No. 21-1367

In The

Supreme Court of the United States

AMY NICHOLS-STUART,

Petitioner,

v.

COUNTY OF AMADOR, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California

REPLY BRIEF

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PARTIES TO THE PROCEEDINGS

There has been no change since the Petition was filed.

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DECISIONS BELOW

There has been no change since the Petition was filed.

JURISDICTION

Is the same as stated in the Petition.

CONSTITUTIONAL PROVISIONS

In addition to the Fourteenth Amendment, the Right to Familial Association has its roots in the First Amendment's "penumbra of associational privacy." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

CALIFORNIA STATUTES

Welfare & Institutions Code Sections 306(a)(2) and 300(b) which allow a social worker to take a child into custody without a warrant or court order when the social worker has reasonable cause to believe the child is in immediate danger of physical abuse . . . or the physical environment poses an immediate threat to the child's health and safety.

RESPONSE TO RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE

A. The Dependency Proceeding Proceeding

Petitioner has no record. At the time the father was recommended to receive custody of Jace, he was clean and sober, just recently having been released from prison. The Court placed Jace with the father on conditions he not consume alcohol or drugs (be clean and sober) and submit to testing.

The Court followed the recommendation of staff of placing Jace with his father. At no time during the proceedings was there any discussion of Petitioner waiving her right to familial association with her son. There was no discussion of any waiver. The placement of Jace with his father was conditioned on the father's compliance with the case plan which prohibited his consumption of alcohol given his history of drunk driving.

When Petitioner heard that the father was drinking and driving with Jace she called the Sheriff and the social worker. The social worker was also told by Jace's daycare worker that the father had dropped Jace off when intoxicated and by a neighbor that the father was driving drunk with Jace in the car and that he feared for Jace's safety. The social workers then confirmed on two occasions with the father that he had resumed drinking and left Jace in his care even though the social workers were aware of the Judge's order that the father could not have Jace if he was drinking. The social workers say they told the father to stop drinking, but obviously he did not as he killed Jace while drunk

driving. The County only filed a Supplemental Petition when it was too late.

B. The Wrongful Death Action – Trial Court

The trial court adopted Respondent's argument's in support of the Demurrer.

C. The Wrongful Death Action – Appeal

The Petitioner believed the facts supported a cause of action against the social workers for being deliberately indifferent to her son's welfare. She also believed there could not be a 'waiver' without a 'knowing' waiver and the right to familial association had never been discussed. The Court of Appeal decision seemed contrary to law in that it created an implied waiver of a Constitutional Right and used as it's support a case, *DeShaney v. Winnebago County Social Services Dept.*, 489 U.S. 189 (1989) where the Court had not assumed jurisdiction over the complaining Plaintiff. Here, the Court took jurisdiction and placed the child with his father on the case plan that he not consume alcohol which was known by the social workers who deliberately failed to enforce the case plan and protect the minor from imminent injury and death which sadly happened.

WHY CERTIORARI SHOULD BE GRANTED

Rule 10. Considerations Governing Review on Certiorari subsection (c) states a reason for review is when a state court . . . has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

In this case the important question of federal law which there appears to be no clear resolution of is the holding that the Petitioner 'impliedly' waived her Right to Familial Association when she did not contest the dispositional order or file a Petition to Modify the placement of Jace with his father. For the reasons set forth herein, neither of these arguments are consistent with the Right to Familial Association. Respondent initially argued 'waiver' as a failure to act by Petitioner being an implied waiver. But, waiver is usually 'express' and 'knowing', neither of which applies in this case.

Contrary to Respondent's argument that "knowledge" is presumed, *Duignam v. United States*, 274 U.S. 195, 199 (1927) only held that there could be no appeal of a lack of jury trial when the party had failed to answer the cross-bill. The question of an effective waiver of a federal constitutional right in a proceeding is governed by federal standards (*Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). *Boykin v. Alabama*, 395 U.S. 238 (1969), was concerned with a waiver of constitutional rights in connection with a voluntary

plea of guilty where it was held that 'presuming waiver' of constitutional rights from a silent record was impermissible. In this case there was a silent record. Respondent's reference to *United States v. Moore*, 340 U.S. 616, 621 (1951) was to a case involving a denial of restitution where an earlier appeal upheld a denial of a jury trial right when none was demanded and was not required in a court of equity. Nowhere in the juvenile court proceedings was the waiver of the Constitutional Right to Familial Association ever discussed.

