OA 12-1-98 067

IN THE SUPREME COURT OF FLORIDA

ETIRZA EVERSLEY,

Petitioner

vs. Case No. 92,624

STATE OF FLORIDA,

Respondent

_____/

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

BRIEF OF RESPONDENT ON MERITS

ROBERT BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Fla. Bar No. 0238538

ERICA M. RAFFEL
Assistant Attorney General
Fla. Bar No. 329150
Westwood Center
2002 N. Lois, Suite 700
Tampa, Florida 33607

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's of the Case and Facts as substantially accurate and without intending needless duplication, but noting that some repetition of certain facts is unavoidable, would add the following for further accuracy regarding the issue raised:

At trial, the State called Carey Barron as its first witness. (T. 150) She has known Petitioner for somewhere between 8-10 months. She had previously babysat for Petitioner's two older children (T. 152), and when baby Isaiah was born, Petitioner took care of him for one day, and then he remained with Ms. Barron for two months. (T. 153) Ms. Barron had 5 children of her own, and raised another little boy as well. (T. 154) During the time Isaiah was with her, he had no health problems. She said he was cheerful and active and moving faster than average. At the time Petitioner came to pick Isaiah up and take him back, he was not having any problems breathing, nor did he have a cold or any sniffles. (T. 155-160) Ms. Barron and Petitioner had signed papers; one of which was notarized and basically stated that Ms. Barron would be caring for Isaiah. (T. 160) The first agreement that they signed regarding Ms. Barron's custody of Isaiah was reduced to writing while Petitioner was still pregnant. (T. 161) Petitioner sought out Ms. Barron to take care of/custody of Isaiah because Ms. Barron was known to be very good with children. (T.

161-162) While she was still pregnant with Isaiah, Petitioner told Ms. Barron that she had called an adoption agency, but that she really did not want to allow Isaiah to be adopted because that 'would be like he was dead'. (T. 163-164) The Sunday that Petitioner came to take Isaiah away, another document was entered agreeing that all responsibility for Isaiah would be taken away from Ms. Barron. (T. 170-171) Ms. Barron could not face Petitioner when she came to pick up Isaiah because Ms. Barron felt she was going to cry. (T. 159) During Ms. Barron's first conversation with Petitioner while Petitioner was still pregnant, Ms. Barron was initially unaware that Petitioner was pregnant. Petitioner told Ms. Barron she wanted to hurt herself and her children. She then told Ms. Barron that she was pregnant as well. (T. 174) Petitioner had said she felt like she wanted to hurt herself and her baby. Ms. Barron initially thought she was talking about her other two children because she did not know Petitioner was pregnant. (T. 176) Ms. Barron was very attached to Isaiah and loved him. (T. 182) She said she became hysterical when the police came and told her Isaiah had died. (T. 183) Ms. Barron did not want to give Isaiah back to Petitioner. (T. 185) Ms. Barron said when Petitioner took Isaiah that Sunday, he was fine. (T. 186) Ms. Barron was so upset when she found out Isaiah had died, she went to St. Joseph's Hospital and ended up in the crisis center. (T. 189)

The State next called John Touchton who testified he is an officer with the Tampa Police Department and responded to Petitioner's home at approximately 3:15 a.m. on February 6th. He looked over Isaiah and felt that he was extremely cold to the touch and stiff. (T. 190-192) The emergency medical people were leaving as the officer was arriving. They had gotten there at approximately 3:05 a.m. and pronounced him dead. Officer Touchton said that Petitioner was very calm and collected with no display of emotion that he was able to observe. (T. 197)

The State next called Officer James Parry. He is a Tampa Police Department Officer and a child abuse investigator. (T. 202-203) When he entered Petitioner's apartment, she was sitting on the couch and had the baby in her arms. Petitioner was very calm; her eyes were not read or swollen nor did it appear that she had been crying. (T. 204) Petitioner told Officer Parry that Carlene Barron had had custody of Isaiah from two days after his birth. She said that Ms. Barron had custody as she could not take care of Isaiah because she had to work. She said she only visited Isaiah once on the day she picked him up to bring him home. Petitioner told Officer Parry that Ms. Barron had told her Isaiah was sick when she picked Isaiah up. (T. 205-206) Petitioner had told Officer Parry that she went to the WIC Center to get milk, and while there, the nurse at the clinic looked at Isaiah and told Petitioner she had to take him to the hospital because he was sick.

Petitioner told Parry that she had a friend to drive her to St. Joseph's Hospital emergency room, that she went in and saw it was crowded and left. (T. 206-207) Petitioner told Officer Parry that at around midnight, the baby drank only 8 ounces of formula and that the baby was having trouble breathing. (T. 207) She said she laid the baby down on the bed with her and when her brother came by around 3:00 a.m., she noticed the baby was not breathing. (T. 207-208) Petitioner called her aunt who told Petitioner to call 911. (T. 208) Officer Parry said that Petitioner was not upset, she was very calm and precise and there was no hesitation in her interview. (T. 209) The State next called James Keasling who testified he is a clerk typist at the front desk at the Sulphur Springs Health Clinic. He prepares patients to be seen by the nurse or doctor and open their records. (T. 214-215) On February 5th, Petitioner and her baby came in and asked that someone see her baby. From where he was sitting across his desk, he observed the baby seemed to be in discomfort. (T. 214-216) Mr. Keasling testified it appeared to him that Isaiah was having difficulty breathing. He said there was a choking coughing noise coming from Isaiah and so he went to get a triage nurse. (T. 223) When Petitioner arrived at this clinic, she came right up to the window, she did not wait to be called. (T. 234) The witness did not see Petitioner and the baby being attended to nor did he see them leave. (T. 236)

