IN THE SUPREME COURT OF THE STATE OF FLORIDA,

THERESA SIENIARECKI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94,800
	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

JOSEPH R. CHLOUPEK
Assistant Public Defender
Florida Bar No. 434590

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and was the appellant in the District Court of Appeal, Fourth District. She will be referred to as Petitioner in this brief.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2 (d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New Type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on her statement of the case and facts outlined in her Initial Brief on the merits. Additionally, Petitioner will note the following:

(1) Respondent's factual claim "because Petitioner did not work, Petitioner and her brothers reached an agreement that she would care for [her] mother," (T 156-157) refers to the trial testimony of state witness John Albright. On the referenced pages, Albright responded to the question "do you know how it was decided that Patricia [Sieniarecki] would move in with you and [Petitioner] as oppose to going to live with her brothers?" by stating "I don't know how it came up, but I believe [Petitioner] wanted her mom with her. The brothers I guess wanted to be off on their own. And they were moving in with a friend of theirs" (T

156-157).

(2) Respondent's factual claim "the brothers took care of the financial needs of Petitioner and their mother while Petitioner was to take care of her mother in the apartment into which they moved" contains no citation to the record. However, on pages 468-470, Petitioner testified on this subject:

> Q. Outside of when [David Sieniarecki] would come over, the responsibility [for caring for Patricia Sieniarecki] just fell on you?
>
> A. Yes. . .
>
> Q. The money from the sale of the [family] house , how was that divided?. .. .
>
> A: David [Sieniarecki] got the check, the money, and he gave me a $1.050 [sic] for an apartment for us. Then he took the rest for him and Al [Sieniarecki]
>
> Q: And you were going to try and take care of your mom?
>
> A. Yes. . .
>
> Q. .

(3) Petitioner testified at trial concerning her attempts to get Patricia Sieniarecki to see a doctor and/or eat as follows:

> Q. Did you try everything you knew how to get your mother to go to the doctor?
>
> A. Yes.
>
> Q. Did you try everything you knew how to get your mother to eat?
>
> A. Yes. (T. 469)

SUMMARY OF THE ARGUMENT

Petitioner will rely on the summary in her initial brief on the merits.

ARGUMENT

POINT ON APPEAL

FLORIDA STATUTES, SECTION 825.102 (3) (1995) MUST BE DECLARED UNCONSTITUTIONAL, BOTH FACIALLY AND AS APPLIED.

As to Respondent's arguments concerning Petitioner's due process claims relating to criminalizing innocent conduct and the vagueness of certain statutory terms found in Chapter 825.102 (3), Petitioner would rely on the arguments and authorities presented in her Initial Brief on the Merits. As to Petitioner's arguments concerning her assertion of Patricia Sieniarecki's constitutional right to refuse medical treatment, Respondent relies strictly on the notion that "constitutional rights of a personal nature generally may not be asserted vicariously [; thus,] Petitioner has no standing to raise this contention," Answer Brief on the Merits, at pp. 26-27. Unfortunately for Respondent, this contention is incorrect.

In Jones v. State, 640 So.2d 1084 (Fla. 1994), this Court was faced with a constitutional challenge to Florida Statutes, Section 800.04 (1991) the lewd assault statute, based on that legislation's prohibition of a consent defense. In Jones, the defendant sought to attack the constitutionality of that statute partially on the basis of the underaged "victim's" consent to sexual activity; the defense contended that Jones had standing "to assert the privacy rights of the girls with whom [he] had sexual intercourse," 640 So.2d at