THE WAIVER OF A CONSTITUTIONAL RIGHT TO DAMAGES FOR INJURY OR DEATH TO A PARENT'S CHILD IS NOT AN ALLEGATION OF MERELY MINOR IMPORTANCE

The actual record in the juvenile court was presented by Petitioner to the Court of Appeal. What was stated was a submission on jurisdiction and not disposition. During the juvenile court proceedings there was no discussion of waiving the Right to Sue for Loss of Familial Association for the injury or death of her child which was the result of the deliberate indifference of the social workers whose job was to make sure Jace was not at risk which he was, which they knew and did nothing about.

Respondent repeatedly references that Petitioner failed to file a Petition To Modify Custody and therefore waived her Right to Familial Association.

How can that argument be made when Petitioner was in a rehabilitation facility and restricted to supervised visitation? She could only see Jace for a few hours when the social workers were monitoring the visitation. Her information was limited to hearsay.

PETITIONER DOES NOT UNDERSTAND "NON-EXISTENT INTERFERENCE"

Jace was intentionally left at risk of serious injury or harm from his father. *Zablocki v. Redhail*, 434 U.S. 374, 386-387 (1978) held that when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld. Petitioner fails to see how that holding relates to this case. Petitioner's right to Familial Association was ended by the social worker's deliberate indifference to the well being of Jace. The interference was in letting Jace remain in an environment where injury or death was a known substantial risk. The social workers had a meeting and overruled the Court.

Respondent argues W&I 387(a) required a noticed hearing upon a supplemental petition before the child could be removed from the physical custody of a parent. Respondent is wrong and misrepresents the law to this Court. W&I 306(a)(2) and W&I 300(b) are emergency measures which allow children to be taken into *temporary custody. Welfare and Institutions Section 306(a)(2) specifically refers to a child who has been declared a dependent child* as Jace had been. Respondent is misstating the law. Respondent's statement that

"The existence of the father's custodial right is precisely why California Welfare and Institutions Code Section 387(a) forbade Respondents from that course of action absent prior juvenile court approval following hearing of a noticed motion" is a misstatement of law. Welfare and Institutions Code Section 306 specifically authorized removal of Jace into temporary custody TO SAVE HIS LIFE. (my emphasis added). It is no wonder Petitioner lost in the trial court when the firm employed by the County does not know the law and the Court of Appeal went with "implied waiver" which does not apply to Constitutional Right of Familial Association but does save the state government the cost of paying for the deliberate indifference of social workers.

D. PETITIONER ADDRESSED THE "WAIVER" ISSUE.

In Petitioner's Opening Brief in the Introduction Petitioner stated: "Appellant also does not believe Waiver is applicable at the demurrer stage since it involves a question of fact which usually is decided by way of Motion For Summary Judgment or Trial. Appellant does not believe that anybody could seriously believe she ever intentionally relinquished her right to object to her son being placed in imminent risk of death with his alcoholic father who was back to drinking and driving."

Also in the Section entitled "1. THERE WAS NO "WAIVER" ALLOWING DEFENDANTS TO KEEP JACE IN IMMINENT DANGER BY CONTINUING

TO ALLOW HIM TO BE IN CUSTODY OF A FATHER WHO WAS CARING FOR AND DRIVING HIM WHILE UNDER THE INFLUENCE" Petitioner stated: "Defendants argue that Appellant is precluded from bringing this suit because she has waived her right to challenge the action of Respondents in deciding to allow her son, contrary to court order, to remain in the custody of his father who was known to be consuming alcohol and driving his son while intoxicated. This result Respondent's claim is because Appellant consented to the jurisdiction of the juvenile court. . . . After the parties admitted the jurisdictional facts, the court made a Dispositional Order awarding custody to the father "as long as he remained clean and sober." . . . Waiver is the intentional relinquishment of a known right. (cites omitted) . . . The elements of waiver are set forth more specifically in (cite omitted) . . . as follows: To constitute waiver, it is essential that there be an existing right, benefit, or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it had been relinquished. . . . Waiver is a question of fact and not of law, hence the intention to commit a waiver must be clearly expressed." (Cite omitted)

RESPONDENT ADMITS THAT THE IMPLIED WAIVER ISSUE IS NOT WELL TAKEN AND RESORTS TO *DESHANEY* FOR SUPPORT WHICH CASE IS NOT APPLICABLE.

