**STATE OF WISCONSIN**

**C O U R T O F A P P E A L S**

DISTRICT III

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Appeal No. 11 AP 1044

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

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# DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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On appeal from the Circuit Court
of Marathon County, Hon. Vincent K. Howard,
Circuit Judge, presiding.

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## ISSUES FOR REVIEW

1. Was defendant's right to due process notice violated when he was charged based upon conduct expressly exempt from prosecution under another criminal statute?

The trial court answered: "No."

2. Was defendant's duty to provide his child with conventional medical care defined by the exemption for faith healing contained in Wis. Stat. § 948.03 or, barring that, a parent's constitutional right to direct a child's medical care?

The trial court answered: "No."

3. Was the real controversy fully tried, or was trial counsel ineffective, when the jury was not properly informed it could consider "faith healing" as a defense to the subjective element of Wis. Stat. § 940.06?

The trial court answered: "Yes, the real controversy was fully tried; and no, trial counsel was not ineffective."

4. Were the jurors objectively biased when the trial court informed them defendant's wife had been previously convicted on the same charge?

The trial court answered: "No."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are both requested.

## STATEMENT OF THE CASE

Dale and Leilani Neumann are the parents of Madeline Kara[1] Neumann. They were each charged with one count of second degree reckless homicide (Wis. Stat. § 940.06) when Kara died from undiagnosed diabetes. The charge results from the Neumanns' decision to treat Kara's through prayer and faith healing rather than conventional medical care. They were each tried separately. Leilani was convicted on May 22, 2009, and Dale was convicted on August 1, 2009, after separate jury trials. On October 6, 2009, both were sentenced to 10 years probation, with six months in the county jail stayed. In addition, each parent was required to serve 30 days in jail during the month of March, every other year, for six years. A written judgment of conviction was filed on October 8, 2009. The jail terms were stayed pending appeal.

Dale filed a postconviction motion on January 7, 2011. A motion hearing was held on February 22, 2011. On April 27, 2011, the trial court filed a written decision denying the postconviction motion. (85:1-16; Appendix ("A:") pp. 20-36). A notice of appeal was filed on May 5, 2011. On June 29, 2011, this Court ordered the cases consolidated for decision only.

1 Madeline Neumann is referred to by her middle name "Kara" throughout the record.

## STATEMENT OF FACTS

Dale Neumann is a deeply religious man who identifies with the Pentecostalist tradition. (109:132; 111:72, 86, 95). He attended Christian Life College and received a B.A. in theology and missions. (111:89, 91). Together with his wife and family, Dale engaged in community ministry and hosted bible studies and other religious gatherings in his home. (109:32-33, 119, 194, 199; 111:10-11, 17, 87). In addition to their ministry activities, the Neumanns owned and operated a drive-up coffee shop.

One of Dale's fundamental religious precepts is his absolute belief in the casual relationship between sickness and sin, the power of God to heal the sick, and the use of prayer to heal rather than conventional medical treatment. (109:35, 36, 129-133, 142, 208, 213-214, 267, 285; 111:19, 33). Dale has personally witnessed the healing power of God to cure cancer, infertility, and other serious medical conditions. (111:102-103). Dale and his family have foresworn conventional medical care. Seeking medical attention rather than turning to God would have been putting the doctor before God, and would thus constitute "disobedience" to God. (109:111, 130; 111:105-110, 118-119, 154). According to Dale, both his and his family's health improved when they stopped using medical services. (109:143; 111:111, 115). The genuineness of Dale's beliefs was never contradicted nor disputed at trial. (109:287). According to one of his friends, Dale has "great faith" and confidence in his beliefs. (111:33).

Eleven-year-old Kara was the youngest of Dale and Leilani Neumann's four children. (107:10, 11; 109:8). Kara had no past medical history. (107:128). For at least a couple of weeks before her death on March 23, 2008, Kara had been feeling weak and tired, and was often thirsty. She used the bathroom more frequently. (109:37). To the casual observer,

however, Kara would have appeared healthy up to and including Thursday, March 20, 2008. (111:177).

