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IN THE SUPREME COURT OF FLORIDA

MARY NICHOLSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,045

# BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

The state indicted Petitioner, MARY NICHOLSON, for first-degree felony murder and aggravated child abuse. (R988-989)[1] A notice of intent to rely on similar fact evidence was filed, as was a stipulation not to seek the death penalty. (R1015-1018) The case proceeded to trial before Circuit Judge George Lowrey. (R1)

At the conclusion of the state's case, defense counsel moved for judgments of acquittal on both counts and argued that the state had not presented a prima facie case on the underlying charge of aggravated child abuse. (R813) Counsel also asserted that the state's case relied primarily on circumstantial evidence which was not inconsistent with Petitioner's reasonable hypothesis of innocence. (R814) The court denied the motion at that point, and again when it was renewed at the close of all evidence. (R815, 835) In its final instructions to the jury, the

[1]Herein, references to the record on appeal appear as (R[page number]).

court defined "willful torture" as an element of aggravated child abuse in accord with the definitions provided in Chapter 827 and the standard jury instructions. Defense counsel did not object. (R943-944)

The jury found Petitioner guilty of first-degree felony murder and aggravated child abuse as charged. (R961, 1019) Motions for new trial and acquittal notwithstanding the verdict were filed, argued and denied. (R969-976) The court adjudicated Petitioner guilty of the offenses and imposed sentences of life imprisonment without parole for 25 years on Count I, concurrent to a guideline sentence of 30 months on Count II. (R981-983, 1026-1031)

On direct appeal, Petitioner argued that the state had presented legally insufficient evidence of specific intent to commit either malicious punishment or willful torture, an essential element of the enumerated felony of aggravated child abuse. Petitioner also argued that an instruction on aggravated child abuse constituted fundamental error. The First District Court of Appeal affirmed the conviction. Nicholson v. State, 579 So.2d 816 (Fla. 1st DCA 1991). Petitioner successfully sought review in this Court on grounds of conflict between the panel decision below and the decisions in Jakubczak v. State, 425 So.2d 187 (Fla. 3d DCA 1983), and State v. Harris, 537 So.2d 1128 (Fla. 2d DCA 1989). This brief follows.

## STATEMENT OF THE FACTS

This is a tragic case involving the death by starvation of four-year-old Kimberly McZinc on February 8, 1988. (R724) Kimberly was the daughter of Darlene Jackson, who lived with her in Petitioner's home in Pace from July 1987 until the day of Kimberly's death. Darlene was subsequently charged with first-degree felony murder and aggravated child abuse. She went to trial on the charges, then pled to third-degree murder and simple child abuse during jury deliberations. (R759-764) At the time of her plea, Darlene understood she would testify for the state in Petitioner's trial. (R764) She did so, for several days. Distilled below is much of what she said.

Darlene Jackson, a native of Charleston, S.C., moved to New York City after receiving her master's degree in public administration. (R161) She began working for New York Telephone in 1979, then joined AT&T in 1983. (R163) Through a volunteer group at the phone company, she met Ellen Cates in 1980, and through her Johnny Hugee. (R164-167) Johnny's father was a minister in a church in the Bedford-Stuyvesant section of Brooklyn. (R171) Darlene began to spend time more time there helping with a reading program and Bible study. (R167-171) Darlene met Kenneth McZinc, also through Ellen, in 1980. (R169) The two became romantically involved, leading to Darlene's pregnancy. (R169) Kimberly was born prematurely on March 17, 1983. (R170) She remained hospitalized with jaundice and a threat of meningitis after birth, but then grew normally, according to Darlene.

