

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	
)	
ABIGAIL CALIBOSO and)	I.D. No. 0004019366
JOSE E. OCAMPO,)	I.D. No. 0004004124
)	
Defendants.)	

Submitted: October 30, 2001
Decided: November 13, 2001

Upon Defendants' Petition of Certification of Questions of Law. **Granted.**

Order

James V. Apostolico, Andrew J. Vella, Deputy Attorneys General, Wilmington, Delaware, Attorneys for the State.

Kathleen M. Jennings, Oberly & Jennings, P.A., Wilmington, Delaware, Attorney for Defendant, Jose Ocampo.

Eugene J. Maurer, Jr., Eugene J. Maurer, Jr., P.A., Wilmington, Delaware, Attorney for Defendant, Abigail Caliboso.

GOLDSTEIN, J.

This 13th day of November, 2001, upon review of the Defendants' Petition for Certification of Questions of Law and the State's response, the Court finds that:

(1) Defendants, Jose Ocampo and Abigail Ocampo, are charged with Murder by Abuse or Neglect in the Second Degree for allegedly causing the death of their infant. Specifically, the State alleges that Defendants abandoned the infant, which led to her death.

(2) On October 18, 2001, the Court denied Defendants' joint Motion for a Non-Jury Trial. The Court stated, in dicta, in its decision that a jury would not have to consider the issue of whether Defendants had the "ability and financial means to provide adequate care and protection" to their infant, as set forth in 11 *Del. C.* § 1103(c). *State v. Ocampo*, Del. Super., Cr. A. No. IN01-03-0548, Goldstein, J. (Oct. 18, 2001), Mem. Op. at 6. The Court explained that, where the act of neglect alleged under 11 *Del. C.* § 633 was that of abandonment, the above-quoted language was not applicable. *Id.*

(3) Defendants have also filed a joint Motion to Dismiss the indictments against them. Defendants' motion calls into question the proper interpretation of the language of 11 *Del. C.* § 1103(c), which sets forth the definition of "neglect" to be used in 11 *Del. C.* § 633. "Neglect" is defined in 11 *Del. C.* § 1103(c) as:

threatening or impairing the physical, mental or emotional health and well-being of a child through inadequate care or protection, nontreatment or abandonment by the child's custodian or other person in whose temporary custodial care the child is left, when such custodian or other person has the ability and financial means to provide adequate care or protection, but does not or will not do so.

Defendants argue in their Motion to Dismiss that the above-quoted languages violates the Equal Protection clause of the fourteenth amendment to United States Constitution. In considering Defendants' motion, it will be necessary for the Court to decide the issue of the proper interpretation of the language of 11 *Del. C.* § 633 and 11 *Del. C.* § 1103(c).

(4) Defendants have now filed a Petition for Certification of Questions of Law pursuant to Superior Court Criminal Rule 37(f) and Supreme Court Rule 41. The State opposes the certification.

(5) In their current petition, Defendants ask that the Court certify three questions to the Supreme Court:

First, whether the phrase, "ability and financial means to provide adequate care and protection," as set forth in 11 *Del. C.* § 1103, apply to a charge of Murder by Neglect in the Second Degree where the State alleges that the child was abandoned, or whether the phrase apply only to allegations of neglect where the State alleges "inadequate care or protection?";

Second, whether the statutory distinction between those with the "financial means" to provide adequate care and protection and those without "financial means," found in 11 *Del. C.* § 1103, violates the State and Federal Equal Protection Clauses; and

Third, whether the word, "ability," in the context of the language of 11 *Del. C.* § 1103, encompasses both physical and psychological ability.

(6) After considering the arguments of the parties, the Court finds that the questions should be certified to the Supreme Court. This Court acknowledges that, "it is preferable as a matter of orderly administration of justice for the trial courts of this State to

decide in the first instance all questions of law, including new and challenging legal questions.” *State Farm Mutual Auto. Ins. Co. v. Dann*, Del. Supr., ___ A.2d ___, No. 538, 2000, Per curiam, (Mar. 26, 2001), at 2. However, the Court believes that this is one of the compelling instances where there are, “important and urgent reasons requiring an exception to this principle when exigencies of time or a strong showing of judicial economy” that dictate certification. *Id.*

(7) The questions of law Defendants request to be certified fall under Supreme Court Rule 41(b)(ii), because, to the Court’s knowledge, the questions are of first instance for the Supreme Court, and under Rule 41(b)(iii), because they “relate[] to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.” Although 11 *Del. C.* § 1103 is not a new statute, the courts have yet to interpret the scope of the language at issue, especially in relation to a prosecution for Murder by Abuse or Neglect pursuant to 11 *Del. C.* § 633. As noted by Defendants, amendments to 11 *Del. C.* § 633 in 1999 greatly expanded the scope of conduct that can be charged under the statute, increasing the urgency of a proper interpretation of the language at issue here.

(8) In addition, Defendants have represented to the Court that the entire scope of their defense will be determined by the interpretation of the language of 11 *Del. C.* § 1103(c). Defendants state that, if the language of the statute is interpreted so that the “ability and financial means” language does not apply to prosecutions for Murder by Neglect alleging abandonment, Defendants would not be able to present proposed testimony “which

goes to the heart of their contemplated defense” and that, as a result, the trial would result in a near certain conviction.

(9) If the Court were to rule that the “ability and financial means” language does not apply to Defendants’ prosecution, Defendants would certainly appeal their conviction to the Supreme Court. If the Supreme Court then ruled that the Court’s interpretation of the language at issue was erroneous, the matter would have to be retried in order to give Defendants the opportunity to address Defendants’ “ability and financial means” to provide adequate care and protection of their infant. Therefore, the interest of judicial economy is also strongly implicated in these circumstances.

For the foregoing reasons, the Court finds that there are important and urgent reasons for determination by the Supreme Court of the questions presented. Defendants’ Petition for Certification of Questions of Law is therefore **GRANTED**.

IT IS SO ORDERED.

Carl Goldstein, Judge

oc: Prothonotary