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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO.: 77,067

WILLIAM HERMANSON and
CHRISTINE HERMANSON,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

PETITIONERS' REPLY BRIEF ON CERTIFIED QUESTION

THOMAS H. DART, of
DART, FORD, STRELEC & SPIVEY, P.A.
1549 Ringling Boulevard, Suite 600
Sarasota, Florida 34236
(813) 365-0140

and

LARRY KLEIN, of
KLEIN & WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(407) 659-5455

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PREFACE

The parties will be referred to as Defendants or by their proper names. The following symbol will be used:

(R) - Record on Appeal.

CERTIFIED QUESTION

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)?

In addition to the certified question, petitioners raise the following points:

POINT I

THE FLORIDA STATUTES UNDER WHICH THE DEFENDANTS WERE CONVICTED DID NOT GIVE FAIR WARNING TO THE HERMANSONS AS TO THE CONSEQUENCES OF PRACTICING THEIR RELIGIOUS BELIEFS, AND THEIR CONVICTION IS THEREFORE A DENIAL OF DUE PROCESS.

POINT II

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE FAILED TO ESTABLISH DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT.

POINT III

PERMITTING A JURY TO DECIDE THE REASONABLENESS OF THE DEFENDANTS IN FOLLOWING THEIR RELIGIOUS BELIEFS IS A VIOLATION OF FREEDOM OF RELIGION.

POINT IV

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN THE PROSECUTOR STATED IN CLOSING ARGUMENT THAT CHRISTIAN SCIENCE RECOGNIZES CONVENTIONAL MEDICAL TREATMENT, WHICH WAS NOT SUPPORTED BY EVIDENCE OR TRUE.

PRELIMINARY STATEMENT

The state points out on page one that we have raised four issues which are not included in the certified question. This court's review, however, extends to the "decision" of the District Court, not merely the certified question. Hillsborough Association for Retarded Citizens v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). In addition, Points I and III are constitutional questions which involve provisions of the Federal Constitution which were expressly construed by the Second District Court of Appeal. This court has discretionary jurisdiction to review those issues under Article V, Section 3(b) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii).

ARGUMENT

CERTIFIED QUESTION

> 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)?

The state seeks to distinguish the provisions of Florida Statutes sections 415.502 - 415.514 (1985) and those of section 827.04 (1985) rather than acknowledge their logical connection. The dogmatic assertion that these two sections of the Florida Statutes should be treated separately is contrary to the entire statutory scheme which is geared for the protection of children.

As was recognized by the Second District, the relevant provisions of Chapter 415 were previously contained in chapter 827 which harbored the other criminal statutes dealing with child

abuse. Thereafter, it was moved to chapter 415 by the Legislative Revision Service without official action by the legislature. See, 14b (Part 2), Fla.Stat.Ann., Historical Note Foll. sections 415.502 and 415.503 (West 1986). The election of the legislature to encompass all sections dealing with child abuse in one chapter is certainly indicative of its intent. More telling however, is the evolution of the requirement for medical attention in the child abuse statutes.

Until 1974, the statutory proscriptions and prescriptions concerning cruelty of children were found in Chapter 828. At that time, section 828.04, Florida Statutes, (the predecessor to section 827.04) did not impose an affirmative duty to provide medical treatment to children. The only mention of such an obligation was contained in section 828.041, Florida Statutes (1973), which has similar provision for the detecting and correcting of abuse or maltreatment of children as is presently found in chapter 415 (See, section 828.041(2) (1973)). It was not until the following year, when the provision relating to child abuse was amended and moved to Chapter 827, that medical treatment first appeared within the felony child abuse statute (See, ch. 74-383, section 50, Laws of Fla., 1974). That statute has remained upon the books without substantial revision since that time.

During the next year's regular session (1975), the legislature passed Senate Bill 332 which made substantial revisions to other sections of chapter 827. It was then that the spiritual treatment proviso was inserted into the provisions of chapter 827 in apparent

response to the criminalization for the failure to provide medical treatment to children. (See, ch. 75-185, Laws of Fla., 1975). At that time, the legislative staff analysis and the explanation of the bill to the members of the Judiciary - Criminal Committee stated that the spiritual healing provision constituted "a defense for parents who decline medical treatment for legitimate religious reasons" (R 1354). This analysis was also provided for by the explanation of Senator Deeb in his presentation of the bill to the Senate Judicial-Criminal Committee (R 1358).