(R170-175) There was no marriage, but McZinc played an active part in Kimberly's growth and development. (R170)

After Kimberly's birth, Darlene became born again, and made an open commitment at the church in Bedford-Stuyvesant in the summer of 1983. (R174) She moved from Manhattan to Brooklyn, and in 1985 left the phone company to become a teacher at a junior high school in Brooklyn for much less money. (R179) She met Hope Renwick in April 1986. Hope and Kimberly, then three years old, did not get along at first, but the relationship improved with time. (R183) Darlene admired Hope's enthusiastic approach to the Christian faith. (R184) Hope shared with Darlene her view of earthly life as continuous spiritual warfare between the forces of God and Satan. (R184-185) This was a change from the focus on the love of God and a Godly life which she had shared with Johnny Hugee and Ellen Cates. (R184) Darlene began to spend more time with Hope and less time with her old friends. (R186-187) After school ended in the summer of 1986, Darlene and Hope traveled together to the Carolinas, where both visited their families, then returned to New York. (R187)

Back in New York, Darlene and Kimberly paid their first visit to Hope's church, which she recalled as either Pentecostal or Holiness in denomination. (R190) Darlene had been told that occasionally people became sick during the service, and that this was a sign of the cleansing of demons. (R190) Kimberly spit up in church, drawing the attention of other worshipers, who chanted "Hallelujah." (R190) After this event, Darlene began to pay more attention to Hope's accounts of spiritual warfare. (R193) Hope

also attached significance to nightmares described by Darlene. (R193) One night in September 1986, Hope called Petitioner, Mary Nicholson, and handed the phone to Darlene. (R193, 195) Mary interpreted Darlene's dream about Kimberly running away as signifying the child being pulled from Darlene toward evil. (R194)

Darlene began to speak often by phone with Mary, who lived in Pace. (R195) Hope assured her Mary was a woman of God. (R196) Petitioner instructed Darlene in the practice of anointing with oil. (R197) According to Darlene, Mary gave prophecies to her over the phone. (R198) The prophecies always came after Petitioner spoke in tongues. (R198) The two women also corresponded by mail. (R198) Darlene began to send Mary gifts and money, called "love offerings." (R199) Eventually, Darlene quit tithing to her church in Brooklyn, and began tithing to Mary. (R200)

Mary Nicholson and Darlene Jackson first met in North Carolina during the Christmas holidays in 1986. (R206) Darlene had taken Kimberly to visit their family in Charleston before flying to Fayetteville, where Hope's family lived. (R207) Kimberly became hysterical when she was told whom they were visiting upon their arrival in Fayetteville, according to Darlene. (R207) Darlene testified that, to that point, she had followed Mary's instructions not to tell Kimberly whom they were going to see. (R208) Mary later told Darlene she had made a mistake in first taking Kimberly to Charleston, where she was exposed to the evil influence of Darlene's family. (R209) Darlene stayed in Fayetteville for a week, and participated in a

prophecy session led by Mary. (R210) Darlene returned to New York after the holidays and resumed teaching in early 1987. (R211) She worked at a public school in Bedford-Suyvesant that year. (R211) Her contacts with Mary by phone and mail increased throughout the winter and spring. (R212) She continued to have dreams about Kimberly, which she said Mary and Hope interpreted as evidence of evil spirits besetting the child. (R214-229)

Darlene took Kimberly to Mary's home in Pace in July, 1987. (R278) She planned to stay about a month, then return to New York. (R282) Mother and daughter slept in the same bed in one of the bedrooms of Mary's home, a trailer. (R287) Mary, her husband and three children also lived there. Darlene kept a diary, which contained Bible study notes and prophecies. (R290-291) The entries reflect Darlene's participation in church services and revivals she attended with Mary, as well as specific directions for Kimberly which Darlene said were relayed to her by Mary through prophecies from God. Darlene testified that Kimberly's behavior was fine before arriving in Florida, but that she began to misbehave. (R309) Mary told Darlene that evil spirits were oppressing her, and attached particular demons to different types of misconduct. (R309)

One "evil spirit" afflicting Kimberly, according to Darlene's account of Mary's prophecies, was that of gluttony. (R364-365) The prophecies, as reflected in the diary, contained directions about Kimberly's feeding and exercise habits. (R344, 372, 400, 404) Darlene was commanded to make Kimberly run, and to strike her with a switch if she resisted. (R388) The

prophecies also discouraged Darlene from returning to New York with Kimberly, threatening dire consequences. (R329-332) In September, Darlene, who was often ill with flu-like symptoms, was instructed to separate herself from Kimberly, and allow Mary to care for her on a daily basis. (R324-340) A September entry in the diary reflects several days in which the child was denied food and forced to drink urine and bath water. (R345-346) Darlene testified that she did not see these events, but was told when she inquired about them that obedience was important "because it could happen." (R353) Around this time, Darlene noticed Kimberly's weight loss, but did not consider it severe. (R347)