The State next called Carmen Augustine who testified she is a registered nurse at the Sulphur Springs Clinic. She said they observe clients there, it is not a hands on treatment clinic. (T. 237-238) She said her responsibility was to interview clients, take vital signs and do an assessment. (T. 239) She said when she approached Petitioner, she observed that Isaiah was not breathing right. (T. 239) Based on her observation, she advised Petitioner to take Isaiah the emergency room at Tampa General or St. Joseph's. Ms. Augustine said she insisted that Petitioner get treatment, and then called the doctor on staff. Dr. Delossantos also told Petitioner take Isaiah to the emergency room. Augustine testified she was aware that Petitioner was with someone and had transportation. She said they did not need to call an ambulance but would have gotten a van or some sort of assistance to take her if she did not have her own transportation. (T. 240-241) Nurse Augustine described the sound of Isaiah's breathing and demonstrated to the jury the way it sounded. (T. 241-242) Nurse Augustine said they did not do a full assessment on Isaiah because Petitioner was not a client of theirs and did not have an appointment. But if someone walks in as Petitioner did, they will give them a quick observation. (T. 243-244) She said she did not think the baby was actually in respiratory distress but she was not a doctor; and that's why she called the doctor. She said she made a quick assessment and "I run and got the doctor". (T. 249)

Nurse Augustine said she remembered telling Petitioner to take the baby the emergency room because they did not have sufficient equipment there to know if Isaiah had pneumonia. She said she told Petitioner they had to do a chest x-ray. She said she remembered telling Petitioner the baby did not look right and that she had to take the baby to the emergency room and she insisted on that more than once. (T. 251)

The State called Dr. Lydia Delossantos who testified that in February, 1996, she was practicing at the health department in Sulphur Springs. (T. 260, 263) She recalled that on February 5th, she had contact with Petitioner and 2 month old Isaiah. (T. 264) The doctor testified she went with Nurse Augustine to the triage room and met with Petitioner. She said the baby was grunting but when she listened to his chest, she did not hear any rales. She said she was concerned to hear the grunting and reinforced what Nurse Augustine had already told Petitioner; that the baby needs to be in the emergency room right away. (T. 265) Dr. Delossantos testified that she told the nurse in Petitioner's presence that the baby was serious. (T. 266-267) Dr. Delossantos testified she did not call an ambulance or call ahead to the hospital and let them know that Petitioner was coming primarily because she did not hear rales. However, she also stated that she did not call an ambulance because "mainly I trusted that she would go to the emergency room because its 20 minutes to the emergency

room." (T. 271) Delossantos said they told Petitioner her baby has to be in the emergency room but not that it might die. (T. 273) Delossantos said she believed Petitioner got the message that the baby needed to be in an emergency room. (T. 273) Delossantos was asked if she went into any detail with Petitioner other than saying go to the emergency room and Delossantos responded "I am sorry." When asked in essence, why, Delossantos said "because I did not know she was unreliable". (T. 273-274) Delossantos said she expected Petitioner to carry out the doctor's instructions. She was not told in a casual tone of voice to go to the emergency room. (T. 274)

Georgina Butts testified that Petitioner is her niece, and she saw Isaiah on Sunday at about 4:00 in the afternoon and he did not exhibit any signs of having trouble breathing nor did he have a cold or sniffles or any indication there was something wrong at that time. (T. 276-278)

The State called Detective Yaratch who testified he responded to the scene that evening and spoke briefly with the individuals in the home as well as with Petitioner. He thereafter investigated this case by speaking with all witnesses. (R. 280-284) On the night of the baby's death, Petitioner told the detective that Ms. Barron had been taking care of Isaiah and in fact had custody of him. Petitioner told the detective that the previous Sunday she took Isaiah back from Ms. Barron. At no time did Petitioner

indicate that Isaiah had been sick or was sick at the time she picked him up from Ms. Barron. (T. 285-286) Yaratch said that Petitioner took Isaiah to the clinic the following Monday morning. Petitioner told him that she spoke to the nurse and the doctor and was told to go to the hospital. Petitioner was at the clinic with a friend who took her to the hospital. The friend (Mr. Walker) dropped her off at the emergency room and left while she went inside. (T. 288) Petitioner had indicated to the detective that she knew the child needed be taken care of. Petitioner told him that when she walked in the door there were people waiting in line and she did not want to wait so she turned around and got a cab and went home. (T. 289) During this initial interview, Petitioner told Yaratch that the last feeding was at midnight and that she had noticed in a prior feeding that evening that Isaiah was having a hard time breathing. Detective Yaratch asked her if she had sought out medical attention and Petitioner responded she had not. (T. 290) A little over a month later, Yaratch interviewed Petitioner again after advising her of her Miranda warnings. (T. 293) The tape recording of that interview was introduced into evidence and played for the jury. (T. 295, 299-311) She said she took the baby to the clinic because he was wheezing and was not breathing right. They told her to go to the emergency room and she did but did not stay there because it was full and she did not want to wait because she believed the baby

just had a cold. She said the line at the emergency room had 2-3 people in it. She said the people at the clinic said it sounded like Isaiah had a cold but she had to take him to the emergency room because they did not have the proper equipment to determine why he was not breathing right. (T. 307) She said that later in the day he was not wheezing but was acting right. (T. 307) She said he drank half his bottle at midnight and his breathing was alright. (But see her comment contra to the responding officer on the night of Isaiah's death that he was having trouble breathing at midnight as well. (R. 207)) After she left the emergency room, she went home. She had no other appointments that day and she did not go to work as she had taken the day off to take care of the baby. (T. 310) When asked "so really there was no reason you could not have waited, at all?" She responded "I don't know. I am just impatient." The detective asked her if it ever cross her mind that if she had just walked up and said she had a baby that was having difficulty breathing they would have put her in front, Petitioner responded "they would have. They would have. I understand that." (T.311) The detective testified that pursuant to his investigation, there was no indication that Isaiah was exhibiting any kind of medical symptoms at the time Petitioner picked him up from Ms. Barron's house two days before his death. (T. 317)