The state's reliance upon Walker v. Superior Court (People), 47 Cal.3d 112, 763 P.2d 852 (1988), cert. denied, 109 S.Ct. 3186 (1989), Commonwealth v. Barnhart, 345 Pa. Super 10, 497 A.2d 616 (1985), app. denied, 517 Pa. 620, 538 A.2d 874 (1988), cert. denied, 109 S.Ct. 55 (1988) and Hall v. State, 493 N.E.2d 433 (Ind. 1986) is misplaced. There was no discussion or recognition of any statutory recognition of spiritual treatment in Barnhart, only First Amendment grounds were discussed. In both Walker and Hall, the statutory construction and legislative history was significantly different. Neither state (California nor Indiana) had the strong exemption and immunization language in its statutes as is contained in the Florida Statutes.[1]. As set forth in the Hermansons' initial brief, this immunity section was further clarified in 1988 (See, Petitioners' initial brief at page 23).

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[1]"Any person, official or institution participating in good faith in any act authorized or required by ss 415.502 - 415.514 shall be immune from any civil or criminal liability which might otherwise result from such action." Fla. Stat. 415.511 (1985)

Finally, the underlying rationale of the state's position is based upon its refusal to recognize spiritual healing as an acceptable form of treatment in today's society. This, notwithstanding the omnibus recognition given it by the legislature of Florida and those of at least 42 other states. It is also recognized by Federal agencies and insurance companies throughout the country (See, Petitioners' initial brief pages 17-19 and Brief of Amicus Curiae, The First Church of Christ, Scientist). Rather, the state imposes a post hoc analysis of spiritual healing based upon the results in this instance. However, such public policy decisions are properly within the ambit of the state legislature which has recognized spiritual healing as an acceptable method of treatment.

POINT I

THE FLORIDA STATUTES UNDER WHICH THE DEFENDANTS WERE CONVICTED DID NOT GIVE FAIR WARNING TO THE HERMANSONS AS TO THE CONSEQUENCES OF PRACTICING THEIR RELIGIOUS BELIEFS, AND THEIR CONVICTION IS THEREFORE A DENIAL OF DUE PROCESS.

The Second District's lengthy analysis of sections 415.502-415.511, Florida Statutes (1985) demonstrates almost beyond question that the Hermansons were deprived of due process. How could the Hermansons have been given the fair warning of the consequences of practicing their religious beliefs, which is required under due process, where it took this legal reasoning to arrive at the conclusion that spiritual treatment is not a defense?

It is not the term "culpable negligence" about which the Hermansons claim a lack of "fair warning". Rather, it is the

apparent authorization of the use of spiritual healing by the legislature which creates the uncertainty triggering due process considerations. Even if sections 415.502 - 415.514, Florida Statutes (1986) are only to provide a mechanism to investigate, report and prevent abuse or neglect to children as opined by the Second District, it is unfair to recognize spiritual healing as an acceptable form of treatment and then impose criminal liability should such treatment prove unsuccessful. Such a result runs afoul of the due process considerations articulated in Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 (1978) wherein the U.S. Supreme Court recognized:

> to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . (At page 363).

The Second District, as did the Walker Court, responded to these due process concerns by quoting Mr. Justice Holmes in Nash v. United States (1913) 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232.[2] However, the "matter of degree" of which Justice Holmes spoke did not contemplate legislative sanctioning of conduct on the one hand and then prosecution of that conduct on the other. In this case, unlike Walker, the use of spiritual healing has been immunized from "any civil or criminal liability which might otherwise result".[3] The criminalization of conduct in one statute which is seemingly sanctioned in another creates the "lack of

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[2]Hermanson v. State, 570 So.2d 322 (Fla. 2nd DCA 1990) at page 332.

[3]Section 415.511, Fla. Stat. (1986).

clarity in the relationship between the two statutes" which the Minnesota Supreme Court found unacceptable in State v. McKown, 461 N.W.2d 720 (Minn. App. 1990).

Additionally, the state has failed to address the second due process concern raised by the Hermansons. That is, the Second District's determination of the certified question to this court in the negative affected its review of the asserted errors in the trial court. By withdrawing the spiritual treatment proviso as a statutory defense and analyzing other issues of claimed error on that basis, the Second District has "changed the rules" in midstream. The District Court stated in its opinion:

> We agree with the state that an error occurred at the outset of this case which caused an unnecessary legal tangle throughout the entire proceedings: the trial court ruled, at the Hermansons' request in pretrial proceedings, that a portion of section 415.503, which we shall refer to in this opinion as the "spiritual treatment proviso," was available to the Hermansons as a statutory defense to the crimes committed. The erroneous ruling worked to the appellants' advantage but underlies most of the issues raised by them on appeal. Hermanson, supra, at page 325.

