IN THE SUPREME COURT OF FLORIDA

MARY NICHOLSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 78045
DCA CASE NO. 90-1195

PETITIONER'S BRIEF ON JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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A P P E N D I X

FOR

PETITIONER'S BRIEF ON JURISDICTION

IN THE SUPREME COURT OF FLORIDA

MARY NICHOLSON,
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vs.

STATE OF FLORIDA,
Respondent.

Case No. _____
1st DCA No. 90-1195

JURISDICTIONAL BRIEF OF PETITIONER

STATEMENT OF THE CASE

Mrs. Nicholson was charged by indictment with first-degree felony murder and aggravated child abuse. (R988-989) The state alleged the statutory alternatives under section 827.03, Florida Statues of "malicious punishment" and "willful torture." (R988-989) Mrs. Nicholson went to trial on the charge, and after her motion for judgment of acquittal was denied, the jury found her guilty of both offenses as charged. (R961, 1019) The court adjudicated her guilty and imposed the mandatory sentence of life imprisonment without possibility of parole for 25 years for the murder. (R981-983, 1026-1031)

In her appeal to the First District Court of Appeal, Mrs. Nicholson argued that the state had failed to present competent, substantial evidence of either malicious punishment or willful torture, requiring reduction of the convictions to the simple child abuse, an unenumerated felony, and third-degree felony murder. On this point, Mrs. Nicholson asserted that prosecution under section 827.03 for the willful deprivation of food deprived section 827.04, which encompasses the same conduct, a reasonable

field of operation. She also argued that the trial court erred in instructing the jury that willful torture could include acts of omission and neglect. The First District Court of Appeal rejected both arguments and affirmed the convictions. The court noted the opinions of its sister courts in Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983), and State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989), "wherein in those courts concluded that the Legislature intended to punish only acts of commission in Section 827.03, Florida Statutes . . . ." The court went on to "decline to follow the rationale of Jakubczak and Harris and hold that Section 827.03 contemplates acts of commission or omission, including the deprivation of food." Slip op. at 6.

Mrs. Nicholson filed notice to invoke this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) on the basis of express and direct conflict with Jakubczak and Harris. This brief follows.

STATEMENT OF THE FACTS

Facts as described in the opinion below and pertinent to a decision on discretionary review are as follows:

Darlene Jackson was the mother of Kimberly McZinc, whose death led to this prosecution. Ms. Jackson became acquainted with Mrs. Nicholson through a mutual friend. Ms. Jackson began to speak with Mrs. Nicholson often over the phone, usually about spiritual matters within the Christian faith. Mrs. Nicholson sometimes interpreted dreams of Ms. Jackson. In July 1987, Ms. Jackson took Kimberly from their home in New York City to Mrs. Nicholson's residence in Pace, where they remained until Kimberly's death the following February.

Through prophecies and dream interpretations, Mrs. Nicholson caused Ms. Jackson to believe that Kimberly was oppressed by evil spirits. She instructed Ms. Jackson to make Kimberly run and strike her with a switch if she resisted, as a way of breaking the spirit's hold. In September 1987, Mrs. Nicholson instructed Ms. Jackson to separate herself from Kimberly and allow her to care for the child on a daily basis, including her feeding. Kimberly's weight began to decline. Ms. Jackson questioned Mrs. Nicholson about the weight loss in January 1988, to which Mrs. Nicholson responded that the questions angered God and made the spirits stronger. Mrs. Nicholson whipped Kimberly for being disobedient on the Friday before her death, then within the next several days instructed Ms. Jackson to whip Kimberly in compliance with the Lord's instructions.

Kimberly fell ill, and after an evening when Mrs. Nicholson and Ms. Jackson prayed over and anointed the child, she died on February 8, 1988. She was four years old. The medical examiner testified that Kimberly died of starvation. She also had severe bruises on her back, legs, abdomen and arms.

SUMMARY OF THE ARGUMENT

The opinion of the court below is in express and direct conflict with the decision of the second and third district courts of appeal on the same question of law. That question is whether section 827.03, Florida Statutes, encompasses acts of omission. The First District Court of Appeal has held that it does, while its two sister courts have held it does not. This Court should resolve the conflict to ensure uniform application of the aggravated child abuse statute, and to determine its field of operation relative to section 827.04, the simple child abuse statute.

ARGUMENT

THIS COURT SHOULD ACCEPT THIS CASE TO RESOLVE CONFLICT BETWEEN THE LOWER COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE APPLICABILITY OF SECTION 827.03, FLORIDA STATUTES, TO ACTS OF OMISSION.

Kimberly McZinc died of starvation, caused by deprivation of food. This was an act of omission, akin to withholding medical treatment from a child. Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1987), involved the latter course of conduct. There the court considered section 827.03, Florida Statutes in comparison to section 827.04, and concluded that the Legislature intended to punish under section 827.03 only acts of commission done with specific intent. Section 827.04, the simple child abuse statute, explicitly encompasses willful or negligent deprivation of food or medical attention. In State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989), another appellate court followed Jakubczak and held that the failure to seek prompt and timely medical attention for a burned child did not meet the statutory definition of torture under sections 827.01 and 827.03, Florida Statutes.

