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IN THE SUPREME COURT OF FLORIDA

MARY NICHOLSON,

Petitioner,

v.

CASE NO. 78,045

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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_____ /

RESPONDENT'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner, Mary Nicholson, Appellant below, will be referred to herein as "Petitioner". Respondent, the State of Florida, Appellee below, will be referred to herein as "Respondent".

STATEMENT OF THE CASE AND FACTS

Respondent adopts Petitioner's statement of the case and adopts the statement of facts set forth in the opinion below, attached hereto.

SUMMARY OF ARGUMENT

This Court should decline accepting jurisdiction in this case as the cases cited by Petitioner are factually and legally distinguishable from the opinion below, and provide no basis for "conflict" jurisdiction.

ARGUMENT

ISSUE

THE COURT SHOULD DECLINE TO ACCEPT
DISCRETIONARY JURISDICTION IN THIS CASE

Petitioner, Mary Nicholson, was convicted of first degree felony murder based on the underlying felony of aggravated child abuse, that abuse being the systematic beating, mistreatment, and intentional withholding of food from the child victim.

In the opinion issued below, the First District Court of Appeal stated:

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, 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 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.

Nicholson v. State, 16 FLW D1284, 1285 (Fla. 1st DCA 1991), attached hereto.

The Petitioner contends that the decision in this case conflicts with the decisions of the Second and Third District Courts of Appeal in State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989), and Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983). As the First District pointed out in the opinion below, however, there is no conflict.

The court noted that Harris and Jakubczak stood for the proposition that failure to seek medical treatment for a child was not an act of "commission" as contemplated in §827.03, Florida Statutes, and thus could not support a conviction for aggravated child abuse.

In the instant case, however, the court held that the willful, systematic deprivation of food over a four month period culminating in death from starvation and the administration of severe beatings to the four year old victim were acts of commission.

The situation in the instant case is factually dissimilar to that in Harris and Jakubczak, and presents a scenario in which the defendant's actions were more than mere negligent acts of omission. As such, no direct conflict exists and there is no unresolved ambiguity in the law of felony child abuse which requires this Court's attention.

CONCLUSION

Based on the above arguments, Respondent respectfully urges this Honorable Court to decline accepting jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



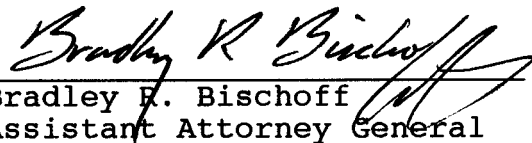
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 24th day of June, 1991.



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