Dr. Laura Hair testified she is a medical examiner in Tampa. She is board certified in Anatomic Pathology and Neuropathlology, is a member of several professional associations and has been published 20-30 times. (T. 322-323) She responded to the scene of Petitioner's home on the night Isaiah died and pronounced him dead there. Later that day, she conducted an autopsy on Isaiah. (T. 323-324) The doctor's initial findings revealed abnormality of Isaiah's organs. However, microscopic slides of lung sections were examined revealing abnormality. (T. 325-326) Bacterial cultures wee done of both lungs, revealing a specific bacteria causing the doctor to reach the opinion that Isaiah had Group B hemolytic bacteria in both lungs and died of Streptococcal Pneumonia. (T. 327) On cross-examination, the doctor agreed that this type of pneumonia may not show any other symptoms besides grunting. (T. 330-331) She said babies rather than adults get this type of pneumonia which can cause death in a 24 hour period. (T. 331)

The State next called Dr. Lola Bahar-Posey who testified she is a board certified doctor of pediatrics employed at Bayfront Medical Center and is also the child protection team medical director for Hillsborough County. (T. 336-338) She elaborated somewhat on the symptoms Isaiah exhibited, and indicated that grunting is a mechanism that children use to increase the amount of air in their lungs when their abdominal and chest wall muscles work harder to get air. She reviewed documents relating to Isaiah's

death and as a follow-up discussed the case on the phone with Dr. Hair. (R. 339) She said Isaiah died from Strep Pneumonia bacteria in his lungs, and that this is the most common cause of illness, and various infections in children, such as ear infections, sinusitis, throat infections, and pneumonia. (R. 340) She said if she saw this symptom in a child of this age, she would be very concerned because it means impending respiratory problems; she said with antibiotics, the mortality rate for this infection has decreased from 20-50 percent to one percent. (T. 341-342) On cross-examination, she elaborated that grunting is a symptom of respiratory distress, and that this strain of pneumonia could kill within 32 hours. She said that it is possible that during the first, second, third or even the 15th hour of having this infection, there might not be any visible symptoms. (T. 343,345) She said that exhibiting grunting does mean that the individual is in respiratory distress at that point. (T. 347) She said you could arrest the progression of this disease by introducing antibiotics. (T. 347-348)

On cross-exam, counsel for Petitioner asked Dr. Bahar Posey the following:

> Q. Doctor, it certainly is possible isn't it that if an infant of two months old had streptococcal pneumonia to a certain degree that even antibiotics might not check that disease and the child would still die as a result of that?

> A. It's always possible, but the incidence is much less. You can arrest the progression of a disease if you introduce antibiotics. ...(R. 348)

On direct examination of Dr. Bahar Posey, the following transpired:

> Q. If you were to learn that a baby was seen with this symptom of grunting, would you expect that symptom to continue?
>
> A. Yes.
>
> Q. Would you expect to ever see it lessen or abate in nature?
>
> A. Not in my experience. (R. 342)

The State then rested its case. (T. 349)

Petitioner moved for a judgment of acquittal arguing that in both counts of the information, the State failed to establish culpable negligence; that the State did not show a course of conduct that Petitioner must have known or reasonably should have known that Isaiah's condition was likely to cause death or great bodily injury. (T. 349-350) The State responded that two medical professionals instructed Petitioner to go to the emergency room evidencing that an emergency existed; and the fact that Petitioner actually went to the emergency room corroborated the doctor's instructions, and that Petitioner was aware the baby was having trouble breathing. (T. 351-352) The court reviewed Dr. Bahar-Posey's testimony regarding the pre-antibiotic mortality rate of

20-50 percent, as opposed the present antibiotic era which indicates the mortality rate has dropped to one percent, and denied Petitioner's motion for judgment of acquittal as to each count. (R. 353) The court said:

> " .... I find that is a jury question as to whether a mother of a 2 month old child who was told by a nurse and a doctor to take your child to the emergency room and does so and sees a line with only 2 or 3 people ahead of her and decides that she does not want to wait and voluntarily ignores the advice of that nurse and doctor and leaves the hospital emergency room and even admitted that she knew she could have told somebody about the child and the clinic having said bring the child and she would have been placed in front of the line. That is for the jury to decide whether there is culpable negligence." (T. 354)

The court did indicate it was unclear whether the State proved a prima facie case that Petitioner's culpable negligence "caused" the death of Isaiah. (T. 354-355) The court stated: "although the doctor said that if any baby grunts, although you tried to get her to say otherwise, that doctor would be very concerned with a respiratory problem and I am sure would have immediately instituted appropriate medical remedial procedure. But that's the only avenue I am concerned, is the causation of Ms. Eversley's alleged culpable negligence. And I can always revisit it. I am denying the motion for judgment of acquittal at the close of the State's case in chief." (T. 355)

The defense called Edward Willey who testified he is a physician and a pathologist. (T. 366) He does not practice medicine; he is a consultant for lawyers (T. 367), and has been for 10 years. (T. 398) He received no training nor has any experience in pediatric emergency room medicine nor experience treating streptococcal "B" patients. (R. 401-402). He reviewed the information supplied by Dr. Hair (T. 371-372) and confirmed that grunting requires investigation, (T. 375) and that streptococcal pneumonia was the cause of death. (R. 399) After extended argument as to whether Dr. Willey could testify whether or not the nurse and doctor at the Sulphur Springs Health Clinic sufficiently instructed Petitioner that her son required immediate attention (T. 377-395) in an effort to put blame on them, and the court's ruling that the witness could not so testify (T. 378-396), Dr. Willey testified he could not say whether or nor Isaiah would have survived if he had actually gotten treatment at the hospital. (T. 397) He also testified a child's symptoms would get worse, (T. 400) and based on the textbook that he utilized, Pediatric Infectious Diseases by Feigin and Cherry, he believed that 25 percent of infants who developed this disease after they left the hospital would die. (T. 408,409,411) Dr. Willey did not consult a recognized treatise which indicates the mortality rate would be less than one percent for a treated infant, but (without basis) he disagreed with that percentage assessment, and maintained one out of four children with