By October, Mary's 23-year-old daughter, Tina Brown, became concerned over Kimberly's apparent loss of weight. (R112) Tina lived with her grandparents down the road from Mary's trailer. She called the Department of Health and Rehabilitative Services, leading to a visit from an investigator who apparently found the complaint unfounded. (R116) Darlene spoke to the investigator and said she answered all his question truthfully, but did not inform him of Kimberly's "oppression." (R374) Tina placed another call to the Department, leading to another visit and, evidently, another conclusion of an unfounded complaint. (R118)

Darlene said that during the stay in the trailer, she saw Mary and her husband strike Kimberly, but at that time did not believe the blows were severe. (R633-634) Darlene also struck Kimberly with a belt, a switch while Kimberly was running, and a bedroom slipper. (R631) Mary continued to take responsibility for Kimberly's diet, according to Darlene. (R638) Even on the

few occasions when Darlene prepared the food, Mary served it, she said. (R638) They followed this course in obedience to the prophecies commanding separation of Darlene from Kimberly. According to Darlene, even though she slept in the same single bed with Kimberly during their entire stay, they were under separate covers with no physical contact. (R640) Darlene explained that this was the reason she failed to notice the weight loss earlier. (R640) By January of 1988, the prophecies continued to warn Darlene about the spirits afflicting Kimberly, but promised that "thine seed" would be sustained. (R413, 417) Darlene testified that when she asked Mary about the weight loss, she was told that her questioning angered God and strengthened the spirits. (R418-419) On January 10, 1988, Darlene wrote a letter to a New York friend in which she stated that Kimberly had lost a lot of weight but had "improved greatly." (R421-424)

On the Friday before Kimberly's death, Darlene testified that Mary told her that the child had been disobedient and would be chastised. (R425) When Darlene protested that the whipping was too severe, Mary stopped. (R426) During the weekend, Darlene was praying in Mary's bedroom when she heard Mary's voice tell her to chastise Kimberly. (R428) Darlene reported the voice to Mary, who told her that if the Lord said to do it, she should comply. (R429) Darlene followed these directions. On the day before Kimberly's death, Darlene noticed that she was sluggish. (R431) Mary told her the child was faking. (R431) Kimberly kept falling asleep while drinking liquid at the kitchen table, so Darlene put her back in bed. (R432) The trailer was cold because

a pipe had burst. Darlene covered the child with blankets. (R432) Kimberly stayed in bed throughout the day, wanting only to sleep. (R432)

Later, while changing Kimberly after she had wet the bed, Darlene noticed a bad bruise on the child's side. (R433) She testified that when she asked about it, Mary was too busy preparing for church to answer. (R433) Darlene stated that she tried to give Kimberly food, but the child would not wake up. (R434) Darlene alerted Mary, who was able to get Kimberly to drink some milk. (R434) Mary and Darlene stayed in the room throughout the evening. (R435) They prayed over and anointed the child. (R435-438) Darlene awoke at 5 or 6 a.m., and noticed Mary was gone. (R438) She woke up again at 7:30 a.m., discerned something wrong with Kimberly and called for Mary. (R439) They phoned for an ambulance. Rescue personnel arrived and began trying to revive the child, then determined she'd been dead for several hours. (R439, 64-67) At the hospital, Darlene told doctors that Kimberly had been sick for several days, had had a poor appetite for several weeks, and had been taken off junk food and put on a soft food diet. (R68)

At the time of her death, Kimberly McZinc was 4 years, 11 months old, 44 inches tall, and 28-1/2 pounds in weight. (R728) The height was normal, but the weight was approximately 17 pounds below normal. (R728) She had virtually no body fat, plus wasted muscles and a small liver. (R718) She also had severe bruises on her back, legs, abdomen and arms. (R718) Some of the bruises

appeared to have been made by a strap. (R721) Her height indicated normal development for most of her life. (R722)