1085. In response, this Court noted that in Stall v. State, 570 So.2d 257 (Fla. 1990) certiorari denied 501 U.S. 1250, 111 S.Ct. 2088, 115 L.Ed.2d 1054 (1991), the Court had upheld the standing of the "sellers of obscene materials. . . . . to raise the privacy rights of their customers;" the Jones Court noted that "the petitioners in [that] case, like the sellers in Stall, [stood] to lose from the outcome of [that] case and yet . . . . have no other effective avenue for preserving their rights," id. at 1085. As a result, in Jones this Court agreed with the defense that Jones "[had] standing to attack the constitutionality of the statute under which [he was] prosecuted," 647 So.2d at 1085 (citations omitted). Similarly, in Pesci v. Maistrellis, 672 So.2d 583, 586 (Fla. 2d DCA 1996), the Second DCA held that a party to a lawsuit had standing to assert the privacy interests of jurors in the jurors' deliberations, which the other party to that lawsuit sought to invade via post-verdict juror interviews. Finally, in Kevorkian v.Thompson, 947 F.Supp. 1152, 1159-1161 (E.D. Mich. 1997), involving a motion for declaratory judgment concerning a Michigan statute prohibiting assisted suicide, the Federal District Court found that Kevorkian had standing to attack the constitutionality of that statute based in part on the privacy rights of his "clients" to receive assistance in committing suicide. Of course, Petitioner is not attacking the constitutionality of Section 825.102 (3) (1995) on the basis of any putative right by Patricia

Sieniarecki to receive assistance from Petitioner in committing suicide, both because the facts below do not support the notion that Petitioner's mother had such an intent, and because such a right is not recognized by either the Florida or United States Constitutions, see Krischer v. McIver, 697 So. 2d 97, 100, 103-104 (Fla. 1997); Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 2269-2270, n.18, 2275, 138 L.Ed.2d 772 (1997); Vacco v. Quill, 521 U.S. 793, 117 S.Ct. 2293, 2297, 2300, 2302, 138 L.Ed.2d 834 (1997). However, this Court held in In Re Guardianship of Browning, 568 So.2d 4, 10-12 (Fla. 1990)that both competent and incompetent adults have the right under Article 1, Section 23, of the Florida Constitution to refuse medical treatment, a right reaffirmed in Krischer v. McIver, 697 So.2d at 102. Accordingly, although no substantial evidence was presented that Patricia Sieniarecki was incompetent during all times relevant to this prosecution, the factual reality of this circumstance is irrelevant to this appeal, since Mrs. Sieniarecki could have refused medical treatment whether or not she was competent, Browning, supra. at 12, n. 9; see also Rodriguez v. Pino, 634 So.2d 681, 688 (Fla. 3d DCA 1994). Therefore, based on the binding authority of Jones, as well as the persuasive authority of Pesci and Kevorkian,Petitioner unquestionably has standing to assert Patricia Sieniarecki's right to refuse medical treatment as a constitutional impediment to Petitioner's prosecution below.

On the merits, Respondent presents no argument showing why due process is not violated by prosecuting Petitioner for not interfering in her mother's exercise of the mother's right to refuse medical treatment or services, broadly construed as including hospital and doctor visits, personal hygiene, and the intake of food, see Petitioner's Initial Brief on the Merits, p. 21. In a materially analogous situation, the Fourth District Court of Appeal in St. Mary's Hospital v. Ramsey, 465 So.2d 666 (Fla. 4th DCA 1985) rejected "the premise that those who practice, dispense, or furnish medical services. . . . should be held criminally responsible or civilly liable because they accede to the refusal of a competent adult to undergo treatment which they urge upon him", 465 So.2d at 669. This holding was subsequently given statewide application by this Court in In Re Matter of Patricia Dubreuil, 629 So.2d 819, 823-824 (Fla. 1993), where the Court found:

> When a health care provider, acting in good faith, follows the wishes of a competent and informed patient to refuse medical treatment, the health care provider is acting appropriately, and cannot be subjected to civil or criminal liability.

