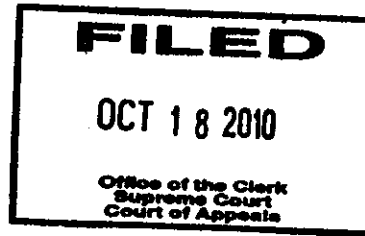


COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LONI MARIE RUTLAND



APPELLANT

VS.

NO. 2008-KA-1544

STATE OF MISSISSIPPI

APPELLEE

SUPPLEMENTAL BRIEF FOR THE STATE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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COMES NOW, the State of Mississippi and files this supplemental brief in the above styled and numbered cause. *M.R.A.P.* Rule 17(h).

Rutland was convicted, after a jury trial in the Circuit Court, Franklin County, Judge Forrest H. Johnson, Jr., presiding of felonious child abuse. On direct appeal the Court of Appeals affirmed the conviction and sentence on February 16, 2010. Certiorari was granted by this Court. The State now responds with this supplemental brief.

Petitioner Rutland asserts two issues, the first being the Court of Appeals ignored the requirement for the finding of an intentional act in the facts. Petitioner

asserts – “Without an intentional act, there is no felony.” Petitioner claims ‘omissions’ are not intentional acts and as rise only to the level of a misdemeanor.

The Supreme Court of the State of Mississippi has specifically heard this said same argument before and held:

¶ 24. Miss.Code Ann. § 97-5-39(2) states:

Any person who shall intentionally (a) burn any child, (b) torture any child or, (c) except in self-defense or in order to prevent bodily harm to a third party, whip, strike *or otherwise abuse* or mutilate any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse and/or battery of a child and, upon conviction, may be punished by imprisonment in the penitentiary for not more than twenty (20) years.

Miss.Code Ann. § 97-5-39(2) (2000) [(emphasis in original)].

We find that the term “otherwise abuse” is a clear indicator that the list provided is not exhaustive. Certainly, failure to feed, nourish, or provide medical care to a child can be intentional, and such a refusal may cause serious bodily harm. In fact, the very language of § 97-5-39(1) signals the Legislature's inclusion of even acts of omission as abusive behavior. This Court explained in *Faraga v. State*, 514 So.2d 295, 303 (Miss.1987), that the purpose of § 97-5-39 is to protect the child. ***Buffington's interpretation of this statute would allow one to refuse to feed a child until the brink of death, yet the omission, intentional or negligent, could be charged only as a misdemeanor. This would not serve the purpose behind the statute.***

Buffington v. State, 824 So.2d 576, 582 (Miss. 2002)(emphasis added).

The rationale of the Court of Appeals in the opinion below is absolutely in accord with the holdings of the Mississippi Supreme Court on weight of the evidence

to support a felonious child abuse conviction..

The second issue is the claimed ‘juror misconduct.’ Specifically, Rutland claims the opinion below conflicts with this Court’s holding in *Collins v. State*, 701 So.2d 791 (Miss. 1997).

Because the word ‘dictionary’ was used at the trial level in this case – in that a member of the jury looked up definitions – does not immediately invoke the result that was reached in *Collins*. It would appear this second argument is still predicated upon the erroneous assumption of issue one: specifically, that ‘neglect’ is only a misdemeanor act.

As this Court so clearly stated in *Buffington* “...failure to feed, nourish, or provide medical care to a child can be intentional, and such a refusal may cause serious bodily harm.” *Buffington* at ¶ 24. So in actuality, the verdict based on abuse or neglect or both is still within the statute.

In *Wilcher*¹ this Court looked at the extraneous influences on the jury and compared them to the facts in *Collins*. The *Wilcher* court noted that in *Collins*, the possibility of the definition for ‘premeditation’ being inconsistent with Mississippi law was enough to reverse and remand. *Wilcher* at ¶ 201.

Whether abuse or neglect, either dictionary definition would suffice to satisfy

¹*Wilcher v. State*, 863 So.2d 719 (Miss. 2003)(executed Oct. 18, 2006).

the statutory requirements for a conviction under *Miss.Code Ann.* § 97-5-39(2). *Buffington*, supra. It would appear, nor does petitioner argue, any prejudice resulted from the juror bringing such information to the deliberations. One difference in the two being the degree of injury. Here the expert testimony and exhibits clearly supported the ‘serious bodily injury’ element. It does not matter if the injury be by abuse, or neglect in seeking medical care. Either one – neglect or abuse – makes it only a felony since there was serious bodily injury. *Buffington*, supra.

In conclusion, any ‘extraneous influence’ interjected into the jury deliberations was not prejudicial. The statute under which Rutland was charged and the jury instructed allowed for a felony child abuse conviction upon a finding of serious bodily injury arising from abuse or neglect. The State would ask this Court, upon closer review to deny any relief and affirm the ruling of the Court of Appeals.

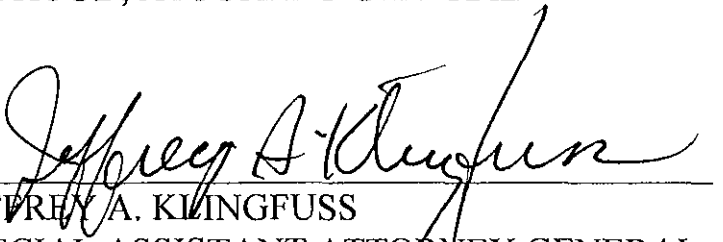
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the opinion of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeff Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **SUPPLEMENTAL BRIEF FOR THE STATE** to the following:

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This the 18th day of October, 2010.



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