On Friday, March 21, Leilani came home from work around 6 p.m. Kara was sitting at the table trying to do homework. Leilani noticed Kara looked tired, and told her to lay down. (109:39, 40). Dale later came home with two McChickens and a shake from McDonalds. (111:132). Kara ate one McChicken and drank half the shake. (111:134).

On the morning of Saturday, March 22, Leilani spoke with Kara and decided she should stay home and rest rather than working at the family coffee shop. (109:47). Dale later saw Kara and asked her if she was okay and she responded that she was just tired. (111:127). She agreed she was going to lie down, and Dale spent the day working on the family tax return. (111:129). Leilani returned home around 5 p.m. and Kara was on the couch. She was weak and looked pale. She had a blueness in her legs and her breathing was labored. Leilani called for Dale, as she was concerned. They started praying and massaging her. The blueness started to leave. Leilani gave Kara a smoothie, which she drank. (109:54, 55, 59, 66; 111:131, 134, 138). They continued praying for her. (111:131).

Dale was sufficiently concerned that he broadcast an email seeking emergency prayer and assistance from David Ellis, an elder of the church. Ellis called them later that evening and joined them in prayer. (109:62; 111:134, 138). Dale testified: "I didn't know what specifically was wrong with her. It could have been the flu. It could have been the fever. It could have been so many different other things. But whatever it was, she was very sleepy, so it needed attention so we prayed." (111:135-136).

The family was praying for her continuously that evening. (109:65, 68, 75). Friends and family were called to

join in prayer (109:76, 77, 82, 84, 87, 99; 111:22). Eventually, the family took a break from prayer to eat dinner. During that time Kara got up from the bed on her own and went to the bathroom. She fell off the toilet. (109:72). When she was found several minutes later, around 7 or 8, she was carried downstairs to the living room couch where the family could keep a closer eye on her. (109:73). At this point she was very weak. She couldn't walk on her own and did not talk. The family continued to pray on Kara's behalf until they went to bed sometime after midnight. (111:136, 137). Two of Kara's siblings slept next to her that night. (109:84).

At about 5:00 a.m., on March 23, Easter Sunday, the two children sleeping by Kara woke Dale up and told him Kara kept kicking the covers off the couch and thought she needed to go to the bathroom. (109:85). Kara did not appear conscious. (109:90). She was limp, still in a deep sleep, but "she was breathing – what I considered normal breathing. So I just said, well…whatever this is, Lord, it's going to burn out of her, and it's no problem at all." (111:138, 139). Both Dale and Leilani thought her breathing had improved. (*Id.*; 109:120).[2] The Neumanns began making calls to bring people from their bible study to their house. (109:87, 219, 245). They continued praying. (111:139, 140).

Lynn Wilde arrived around 9 a.m. and stayed for 3 to 3½ hours (111:23, 58). She joined Dale, Leilani and the children in prayer. (111:24). According to Lynn, Kara appeared as if she had the flu or something. She was limp, but she would move her head and moan in response to their attempts to communicate with her. (111:32, 49, 53).

Dan and Jennifer Peaslee arrived around 11:30 a.m., just as Lynn Wilde was helping Leilani give Kara a sponge

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2 The medical testimony was that breathing often "normalized" at end stage, when organ failure occurred. (107:219; 108:13, 19)

bath. (109:93, 95, 204, 205, 222). After the sponge bath, Dan Peaslee carried Kara downstairs to the main floor and placed her on a futon which Dale had prepared in a room just off the kitchen. (109:97, 206, 228, 229). The Peaslees described Kara as pale, not moving, with audible breathing. (109:95, 96, 204, 222, 225, 226). Dale was distraught, his nose and eyes red as if he had been crying. (109:224).

They shared communion at Kara's side and all prayed until around 1:00 p.m., when the Peaslees and Lynn Wilde left. (109:106, 222, 231, 230, 233-234; 111:36-37, 58). Despite Kara's condition, they were all optimistic. Lynn fully expected she would get a call later telling her that Kara "was fine, walking around. I had peace about it. Otherwise, I would not have left." (111:38). The Peaslees also had faith that Kara would be healed. (109:230, 233). When they left, they felt she was going to get better. (109:235).