Here, the First District Court of Appeal ruled that an act of omission may constitute malicious punishment or willful torture, in express and direct conflict with Jakubczak and Harris. In so holding, the court implicitly rejected the conclusion reached by the Jakubczak court after comparing the elements of sections 827.03 and 827.04. Section 827.04 specifically encompasses the willful or negligent deprivation of food or medical attention; section 827.03, in contrast, includes the elements of malicious punishment or willful torture.

This Court should review this case for two reasons. First, the lower court's opinion created an interdictrict conflict, which this Court should resolve to ensure that section 827.03 is uniformly applied. Second, this Court may offer guidance to Florida's lawyers and judges on the relative fields of operation of sections 827.03 and 827.04, Florida Statutes. In short, this Court should accept this case to address and, if possible, resolve the uncertainty created by the First District Court of Appeal in the law of child abuse in this state.

CONCLUSION

For the reasons expressed herein, Petitioner requests that this Honorable Court accept this cause for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 4th day of June, 1991.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MARY NICHOLSON,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	)	DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 90-01195
STATE OF FLORIDA,	)	
Appellee.	)	
	)	

Opinion filed May 9, 1991.

An Appeal from the Circuit Court for Santa Rosa County.
George Lowrey, Judge.

Barbara M. Linthicum, Public Defender, and Glen P. Gifford,
Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Bradley R. Bischoff,
Assistant Attorney General, Tallahassee, for Appellee.

BOOTH, J.

This cause is before us on appeal from appellant's conviction of first-degree felony murder and aggravated child abuse. Appellant argues that: (1) the trial court erred in denying her motion for judgment of acquittal because the evidence failed to establish that the victim died from either malicious

torture or willful punishment; and (2) the trial court committed fundamental error in instructing the jury that aggravated child abuse by willful torture under Section 827.03(1)(b), Florida Statutes, includes acts of negligence or omission. After careful consideration, we affirm as to each issue.

On February 8, 1988, four-year-old Kimberly McZinc died of starvation. Kimberly's mother, Darlene Jackson, was indicted for first-degree murder and aggravated child abuse. She subsequently pled nolo contendere to third-degree murder and simple child abuse.

Ms. Jackson, a native of Charleston, South Carolina, moved to New York City in 1979, where she met Kenneth McZinc, who fathered her child, Kimberly, born March 17, 1983. After Kimberly's birth, Ms. Jackson experienced a renewed interest in religion and became "born again."

In April 1986, Ms. Jackson met Hope Renwick. Ms. Renwick shared with Ms. Jackson her view that life on earth was a continuous struggle between the forces of God and Satan. In the summer of 1986, Ms. Jackson and Kimberly paid their first visit to Ms. Renwick's church. Ms. Jackson had been told that occasionally people became sick during the service and that such sickness was a sign of the cleansing of demons. Kimberly spit up in church, drawing the attention of other worshipers, who chanted "hallelujah." Afterwards, Ms. Jackson placed more credence in Ms. Renwick's accounts of spiritual warfare. Ms. Jackson began to dwell on concepts such as Satan and oppression by demons.

Ms. Renwick introduced Ms. Jackson to appellant. Appellant and Ms. Renwick began to interpret dreams which Ms. Jackson had been having. Appellant suggested that Ms. Jackson's dreams signified that Kimberly was being pulled toward evil. Ms. Jackson began to speak with appellant more frequently.

In July of 1987, Ms. Jackson took Kimberly to appellant's home in Pace, Florida. Ms. Jackson kept a diary that chronicled her participation in religious activities with appellant. The diary reflected that appellant provided specific directions to Ms. Jackson for Kimberly's discipline, which were based upon appellant's "prophecies from God."

Appellant persuaded Ms. Jackson that the evil spirit of gluttony oppressed Kimberly. Appellant instructed Ms. Jackson to make Kimberly run and to strike her with a switch if she resisted, as a means of breaking the demonic hold over Kimberly. In September 1989, appellant instructed Ms. Jackson to separate herself from Kimberly and allow appellant to care for Kimberly on a daily basis. A September diary entry records that Kimberly was denied food for several days and suggests that Kimberly may have been forced to drink urine and bath water. Appellant assumed full control of Kimberly's diet, and Kimberly's weight began to drop.

In early October 1987, appellant's daughter, Tina Brown, noticed that Kimberly was losing weight and notified the Department of Health and Rehabilitative Services (HRS). After visiting appellant, HRS took no further action. Kimberly

continued to lose weight. In December 1987, Ms. Brown again notified HRS. HRS again visited appellant's home but did not take further action.

A laundromat worker testified that she had observed Kimberly during the summer and fall of 1987. During appellant's visits to the laundromat, Kimberly sat quietly and never ate snacks. She became thinner and weaker during this period, but when the worker told appellant that something was wrong with Kimberly, appellant replied that there was always something wrong with Kimberly. On one occasion, the laundromat worker offered Kimberly food; however, appellant would not allow her to eat and stated that the child had a stomach virus.

