

**Supreme Court of the State of New York
County of Queens: Part XX**

People of the State of New York

against

Jane Smith,

defendant

Ind: XXXX-200X

Memorandum of Law

Submitted to:
Honorable Justice XXXX XXXXXXXXX
Part XX

October 1, 200X
(courtesy copy faxed to Court on September 30, 200X)

by

Don A. Murray, Esq.
Shalley & Murray
125-10 Queens Blvd., Suite 10
Kew Gardens, NY 11415
718-268-2171

Attorney for Jane Smith

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The Grand Jury presentation failed to establish sufficiently the required element of “grave risk of death” with respect to counts one and two of the indictment against Jane Smith

No, 'tis not so deep as a well, nor so wide as a Church-door; but 'tis enough, 'twill serve: ask for Me to-morrow, and you shall find me a **grave** man.

Romeo and Juliet, William Shakespeare
Act 3, Scene 1: A public place. (*emphasis added*)

Mercutio's play on words in his dying declaration represents an ancient understanding of the concept of injuries posing a “grave risk of death” although in an admittedly literary as opposed to a strictly legal manner. And yet, Mercutio's analysis of his situation is reminiscent of the distinctions drawn by current New York State law with respect to acts or omissions posing a merely theoretical risk of death (or even substantial risk of death) and acts or omissions posing a *grave risk of death*.

Good Mercutio's injuries, he knew, were “enough” and would “serve” to make him a *grave* man indeed. His injuries were more than serious and his risk of death was more than hypothetical. The risk of death was imminent and clear.

The limited testimony presented to the Grand Jury in the instant case, however, was not *enough* and does not *serve* to support the required element of *grave risk of death* as that phrase has been interpreted in New York.

For the convenience of the Court, counsel has organized in the section that follows all the testimony of the medical expert related to an assessment of the risk of death posed to the child in the instant case. Following this, the Court will find a review of the law in New York with respect to the meaning and application of *grave risk of death*. Finally, the *grave risk of death* section will conclude with an in depth analysis of the medical expert's testimony as compared with the law.

RISK OF DEATH MENTIONED IN THE GRAND JURY

The issue of **risk of death** is addressed in the Grand Jury testimony, to the limited extent that it is addressed, at three separate times. [*Certain key phrases are emphasized by the author.*]

ONE:

Beginning on page 19, line 16, the sole medical witness testified as follows:

Q: *Could* that cause death?

A: Oh that *could cause death*, yes.

TWO:

Beginning on page 21, line 17 the sole medical witness testified as follows:

Q: Doctor, on the date she was admitted, did she *face a risk of death* had she not received medical attention?

A: Yes

Q: Can you explain?

A: *Often times* infants that are present with rickets are presented with seizures because their calcium levels are so low.

On admission her calcium level was critically low. She was *at risk for developmental seizures*, number one. And number two, she was severely famished, it was a matter of time until her *body system would deteriorate*.

I forget to mention before, during the hospitalization, it came to our attention that she required oxygen. One of the procedures that she was having a test for, the MRI of the brain, she was – received some minor sedation so she would be still during the procedure. In part when you sedate a child the protocol is to monitor their oxygen level and this is done by putting a little monitor on their toe or their finger, that's called oximeter and that registers you oxygen level in your body.

And *normal oxygen for us* is like 95 to 100 percent, anything less than 92 percent requires supplement with oxygen and when the monitor was put on her, her oxygen level was

below 92 percent and she required oxygen therapy so you could see there, because she was so severely malnourished her legs weren't able to properly function and she required oxygen.

Q: Could you tell us what is *the risk if a baby is having a seizure* and is not treated immediately?

A: They will die.

Q: And what does a seizure effect [sic]?

A: The brain.

Q: And does it effect [sic] breath also?

A: Once you have a seizure in your brain, brain function is altered, the brain is responsible for controlling breathing and heart rate and other processes that go on in the body. If the brain is not functioning properly none of the other systems *work well* either.

THREE

Beginning on page 28, line 14, the sole medical witness testified as follows:

Q: Doctor, to a reasonable degree of medical certainty without the therapies you described, the monitoring of the refeeding and the medical intervention that she received at your hospital *could she have died*?

A: Yes.