Shortly after 1:30 p.m., Randall and Althea Wormgoor arrived with their four children. (109:250-251, 277). Kara was unconscious. (109:278). The Neumanns told them, however, that she appeared to be doing better. (109:96, 252, 254). They prayed with the Neumanns. (109:255).

At approximately 2:30-2:40 p.m., Randall led Dale away from the others and told him that if it were his daughter, he would be bringing her to a doctor. (109:279, 280). Dale responded: "don't you think that crossed my mind?" It was a "struggle for him." (109:281). At the same time they were having this discussion, Althea noticed a distinct twitch from Kara's mouth which startled her, and she made the decision she was going to call for help. She started looking for an envelope or anything with an address on it. (109:253, 257; 111:67). As she was looking, Randall handed her the phone. Randall had just heard his daughter say that Kara had stopped breathing, and he had already dialed 911. (109:258, 283). Randall then saw Dale crouched down on

his knees, holding Kara, while crying out "Jesus, Jesus." (109:284).

Dispatch told Althea that someone was already on the way.[3] (109:258). When the ambulance arrived at 2:44 p.m.[4], Kara was pulseless and non-breathing. Dale was performing CPR. (107:87, 139). On the way to the hospital, Kara's blood sugar was checked and found to be 5 times the normal level. (107:130, 131).

All attempts to revive Kara at the hospital failed. At 3:30 p.m., thirty minutes after her arrival, she was declared dead. (107:199). The cause of death was diabetes ketoacidosis. (109:173). Had she been brought to the hospital before she stopped breathing, her prognosis for recovery would have still been good. (107:201; 108:9). Neumanns did not learn the cause of death until two days later. (107:21, 110:42, 54).

Dale never believed Kara would die. "Death was not even on my mind." (111:146). Even after she was pronounced dead at the hospital, Dale was hopeful: "Well, Jesus raised Lazarus from the dead. So I'm hoping. Yeah. I'm trusting. I'm believing that there would be a resurrection. Why? I don't want – I don't want to see Kara gone." (111:149). After Kara's death, Dale was in shock. He was "very sad. Very, very sad." (109:237; 111:173).

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3 A 911 call had already been made by Ariel Neff, the wife of Dale's brother-in-law, from California. (107:50, 54, 59-64).

4 The ambulance's arrival was not "very much longer" after the Wormgoor's made the 911 call. (107:139; 109:284).

## ARGUMENT

### I. THE RECKLESS HOMICIDE STATUTE VIOLATES DUE PROCESS BECAUSE IT CRIMINALIZES THE SAME CONDUCT EXPRESSLY AUTHORIZED UNDER WIS. STAT. § 948.03(6).

Wisconsin's child abuse statute, Wis. Stat. § 948.03, prohibits either intentionally or recklessly causing "great bodily harm to a child." The definition of "great bodily harm" includes "bodily injury which creates *a substantial risk of death*,…." (Emphasis added). Wis. Stat. § 939.22(14). Parents engaged in faith healing cannot be prosecuted under Wis. Stat. § 948.03(6)"solely because" they are providing their child "with treatment by spiritual means through prayer alone for healing…." In other words, Wis. Stat. § 948.03 tells faith healing parents that until a child's medical condition progresses to at least some point *beyond* a "substantial risk of death,"[5] they are immune from prosecution.

The second degree reckless homicide statute, on the other hand, punishes a faith healing parent if they "recklessly" cause the death of another human being. Wis. Stat. § 940.06. "Recklessly" means creating an unreasonable and "*substantial risk of death* or great bodily harm," and the defendant is aware of that risk. (Emphasis added) *State v. Chapman*, 175 Wis.2d 231, 242, 499 N.W.2d 222. In other words, the conduct subject to criminal liability under Wis.

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5 An imminent risk of death—i.e. respiratory failure; severe bleeding; severe trauma; etc.—would arguably lie *beyond* "a substantial risk of death," and would give clear notice to a parent that immunity under Wis. Stat. § 948.03 no longer applies. As 911 was called as soon as Kara stopped breathing, however, that "line" was never crossed.