Respondents finally resort to *DeShaney v. Winnebago County Social Services Dept.*, 489 U.S. 189 (1989) a case which did not involve the exercise by a juvenile court of its jurisdiction as does this case. *DeShaney* stands for the proposition that the government is not liable to a young man because of a failure to act. There was no jurisdiction to allow the government to take control. This case is a case of jurisdiction. The Court accepted jurisdiction and ordered Jace to be placed with his father who was "clean and sober" and had to remain "clean and sober." The social workers supervising the placement had responsibility to make sure Jace's father was not violating the case plan. Jace's father started drinking again, a violation of the case plan, which placed Jace's safety at risk of injury from his drunk driving father. When the court took jurisdiction of Jace the Court entered into a special relationship with the young man which required the Court and its social workers to protect Jace from immediate or imminent injury. People witnessing Jace being driven by his drunk father called the social workers to have them do something which they did not do. The social workers on two occasions visited Jace's father and confirmed he was drinking and they did nothing after having a meeting about the complaints and the drinking.

In *DeShaney* the child was not taken from the parent and no jurisdiction was asserted. In this case a

"special relationship" with Jace was formed and the social workers and the Court were to ensure Jace's father complied with the Dispositional Order and Case Plan especially in the area of alcohol. Everyone knows of the dangers of drunk drivers and the social workers in this case were warned about Jace's father's drunk driving with Jace and did not remove him from the immediate threat which happened.

In *DeShaney* there was no custody, either legal or physical. In this case there was both legal and physical custody of Jace. It was the social workers' duty to protect Jace from the know threat of being driven by a drunk driver.

Respondent's cite *Wooton v. Campbell*, 49 F.3d 696, 700-701 (11th Cir. 1995) where a child was killed by his father who had also killed himself. In that case, the agency's only involvement was to arrange court-ordered supervised visitation. The agency did not know the father was going to kill the son. In *Wooton*, supra, 49 F.3d 696, 700-701 (11th Cir. 1995) there was no evidence of a known risk to the child.

Also, Respondent cites *Burton v. Richmond*, 370 F. 3d 723, 727 (8th Cir. 2004) where the children were placed with relatives at their mother's arrangement which the juvenile court approved and provided continuing supervision of the placement by DFS (Division of Family Services). The suit was brought because of sexual abuse by one of the adults who the children had been placed with. In that case, the Court held that the social workers were entitled to qualified immunity. In

reaching that decision the Court acknowledged a substantive due process right to protection can arise under two theories. First, the state may owe a duty to protect individuals in its custody (*Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992)) and second, the state may owe a duty to protect individuals if it created the danger to which they may become subject. (*S.S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000)). Petitioner believes both apply to the death of Jace. The three year old was in no position to articulate the immediate risk he was undergoing by being with his alcoholic father by the court at the recommendation of the social workers who had become aware of the father's return to consuming alcohol and did nothing to help Jace and once Jace's father returned to drinking, a risk everyone was aware of at the time of the Court's placement, with the knowledge of the social workers, Jace was now in danger because staff knew of the threat which was created by the placement with the father and his known return to being a drunk. The social workers and the Court put Jace with his father and when he was known to have returned to drinking, the social workers had a duty to remove Jace from the threatening environment.

A CONSTITUTIONAL QUESTION IS PRESENTED

Contrary to Respondent's position that the issues of jurisdiction and disposition are handled jointly, they are handled separately, as was done in this case with Petitioner only submitting on the Court's jurisdiction

and not the disposition. However, Respondent has stated "Petitioner . . . affirmatively agreed to the juvenile court taking jurisdiction, as well as to the proposed temporary placement of the boy with his father."[1] Petitioner was not asked about placing her son with the father and never agreed to that placement. Respondent is attempting to manufacture 'facts'. Petitioner never 'affirmatively agreed' to the placement. More importantly, there was no express or implied waiver that Petitioner was relinquishing her constitutional right to seek damages in the event staff caused the death of her son which is very sadly what happened.

Respondent has repeatedly misrepresented the law concerning the social workers' authority after the placement of 3 year old Jace Nichols with his father. Respondent argues Petitioner should have filed a Petition for Modification and staff was powerless without a court order which is contrary to the law.

Welfare and Institutions Code 306(a)(2) authorizes a social worker to "take into and maintain temporary custody of, without a warrant, a child . . . who the social worker has reasonable cause to believe is a person described in subdivision (b) . . . of Section 300, and the social worker has reasonable cause to believe that the child . . . is in immediate danger of physical abuse . . . or the physical environment poses an immediate threat to the child's health or safety."[2]

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[1] PAGE i, second paragraph.

[2] W&I 306(a)(2).

Welfare and Institutions Code Section 300(b) states: "A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: . . . (b)(1) The child has suffered, or there is substantial risk that the child will suffer, serious harm . . . as a result of the failure or inability of the child's parent . . . to adequately . . . protect the child, or the willful or negligent failure of the child's parent . . . to adequately . . . protect the child from the custodian with whom the child has been left, . . . or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse."

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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