this infection will die. (T. 411-414) The doctor named three treatises relied on by pediatricians, which included the one relied upon by the State. The text book he utilized as a basis for his opinion was not one of the three recognized treaties he acknowledged. (T. 413) Dr. Willey also opined that the doctor from the child protection team (Dr. Hair) testified in a deposition that Isaiah had "S" pneumonia which is a different organism. (T. 414) He said there was an initial misconception as to which organism was involved and it was only after he got the laboratory reports that he was aware that this was a group B Strep which is a more dangerous organism than the one he originally thought was present. He said it appeared from the materials he had that the State witnesses were initially interpreting that Isaiah had a different strain of "S" pneumonia. (T. 413, 416) Dr. Hair had testified for the State that Isaiah had group B hemolytic Streptococcal pneumonia. (T. 327, 330-331) Dr. Bahar-Posey read Dr. Hair's report and spoke to Dr. Hair on the phone and testified for the State that Isaiah had Streptococcal pneumonia. (T. 340.342-343)

Petitioner next called Mr. McTavish who testified he is a senior paramedic lieutenant with Tampa Fire Rescue and responded Petitioner's home at 3:00 a.m. on February 6, 1996. He said Isaiah was found stiff, cold, pulseless, and breathless with fixed dilated pupils and appeared that he had been dead for quite

sometime; more time than would be consistent with working on him. (T. 429-430) He testified Petitioner was holding and rocking the baby and continued do so after she was told Isaiah was dead. Petitioner was crying over the baby and upset. (T. 430)

George Martinez testified he too is a paramedic with the fire department and he told Petitioner that her baby was dead. He said he then turned his attention toward her as a patient because he was concerned she would become hysterical. He said she seemed very solemn and numb, kind of shocked and distraught. (T. 433-435) The 911 tape was introduced into evidence by the defense and played for the jury. (T. 436-439) On the tape, Petitioner asked for an ambulance and specifically stated "I got a dead baby here."

The defense then rested. (T. 439) Petitioner again moved for a judgment of acquittal arguing there was insufficient evidence support a conviction for culpable negligence, and that as the element of causation, Petitioner's failure get medical aid did not actually result in Isaiah's death. (T. 441) After a further argument, the State reminded the court that the State's expert testified that 99 out of 100 babies if given proper medical care would live, the court denied Petitioner's motion for judgment of acquittal but reserved ruling on the element of causation. (T. 443-444) Petitioner argued that Count II should not go the jury as it violated Petitioner's double jeopardy rights. (T. 447) The court overruled that objection stating that if the jury found

Petitioner guilty of both counts, the court could not adjudicate her guilty of both. (T. 447)

On November 4, 1996, a hearing was held before the Honorable M. William Graybill, upon Petitioner's reserved motion for judgment of acquittal. (T. 557-592) At that hearing, Petitioner argued that the State witnesses, Dr. Posey and Dr. Hair, testified that Isaiah died of either group B Streptococcal Pneumonia or Streptococcal pneumonia, and the defense witness, Dr. Willey testified that Isaiah died of Streptococcal Pneumonia. (T. 560-569) The thrust of Petitioner's argument was that this conflict in the evidence should have been taken into consideration with Isaiah's own weakened immune system and physical characteristics to establish that he may well not have survived even with medical attention, and therefore the State did not present a prima facie case. The State responded with citations of authority regarding the affirmation of convictions where physicians testified that either in all likelihood, the victim would have lived, or that the victim had a 50-50 chance of living, and that the testimony in the instant case was that less than 1% of children who receive treatment for this infection do not survive. (T. 570-571) The State further argued that once Petitioner understood that Isaiah was sick and the gravity of the situation required emergency room treatment, and her impatience alone prevented him from receiving that treatment, she erased his opportunity for survival. (T. 571-572) The Court

found that upon the authority of Bradley v. State, 84 So. 677 (Fla. 1920) even reprehensible conduct of a parent in failing provide medical care for a child did not cause the death of that child, and that this Court is bound follow the dictates of Bradley until it is overruled. (T. 582-584) Upon that basis, the trial court vacated the jury verdict of guilty on Count I, Manslaughter, and, finding that the child abuse count causing great bodily harm was the same as causing death, there was no evidence that Isaiah was caused any great bodily harm from lack of treatment, and vacated that jury verdict as well and found Petitioner guilty of first degree misdemeanor child abuse as a lesser included offense under Count II. (T. 584) The court reiterated it was making its determination based on Bradley v. State, inviting this Court to distinguish it. (T. 596) Four days later on November 7, 1996, the State timely filed its notice of appeal from this ruling. (T. 89) That appeal follows.

SUMMARY OF THE ARGUMENT

As to both charges, regarding the element of causation, and as to the issue of culpable negligence, a jury issue had been sufficiently created and resolved by the evidence beyond a reasonable doubt, and the trial court erred in granting a post-verdict motion for judgment of acquittal.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN VACATING THE JURY VERDICT FOR MANSLAUGHTER BASED UPON THE PREMISE THAT Petitioner'S FAILURE TO PROVIDE MEDICAL ATTENTION FOR ISAIAH DID NOT CAUSE HIS DEATH.

When, as Petitioner did here, a defendant moves for a judgment of acquittal, he or she admits all facts and evidence adduced and every conclusion favorable to the State reasonably inferable therefrom. Lynch v. State, 293 So.2d 44 (Fla. 1974). For purposes of a judgment of acquittal, the State need not disprove every reasonable hypothesis of innocence before the case can go to the jury. Lincoln v. State, 459 So.2d 1030 (Fla. 1984). Although referring to circumstantial evidence, when inferences pointing to guilt are sufficiently strong to permit a jury to find guilt beyond a reasonable doubt, the case should in fact go to the jury. Thomas v. State, 512 So.2d 1099 (5th DCA 1987) A trial court should not usurp this function after the fact. Credibility matters should not be determined on a motion for judgment of acquittal. Lynch v. State, supra.