Stat. § 940.06 is for all practical purposes identical to the conduct expressly immune from prosecution under Wis. Stat. § 948.03—the only difference being the result (i.e. whether the child survives or dies).

For the faith healing parent who would be immune for his or her actions or omissions under Wis. Stat. § 948.03, prosecution under Wis. Stat. § 940.06 violates due process notice. In this case, the only difference between immunity under Wis. Stat. § 948.03 and liability under Wis. Stat. § 940.06 was the happenstance of death.[6] Because of the nearly complete overlap between immune conduct under Wis. Stat. § 948.03 and non-immune conduct under Wis. Stat. § 940.06, Wis. Stat. § 940.06 fails to give "fair warning" as to what *conduct* by the parent is prohibited. *Election Bd. Of State of Wisconsin v. Wisconsin Manufacturers and Commerce*, 227 Wis.2d 650, 676-677, 597 N.W.2d 712 (1999) ("Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly.").

Kara's condition never progressed beyond a "substantial risk of death" until she stopped breathing. At that point, 911 was called immediately. There was no boundary, no line, no clear moment when Dale Neumann was on notice that his "conduct" (i.e. his failure to provide conventional medical care) had crossed a line between immunity under Wis. Stat. § 948.03 and liability under Wis. Stat. § 940.06.

A due process notice violation was found under very similar circumstances in the case of *State v. McKown*, 475 N.W. 2d 63 (Minn. 1991). In *McKown*, the Minnesota

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6 Again, this is not a circumstance where death was clearly imminent. See footnote 5.

Supreme Court granted relief under a statutory scheme that arguably provided more notice than Wisconsin's. As in this case, the parents were treating their child's undiagnosed diabetes through prayer rather than conventional medicine. ***Id.*** at 63-64. When the child died, the parents were charged with second degree manslaughter, which was defined as causing death by "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." ***Id.*** at 65. Like Wisconsin, the Minnesota manslaughter statute contained no faith healing exception. The child neglect statute, however, did:

> a) A parent, legal guardian, or caretaker who wilfully deprives a child of necessary…health care…and *which deprivation* ***substantially harms*** *the child's physical or emotional health*, is guilty of neglect of a child…
> …
> If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment shall constitute "health care" as used in clause (a).

*(Emphasis added) Id.* at 65. The defendant argued he had insufficient notice as to when prayer treatment became illegal. The Minnesota Supreme Court agreed. The prayer treatment exception did not identify "a point at which doing so will expose the parent to criminal liability. The language of the exception therefore does not satisfy the fair notice requirement inherent to the concept of due process." ***Id.*** at 68. In addition, "the indictments issued against respondents violate the long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct…" ***Id.*** at 68. This is especially so where "the state has clearly expressed its intention to permit good

faith reliance on spiritual treatment and prayer as an alternative to conventional medical treatment, it cannot prosecute respondents for doing so without violating their rights to due process." ***Id.*** at 68-69 (internal citations omitted).

The Florida Supreme Court reached the same result under similar facts. See *Hermanson v. State*, 604 So. 2d 775 (1992). The child also died of diabetic ketoacidosis after her parents unsuccessfully treated her with prayer rather than conventional medicine. *Id.* at 775-776. The defendants were convicted under a homicide statute which created criminal liability for anyone who causes the death of a child and who "willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of,…medical treatment…and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child." *Id.* at 776. This statute contained no prayer treatment exception. A separate statute defining the term "abused or neglected child," however, did:

> (7) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:
> …
> (f) Fails to supply the child with adequate... *health care...*; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone.

*Id.* Because of this prayer treatment exception, the parents did not have sufficient notice as to when prayer treatment was protected:

> …when considered together, [the homicide and child abuse statutes] are ambiguous and result in a denial of due process because the statutes in

> question fail to give parents notice of the point at which their reliance on spiritual treatment loses statutory approval and becomes culpably negligent. We further find that a person of ordinary intelligence cannot be expected to understand the extent to which reliance on spiritual healing is permitted and the point at which this reliance constitutes a criminal offense under the subject statutes. The statutes have created a trap that the legislature should address.

