the validity of their religious beliefs in order to find them guilty. It is true that the First Amendment prevents judicial scrutiny into the reasonableness of a person's religious beliefs. United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). However, if the jury in this case scrutinized the formal doctrines of petitioners' religion, it did so at the behest of petitioners. As the district court pointed out, the defendants were allowed, albeit wrongly, to defense the criminal based on religion. They requested that the jury be instructed that they could not be found guilty if they were "legitimately practicing their religious beliefs". Thus, to the extent, if any, the jury considered the legitimacy of petitioners' religious belief, such scrutiny was invited by the defense.

Petitioners cannot be heard to complain on appeal for any error caused by them. White v. State, 446 So.2d 1031, 1036 (1984).

Neither the First Amendment nor Article I, section 3 of the Florida Constitution was violated by petitioners prosecution for felony child abuse, third degree murder or manslaughter in the

death of their minor child where the parents had failed to provide necessary medical treatment for the child.

ISSUE V

THE TRIAL COURT PROPERLY DENIED PETITIONERS' MOTION FOR A MISTRIAL SINCE THE COMMENTS BY THE PROSECUTOR CONCERNING CHRISTIAN SCIENCE RECOGNITION OF CONVENTIONAL MEDICAL TREATMENT WAS A FAIR COMMENT ON THE EVIDENCE.

Petitioners argue that a motion for mistrial made during the State's closing argument should have been granted because the State made statements not supported by the evidence. Respondent respectfully submits these comments by the prosecutor were references to evidence presented to the jury and logical inferences from that evidence. As such these comments were not improper, and the mistrial was properly denied. *See,* Breedlove v. State, 413 So.2d 1 (Fla.), *cert. denied,* 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982) and Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980).

During the closing argument by the State, the prosecutor commented on the fact that a Christian Science nurse was called in to treat Amy. (R1205) The nurse, Mary Jane Sellars, indicated she became concerned about Amy's condition and told the Christian Science practitioner that she had to call an ambulance. The practitioner said he had to call Boston first. (R1054) Ms. Sellars waited until the practitioner had completed his call; thereafter, the practitioner said she could call the ambulance. (R1055) An ambulance and the paramedics were in fact called. (R1055)

As a consequence of this testimony, the prosecutor further argued that the Christian Science Church used medical treatment under certain circumstances. This is a fair inference to be drawn from the evidence. The nurse thought medical assistance was needed. The practitioner acting on the nurse's request to get medical assistance, called the Boston headquarters. It is obvious that permission was given to seek medical treatment, since the practitioner then indicated an ambulance could be called.

A motion for mistrial is addressed to the sound discretion of the trial judge and is appropriate only when the alleged error is so prejudicial as to vitiate the entire trial. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Salvatore v. State, 366 So.2d 745 (Fla. 1978), *cert. denied,* 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979) and Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986). A mistrial is certainly not warranted when there is no error.

This is yet another issue, as pointed out by the district court, that arose because of the trial court's erroneous ruling that the spiritual treatment proviso of Section 415.503(7)(f) could be used as a defense to the criminal charges of murder, manslaughter and felony child abuse. However, this error notwithstanding, the district court found this argument by the prosecutor was in fact fair comment on the evidence. The logically conclusion from the events which occurred between the nurse and the Christian Science practitioner was that

conventional medical treatment was being allowed Amy by the Church.

CONCLUSION

Based on the foregoing arguments and citations of authority, the respondent respectfully requests that this Honorable Court affirm the decision of the district court of appeal holding that Section 415.503(7)(f), Florida Statutes, is not a defense to the crimes of murder, manslaughter, and felony child abuse. Additionally, respondent request should this Court find that statutory section a defense that the judgment and sentence be affirmed since the defendants were allowed to present that defense.

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 THOMAS H. DART, ESQUIRE, Dart, Ford, Strelec & Spivey, 1549 Ringling Blvd., Suite 600, Sarasota, Florida, 34236; LARRY KLEIN, ESQUIRE, Klein & Walsh, P.A., Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida, 33401; and WILLIAM G. CHRISTOPHER, ESQUIRE, Honigman, Miller, Schwartz & Cohn, 222 Lakeview Avenue, Suite 800, West Palm Beach, Florida, 33401, this 2nd day of April, 1991.

Peggy A. Quince

PEGGY A. QUINCE

and

Carol M. Dittmar/kb

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