The Hermansons were told by the trial court in its pretrial ruling that the provisions of Florida Statute 415.503(f) (1986) were available to them as a defense to the charges of Felony Child Abuse and Third Degree Murder. However, the Second District then reviewed the other errors asserted by the Hermansons without the benefit of the "spiritual treatment proviso" as a defense. Had the Hermansons known this defense was not available, the conduct of the trial would have differed substantially. The Hermansons may well have elected to present evidence regarding the physical condition

of their daughter and events which transpired prior to her death as well as provide examples of prior experiences wherein spiritual healing proved to be an effective form of treatment for their children as well as evidence of other healings which have occurred under Christian Science care.

While the Second District has noted that "the initial pretrial error, concerning the spiritual treatment proviso, permeated the ensuing trial"[4], it suggests that this was prompted by the defendants. However, the entire defense was in reliance upon the trial court's ruling. It is fundamentally unfair for the Appellate Court not to treat such reliance as reasonable.[5] Such would be the case notwithstanding that the defense prompted the ruling or acquiesced therein. See, U.S. v. Bosch, 505 F.2d 78 (5th Cir. 1974).

The construction of the provisions of 415.503(f), Florida Statutes (1985), by the Second District Court of Appeal in its application to the Hermansons, has denied them fair notice as required by due process. In addition, to require the Hermansons to anticipate that the trial court would be reversed in its ruling construing the effects of the "spiritual treatment proviso" is fundamentally unfair. Its review of the alleged errors committed

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[4]Hermanson v. State, supra, at page 333.

[5]Although this involved the conduct of the trial, the grounds are the same as those giving rise to the doctrine of "reasonable reliance" embodied within the Due Process Clause. See, Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) and Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).

during trial without the benefit of their reliance upon this defense is an independent deprivation of due process.

POINT II

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE FAILED TO ESTABLISH DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT.

Firstly, if this court agrees that the trial court was correct in ruling that the exception for spiritual treatment was available as a defense, or if this court should find that due process considerations require the Hermansons be accorded the benefit of the defense, then a directed judgment of acquittal is appropriate. In its opinion, the Second District recognized that there was no dispute regarding the sincerity of the Hermansons' religious convictions nor any dispute over the legitimacy of their practicing of their religion:

> There is no dispute that they (the Hermansons) were sincerely practicing the tenets of Christian Science which eschews conventional medical treatment in favor of spiritual healing through prayer. Hermanson, supra, at page 325.

However, the Second District only reviewed the record to determine if the evidence was legally sufficient for the jury to find them guilty of culpable negligence.

It is abundantly clear that there were sufficient facts to affirmatively show that the Hermansons, at all material times, were engaged in the conduct recognized by the exemption contained in section 415.503(7)(f) (1985). That this defense was raised in the state's case does not alter its effect. (See, Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1984) affirmative defense may be raised

by the state's evidence.) Once competent evidence of the defense was introduced, the state was required to contradict that evidence beyond a reasonable doubt. Williams v. State, 468 So.2d 447 (Fla. 1st DCA 1985); Accord, Wright v. State, 442 So.2d 1058 (Fla. 1st DCA 1983), rev. denied 450 So.2d 489 (Fla. 1984).

The dearth of any argument in the state's response is due to the absence of testimony rebutting the defense at trial. The Second District Court, having failed to review this case without giving the Hermansons the benefit of the statutory defense, departed from the essential requirements of law and denied them due process.

Secondly, the spiritual treatment exemption notwithstanding, the state failed to sustain its burden of proving the elements of culpable negligence. In Dominique v. State, 435 So.2d 974 (Fla. 3rd DCA 1983) cited in the Hermansons' initial brief, the court defined culpable negligence as follows:

> Culpable negligence, which replaces the element of criminal intent, means action of such a gross flagrant character that it evidences a reckless disregard for human life or safety equivalent to an intentional violation of the rights of others. Culpable negligence must be determined from the facts peculiar to the case. (Emphasis added)

It is interesting to note that the state, in its argument in opposition to the motion for directed judgment of acquittal at trial, was relying upon the willfully provision of section 827.04(1), Florida Statutes (1986) (R 1102-1103). This equivocation by the state attorney underscores the problems of the state's case in showing the elements of culpable negligence. In

Cheek v. United States, 4 FLW Fed. S1001 (January 8, 1991), cited in our initial brief, the Supreme Court held that if the defendant truly believed that his wages were not subject to income tax, the government would not have sustained its burden of proving willfulness "however unreasonable a court might deem such a belief."