*Id.*

The argument for lack of notice is even stronger here than either of these two cases. In *McKown*, there was no clear overlap between the child abuse statute (which protects parents up to and including "substantial harm" to the child's physical health) and the manslaughter statute (which requires risk of "death or great bodily harm"). Likewise, in *Hermanson*, there was no clear overlap between the child abuse statute (which protects a parent from liability when her child is "harmed") and the homicide statute at issue (which created liability for "great bodily harm, permanent disability, or permanent disfigurement"). Because of this gap between exempt conduct and conduct subject to liability under the homicide statutes, notice was more prominent in either of these cases than it was here. Even then, the courts found it insufficient.

Other states have rejected the claims of prayer treatment practitioners, but only because the legal context was significantly different. In *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. 1985) and *Commonwealth v. Nixon*, 761 A.2d 1151 (Pa. 2000), both Pennsylvania cases, for example, there was no express statutory protection for faith healing. In *Hall v. State*, 493 N.E.2d 433, 435 (Ind. 1986), there was an express statutory protection for prayer treatment, but no due process notice claim was actually raised on appeal.

In both *State v. Hays*, 964 P.2d 1042 (Ct. App. 1998) and *Walker v. State*, 763 P. 2d 852 (1988), express statutory protection for prayer treatment and a due process notice claim were present. These cases are distinguishable, however, because there was, in fact, a substantial gap between the exempt conduct and conduct liable under the homicide statute. In these cases, the gap was greater than it was in either *McKown* or *Hermanson,* and *far greater* than it is in this case.

In *Hays*, a faith healing parent was charged with "criminally negligent homicide." 964 P.2d at 1044. A separate statute penalizing "criminal mistreatment" expressly exempted prayer treatment from prosecution. *Id.* at 1045. "Criminal mistreatment" prohibited the maltreatment of dependents, the worst of which was causing "physical injury." *Id*. The Court rejected defendant's notice claim because it was clear the criminal mistreatment statute did not apply to "life threatening" illness. *Id.* at 1046.

*Walker* also rejected defendant's notice argument because the exemption applied to basic support obligations rather than conduct causing a substantial risk of death. *Id.* at 134. The manslaughter statutes "protect against grievous and immediate physical harm" while the child neglect statute, which includes the prayer treatment exception, covers the routine provision of dependent support. *Id.* at 143-144.

Such is not the case in Wisconsin. The faith healing exemption in Wis. Stat. § 948.03 applies to "great bodily harm," which, as explained above, includes "a substantial risk of death." Here, there is no gap between exempt *conduct* under Wis. Stat. § 948.03, and criminally liable *conduct* under Wis. Stat. § 940.06. In fact, they overlap each other almost entirely.

The trial court's opinion clearly illustrates the notice problem. While the trial court correctly focuses on a parent's ability to conform his or her conduct to what the law requires rather than the result of that conduct, the flaw in the trial court's logic is that it draws the "fair warning" line well within the exemption contained in Wis. Stat. § 948.03:

> It is not the death of the child that makes conduct criminal—only that which makes it a homicide. What makes it criminal is when the parent persists in conduct with the awareness that such conduct might result in death or great bodily harm to their child. *The point where one relying upon the prayer accommodation statute has fair notice that their conduct might 'cross the line' and become criminal* ***is the point where an ordinarily reasonable person would become aware of the risk of death or great bodily harm.*** Once they reach that point, they have also reached the point where they assume the risk of criminal prosecution if they persist in their conduct despite their awareness of that risk.

(Emphasis added) (29:18-19; A:18-19). The very "line" the parents cannot cross, the very line that gives them "fair warning," however, consists of the same conduct expressly authorized under Wis. Stat. § 948.03. Unlike *Hays* and *Walker*, there is no "conduct" gap between Wis. Stat. § 948.03 and Wis. Stat. § 940.06. Thus, the use of Wis. Stat. § 940.06 to prosecute a parent whose conduct is expressly sanctioned under Wis. Stat. § 948.03 violates due process notice requirements. Dale's conviction must be reversed and the charge dismissed.