Pat Sweeney worked at a laundromat patronized by Mary and Darlene Jackson in the summer and fall of 1987. (R768) She had know Mary many years. The women always brought their children. Sweeney testified that Kimberly always sat quietly, instead of playing like Mary's children. (R769) Also, she never ate snacks like the other children. Sweeney noticed the child becoming thinner and weaker and told Mary that something was wrong with her. (R769) Mary replied that something was always wrong with her, according to Sweeney. (R769) Once, Sweeney asked Kimberly if she would like some chips. She nodded her head up and down. (R770) But when Sweeney asked Mary and Darlene if it was all right, Mary said she had a stomach virus. (R770)

Mary gave several statements to authorities which were admitted into evidence as State Exhibits 50-53 and 60-61. Audiotapes of these interviews were played to the jury and now reside in the appellate record. In these statements, Mary said that Darlene began to speak to her to seek advice and counseling. Mary encouraged her to pray and read the Scriptures. Mary's statements contradict much of Darlene Jackson's testimony. For instance, she said she never told Darlene that it was a mistake to take Kimberly to Charleston. She never discussed Kimberly being possessed by the spirit of disobedience and gluttony. During their stay in Pace, Mary spanked Kimberly only three times: once with a belt and once with a switch in front of Darlene, and once at Mary's mother's house outside of Darlene's

presence. Mary's mother testified at trial to the latter episode. (R790-781) Mary's statements corroborate Sweeney's testimony about Kimberly's behavior at the laundromat, with the distinction that it was Darlene who would not allow the child to eat candy because of a stomach virus.

In the statements, Mary stated that she exercised no control over Kimberly and never told Darlene to separate herself from the child. She did not give Darlene prophecies of the word of God, but did give spiritual advice and counseling. She never gave Darlene a fast or diet to follow, and when Darlene asked for a copy of a diet on Mary's wall, she told her to write to the church for a copy. She believed Darlene did so. Mary stated that she never gave Darlene the name, "Daughter Ruth," contradicting Darlene's testimony and diary entry. Finally, according to her statements, Mary did not prepare or supervise Kimberly's and Darlene's diet. Generally, Darlene prepared their food separately, and kept Kimberly on soft foods such as oatmeal, scrambled eggs, muffins and cereal. When Mary and her husband expressed concern over Kimberly's weight loss, Darlene told them that the child could not eat certain foods.

## SUMMARY OF THE ARGUMENT

I. The state failed to present a prima facie case of guilt of aggravated child abuse causing the victim's death. Starvation was the cause of death. The withholding of food is an act of omission, not commission, to which section 827.03, the aggravated child abuse statute, does not apply. Although Chapter 827 defines torture as any "act, omission or neglect," that definition does not define willful torture under section 827.03. Criminal statutes must be construed in para materia. The prohibition of willful or negligent deprivation of food, clothing, shelter or medical treatment in section 827.03 demonstrates the Legislature's intention to treat these acts of omission as simple and not aggravated child abuse.

Assuming any of Petitioner's actions which contributed to the victim's death were acts of commission, the state's case lacked legally sufficient evidence to show that she acted with the specific intent to maliciously punish or willfully torture. However tragically flawed her motivations, the state's case showed only that she acted as she felt necessary to free the child from evil influences. There was no malice or intent to inflict unnecessary or unjustifiable suffering here, just a misguided attempt to rescue a young child from perceived oppression and possession by evil spirits.

II. The offense underlying the felony murder charge, aggravated child abuse, is an offense of commission, not omission. In defining the elements of the crime for the jury, the court included a definition of torture which encompassed acts of

omission and neglect. Here, where the jury may have viewed the withholding of food as an act of omission, it may nonetheless have felt compelled to convict Petitioner because of the erroneous instruction. Consequently, fundamental and reversible error occurred.

## ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AFTER THE STATE FAILED TO PRESENT LEGALLY SUFFICIENT EVIDENCE OF EITHER MALICIOUS PUNISHMENT OR WILLFUL TORTURE WHICH CAUSED THE VICTIM'S DEATH.

