

**IN THE FIRST CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY,  
FLORIDA**

STATE OF FLORIDA \*

vs.

ERIN BRITTANY MARKES

Defendant

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Clerk No.: 5708CF000526A

Division: B.

Agency No.: 08002368

Charge: CHILD NEGLECT - CAUSING  
GREAT BODILY HARM, PERMANENT  
DISABILITY, OR PERMANENT  
DISFIGUREMENT

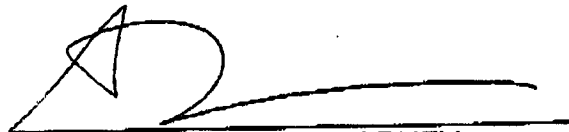
Reason Code: 121

**NO PROSECUTION**

The Office of the State Attorney in and for the First Judicial Circuit of Florida announces a **NO PROSECUTION** in the above-captioned case, saying:

FURTHER INVESTIGATION INTO THE FACTS AND CIRCUMSTANCES SURROUNDING THE ALLEGED OFFENSE HAS REVEALED INSUFFICIENT EVIDENCE TO PROVE THE CHARGE BEYOND A REASONABLE DOUBT AS DETAILED IN THE ATTACHED MEMORANDUM.

DATED: MAY 23, 2008.



ASSISTANT STATE ATTORNEY  
FIRST JUDICIAL CIRCUIT  
ANNE M. PATTERSON,  
PHONE: (850) 595-4500  
FLORIDA BAR NO.: 0498998

MEMORANDUM TO FILE  
MAY 21, 2008  
ST V ERIN MARKES  
CASE NO 08-526 SANTA ROSA COUNTY

This case originated on March 13, 2008, when Jaden Markes, DOB 12/28/03, was brought to Sacred Heart Hospital in the early morning hours by his mother, Erin Markes, DOB 10/23/88. Jaden suffers from Lissencephaly, or "smooth brain", a severe and terminal birth defect of the brain, which causes developmental problems and other physical disabilities. The National Institute of Neurological Disorders describes the characteristics of lessencephaly to be seizures, failure to thrive, decreased muscle tone, severe psychomotor retardation and significant feeding difficulties. Jaden had been fitted with a G-tube for feeding when he was an infant. Jaden was on numerous medications to control the seizures and to try to help his digestion. At the time Jaden was brought to the hospital, he weighed 12.3 pounds. This weight is documented in hospital records. There is no record that he ever weighed less than this amount despite reports to the contrary. Jaden's condition was described as "cachectic" meaning a "wasting" of the body caused by chronic disease. He was also found to have bedsores on two locations of his body.

This was not Jaden's first admission to Sacred Heart Hospital. On September 20, 2007, Erin brought Jaden to the Sacred Heart Hospital ER for treatment of possible pneumonia, diarrhea, and difficulty feeding by mouth. Upon that admission, Jaden weighed approximately 15 pounds. DCF was notified and opened an investigation. That investigation found that Erin Markes had moved with Jaden from Missouri to the Milton area in July, 2007 after the death of her mother. She was in the process of setting up medical and social services for Jaden in Pensacola, although she was residing with a former relative in Milton. After the DCF investigation was concluded, no wrongdoing was found on the part of Erin Markes, and the case was closed.

The next documented contact with the hospital was on February 12, 2008, when Erin brought Jaden in to the Pediatric Care Center at Sacred Heart Hospital for the first time to establish Jaden as a patient there and to seek more medication. Erin had discontinued seeing the pediatrician who had seen Jaden from July until October, 2007, at which time the pediatrician referred her to the Pediatric Care Center. There are no records of Erin seeking medical assistance for Jaden in November or December, 2007 or January, 2008, although there are social service notes where Erin had been contacted in an effort to help her set appointments with different doctors. Erin did not keep some of these appointments. When Jaden was seen by a doctor at the Pediatric Care Center on February 12, he was described as "cachectic" and his weight noted to be 12.8 pounds. However, under the circumstances of his condition, the doctor did not feel he needed to take any further action other than to discuss Jaden's nutrition and medication needs with Erin, who was reported to be an informed and attentive historian. At that visit, no bedsores or other signs of maltreatment were noted to be present on Jaden.

Jaden's next contact with the hospital was March 13, 2008, when Erin brought Jaden to the Sacred Heart Hospital in the early morning hours. Upon arrival, Erin stated that she had awakened in the middle of the night to hear Jaden making a "grunting" noise which concerned her. She brought him to the ER right away. Because of his "cachectic" condition and the findings of no anti-seizure medications in his blood tests, the case was reported to DCF, and a new investigation was commenced. Jaden was eventually moved to the hospital floor where he started to improve, yet continued to suffer from seizures and other lessencephaly related problems.