## II. ALTERNATIVELY, THE JURY WAS IMPROPERLY INSTRUCTED AS TO DEFENDANT'S LEGAL DUTY TO PROVIDE MEDICAL CARE TO HIS CHILD.

### 1. Wis. Stat. § 948.03 defines the legal duty the state must prove in order to convict on a theory of omission under Wis. Stat. § 940.06(1).[7]

The state's theory of liability is that Dale failed to provide his daughter with conventional medical care when he had a legal duty to do so. In general, the law does not impose a duty to protect others from harm. *State v. Williquette*, 129 Wis. 2d 239, 255, 385 N.W.2d 145 (1986). The second degree reckless homicide statute (Wis. Stat. § 940.06), moreover, does not include any language authorizing the prosecution of reckless homicide by omission. Wisconsin appellate courts have held, nonetheless, that one may be found criminally reckless if a failure to act creates an unreasonable and substantial risk of death (or great bodily harm) *and* such a failure violates "a *known duty* to act." (Emphasis added) *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 758, 425 N.W.2d 21 (Ct. App. 1988); see also *Williquette*, 129 Wis. 2d at 253 (criminal liability based on an omission may be possible when a "special relationship" between the accused and the victim creates a legal duty to act). Thus, the question of what legal duty Dale had to provide his daughter with conventional medical care is essential to whether he may be criminally liable under Wis. Stat. § 940.06(1).

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7 The state concedes the issue of defendant's duty to provide medical care, as outlined in pp. 10-15 of defendant's motion for postconviction relief, was preserved for the purposes of appeal. (84:19; 118:3; 24:12).

Wis. Stat. § 940.06(1) itself provides no guidance. It says nothing of duty, much less a parent's duty to provide a sick child with conventional medical attention in lieu of treatment through spiritual means.

Wisconsin's two main cases on criminal omission liability, *Williquette* and *Cornellier*, are not particularly helpful.

In *Cornellier*, the defendant was the operator of a fireworks plant who failed to take various precautions, in violation of safety regulations. 144 Wis. 2d at 750. A fire occurred, killing one of the employees. *Id.* Cornellier moved to dismiss arguing the complaint did not accuse him of any "conduct." In response, this Court held that the defendant could be prosecuted for reckless homicide by omission. *Id.* at 757. Cornellier did not contest whether he had a legal duty, nor did the Court explain the source or extent of such a duty. The most natural reading of the opinion is that, as the operator of the plant, Cornellier had a duty to his employees consistent with the myriad of safety regulations he was required, but failed, to follow. *Id.* at 761. There was also plenty of evidence suggesting actual conduct, as it was Cornellier who created the dangerous conditions in the first place.

In *Williquette*, a mother was prosecuted under a now-repealed statute that criminalized "subjecting a child to cruel maltreatment." *Id.* The allegation was that the mother continued leaving the children in her husband's care and did nothing to stop the abuse. The mother argued she could not be prosecuted for what was an omission. This Court disagreed, for two reasons: First, the defendant's actions constituted more than a mere omission, in that the defendant had acted to place the children in the defendant's care. *Id.* at 250 ("We consider leaving the children in these circumstances to be overt conduct"). Second, the Court concluded that even if there was no overt act, the defendant

could be convicted because she had a duty to protect her children from the abuse. The Court drew this duty from a 40-year-old products liability case, *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 634, 177 N.W. 2d 866 (1970).

In *Cole*, the court had to decide if the parents were immune from contributory negligence because the child's activity at the time of injury was related to their basic support obligations. The underlying basis for this immunity exception was:

> …the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent. The child has the right to call upon the parent for the discharge of this duty, and public policy for the good of society will not permit or allow the parent to divest himself irrevocably of his obligations in this regard or to abandon them at his mere will or pleasure. . . .' *(cites omitted).*

*Id.* at 256.

It could be argued that *Williquette* improperly relied upon *Cole* as a source of duty for an omission based criminal prosecution, as this was not even close to the issue *Cole* was deciding. Williquette, moreover, never made an issue of it. In addition, the court's omission analysis became irrelevant (at least in terms of the result) once it found "overt conduct."