This rule has been followed in subsequent cases, see e.g. Rodriguez v. Pino. 634 So. 2d 681, 685 (Fla. 3d DCA 1994) review denied 645 So.2d 454 (Fla. 1994); Harrell v. St. Mary's Hospital, Inc. 678 So.2d 455, 458 (Fla. 4th DCA 1996). The reason for this rule in the context of professional health care providers was appropriately

spelled out by the Fourth DCA in St. Mary's Hospital v. Ramsey:

> What is the alternative? Must [a health care provider] insist on [the patient's] participation in recommended treatment? Should they, if necessary, be required to administer the treatment by force and against [the patient's] will? We answered the last two questions in the negative.

465 So.2d at 669. All of the aforementioned cases discussed on this subject arose in the context when an adult's refusal to accept medical treatment as proffered; factually, these precise circumstances exist in this case, as a number of testifying witnesses corroborated Petitioner's account of her mother's refusal to eat properly or undergo routine medical examination. For example, John Albright testified that Mrs. Sieniarecki was "a very light... [and] picky eater"(T 145, 154, 324, 331). Albright recalled that Patricia Sieniarecki once "yelled out" that she did not want to see a doctor, which occurred subsequent to her second hip surgery (T. 159). Albright also noted that Mrs. Sieniarecki "always turned down" petitioner's offer of food and drink (T170-171). When Albright himself suggested to Petitioner, in Mrs. Sieniarecki's presence, that she see a doctor, Petitioner's mother responded, "no" in a "very firm manner" (T 173). Al Sieniarecki, Patricia's son, testified that she "didn't ordinarily like doctors" after her two hip surgeries, and would refuse to wear diapers which he brought to her periodically (T 215-216, 225, 228). She also refused to go to the doctor even after complaining of pain

subsequent to her second hip surgery (T 234). Al Sieniarecki also characterized his mother as a "very, very picky eater" who "often" refused food offered by petitioner (T 231-232). Likewise, David Sieniarecki described his mother as a "picky eater" who consumed only chilli dogs and spaghetti, "typically" refused to bath, was "not always interested in" food, and refused to see doctors, "getting angry" when the subject was broached to her by her children (T 330-331, 339-340, 342,344-345,347). Petitioner herself testified that while her mother had last seen a doctor one year prior to her death, Mrs. Sieniarecki responded to Petitioner's request that she do so by "yelling" that Petitioner "couldn't make her," and "would not be her daughter" if Petitioner forced Mrs. Sieniarecki to seek medical help (T 364-366, 462-463, 474,477). Lastly, although Petitioner "occasionally" placed food inside her mother's mouth, Mrs. Sieniarecki refused to eat "homemade" food, consuming only chili dogs and spaghetti (T367-368, 461, 476).

Based on this exhaustive description of Patricia Sieniarecki's recalcitrance concerning her own well being, Petitioner submits that the Fourth DCA's plaintive questions "what [was] the alternative? Must [Petitioner have insisted] on [her mother's] participation in [any] recommended [medical] treatment? Should [Petitioner,] if necessary [have administered] the treatment by force and against [her mother's] will?" takes on particular salience. What, indeed, was Petitioner to do to care for Patricia

Sieniarecki when her mother refused to cooperate with Petitioner? The correct response, Petitioner submits, is that like the professional "health care providers" shielded from criminal liability when a medical patient refuse necessary medical treatment, Petitioner deserves the same due process protection against criminal prosecution under the facts and circumstances of this case, based on the same rationale as identified in Dubreuil, St. Mary's Hospital v. Ramsey, Rodriguez v. Pino, and Harrell v. St. Mary's Hospital, Inc. Given Patricia Sieniarecki's constitutional right to refuse to be taken care of properly, subjecting Petitioner to criminal prosecution below was fundamentally unfair, and violated her constitutional right to due process and equal protection, compare State v. Flontek, 693 N.E. 2d 767, 771 (Ohio 1998) (prosection under statute requiring adult child provide adequate financial support for dependent parent; noted "expansive interpretation" of statute could result in "unwarranted prosecutions of adult children who have elderly parents who may be in need of medical attention or care but have refused to seek treatment for their conditions"). In sum, Petitioner's assertion of her mother's constitutional right to privacy was not, as implied by the Fourth DCA in its decision on review in this Court, idiosyncratic at all, compare 724 So. 2d at 628, but rather constitutes the only practical means to which Petitioner can assert the fundamental unfairness of her prosecution

below, given the facts of her case.