The instant case is not, as Petitioner asserts, a circumstantial evidence case. No inference needs to be drawn to determine what killed Isaiah, and no inference need be drawn as to Petitioner's conduct. It is a question of responsibility ... that

is a jury question, not an issue for a reasonable hypothesis of innocence in a circumstantial evidence. No inference is required to establish what Isaiah suffered from: Group B Hemolytic Streptococcal Pneumonia. No inference needs to be drawn as to whether he grunted to get breath into his lungs, and the obvious nature of distress. No inference needs to be drawn as to whether Petitioner was told he needed to go to an emergency room, and no question or inference needs to be drawn to determine that she initially followed this advice, but left almost immediately due to her own impatience even though she had taken the day off from work to "take care" of the baby, and yet did not feel like waiting in the emergency room even though she knew she would be taken first if she told them her child was having trouble breathing. The so-called inference as to causation, does not make this a circumstantial evidence case. It is a question of weighing evidence and credibility to make a determination as to whether or not Isaiah would have lived if he had received medical attention and the antibiotics that would stop the progression of his infection. The State would assert there was evidence beyond a reasonable doubt to support the fact that Petitioner's failure to obtain this medical assistance caused Isaiah's death. Petitioner's defense is no different than saying "I didn't kill the victim by shooting him, the bullet killed him. There is no hypothesis of innocence that someone else failed to get him medical

care or was responsible for him. Therefore, Petitioner's theory that this case is circumstantial is misplaced. The jury was not asked to draw a conclusion from one set of facts to infer another be it as to what caused Isaiah's death, or identification of Petitioner or the facts as to what transpired in this case. Therefore the trial court should not have disturbed the jury verdict.

In its order, the trial court found two grounds upon which to grant the renewed motion for judgment of acquittal; the first that the State failed to present a prima facie showing that Etirza was culpably negligent in not obtaining medical attention for her child after she left the emergency room, will be addressed in Issue II, infra.

The second ground upon which the trial court granted Petitioner's renewed motion for judgment of acquittal was that the State failed to present a prima facie showing that the failure to obtain medical attention for Isaiah caused his death. (R. 87) Isaiah was not beaten to death, nor was he shot or stabbed, nor was he run over by a car. Isaiah died due to respiratory distress brought on by illness. Although Appellant makes much of what strain that was, the virulence of either strain addressed was plain, and the actual type of pneumonia for which Isaiah suffered is irrelevant. He was in obvious distress and Petitioner was his mother. She was all he had. And she was ordered by a doctor to

take him to an emergency room. Not to another doctor's office, not to wait there for further diagnosis or treatment, but to get him to an emergency room. And Dr. Delossantos did not tell her toi do so in a casual tone or manner. And it must be remembered that Petitioner was clearly aware of Isaiah's distress because she went to the clinic and asked to have a doctor look at him because of the way he was breathing. The Petitioner's expert, Dr. Willey was completely ignorant as to the issue of causation. He said he "couldn't say" whether Isaiah would have survived with treatment. He did not say he could survive, he did not say he could not survive, he could not say that maybe he would survive. He said he "couldn't say". (R. 397) On recross-examination, for the very first time the phrase "S"-Pneumonia is mentioned by Dr. Wiley. When he disagrees with the one percent mortality rate as suggested by Nelson's Treatise on Pediatric Diseases, he questioned the strain, the prosecutor was referring to: "Group B or are you talking about S-Pneumonia which is what was originally thought of in this case?" (R. 413) Dr. Willey said "Strep Pneumonia, S-Pneumonia is a different strain" (R. 414) Dr. Willey indicated that Dr. Bahar Posey said in her deposition that Isaiah had S-Pneumonia. (R. 416-417) He said there was misconception as to what strain there was initially until he got all of the reports and realized that it was Group B. Strep. Respondent would assert there was absolutely no misconception at trial at all. Except of course by r.

Willey who needed to muddy the waters. Now, Petitioner has elevated her own expert witness' confusion to a defense. Although the instant record does not contain Dr. Bahar Posey's deposition, but rather only Dr. Willey's hearsay statement as to what was said in that deposition, it is certainly possible that the court reporter could not spell streptococcus or Dr. Bahar Posey meant streptococcal .... after all she was using Dr. Hair's report which said Group B Hemolytic Streptococcal Pneumonia and the argument in Petitioner's brief certainly is a creation to confuse as there was no question at trial as to the cause of Isaiah's death. Both State experts were going under the belief that Group B Hemolytic Streptococcus Pneumonia killed Isaiah. Dr. Willey named the three leading treatises relied upon by pediatricians, one of which was utilized by the State. He, however, relied on a text book outside these three treatises. He too agreed as to what killed Isaiah as Group B Hemolytic streptococcal Pneumonia. But all of the doctors at times even Dr. Willey referred to this as Streptococcal Pneumonia. Dr. Willey's comment that Dr. Bahar Posey said S-Pneumonia in her deposition was hearsay and properly excluded and did not mean Isaiah's cause of death was misdiagnosed, confusing causation with parental responsibility. Even if the words "S-pneumonia" were spoken does that necessarily refer to a different group or strain or just short for Streptococcus? No inferences need to be drawn for that determination, nor are inferences