Whatever legitimacy *Cole* may have had as a source of duty in *Williquette* is clearly superseded in this case by the passage of Wis. Stat. § 948.03(6). Indeed, Wis. Stat. § 948.03(6) is the only criminal statute which specifically

addresses a parent's choice to treat a child by spiritual means in lieu of conventional medical treatment. While Wis. Stat. § 948.03 prohibits either intentionally or recklessly causing bodily harm or great bodily harm to a child, it also creates an exception to criminal liability for treatment by spiritual means:

> **Treatment through prayer**. A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4, or 448.03(6) *in lieu of* medical or surgical treatment.

(Emphasis added). Wis. Stat. § 948.03(6). See also Wis. Stats. §§ 48.981(3)(c)4[8] and other statutory sections[9] which likewise express a similar legislative policy.

The trial court chose to ignore Wis. Stat. § 948.03(6), however, and defined Dale's legal duty based upon the language in *Cole.* The jury was instructed:

> Conduct can be either by an act or omission, when the defendant has a duty to act. One such duty is the duty of a parent to protect their children, to care for them in sickness and in health.

(112:52).

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8 Wis. Stat. § 48.981(3)(c)4, which pertains to human services investigations, states in relevant part: "A determination that abuse or neglect has occurred *may not be based solely on the fact that the child's parent, guardian, or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child*." (Emphasis added)

9 Additional Wisconsin statutes which create an exemption for faith healing under a wide variety of circumstances are: Wis. Stats. §§ 448.03(6); 46.90(4)(ae)2; 46.90(7); 48.82(4); 938.505(2)(a)1; 940.285(1m); 102.42; 949.01(4); & 155.01(7).

The trial court's reliance on *Cole* is misplaced. The spiritual treatment privilege contained in Wis. Stat. § 948.03 extends, at a minimum, to any violation under that statute. A privileged violation thus includes causing a child to suffer great bodily harm. Commensurate with the faith healing privilege is the *absence* of any legal duty to provide conventional medical care. In other words, there can be no affirmative legal duty to provide conventional medical care when, under the same circumstances, Wis. Stat. § 948.03(6) grants faith healers immunity from prosecution.

Dale, therefore, had no legal duty to provide conventional medical care until his daughter's condition went *beyond* great bodily harm. The definition of "great bodily harm" includes "bodily injury which creates *a substantial risk of death*,…." (Emphasis added). Wis. Stat. § 939.22(14). Thus, the jury should have been instructed that if it found Dale was providing his daughter "with treatment by spiritual means through prayer alone for healing…in lieu of medical or surgical treatment," he had no legal duty to provide conventional medical care until his daughter's condition went *beyond* great bodily harm.

The State's response in its postconviction brief is that Wis. Stat. § 948.03(6), by its own terms, applies only to prosecutions under Wis. Stat. § 948.03. It does not provide a defense to Wis. Stat. § 940.06. The exemption reads: "A person is not guilty of an offense *under this section* solely because…." (Emphasis original). (26:3). The trial court agreed. (85:2; A:22).

The state misconstrues defendant's argument. Dale is not arguing that Wis. Stat. § 948.03(6) provides a direct defense to Wis. Stat. § 940.06. The state correctly argues that Wis. Stat. § 940.06 is a homicide statute with no explicit statutory privilege for treatment by spiritual means, and that

such a privilege cannot be borrowed from Wis. Stat. § 948.03(6). Rather, Dale argues he cannot be liable under Wis. Stat. § 940.06 unless the state can prove he had a legal duty to act. Wis. Stat. § 948.03(6) defines his legal duty to act.

There are two types of challenges to a jury instruction. One challenges the legal accuracy of the instruction. The other asserts that a legally accurate instruction unconstitutionally misleads the jury. *State v. Gonzalez*, 2011 WI 63, ¶ 21, ---Wis.2d ---, --- N.W.2d ----.