Petitioner was indicted and convicted of first-degree felony murder based on the underlying crime of aggravated child abuse, which was charged under the statutory alternatives of willful torture or malicious punishment. (R988-989, 1019) The state produced evidence that the victim had been beaten, but the medical examiner attributed the cause of death solely to starvation or malnutrition. (R724) Therefore, only those actions contributing to this cause of death in which Petitioner may have played a part are pertinent to an inquiry whether the state presented a prima facie case of felony murder which has a causal connection to the offense of aggravated child abuse. See Bryant v. State, 412 So.2d 347, 350 (Fla. 1982). The absence of a causal connection between evidence of whippings or beatings and the cause of death renders such evidence irrelevant to this inquiry, although that evidence remains material to the charge of aggravated child abuse standing alone. To the extent that the sufficiency review conducted by the district court of appeal rested partly on evidence of beatings, it is in error. 579 So.2d at 816.

The remainder of this argument is separated into three sections. The first concerns the conflict on which this Court granted review, which is whether Florida's aggravated child abuse

statute covers acts of omission. Petitioner argues that acts of omission fall under other sections of chapter 827, but not the aggravated child abuse statute, section 827.03. In the second section, Petitioner argues that regardless of the conclusion reached on the first question, the state failed to present legally sufficient evidence of specific intent to commit either malicious punishment or willful torture. In the final section, Petitioner argues that principles of statutory construction render her conviction under section 827.03 invalid.

A. COMMISSION V. OMISSION

The conflict on which this Court granted review centers on a determination whether section 827.03, Florida Statutes (1987), encompasses acts of omission. The panel below concluded without difficulty that the terms "willful torture" and "malicious punishment" apply to acts of either commission or omission. The court noted that two other district courts of appeal have held, to the contrary, that the terms as used in section 827.03, Florida Statutes, connote acts of commission, not omission. State v. Harris, 537 So.2d at 1130; Jakubczak v. State, 425 So.2d 187, 189 (Fla. 3rd DCA 1983).

The difficulty arises at least in part from a definition of torture in section 827.01(3) that includes the word "omission." The definition could be construed as bringing acts of omission within the element of "willful torture" in section 827.03, the aggravated child abuse statute. However, section 827.04 punishes as simple child abuse the act of depriving a child of necessary food, clothing, shelter or medical treatment willfully or through

culpable negligence, while section 827.05 punishes negligent deprivation of the same essentials as negligent treatment of children. The plain language of these statutes expressly covers acts of omission. The Harris court noted the apparent overlap and, following the earlier decision of its sister court in Jakubczak, held that the Legislature did not mean to encompass acts of omission within the meaning of "willful torture" under section 827.03(1)(b). 537 So.2d at 1130. In Jakubczak, the Third District Court of Appeal had based its conclusion on the observation that sections 827.04 and 827.05 "expressly provide that there can be a conviction for failure to do something which is required to be done; section 827.03 does not." 425 So.2d at 189.

In Jakubczak, the court ruled that a mother who left her infant child with her husband, knowing his use of drugs and alcohol often left him mentally unstable, and who then failed to seek medical attention, perpetrated an act of omission or culpable negligence subjecting her to prosecution for simple but not aggravated child abuse. In Harris, the failure to seek prompt and timely medical attention for a burned child was likewise held an act of omission to which section 827.03 did not apply. The failure to feed a child, the cause of death here, is as much an act of omission as is failure to to seek timely medical attention, held insufficient in Harris and Jakubczak to support a charge of aggravated child abuse. Also, as in the cited cases, the failure to seek medical attention here was a component of the state's evidence, although to a lesser extent than the

withholding of food.[2] Sections 827.04 and 827.05 expressly cover deprivation of food or medical attention, while section 827.03 does so, if at all, only through implication.