LEGAL ANALYSIS

According to the New York Court of Appeals, "Reckless endangerment in the first degree is committed when a person, under circumstances evincing a depraved indifference to human life, recklessly creates a grave risk of death to another ([Penal Law § 120.25](#))" *People v. Davis*, 72 N.Y.2d 32, 526 N.E.2d 20, 530 N.Y.S.2d 529 (1988)

Similarly, Assault in the First Degree, as it is charged against Ms. Smith requires reckless conduct creating a grave risk of death to another.

The phrase *grave risk of death* is not an **accident** in the law meant to be synonymous with *risk of death*. *Grave risk of death* represents a serious distinctive set of circumstances from what might be considered a less clear, less imminent, less predictable risk of death.

Classically, the use of a gun that actually fires bullets is a circumstance which will generally be considered to create a *grave risk of death* to people within a reasonable range of potential injury. *People v. Galloway*, 89 A.D.2d 214, 455 N.Y.S.2d 434, 4th Department, 1982. This is understandable because the firing of a gun is a discrete act with obvious consequences for causing **virtually immediate** death. The *imminence* of the risk is quite clear and the level of risk is quite clear. *Grave risk of death*, then requires not only the significant likelihood of causing death, but also requires that the risk of death be imminent.

Grave risk is therefore a **temporal** as well as a **causal** concept.

The Third Department illustrated this temporal aspect in a case involving a baby who had been squeezed by the defendant in an effort to quiet the child. *People v. Parrotte* 267 A.D.2d 884, 702 N.Y.S.2d 137 (3rd Department, 1999). In *Parrotte*, the defendant was alleged to have squeezed an infant with enormous force in an effort to quiet the child down. A medical expert testified that the child “had suffered trauma to the chest and abdomen resulting in multiple fractures to his ribs, elevated enzyme levels in the liver and pancreas, and blood in the kidney. The Court found that the facts were sufficient to make out a “grave risk of death”.

The *Parrotte* case is instructive, however, in what a different situation was presented than in the instant case. In *Parrotte* the evidence suggested a discrete physical act of extreme physical force (similar to the firing of a gun in the direction of the child) to the chest of an infant child. The risk posed by the extreme physical act PLUS the immediacy of the potential result are what combined to create a “grave risk of death.” Thus, the defendant’s acts in *Parrotte* were more like a gunshot in the severity of their potential physical harm AND in the immediacy with which the harm could take affect.

Interestingly, a dissenting judge in *Parrotte* believed that the defendant’s acts failed to rise to the level of “depraved indifference to human life” and so supported the concept that the defendant’s conviction for reckless endangerment in the first degree ought to have been reversed. Pinning the analysis on the objective test of what constitutes “depraved indifference” rather than on the element of grave risk of death, the dissenting judge did not believe that the defendant’s acts were equivalent to the person who fires a gun into a crowd or who drives a car

onto a sidewalk filled with people. Part three of this memo will deal with the concept of depraved indifference to human life separately from the issue of “grave risk of death”.

In the instant case, the evidence before the Grand Jury was devoid of information from which the jurors could properly conclude that the child faced an *imminent* risk of death or that the nature of the defendant’s conduct was of a similar level of severity as imposing extreme physical force to the chest of an infant child.

Although the medical expert in the instant case suggested that one possible result of the child’s deficiencies might be seizures, and that one possible result of such a seizure might be death, the expert failed to provide the grand jurors specific information about the child’s actual risk of such seizures, and certainly provided no information suggesting that the child had suffered such a seizure in the past, or, at the time she observed the child, was in imminent danger of suffering such a seizure.

One can only assume that an expert of such qualifications as the expert who testified before the Grand Jury would have provided such information had it existed. Nothing in the medical records that counsel has been able to review (that were placed in evidence before the Grand Jury) seems to support the concept that the child (Ice Smith) suffered any seizures before, during, or after her hospitalization.

The Third Department, in 2001 decided a case in which part of their determination that the people sufficiently demonstrated a *grave risk of death* rested on the imminence of the possibility of death. *People v. Britt*, 283 A.D.2d 778, 728 N.Y.S.2d 197 (3rd Department, 2001). In *Britt*, the defendant repeatedly abused a six month old infant. The medical expert testified that “..upon arrival at the hospital, the infant was **very close to death, lacked a pulse, was not breathing and would have died absent resuscitative procedures.**” *Id.* at 728 NYS2d 198.