required to identify Isaiah's only hope. His mother, the Petitioner herein. At trial, a different tactic was taken rather than an all out assault on causation as is presently being presented to this Court. Below, for twenty pages in the transcript Petitioner tried to show the doctor and nurse at the clinic did not sufficiently advise her of the seriousness of Isaiah's condition so it was their fault that she went to the emergency room but then left so he thereafter died. (T. 377-399) There is no question, no possible question, no humanly conceivable question as to whether or not it occurred to Petitioner that her child was in need of assistance. She herself sought help and initially followed the advice of the doctor and took Isaiah to the emergency room. The court in Maynard v. State, 660 So.2d 293 (2nd DCA 1995) said that the issue of causation as to whether or not a defendant's acts were a contributing cause of the victim's death in a manslaughter case was a jury question. In Maynard, the court held the weight to be given expert medical opinion as to the cause of death is a matter to be determined by the jury. There, believing he purchased food stamps stolen from her, the defendant hit a 76 year old motel owner in the head without provocation. He did not fight back or retaliate in any way, and although he recovered from being hit in the head, approximately 45 minutes later, he died of a heart attack. He had a heart attack some 23 years before but took good care of himself and appeared to be in

good health. The medical examiner concluded the victim had severe heart disease and would have had a heart attack at any time and was in fact living on borrowed time, but that the attack by the defendant constituted a contributing cause. Id. at 295. The court held criminals take their victim as they find them, and that the trial court correctly denied the judgment of acquittal and allowed the jury to resolve the issue of causation. "First, the fact that the Appellant had no way of knowing that the victim suffered from severe heart disease (Streptococcal Pneumonia) and that this condition could be fatally exacerbated by her criminal conduct (failure to obtain medical care) does not absolve her of liability for manslaughter. As was noted long ago by the Florida Supreme Court in sustaining a manslaughter conviction, "the fact that it could not have reasonably occurred to the defendant, or did not occur to him, that death was a probable result of the act, does not prevent a conviction." Baker v. State, 30 Fla. 41, 65; 11 So. 492, 498 (1892) overruled on other grounds Tipton v. State, 97 So.2d 277 (Fla. 1957)" Id. at 296.

At the hearing on November 4, 1996, the trial court indicated it was basing its order vacating the jury verdict for Manslaughter upon the authority of Bradley v. State, 84 So. 677, 79 (Fla.) 651 (Fla. 1920). In Bradley, the defendant, who was the child victim's father, failed to seek medical assistance after his epileptic daughter fell into a fire during a seizure, burning herself badly

and ultimately dying from her burn wounds. Witnesses testified the girl's suffering was acute; she did not know anybody and was biting herself and tearing up the bed clothes. Several witnesses offered to provide medical assistance, but the father repeatedly indicated he was relying on the Lord. The majority opinion held that the fallacy in the State's case was that it failed to prove that with medical attention the child would have recovered. This is so because although no medical assistance was provided for the first three weeks after the fire, the child was under a physician's care at Chatahoochee during the final two weeks of her life. The court's ultimate reasoning in it's opinion from 1920 is faulty in 1996 however:

> "The attention of a physician may or may not have prevented the burning from causing the death of the child; but the absence of medical attention did not cause the killing of the child even if the failure or refusal of the father to provide medical attention was culpable negligence within the meaning of the statute." Id. at 679, 79 Fla. 656.

The thrust of the opinion in Bradley is that the 1920 statute under which the defendant was charged did not contemplate criminal liability for the failure to seek medical care for a child in need of same. However, in Nozza v. State, 288 So. 2d 560 (3rd DCA 1974), the court upheld the defendant's conviction for manslaughter discounting his argument that the trial court should have instructed the jury on the lack of a legal duty of a parent to take

a child to a doctor upon the authority of Bradley. The Third District Court of Appeal discounted this argument finding that Bradley was decided before Florida Statutes criminalized willfully denying treatment to a child, albeit under another statutory section. Nozza v. State, supra, at 562-563. In Nozza, the court held that where the evidence shows a neglect of parental duties contributes to the death, a jury issue as to guilt is created. It is true that Bradley has not been specifically overruled, as the trial court hereinbelow noted, and has, as recently as 1993 been cited by this Honorable Court for the proposition that a statutory definition of a felony should not by construction or interpretation be extended to cover acts of persons that are not within the intent of the statute. Pugh v. State, 624 So. 2d 277 (2 DCA 1993). That case however involved the analysis of a predicate offense of conspiring to commit aggravated child abuse for first degree felony murder and the erroneous jury instruction thereon.

Petitioner argued below that Isaiah was particularly weak and had a diminished immune system. Appellant would respond this is not a legal consideration. In Brate v. State, 469 So.2d 790 (2d DCA) reh. den. (1985), the court found a criminal takes his victim as he finds him, and cannot escape criminal responsibility because the victim is weak. In Brate, the victim was in a car accident and may well have received blunt trauma to the abdomen. But the defendant, who was pursuing the victim in his car, pulled off the

road to where the victim had been pulled away from the wreckage, and the defendant then stomped on the victim's abdomen with his boot. The medical examiner testified that the fatal injury was consistent with a boot stomp, but also believed that the stomp would have contributed to the death of an individual who sustained abdominal injury in an earlier collision. The doctor could not testify the defendant's stomp actually caused or contributed to the victim's death however. The court held that medical testimony regarding cause of death is advisory and not conclusive on the judgment of the jury; and that the jury may evaluate it in light of skill, demeanor, and totality of the evidence along with any other illuminating factors. Id. at 793.

Nor does the evidence in the instant case raise a failure of corpus delecti. Petitioner relies on Golden v. State, 629 So.2d 109 (Fla. 1993) where the issue revolved around the sufficiency of the State's circumstantial evidence to establish that the drowning death of the defendant's wife was the result of a homicide rather than an accident where, when she was by herself on the dock and intoxicated fell into the water and drowned. The court found in Golden that the corpus delecti of a homicide consists of three elements, the fact of death, the criminal agency of another, and the identity of the deceased person and that each element must be proved beyond a reasonable doubt. The instant case presents absolutely no corpus delecti issue nor was that raised below, and

Petitioner misplaces reliance on Golden where the court was asked to determine whether the death was an accident or a murder involving the criminal agency of another with intent to kill. Culpable negligence does not require intent to kill, and any reliance on a case that addresses the criminal agency of another that requires that type of specific intent is inappropriate.