In January of 1988, Ms. Jackson questioned appellant about Kimberly's weight loss. Appellant told Ms. Jackson that her questions angered God and strengthened the evil spirits. On the Friday before Kimberly's death, appellant whipped Kimberly for being disobedient. Ms. Jackson protested the severity of the beating. Afterwards, appellant told Ms. Jackson to pray in appellant's bedroom. During this prayer session, Ms. Jackson heard a voice that sounded like appellant's tell her to chastise Kimberly. Ms. Jackson reported the voice to appellant. Appellant told Ms. Jackson that the Lord's word comes in familiar voices and that she should follow His word and chastise Kimberly. Ms. Jackson whipped Kimberly.

On the day before Kimberly's death, Ms. Jackson noticed that Kimberly was sluggish; however, appellant persuaded Ms.

Jackson that Kimberly was only faking. Appellant and Ms. Jackson stayed with Kimberly throughout the evening. They prayed and anointed Kimberly. At approximately 7:30 a.m., Ms. Jackson determined that something was wrong with Kimberly and called an ambulance. Kimberly, however, had been dead for several hours.

At the time of death, four-year-old Kimberly McZinc had virtually no body fat, had wasted muscles, and a small liver. An autopsy revealed that the child had severe bruises on her back, legs, abdomen, and arms, and that her liver had been partially consumed by her body. The medical examiner testified that Kimberly had died in extreme pain.

Appellant was convicted of first-degree felony murder with the underlying felony being aggravated child abuse pursuant to Sections 827.03(1)(b) and (c), Florida Statutes.[1] Appellant argues that the terms "malicious punishment" and "willful torture" have been held to connote acts of commission, not omission, and therefore the failure to feed a child is

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[1] Section 827.03, Florida Statutes:

> (1) "Aggravated child abuse" is defined as one or more acts committed by a person who:
>
> (a) Commits aggravated battery on a child;
>
> (b) Willfully tortures a child;
>
> (c) Maliciously punishes a child; or
>
> (d) Willfully and unlawfully cages a child.
>
> (2) A person who commits aggravated child abuse is guilty of a felony of the second degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

insufficient to support a conviction for aggravated child abuse. We have no difficulty in concluding "malicious punishment" or "willful torture" may consist of acts of commission or omission. Therefore, we affirm appellant's conviction.

We are aware of Jakubczak v. State, 425 So. 2d 187 (Fla. 3d DCA 1983), and State v. Harris, 537 So. 2d 1128 (Fla. 2d DCA 1989), wherein those courts concluded that the Legislature intended to punish only acts of commission in Section 827.03, Florida Statutes, and that failure to take a child for medical treatment was not an act of "commission." However, Florida's child abuse statute,[2] clearly defines "torture" as an act of omission. Therefore, we decline to follow the rationale of Jakubczak and Harris and hold that Section 827.03 contemplates acts of commission or omission.

We also hold that the willful, systematic deprivation of food over a period of four months, culminating in death from

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[2] Section 827.01, Florida Statutes:

> (1) "Child" means any person under the age of 18 years.
>
> (2) "Placement" means the giving or transferring of possession or custody of a child by any person to another person for adoption or with the intent or purpose of surrendering the control of the child.
>
> (3) "Torture" means every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused.

starvation, and the administration of severe beatings to the four-year-old child are each acts of commission.

Appellant contends that the evidence does not establish that she had the requisite intent to act as a principal in the willful torture or malicious punishment of the child. On the contrary, the evidence reveals that appellant was in complete control over Kimberly's diet, that she also exercised controlling influence over the mother, and that she directed the mother's punishment of Kimberly. When Kimberly was offered food from third persons, appellant prohibited her from eating. This process of willfully starving the child occurred over a period of at least four months. There was evidence that appellant severely beat Kimberly on at least one occasion and directed Ms. Jackson to chastise her on several others. Evidence proved that the starvation and beatings were unusually long and intensely painful. There was evidence that appellant's conduct was excessive, cruel, and merciless. The weight of the evidence on the issue of intent was a matter for the jury to resolve. Freeze v. State, 553 So. 2d 750 (Fla. 2d DCA 1989).

Deprivation of food is specifically addressed in Section 827.04, Florida Statutes. However, the case sub judice involved an aggravated form of food deprivation carried out systematically with intent to willfully torture and maliciously punish the child. Under these aggravated circumstances, the State was entitled to prosecute under Section 827.03, Florida Statutes.

Appellant's second contention is without merit. The trial court gave the standard jury instructions on aggravated child abuse, as agreed by all parties at the charge conference. Appellant made no objection concerning the aggravated child abuse statute. The error was not fundamental, and the issue was not properly preserved for appeal. Murray v. State, 491 So. 2d 1120 (Fla. 1986).

Accordingly, we affirm the judgment of conviction and sentence imposed thereon.[3]

ZEHMER AND WOLF, JJ., CONCUR.

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[3] Appellant was sentenced to life on the felony murder charge, and 30 months on the aggravated child abuse charge, the sentences to run concurrently.