On March 17, 2008, Erin Markes was interviewed by investigators with the Santa Rosa Sheriff's Office and DCF. During that interview, Erin stated that she had been feeding Jaden and giving him his medicine. She stated that she was aware of the bedsores and had taken steps to try to heal them, but later found out her efforts were ineffectual. She stated she had been trying to "do her best" to take care of him, but upon hindsight, realized she "should have done more" for Jaden. Erin stated, "I love him with all my heart, but I can't do it all (and) like I have been. I need help with him. I think he needs more attention than I can give."

Erin Markes had been caring for Jaden, whose special needs were complicated and demanding, his whole life. Up until her move to Florida, the medical records of Jaden's care show Erin was attentive and proactive in providing for his needs. However, the initial investigation by law enforcement and DCF seemed to indicate that since coming to Florida, Erin's efforts to provide for Jaden may have waned. The initial review by law enforcement of Jaden's extremely poor physical condition on March 13, coupled with Erin's short, sporadic history of providing for Jaden's medical care here in Florida, and Erin's admissions that she had not made the effort she knew she should have to take care of Jaden as best as she could, provided probable cause for Erin's arrest on the child neglect charge. A warrant was prepared by an investigator with the Santa Rosa Sheriff's Department, reviewed and approved by the state attorney's office, signed by a judge, and legally served.

While sufficient evidence existed to satisfy the probable cause requirement to secure a lawful warrant for arrest, the State faces a much higher burden of showing proof beyond a reasonable doubt that the alleged crime was committed. Section 827.03(3) Florida Statutes defines the crime of Child Neglect. In order to prove this crime, the state must have evidence showing beyond a reasonable doubt that the defendant, "*willfully, by culpable negligence, failed or omitted to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health.*" The jury instructions define culpable negligence as follows:

*Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is the consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known was likely to cause death or great bodily harm.*

Upon receipt of this case, an intensive investigation was undertaken by the State Attorney's Office. The local physicians who treated the child were consulted and interviewed, medical and social service records for Jaden, both from Florida and Missouri, were researched and reviewed, as well as the law enforcement's case file of their investigation. Early on in the investigation leaders of the National Lessencephaly Network and medical experts, including Dr. William Dobyms, a nationally recognized expert on the condition working at the University of Chicago, and Dianna Fitzgerald, president of the National Lessencephaly Network, volunteered their time, information, and expertise to assist in an understanding of the condition, and importantly, the obstacles and challenges parents of these children face on a daily basis. They indicated that they were familiar with Erin, who had over the years, sought advice and guidance from the Network in her efforts to deal with Jaden's challenges. They provided educational information and statistics on the life expectancy of children suffering with this condition and facts that changed one's perception of the physical condition and frailty of these children. The high level of constant effort, attentiveness and care to provide for these children is unrelenting. And, most significantly, the potential for rapid and unforeseen deterioration of the child's condition is always present. They also explained that a negative finding of medication in the blood did not necessarily prove the child had not received his medication because of the severe digestion problems that are characteristic of the condition. Apparently, according to those who have cared for a child with lessencephaly, it takes only a small amount of neglect or loss of diligence, whether willful or not, to result in dire consequences. Finally, family members with whom Erin lived were interviewed and indicated that they had witnessed Erin's efforts to take responsible care of Jaden.

As of April 7, 2008, Jaden was in hospice care, and was noted to weigh 15.8 pounds. While Jaden has gained more weight, he still suffers from seizures and eating difficulties. Since his move to hospice, Jaden has been thought to be near death on more than one occasion, most recently May 17<sup>th</sup>. As of this date, however, he is reported stable. It is noted that Erin visits him regularly, if not for long periods of time, and that significantly, Jaden knows when she is there. It is still the consensus of the medical personnel that Jaden is in the end stages of this syndrome. It is believed that Jaden suffers from a particularly rare and severe type of lessencephaly called *Miller-Deiker*, which usually results in death around or before the age of 2.

When presented with all the facts and circumstances of the case, all the physicians consulted as well as the experts were in agreement that the child's tenuous condition on March 13 was most likely as a result of the effects of his lessencephaly and not as a direct result of negligence on the part of Erin Markes.

It is therefore the conclusion of this investigation that after a thorough review of the facts, evidence and applicable law, the acts of Erin Markes were not willful in a criminal manner, and her actions, when taken in light of all the facts and circumstances of the case, did not rise to the level of culpable negligence sufficient to prove a charge of criminal child neglect beyond a reasonable doubt.

It is important to note that Family First Network and Children's Medical Services were assisting the family before, and have continued to support them since, this case's inception. Through the dependency court system, they remain involved with the family to assure that Jaden's needs are met and will continue their assistance even after the criminal case is resolved.

A M PATTERSON, ASA