The testimony presented to the Grand Jury by the medical expert in the instant case, in comparison, lacked even a remotely similar clarity with respect to the imminence of the possibility of death. The medical expert in *Britt* testified that the victim was “very close to death”. The medical expert in the instant case could only hypothesize about what might happen at some

unspecified time period in the future without even connecting such hypothetical projections to the child in the instant case in any meaningful way.

Indeed, the medical expert in *Britt* testified specifically that the child **would have died** absent their (apparently immediate) resuscitative procedures (given that the child presented with no pulse). There was no such testimony even remotely similar from the medical expert who testified before the instant Grand Jury. The medical expert in the instant case never once suggested that the child in the instant case was “very close to death” when the child appeared in the hospital.

Even the firing of a gun, something clearly mortally dangerous is not sufficient to show grave risk of death absent evidence as to the proximity of people to the potential paths of the bullets. The Second Department held that evidence that a gun was fired in the vicinity of a group of people and that bullets struck two objects, one of which was approximately 30 feet from at least one person, was insufficient to establish a *grave risk of death*. *People v. Bennett*, 193 A.D.2d 808, 598 N.Y.S.2d 84 (2nd Department, 1993). Thus there is *something more* about grave risk of death than simply the risk of death, even if that risk is larger than say, “running with scissors”. That *something more* is an imminence or likelihood that separates the situation from simply a potential, or even a strong potential.

And it makes sense for the legislature to have meant to be strict with respect to this requirement, especially in the context of the enormous difference it makes in the scope of punishment for the behavior in question. The current difference is the difference between a mandatory minimum of five years in state prison or misdemeanor exposure. It only makes sense then, that the legislature really meant *grave risk of death* as opposed to *risk of death*, or *higher than usual risk of death*. The use of the word *grave* was no more a coincidence when the legislature used it than when Shakespeare used it for Mercutio’s dying declaration in *Romeo and Juliet*.

In the case of *People v. Miller*, 290 A.D.2d 814, 736 N.Y.S.2d 773 (3rd Dept. 2002), the Third Department again illustrated the concept that a *grave risk of death* is one in which death is potentially **imminent**. There is (must be) a temporal component to *grave risk of death*. In *Miller*,

the defendant's conduct consistent of strangling the victim with his own hands to the point she became dizzy and her vision blurred. According to the court, "defendant's conduct actually restricted the flow of blood to La Porte's brain causing anoxia and that the pressure he applied would have **quickly** caused her death if it had continued." *Id.* at 736 NYS2d 815. (emphasis added).

The Second Department has specifically noted that merely a "substantial risk of death" is insufficient to rise to the level of a "grave risk of death". *People v. Ostraticky*, 117 AD2d 759, 499 NYS2d 3 (2nd Department, 1986). In *Ostraticky*, the defendant's vehicle struck a police vehicle two times. The defendant was arrested and convicted of a "grave risk of death" reckless endangerment crime. The Second Department held that the proof was insufficient to establish a grave risk of death. Significantly, the Second Department held that "there was no testimony to support a finding that the officer, the person at whom defendant's conduct was directed, was in **imminent danger of death.**" *Id.* (emphasis added) There was testimony that the officer was admitted to the hospital, that he took 3 days of sick leave, but nothing establishing an imminence of death. *Id.* Once again the concept of imminence and the specific distinction from even a "substantial" risk of death is noted by the Second Department.

The Court of Appeals, in *People v. Gomez*, 65 N.Y.2d 9, 478 N.E.2d 759, 489 N.Y.S.2d 156 (1985) held that driving a speeding car onto a sidewalk crowded with people poses a *grave risk of death*. Like firing a gun into a crowd, the physical forces involved in this discrete act are such that in the event that there is contact between the bullet or the car and a human being, there is a clear and obvious risk of immediate death.

The testimony before the Grand Jury in the instant case, however, fails even to begin to suggest such a level of catastrophic imminence or likelihood of death. The medical expert barely connected the "risk" of death to the specific child in question before the Grand Jury, instead, simply describing what might generally happen after some unspecified period of time (if ever).