Petitioner then attacks the mortality rate cited by the State and argues that Dr. Willey's contradictory testimony created a reasonable hypothesis of innocence. It did not. It merely created a difference in the mortality rate as testified to by two separate experts and created a credibility issue. But statistical data does not have to be as exact as Petitioner would like in order for an element to be established to the requisite burden. In Walker v. State, 1997 WL 539438 (Fla. 1997), the defendant was convicted of killing his former girlfriend and their 17 month old child. The defendant sought to suppress testimony concerning DNA testing on a cigarette butt found in the victim's car arguing that it was not probative of his presence in the victim's car, and went to the issue of identity. The court admitted the expert testimony that the DNA from the filter of the cigarette was type 1.1, 1.2 .. A type shared by the defendant, the defendant's brother and 12.2 percent of the African American population, 6 percent of the Caucasian population, and 4.8 percent of the Hispanic population. In its opinion in Walker, this Court found the concerns raised by

the defendant went to the weight of this evidence, not to admissibility. In that regard, it is an issue for the jury to resolve, not for the court to interpret on a post verdict motion for judgment of acquittal. In State v. Martinez, 549 So. 2d 649 (5th DCA reh. den. (1989) the court said that DNA tests do not necessarily rise to the level of a 100 percent probability but that the jury can evaluate the expert's opinion in making its final decision. The Martinez court said that the jury is always free in all cases to disregard or disbelieve an expert witness just as it can absolute eyewitness testimony. The court held however that where statistical probability testimony is scientifically and reliably grounded, it is admissible; in reply to this brief, Petitioner may well argue that a one percent mortality rate without treatment for the type of pneumonia from which Isaiah suffered and died is not scientifically and reliably grounded based on the alleged misdiagnosis or confusion over the strain of pneumonia from which he suffered. The State would respond strongly that it is only the Petitioner's expert who was confused, and a doctor who admittedly relied on a text that is not one of the three treatises he himself noted as the top three treatises to be relied upon in pediatric matters effectively compromised his own credibility before the jury, and when combined with his admission that he had no pediatric training or experience, the jury was free to disregard

his testimony, and abide by the State's expert, Dr. Bahar Posey, a bord certified pediatrician..

In the instant case overwhelming factors and circumstances illuminated the sufficiency of the evidence presented on a charge of manslaughter for which the jury found Petitioner guilty; this Court should affirm the opinion of the Second District Court of Appeal that reserved the trial court's order vacating that verdict.

ISSUE II

THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THAT APPELLANT WAS CULPABLY NEGLIGENT. (Restated)

In its order, one of two grounds upon which the court granted Petitioner's renewed motion for judgment for acquittal was that the State failed to present a prima facie showing that Petitioner was culpably negligent in not obtaining medical attention for her child after she left the emergency room.

With the introduction of Petitioner's post Miranda statement to the police, which was tape recorded and played at trial, the issue of her credibility and intent was placed before the jury. Clearly this was a child that was grunting like an animal endeavoring to get air into its lungs. The Petitioner recognized this, and went to a clinic which was only equipped as any doctor's office would be. She inquired of the nurse as to the baby's condition, and was told Isaiah needed to go to an emergency room. The nurse told her to wait while she went to get a doctor to look at the baby. Dr. Delossantos came to the room where Isaiah and Petitioner were waiting, and she too observed Isaiah, and, in Petitioner's presence, told the nurse that "this was serious". Dr. Delossantos then told Petitioner to get Isaiah to an emergency room. The doctor said a casual tone of voice was not used. Even Petitioner, recognized the serious nature of Isaiah's condition; she followed the doctor's orders and took him to an emergency room.

Her boyfriend was with her at the clinic and drove her to St. Joseph's Hospital and let her off. He went on to do other errands, and Petitioner went into the emergency room with Isaiah. She noticed 2 or 3 people in line ahead of her, and, as she told the detective, she was too impatient to stay. She acknowledged that she had taken the day off from work and had no other appointments that day, and further acknowledged that if she had gone to the front of the line and told them that she was sent over by the clinic because her baby was having trouble breathing, that she knew that she would be taken immediately. She acknowledged that she knew that, yet her impatience and even bothering to do that overrode her concern for her child's obvious respiratory distress. All of the medical testimony at trial indicated that this condition would worsen, and although Petitioner chose not to testify at trial, the jury could easily infer that her disregard for her child's health and the admonishment and order of the doctor to seek assistance at an emergency room was nothing less than gross flagrant and reckless disregard for Isaiah's health and well being. However, in light of her comments and all of the surrounding circumstances, the jury readily, and was easily able to infer culpable negligence on Petitioner's part.

There is no doubt today, that manslaughter by culpable negligence includes the failure to obtain medical assistance for a child. In Hermanson v. State, 604 So.2d 775 (Fla. 1992), the court

overruled this Court's affirmance of a felony child abuse and third degree murder verdict based on the failure to obtain medical assistance for a child. The Supreme Court's decision revolved around this Court's certified question as to whether Florida's spiritual treatment proviso was a statutory defense to criminal prosecution; the Supreme Court found that a due process issue evolved ... a parent relying on the spiritual treatment proviso would not know when crossing the line from spiritual treatment and into criminal behavior. The Supreme Court confined its opinion to that issue alone, leaving untouched this Court's recognition that under the proper circumstances prosecution for manslaughter would lie for failure of a parent to provide medical treatment for a child. The Hermanson's conviction for third degree murder and child abuse were upheld initially by this Court as supported by the evidence because the expert testimony admitted that it was within the bounds of medical probability that Amy Hermanson's death could have been prevented even up to several hours before her death with proper medical treatment. This Court went on to decline to reverse the trial court's dismissal of the manslaughter count only because it was upholding the other two counts and felt that double jeopardy prevented further conviction. It should specifically be noted that the Florida Supreme Court's opinion reversing this Court, did not address the substantive ruling by this Court in its opinion, but narrowed and confined its insight as to the due process issue

regarding the spiritual treatment proviso. Therefore, it is clear that a parent can in fact be culpably negligent in failing to obtain medical attention for a child, and the trial court's reliance on Bradley was grossly misplaced.