In affirming Petitioner's conviction below, the First District Court of Appeal merely cited to the definition of torture in section 827.01(3) as proof that the child abuse statute "clearly" defines torture as an act of omission. Harris offers the better supported perspective, for it at least acknowledges the potential conflict in the statutes and makes a reasoned choice of one interpretation over another. Moreover, as noted in Harris, section 827.03 defines aggravated child abuse as willful torture, while section 827.03 defines torture alone as an act of omission.

Therefore, Petitioner's felony-murder conviction arises from an act of omission, which is not encompassed within the underlying felony of aggravated child abuse. For this reason, it cannot stand.

B. LACK OF SPECIFIC INTENT

When the offense underlying a felony murder charge is a specific intent crime, the state must prove that the accused entertained the type of intent described in the statute. Gurganis v. State, 451 So.2d 817, 822 (Fla. 1984). Aggravated child abuse, as defined by section 827.03, Florida Statutes

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[2]The prosecution specified failure to seek medical attention in its notice of intent to rely on similar-fact evidence. (R1015)

(1987), is a specific intent crime. State v. Harris, 537 So.2d 1128, 1130 (Fla. 2d DCA 1989). In its indictment, the state set for itself the task of proving that Petitioner acted either with malice in punishing the victim or willfully in torturing her. See Rose v. State, 507 So.2d 630, 632 (Fla. 5th DCA 1987) (an accused is tried only on the charge in the accusatory document and the proof at trial must conform to the charge).

If this Court decides that the acts leading to the victim's death were those of commission rather than omission within the parameters of section 827.03, the question remains open whether the state presented a prima facie case that Petitioner had the requisite intent to act as a principal in the willful torture or malicious punishment of the victim. Cf. Freeze v. State, 553 So.2d 750, 753 (Fla. 2d DCA 1989). Prior opinions offer little guidance; of the state cases construing these terms, most focus either on the withholding of medical attention (e.g., Harris, Jakubczak) or on corporal punishment (e.g., Moakley v. State, 547 So.2d 1246 (Fla. 5th DCA 1989); Kama v. State, 507 So.2d 154 (Fla. 1st DCA 1987)). To Petitioner's knowledge, before the DCA opinion in this case, no Florida court had determined whether the denial of food, combined with forced physical exertion, meets the definition of malicious punishment or willful torture.

In its final instructions to the jury on the element of willful torture, the trial court defined "willfully" as "knowingly, intentionally and purposely." (R943) This is combined with the definition of torture as an "act, omission or neglect whereby unnecessary on unjustifiable pain or suffering is caused." (R943)

The validity of Petitioner's conviction thus rests on whether the state presented competent, substantial evidence that Petitioner acted with the specific intent or purpose of inflicting unnecessary or unjustifiable pain or suffering. Similarly, to the extent that Petitioner's actions leading to the victim's death were taken as punishment, there must be evidence that she was motivated by malice. The statutory definition of malice has been upheld when construed as ill will, hatred, spite or evil intent. State v. Gaylord, 356 So.2d 313 (Fla. 1978).

Even resolving all conflicts in the evidence in favor of the verdict, as is required in a sufficiency review, the state failed to establish specific intent either through willful torture or malicious punishment. The view of the evidence most favorable to the state shows no more than that Petitioner's motivations were tragically flawed. Her intentions cannot be equated with purposeful infliction of unnecessary or unjustifiable suffering, or with ill will, spite, hatred or evil intent. The testimony of Darlene Jackson, the victim's mother, showed only that Petitioner believed that the course of action she directed for the child was necessary to do God's will in banishing evil spirits and saving a soul. Passages from Jackson's diary, relied on heavily by the state at trial, illustrate this point. Jackson testified that the diary passages were purportedly prophecies delivered through Petitioner by God. (R320-321) A passage dated September 20, 1987, reads in part as follows:

> My Daughter Ruth. Know thee that in this hour thine seed's spirit is on its way out. Obey ye me in all that you do and ye shall

> fare well. I have heard thine prayer for a change in thine seed's heart. I the Lord, thy God can do any and all things. It is through faith, faith moves me to move for thee. Believe and you shall receive. Believe in and decree it done.