So strict is the concept of *grave risk of death* that even situations that might seem *obviously grave* require sufficient expert testimony to meet this burden. *People v. Grossman*, 124 AD2d 974, 508 NYS2d 815 (4th Department, 1986). In *Grossman*, the defendant "turned on the

gas jets on the kitchen stove, closed the windows of the house, and left a candle burning in a second floor bedroom with the victim bound and gagged in another bedroom.” *Id.* The Fourth Department held that although the properties of natural gas may be familiar to many people, expert testimony was necessary in order to establish the element of *grave risk of death*. *Id.*

Although the Government presented an expert witness to the Grand Jury in the instant case, the expert failed sufficiently to establish the *grave risk of death*.

Factual Analysis and Conclusion

To listen to our mothers, ***running with scissors*** is something that poses a *risk* of death to the runner and those around him. Almost any illegal aggressive or reckless behavior poses *some* risk of death to the person on the receiving end of it. A punch to the face, a kick in the ribs, purposely tripping someone all, depending on the circumstances and the physical health of the victim, pose some risk of death.

The testimony presented to the Grand Jury, however, even in the light most favorable to the People, suggests a mere possibility of death at some unspecified time in the future. Perhaps it established that there was *a risk* of death. But the testimony did not address the gravity of the risk OR its imminence with even minimal specificity.

The first mention of the risk of death occurred when the sole medical witness testified that a worsening of the child’s condition *could* cause death. The fact that there was a potential cause of death out there, however, is not the issue. The ***possibility of death*** is not legally the same as a *grave risk of death*.

In the second mention of a risk of death, the sole medical witness provided information about the possibility of death in explanation of the predicate statement that the child faced a “**risk of death**” were she not to have received “medical attention”. The page and a half explanation that followed this assessment that the child faced simply “a risk of death” **was in explanation and in support of the concept that the child faced a “risk of death”**. The question from the assistant district attorney clearly demonstrates that all that follows was in explanation of this

unqualified risk of death. The assistant district attorney asked the sole medical witness, “Can you explain?” immediately following the witness’ statement that the child faced an unqualified “risk of death.”

This sole medical witness was the expert. **One can only assume that the expert medical witness would be as precise as the data supported.** It is not our place to assume that a medical professional whose qualifications include twenty years experience and the treatment of 80,000 different patients (an average of 333 different patients per month every month for 20 years) (see *Grand Jury testimony page 5 lines 14 – 21*) meant *grave risk of death* when she used a clearly more generic term.

The explanation that follows the initial non-specific risk assessment of the medical expert even supports that *lack of specificity or gravity* of the risk described.

The medical expert testified that *often times* patients with rickets are at risk for certain problems. But the medical expert failed to indicate that the child in the instant case was specifically one of those patients. The medical expert suggested a *risk* for seizures, but never provided any evidence of the likelihood that the *child in question* was at risk for such seizures. Certainly the expert did not present any evidence that the child **actually suffered** any such seizures.

Additionally in explanation of a broad possibility of “risk” the medical expert suggested the risk that “it was a matter of time” before her “body systems began to deteriorate.” The expert failed to explain *what amount of time* she meant, and failed to explain what “body systems begin to deteriorate” means or how or if “body systems beginning to deteriorate” equals death.

Finally, in explanation of the broad possibility of “risk” the medical expert answered a hypothetical question with respect to what is risked when a hypothetical child experiences a seizure. The expert suggested that death was the risk, but again there was no analysis of the level of risk that the child in question in the instant case was at risk for experiencing such seizures except the broad possibility of “a risk” referred to earlier in her testimony. Furthermore, there was no analysis of the time within which this risk was to exist.

In the last mention of risk of death in the Grand Jury testimony, the assistant district attorney asks a summary question ending in "...could she have died?" to which the medical expert responded "yes". No explanation is provided to suggest that the possibility of death was "grave" or any other level of imminence or seriousness.

One can only conclude that a medical expert of such impressive qualifications as the expert presented to the Grand Jury, would be as precise as the data she had available, no more and no less. An expert who has seen more than 300 patients per month every month for 20 years and who is so experienced with malnourished and maltreated children is clearly someone who could be relied upon **to say what she means**.

Therefore, the evidence presented to the Grand Jury was legally insufficient to support the strict legal concept of *grave risk of death*. Since both counts one and two of the indictment require that a grave risk of death be established, counts one and two of the indictment ought to be dismissed.