In Hodges v. State, 661 So. 2d 107 (3rd DCA), reh. den.; rev. den. 670 So. 2d 940 (1995), the court found that criminal responsibility for manslaughter should be determined by considering the act that resulted in the death in light of all of the surrounding circumstances, and not by considering the result alone. The act that resulted in Isaiah's death was Petitioner's flagrantly reckless and gross indifference to her child's effort to breathe. Because the court ruled that the State failed to present a prima facie showing that the failure to obtain medical attention for Isaiah caused his death, and because the defense may well argue that a persons failure to act is not what causes death, Appellant would respond that is nothing less than sophistry when a parents's legal obligation to provide care for an obviously gravely ill infant is at issue. When a child is actually grunting, straining to get air into its lungs and the mother is told to get the child to an emergency room, notice of an emergency is clearly present and that parents's failure to act accordingly is cognizable as causing or contributing to the death that ensues. The State offered medical testimony that less than 1% of children treated for this condition will die. The defense disagreed with the percentage and

the strain of illness; providing an issue of credibility and fact for the jury. This is not a scenario as that presented in Thus v. State, 265 So.2d 407 (1st DCA) reh. den. (1972) where the evidence did not establish culpable negligence in a manslaughter charge against a mother who's child died of malnutrition because she had sought medical attention for the baby many times, and followed the urging of a nurse to take the infant to the doctor, and then followed the doctor's orders for treatment, and continued to appear at follow up visits to the doctor five more times. In State v. Hoffman, 639 P.2d 507 (Mont. 1982) a mother was convicted of the negligent homicide of her three year old son in disregarding the seriousness of his injuries. In affirming, the court held the evidence supported the conviction in light of testimony that if he had been brought to the hospital at the time the mother observed him, in all likelihood his life could have been saved. In the instant case, a board certified pediatrician, not an individual like the Petitioner's expert who, during the last 10 years provided merely consultations as a pathologist to the legal profession, testified that Isaiah's condition is very common. Certainly, if the rate of deaths from this strain of pneumonia were as common as Petitioner asserts, the infant mortality rate would be enormous. There is no doubt that the strain is virulent; progressing quickly, and quite capable of causing death without treatment. Nevertheless, Petitioner's clear recognition of her baby's distress

and acknowledgment of his needs by going to the clinic, and then to the emergency room established her own recognition of the serious nature of Isaiah's condition. In Commonwealth v. Miller, 627 A. 2d 741 (Pa. Super. 1993), a mother's conviction for third degree murder in the starvation of her seven month old twin daughters was upheld in light of her post-Miranda statement that she was aware she could go to a clinic and receive free formula. Again, in the instant case, Petitioner's statements, post-Miranda establish far more than mere culpable negligence.

In Leet v. State, 575 So.2d 959, 964 n.3 (2d DCA 1991), the court held that culpable negligence involves an objective standard. The State is not required to establish or prove the accused's actual knowledge that his omission will lead to death or great bodily harm; as long as the defendant's conduct was gross and flagrant, evincing a reckless disregard for human life if committed by an ordinary and reasonable person, the State's burden is met. Petitioner's conduct as established below far exceeded this standard. There was ample evidence that had Petitioner obtained medical assistance for her baby, he would have survived. Petitioner's obvious knowledge of baby Isaiah's distress is the functional equivalent of outright intent particularly when cast against her selfish impatience and ultimate failure to seek aid for her own child, knowing he required emergency assistance. Negligent acts of omission certainly do constitute the basis of both

manslaughter by culpable negligence and felony child abuse particular when the omission is willful. The evidence of Petitioner's impatience, her lack of other commitments that day and her clear knowledge that she would have received immediate attention at the hospital if she told someone that she was sent there by the clinic because her baby was having trouble breathing constitute all that is required to show willfulness and intent; and certainly establishes gross and culpable negligence in her omission. Respondent would urge that the degree of neglect in failing to heed the doctor's orders to obtain assistance for Isaiah at an emergency room is astounding in light of all the circumstances. This Court has previously ruled that omission of a duty to a child is equivalent to an act in determining that aggravated child abuse can be committed through a failure to act. Nicholson v. State, 600 So.2d 1101 (Fla. 1992). In State v. Carwile and Gray, 615 So.2d 648 (2d DCA 1993), the trial court disposed of the case on a motion to dismiss, specifically addressing matters of intent, and the District Court reversed and remanded for trial specifically finding that the defendants had a duty to the child to obtain medical assistance once they observed that she had been injured, and their failure to do so could lawfully result in prosecution for felony child abuse. Based on the facts and circumstances of the instant case, Petitioner's culpable negligence was established with an overwhelming amount of

evidence, and it is clear that it is that culpable negligence that provides the causative link to Isaiah's death.

CONCLUSION

WHEREFORE based on the foregoing arguments, citations of authority and reference to the record, the opinion of the Second District Court of Appeal in this cause should be affirmed by this Court.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
Fla. Bar. No. 329150

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Fla. Bar No. 0238538
Westwood Center
2002 North Lois, Suite 700
Tampa, Florida 33602
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul Helm, Assistant Public Defender, P. O. Box 9000-Drawer PD, Bartow, Florida 33830 this 20th day of July, 1998.

OF COUNSEL FOR RESPONDENT