(R348) From a passage dated November, 9, 1987:

> Keep saying obedience, sayeth the Lord. Obedience is the only way. Give her plenty of pineapple juice and plenty of water. Why do you doubt me? Know ye that the Lord thy God can sustain this one. I can sustain and I can destroy.

(R393) Finally, from an undated passage following a passage dated January 15, 1988 (Kimberly McZinc died February 8):

> The time is at hand concerning thine seed and my little lamb. The spirit of obedience is upon her. Her weak state demonstrates that my way is the only way.
> Regardless of how weak and thin she becomes I will sustain her; I will sustain her to do my commandments. Bend not to the right nor the left. Pray I say for the prayer of a righteous man awarded much.

(R417-418)

The Court is encouraged to examine the entire diary as well as Darlene Jackson's testimony. Many other passages record "prophecies" regarding her daughter and the precise course of conduct she was directed to follow to win Kimberly's deliverance. The Court should note that the overall tone is not one of condemnation of the child but of the evil spirits which Jackson testified that Petitioner, through the prophecies, believed had oppressed and then possessed her. Note also that the prophecies include assurances that the child would be sustained. These observations are made not in an attempt to justify the treatment imposed on this child or minimize her suffering, but to

demonstrate that the evidence includes no showing that Petitioner entertained a state of mind consistent with a specific intent to impose punishment out of spite or hatred or to inflict willful torture. On the contrary, Jackson's testimony and diary show only that she perceived Petitioner as believing in the necessity of these measures to save Kimberly's soul. Petitioner's crime was not one of willfulness but of wrongheadedness. The state simply failed to present competent, substantial evidence of specific intent to commit aggravated child abuse resulting in the death of Kimberly McZinc.

In its opinion below, the district court of appeal rejected Petitioner's specific intent argument by pointing to evidence of the control Petitioner exerted over Kimberly and the suffering caused thereby. 579 So.2d at 816. Neither point is in dispute. The question of specific intent turns, however, on the evidence of Petitioner's motivations. The state presented no evidence of a motivation consistent with an intent to maliciously punish or willfully torture. Even if, as stated by the court, petitioner's conduct was "excessive, cruel, and merciless," the evidence shows that she believed this course of action absolutely essential to rescue the child from damnation. The decision below fails to grasp the distinction between the actions here and their underlying motivation.

C. STATUTORY CONSTRUCTION

The conduct which led to the victim's death are within the field of operation of section 827.04(1), Florida Statutes, which makes it a third-degree felony to willfully or by culpable

negligence deprive a child of, or allow a child to be deprived of, necessary food or medical treatment. As noted in Part A, this provision pertains much more specifically to the circumstances of Kimberly McZinc's death than the elements of section 827.03. A general rule of statutory construction, applicable to criminal and civil statutes alike, holds that the more specific statute covering a subject is controlling over one covering the same subject in general terms. State v. Billie, 497 So.2d 889 (Fla. 2d DCA 1986), rev. denied, 506 So.2d 1040 (Fla. 1987); Kiesel v. Graham, 388 So.2d 594 (Fla. 1st DCA 1980). Section 827.04 is the more specific statute. Another cardinal rule of statutory construction requires that effect be given to legislative intent of statutes passed at the same session dealing with the same general subject by considering them in pari materia so that the court may find a reasonable field of operation for each statute without destroying the intent of either. Pinellas Co. v. Lake Padgett Pines, 333 So.2d 472 (Fla. 2d DCA 1976). Until 1974, section 827.03, Florida Statutes, encompassed as an alternative element the contents of what is now section 827.04. That year, the Legislature created section 827.04, assigned to it that portion of section 827.03, which includes willful deprivation of food, and designated the new offense a third-degree felony. The remaining elements of section 827.03 continued to comprise a second-degree felony. Ch. 74-383, s.49, Laws of Florida. The rule of construction governing such laws, passed at the same session, dictates that each be given a reasonable field of operation without destroying the intent of the other. This rule

is violated by a construction which makes the willful deprivation of food, resulting in great bodily harm, a violation of section 827.03. Such a construction leaves section 827.04 without a reasonable field of operation and destroys the Legislature's intent.