The Grand Jury Evidence failed to establish that the defendant consciously disregarded a known risk as would be required to support a theory of recklessness required for both assault in the first degree and reckless endangerment in the first degree.

To establish recklessness the Government must show “(1) that defendant was "aware of and consciously disregard [ed]" a risk that injury would occur; (2) that the risk was "substantial and unjustifiable"; and (3) that disregard thereof "constitutes a gross deviation from the standard of conduct that a reasonable person would observe" *People v. Leonardo*, 89 A.D.2d 214, 455 N.Y.S.2d 434, **437** (4th Department, 1982).

In deciding whether the Grand Jury testimony supports the charges, “The test is whether there has been a "clear showing" that the evidence if unexplained and uncontradicted would not warrant a conviction by a trial jury.” *Id.* at 437.

In *Leonard*, the defendant fired a gun at a tree, beyond which in the distance lay a baseball diamond. The defendant missed the tree, struck, and injured a young spectator at the field. *Id.* at 436. Although the court had little difficulty in agreeing that the defendant’s conduct involved a substantial and unjustifiable risk and that a disregard of the risk was a gross deviation from the standard of conduct that a reasonable person would observe, the court wrestled with what it described as the “close” issue of whether the evidence before the grand jury supported the assertion that the defendant was aware of and consciously disregarded a risk that injury would occur. *Id.*

Although the Court in *Leonard* ultimately determined that the evidence before the Grand Jury was sufficient to support criminal recklessness, the analysis imposed is instructive and illuminates some of the problems with the Government’s grand jury presentation in the instant case.

The *Leonard* Court noted that the “critical element” in determining whether an accused perceived and disregarded the risk of harm is **the accused’s state of mind**. *Id.* at 437. The Court in *Leonard* went on to note that objective evidence of the surrounding circumstances may be weighed in making the factual determination. *Id.* at 437 (citing [People v. Licitra, 47 N.Y.2d](#)

[554, 559, 419 N.Y.S.2d 461, 393 N.E.2d 456](#); see [People v. Stanfield, 36 N.Y.2d 467, 472, 369 N.Y.S.2d 118, 330 N.E.2d 75](#)).

The Court considered the following factors:

- The defendant's age
- The defendant's specific knowledge that the gun was loaded
- The defendant intentionally aimed a gun at a tree and pulled the trigger
- The defendant's familiarity with the gun and guns in general (as evidenced by the fact that he loaded it, fired it, and cleaned it to remove traces of the firing).
- The defendant's awareness of the proximity of the school and the field (since he lived across the street)
- The likelihood that there would be people in the area on a warm afternoon after school during baseball season.

Clearly the facts of the instant case are radically different, but the Court's detailed analysis of objective facts to get at the subjective state of mind of the defendant is important, because, in the instant case, it highlights the complete absence of information upon which to make a decision that was presented to the Grand Jury.

Age, Experience, and Intelligence

The defendant's age was not addressed in the Grand Jury, nor her experience, if any, with raising infants, her level of education, nor her mental acuity. Clearly these are highly probative issues that were not specifically explored at even the most superficial of levels. The most the Grand Jurors were informed about her age was that she was by definition of child-bearing age – meaning anywhere from 12 to 50 or so.

Certainly objective evidence could have been presented addressing in detail the defendant's interactions with hospital staff/government agents and their impressions of her age, experience, and intelligence. Yet the Prosecution failed to present such evidence. In the absence of this evidence, it cannot be said that the prosecution successfully presented sufficient evidence that the defendant consciously disregarded a known risk.

The long term abstractness of the instant situation is not so clear as firing a gun as the defendant did in *Leonard*. It would seem, then, that the evidence must therefore be clearly defined and not presented to the members of the Grand Jury in a murky haze.

The Defendant's Knowledge

The defendant's state of mind was not more than superficially addressed in the Grand Jury presentation. The medical expert testified to numerous hearsay statements of the accused with respect to the nature of the accused's diet and briefly touched on the doctor's interpretation of the philosophical underpinnings to "vegan" diets.

However limited and superficial such testimony was, it not only failed to support a theory of "conscious disregard of a known risk", but actually **cut against such a theory**. A strong belief in the wisdom of a particular diet could quite easily be based upon a conscious, if perhaps in fact misguided, REGARD of a known risk. The known (or believed) risk being what might be described by a vegan influenced person as "the inherent dangers and life-threatening risks of following the grossly misguided and immoral diets of traditional medicine."