Finally, Petitioner would suggest that the actions of Patricia Sieniarecki in thwarting Petitioner's attempt to care for her constituted a superseding cause, breaking the chain of causation upon which Petitioner's homicide prosecution, and neglect conviction, rest as an essential element. In discussing the concept of proximate causation in a criminal prosecution, the Third DCA in Velazquez v. State,561 So. 2d 347, 350-351 (Fla. 3d DCA 1990) cause dismissed 569 So. 2d 1280 (Fla. 1990) review denied 570 So.2d 1306 (Fla.1990) described this issue as follows:

> . . . the proximate cause element. . . embraces, at the very least, a cause-in-fact test. . . a defendant's conduct is a cause-in-fact of a prohibited result if the said result would not have occurred "but for" the defendant's conduct; stated differently, the defendant's conduct is a cause-in-fact of a particular result if the result would have not happened in the absence of a defendant's conduct. . . even where a defendant's conduct is a cause-in-fact of a prohibited result . . . Florida and other courts throughout the country have for good reason declined to impose criminal liability. . . where it would otherwise be unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result.

see also Hodges v. State, 661 So.2d 107, 110 (Fla. 3d DCA 1995) review denied 670 So.2d 940 (Fla. 1996) (same). The Hodges Court further noted that "because the consequences of a determination of guilt in a criminal case are far more severe than the consequences suffered by a defendant in a tort action, a closer relationship

between the result effected and that intended or hazarded is required," 661 So. 2d at 110, quoting Penton v. State, 548 So.2d 273, 275 (Fla. 1st DCA 1989) review denied 554 So.2d 1169 (Fla. 1989). Thus, for example, in State v. Perez-Cervantes, 952 P.2d 204, 206 (Wash. App. Div. 2 1998), a second degree murder prosecution, the defendant stabbed the victim during a fight; after the victim was treated and released from a local hospital, he began ingesting cocaine, which caused pain for which he did not seek additional medical treatment, 952 P. at 205. In Perez-Cervantes, the defendant sought to admit evidence showing that the victim's ingestion of cocaine, and refusal to seek medical treatment for the effects of same, was a intervening cause, preventing that defendant's stabbing of the victim from being considered the proximate cause of the victim's death, id. at 206. Utilizing the same "but-for" proximate cause test identified in Hodges and Velazquez, the Washington appellate court in State v.Perez-Cervantes found that the trial court in that case erred in denying that defendant the right to present evidence concerning a potential "intervening cause" involved in that victim's death, thus impliedly accepting that notion vel non as a matter of state substantive law. Similarly here, Petitioner's conviction for neglect of her mother violated due process because the evidence below established Patricia Sieniarecki's refusal of medical treatment, food, and personal hygiene constituted a sufficient intervening or

superseding cause, preventing Petitioner's acts or omissions from being the proximate cause of Mrs. Sieniarecki's death. Wherefore, for that reason also, Petitioner's conviction below violates due process.

Therefore, based on the entirety of Petitioner's arguments, the decision of the Fourth DCA in Sieniarecki v. State, 724 So.2d 626 (Fla. 4th DCA 1998) must be vacated and remanded with directions that Petitioner be discharged. Additionally, Florida Statutes, Section 825.102 (3) (1995) must be declared unconstitutional as a violation of due process and equal protection.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, this cause must be remanded with proper directions.

Respectfully submitted,
RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

JOSEPH R. CHLOUPEK
Assistant Public Defender
Florida Bar No. 434590

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ETTIE FEISTMANN, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this ____ day of June, 1999.

_____
Attorney for Theresa Sieniarecki