Below, the district court of appeal acknowledged that deprivation of food is specifically addressed in section 827.04, but found that this case involved an aggravated form of food deprivation "carried out systematically" and thus justifying prosecution under section 827.03. 579 So.2d at 816. However, section 827.03 encompasses even an aggravated form of food deprivation in its use of the word "willful," i.e., done "knowingly, intentionally and purposely." Fla. Std. Jury Inst. (Crim.) Child Abuse F.S. 827.04. The fact that Petitioner engaged in a purposeful course of conduct does not remove her actions from the operation of section 827.04. Moreover, labeling her actions "an aggravated form of food deprivation" does not make the actions aggravated child abuse. The crime consists solely of the elements contained therein and charged (here, malicious punishment, or willful torture). The aggravation in aggravated child abuse exists solely in its title, as a term of art. It cannot be substituted for an essential element of the offense.

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For all the reasons detailed in this point, the state failed to present a prima facie case of aggravated child abuse which resulted in the victim's death. The conviction for first-degree felony murder thus fails for lack of an underlying enumerated

offense. Therefore, the trial court erred in denying the motion for judgment of acquittal, or in the alternative the motions for new trial and judgment notwithstanding the verdict, on Count I. Petitioner's convictions should be reduced to third-degree (felony) murder. Cf. McDaniel v. State, 566 So.2d 941 (Fla. 2d DCA 1990) (willful or culpably negligent deprivation of food and medical attention resulting in convictions for child abuse and third-degree murder).

## II. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSTRUCTING THE JURY THAT THE ELEMENT OF WILLFUL TORTURE IN AGGRAVATED CHILD ABUSE ENCOMPASSES ACTS OF NEGLIGENCE OR OMISSION.

In its final instructions to the jury on the "willful torture" element of aggravated child abuse, the trial court defined the component element as follows:

> Torture means every act, omission, or negligent (sic) by which unnecessary or unjustifiable pain or suffering is caused. Willfully means knowingly, intentionally, and purposely.

(R943-944) Assuming the word meant or actually used was "neglect and not "negligence," the definition of torture was taken verbatim from section 827.01, Florida Statutes (1987). For reasons touched upon in paragraph three in Point I and further developed below, this instruction constituted fundamental, reversible error.

Fundamental error occurs when a jury is misled during final instructions on the controlling law to apply to the case. Butler v. State, 493 So.2d 451 (Fla. 1986); Doyle v. State, 483 So.2d 89 (Fla. 1986); Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985). Here, the trial court misinstructed the jury on an element of the charge in Count II, aggravated child abuse, which serves as the underlying crime for the felony murder charge in Count I. Consequently, the verdict may be a result of this faulty instruction, creating both fundamental and reversible error which is reviewable in the absence of an objection. Doyle, 483 So.2d at 90; Carter, 469 So.2d at 195-96.

In Jakubczak v. State, 425 So.2d 187 (Fla. 3rd DCA 1983), the court examined the provisions of chapter 827, Florida Statutes, and reached the conclusion that the Legislature intended to punish under section 827.03 only acts of commission done with specific intent. Accord, State v. Harris, 537 So.2d 1128 (Fla. 2nd DCA 1989). A jury instruction which defines the offense in terms of neglect and omission is thus incorrect and misleading. Here, if jurors viewed the withholding of food -- which led to the victim's death -- or the withholding of medical treatment as acts of omission and not commission, they might nonetheless have felt compelled by the erroneous instruction to find Petitioner guilty as charged.

There is more than a reasonable possibility that this erroneous instruction on an element of both offenses at issue affected the jury verdict. State v. DiGuilio, 491 So.2d 1120 (Fla. 1986). Fundamental, reversible error resulted, entitling Petitioner to a new trial.

## CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Petitioner requests that this Honorable Court reverse her convictions and remand for reduction to attempted third-degree murder and simple child abuse, or, in the alternative, for a new trial.

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, 32399; and mailed to Mary Nicholson, DOC No. 153122, Broward Correctional Institute, P.O. Box 8540, Pembroke Pines, FL 33024, on this 8th day of November, 1991.

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ASSISTANT PUBLIC DEFENDER