Nothing in the Grand Jury testimony suggests, hints, or otherwise indicates that if asked the question, "Did you for one moment consciously decide to expose Ice Smith to extreme medical risk" the defendant would have responded "yes." In fact, everything suggests that she would have answered "no" and that she would have said that exposing the child to a traditional diet might well have exposed the child to unreasonable moral and physical risks.

The conscious disregard of known risk, it seems, would suggest that the act accomplished in place of the "non-reckless" act be one of a consciously random nature in which the end result of injury was NOT A CONSIDERATION AT ALL. The person who is foolish enough to fire a gun in the direction he knows where people may well be congregating, for example, is acting out of a complete lack of consideration of the consequences.

On the other hand, the person who fires that gun because he honestly believes that someone at the park is in peril might be in a different situation altogether. Perhaps his vision is obscured. Perhaps the mountain lion he thought he saw was really a deer. Or perhaps he

honestly believed he saw a Yeti lurking in the woods about to leap into the park and steal a child away.

Either way, the person pulls the trigger because of an honest CONSIDERATION for the well-being of the person who is harmed or placed at risk of harm. Perhaps the person who honestly believes he saw a Yeti needs help of one kind or another. But if one assumes that he actually honestly believed he was seeing a Yeti about to attack the crowd, can he really be guilty of 'consciously disregarding a known risk'? The answer to whether or not the shooter is guilty of consciously disregarding a known risk cannot depend on whether or not there was a mountain lion or a Yeti about to attack a crowd. It cannot depend on the actual factual circumstance because the issue is a "conscious" disregard.

Likewise in the instant case, there is nothing in the record to suggest that the defendant consciously disregarded a known risk, because nothing in the record indicates that she agreed or acknowledged that the child was in trouble. In fact, the little evidence presented about the defendant's state of mind or conscious disregard suggested precisely that the defendant was not conscious of the allegedly serious physical condition of her child.

She denied noticing anything wrong.

The medical records introduced into evidence before the Grand Jury indicate that the defendant never left the side of the child during the child's stay in the hospital and quite actively questioned and challenged the medical staff about every aspect of her child's treatment. She was apparently extremely difficult to deal with in the sense that she had the audacity to require explanations from the medical staff treating her child and she had the audacity to challenge, in some cases, their basic assumptions and conclusions. Clearly such people are difficult for the medical staff to deal with, and they most likely consider challenges to their underlying assumptions about medicine as colossal wastes of their valuable time, but it does provide objective insight into whether the defendant was *consciously disregarding* anything. This behavior provides evidence that in her state of mind, she was making Herculean efforts to PREVENT both moral and physical harm to her child.

And yet, the medical records are also clear, that when educated, the defendant ultimately would comply with the recommendations of the medical staff, if perhaps begrudgingly. These are not the actions of a person who *systematically consciously disregards known risks*. Perhaps they are the actions of an unwise or extremely misled person, or maybe even an obnoxious person. But they are not the actions of a criminal who cares not about the health of her own child.

This is most powerful evidence that the defendant was anything but consciously disregarding known risks to her child. A person consciously disregarding known risks to her child at the appalling level that the prosecution seems to suggest would have been quite happy to be separated from the child.

The Grand Jury Evidence Failed to Support the Depraved Indifference to Human Life element of Counts One and Two of the indictment

Defense counsel's initial motion to dismiss filed with the Omnibus Motion suggested the possibility that the Government failed to establish in the Grand Jury the element of depraved indifference to human life required to prove counts one and two of the indictment.

Upon actually being in a position to review those Grand Jury minutes, defense counsel reiterates this position and incorporates by reference the arguments made with respect to this issue in the previously filed omnibus motion.

The issue is somewhat tangled together with the concept of grave risk of death, yet carries with it its own analysis as well.

As anticipated, nothing about the presentation to the Grand Jury suggested an objective brutality or callousness on the order of firing a gun into a crowd or driving a car onto a sidewalk crowded with people. In fact, certain evidence presented to the Grand Jury suggested the opposite of brutality or callousness on the part of Ms. Smith. For example, the medical records show that Ms. Smith remained with the child as much as she could in the hospital, she was extremely active in her wanting to understand what the hospital was doing with her child and why.