The state has not attempted to distinguish that decision nor to demonstrate lack of reliance upon spiritual healing in the treatment of their child. Rather, the state recites a litany of facts which evidence that something was wrong with Amy. At the same time, the evidence undisputedly shows that the Hermansons were attempting to treat the condition through spiritual healing in accordance with their sincerely held religious beliefs. It is difficult to understand how the state can reconcile concepts of willfulness and culpable negligence with the Hermansons' conduct in providing treatment which they sincerely believed to be the most effective. Contrary to the assertions by the state, this is not a situation where parents stood idly by and did nothing. Rather, the Hermansons engaged in a course of treatment (apparently sanctioned by the legislature) which they in good faith felt would be effective and in which they sincerely believed.

POINT III

PERMITTING A JURY TO DECIDE THE REASONABLENESS OF THE DEFENDANTS IN FOLLOWING THEIR RELIGIOUS BELIEFS IS A VIOLATION OF FREEDOM OF RELIGION.

On page 21 of its brief, the state answers this argument by stating:

> . . . 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.

The above statement, rather than bolster the state's position, supports our position.

The evidence was undisputed that at all times the Hermansons were following their religious beliefs. The state's argument that the jury was only deciding whether the defendants' "behavior was reasonable" argues a distinction without a difference. The defendants' "behavior" was nothing more than their following of their religious beliefs. Thus, when the jury was deciding whether the defendants' behavior was reasonable, it was deciding whether the defendants were being reasonable in following their religious beliefs. This is prohibited under Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714, 101 S.Ct. 1425 (1981), wherein the court held that courts have no power to decide whether a person's religious beliefs are "acceptable, logical, consistent or comprehensible."

POINT IV

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN THE PROSECUTOR STATED IN CLOSING ARGUMENT THAT CHRISTIAN SCIENCE RECOGNIZES CONVENTIONAL MEDICAL TREATMENT, WHICH WAS NOT SUPPORTED BY EVIDENCE OR TRUE.

The prosecutor's improper remarks were:

> What it shows is that the church does recognize medical help. And that's what was happening in that time. These two experts in this church said, It's time to call a doctor. These two experts say, The Church says it's okay to call a doctor (R 1206).

* * *

> The Christian Science Church believes in sanctity of the life of a child. Christian Science Church allows medical attention.
>
> * * *
>
> If the Defendants were legitimately practicing their beliefs, religious beliefs, if the Defendants were legitimately practicing their religious beliefs, they would have called a doctor and they would have saved her life (R 1207-1208).

The state relies on the fact that a Christian Science nurse called an ambulance, to support the prosecutor's statements to the jury that the Christian Science Church "allows medical attention." Those comments, that the Church authorizes medical attention, were not based on any evidence, nor could they be inferred merely from the fact that a Christian Science nurse called an ambulance. Moreover, as we pointed out on page 46 of our initial brief, the ambulance arrived five minutes after receiving the call, and, when it arrived, Amy had been dead for 20 minutes, which the state does not dispute (R 759-764). It was thus clear that Amy had already died when the nurse called the ambulance.

The stipulation of fact entered into by the state and the Hermansons in the present case, which was set forth in the opinion of the Second District, stated in part:

> Christian Scientists believe in healing by spiritual means in accordance with the tenets and practices of the Christian Science Church. William and Christine Hermanson, at all times material to the facts in this case, followed the religious teachings of their church and relied upon Christian Science healing in the care and treatment of Amy Hermanson (R 1345, Hermanson at page 326).

Not only were the remarks made about the Christian Science Church authorizing medical care not based upon the evidence, but they were directly contrary to what the state attorney knew and to which he stipulated. Such conduct goes beyond "fair comment" on the evidence and to the very heart of the defendants' entire defense in this case, and thus requires reversal.

CONCLUSION

The conviction of the Hermansons should be reversed.

LARRY KLEIN, of
KLEIN & WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(407) 659-5455

and

THOMAS H. DART, of
DART, FORD, STRELEC & SPIVEY, P.A.
1549 Ringling Boulevard, Suite 600
Sarasota, Florida 34236
(813) 365-0140

By: _____
THOMAS H. DART
Florida Bar No. 0228788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to PEGGY QUINCE, Assistant Attorney General, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, CAROL M. DITTMAR, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607-2366 and WILLIAM G. CHRISTOPHER, ESQUIRE, 222 Lakeview Avenue, Suite 800, West Palm Beach, Florida 33401 by U.S. Mail this 29 day of April, 1991.

By: _____
THOMAS H. DART
Florida Bar No. 0228788