Furthermore, the Grand Jury testimony indicated that the apartment from which the child was removed was not a callous, brutal, wanton environment. It was not, for example, strewn with refuse, disorganized, unsanitary, or otherwise dangerous.

Nothing presented to the Grand Jury suggested that the diet provided to the child, as reported in the hearsay statements provided the Grand Jury through the medical expert, indicated that the child was being fed a “random, brutal, wanton, or callous” diet. A diet that could be described as a *depraved indifference diet* would have to be one far different from that which was testified to in the Grand Jury.

A *depraved indifference diet* would be a diet that included random, intermittent feeding of whatever happened to be around, whether it was food, paint, solvents, dirt, or Plutonium 238. Certainly the diet, if the medical testimony is to be credited, may have caused the child harm. Yet the harm caused is not the measure of depraved indifference to human life. The Government’s presentation of this case to the Grand Jury seems to have been founded in a visceral reaction to the tragedy of a child determined by medical experts to be in distress. Who, after all, could feel anything but sorrow at the concept of a child in distress?

Yet this visceral reaction must be placed in the *context of the law*. All terrible situations are not the result of criminal behavior, despite our natural desire to want to strike out for a small defenseless child.

Furthermore, the medical expert testified to the fact that the child’s weight and other milestones were far below average for the child’s age, purportedly on the theory that the failure to reach the milestones described was evidence that the child was being treated with a depraved indifference to human life.

Yet the Doctor accepted as fact that the child was born weighing three pounds. To compare a child who is born at 3 three pounds to the “average” child of a similar age more than ten months later is clearly the height of absurdity. The milestones described by the medical expert were the milestones for children *who are not born at 3 pounds*. The child in question more than tripled her weight by the time she was removed from the defendant’s home. The medical expert’s testimony with respect to the milestones, in order to be relevant on the issue of whether

or not the child was thriving, should have spoken to the milestones *to be expected for a child born 3 pounds*. Nothing in the Grand Jury presentation even suggested that the child's relatively low birthweight was the result of some form of neglect or criminal behavior. Therefore the medical expert's testimony with respect to the failure of the child to reach the "milestones" was totally irrelevant, insufficient, and *downright misleading* on the issue of whether there was some sort of "obvious" or "clear" failure of the child to thrive.

Therefore, the failure to demonstrate that the diet believed to have been presented to the child was the result of some form of depraved indifference diet, combined with the failure to show with sufficient clarity that the child was so clearly deficient (for a child born 3 pounds) failed to show with sufficient evidence in the Grand Jury that the defendant acted with a *depraved indifference to human life*.

The Admission of Unexplained and Unevaluated Testimony about various Organizations' standards for the feeding of children was error, especially given its potential confusion with the legal instruction on "omission".

The Government presented legal instruction with respect to the definition of an omission. The Government also elicited testimony from the medical expert concerning the recommendations of certain organizations with respect to infant diet. The manner in which this testimony was presented, by a medical expert, in conjunction with a legal instruction on the meaning of omission impaired the integrity of the Grand Jury proceeding.

In presenting the testimony of the "official" diet of a medical organization, there was a substantial and unjustifiable risk that the Grand Jurors could assume that failure to abide by the diet testified to was by itself an "omission" within the meaning of the law for which the defendants must have been held accountable. The Government offered no limiting instruction with respect to the "official" diet testimony and simply left it hanging in the air as to the consequences for failure to abide by the official diet.

CONCLUSION

The fact that we are engaged in intricate legal debate about abstract legal concepts in the instant case is a function of the fact that the case simply does not belong where it is. The fact that the Government has had such difficulty presenting a sensible case making out the crimes charged, is striking evidence that it should not have presented the case in the first place.

The Government wants to place the actions of the defendant in this case into the world of people who fire guns into crowds, people who drive cars onto sidewalks, and people who set ablaze buildings full of people. Yet it is a world in which, judging from the Grand Jury presentation, the instant case clearly does not belong.

The Government attempted to place the proverbial square peg into the round hole.

It didn't work.

Counts one and two of the indictment ought to be dismissed.

Don A. Murray, Esq.
Attorney for Jane Smith
September 30, 200X