A legally inaccurate jury instruction "warrants reversal and a new trial […] if the error [is] prejudicial.'" *State v. Fonte*, 2005 WI 77, ¶15, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted). "'An error is prejudicial if it probably […] misled the jury.'" The beneficiary of the error has the burden of proving lack of prejudice. *State v. Harvey*, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189. Whether an error is harmless is a question of law. *Gonzalez*, 2011 WI 63, ¶ 22; *State v. Gordon*, 2003 WI 69, ¶40, 262 Wis. 2d 380, 663 N.W.2d 765.

When a jury instruction is challenged as confusing or misleading, a new trial is warranted when the defendant carries the burden of establishing that the instruction was ambiguous, and that there was a reasonable likelihood that: 1) the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt; or 2) the jury applied the instruction in a way that denied the defendant "a meaningful opportunity for consideration by the jury of his defense ... to the detriment of the defendant's due process rights." *Gonzalez*, 2011 WI 63, ¶ 23-24, citing, *Waddington v. Sarausad*, 555 U.S. 179, 129 S.Ct. 823, 831 (2009). In making either determination, an appellate court "should view the jury instructions in light of the proceedings as a whole,

instead of viewing a single instruction in artificial isolation." *State v. Lohmeier*, 205 Wis.2d 183, 194, 556 N.W.2d 90 (1996).

The trial court's duty instruction erroneously communicated a broad, absolute parental duty to provide medical attendance whenever necessary to "protect" or "care" for one's children. In fact, a parent has no duty to provide conventional medical care even when a child is suffering great bodily harm, as long as the parent is providing treatment by spiritual means. Wis. Stat. § 948.03(6). The duty to provide conventional medical care begins at some point beyond great bodily harm (e.g. some point beyond "a substantial risk of death.").[10] Under these facts, a properly instructed jury could have reasonably concluded that, as a practical matter, no duty arose at all. No duty arose because Kara's overt medical condition never went beyond "a substantial risk of death" until she stopped breathing, when 911 was immediately called. Even if the jury found Kara's condition went beyond a "a substantial risk of death" before she stopped breathing, it could have also concluded Kara was already so close to death the failure to act was not causal. The instruction given, on the other hand, allowed the jury to find Dale guilty by omission long before he had a duty to act.

This was, moreover, exactly what the state urged the jury to do. The state's theory of liability was that as soon as Dale observed any symptom which met the definition of great bodily harm, guilt was proven. (112:19-22, 48-49; A:40-45). In other words, the state did not have to show an objective "risk" of great bodily harm, because there already *was* great bodily harm. The subjective awareness element

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10 As stated earlier in this brief, what lies beyond a "substantial risk of death" may include, for example, circumstances where death is clearly imminent—i.e. respiratory failure; severe bleeding; severe trauma; etc.

was met by showing Dale had knowledge of any symptom which met the definition of great bodily harm, such as Kara's unconscious state. (112:20, 22, 48-49).

Had the jury been properly instructed, the State's argument would have failed. Dale's decision to treat Kara by spiritual means while she was suffering great bodily harm was privileged under Wis. Stat. § 948.03(6). Dale had no duty to provide conventional medical care until, at a minimum, Kara's condition progressed *beyond* "great bodily harm." Without a duty to act, there can be no criminal liability. Dale was prejudiced as there is a good likelihood the jury agreed with the State's incorrect theory.

### 2. Alternatively, the trial court's duty instruction is contrary to constitutional standards.

Apart from any consideration of Wis. Stat. § 948.03(6), the trial court's duty instruction is legally erroneous for the alternative reason that it violates a parent's constitutional right to direct the medical care of his child.

The due process clause of the United States Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). No doubt a "parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care." *PJ ex rel Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th cir. 2010). See also *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003)("It is not implausible to think that rights invoked here—the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child—fall within [the Due Process Clause's] sphere of protected liberty.")

While the extent of a parent's constitutional right to substitute faith healing for medical care is not clearly decided, it certainly goes beyond the trial court's instruction in this case. Most cases have addressed the constitutional issue in the context of the state's right to intervene. See e.g. *Custody of a Minor*, 379 N.E.2d 1053, 1062 (Mass. 1978) (Courts which have considered the "natural rights" of the parents have "uniformly decided that State intervention is appropriate where the medical treatment sought *is necessary to save the child's life*." (Emphasis added)). *Muhlenberg Hospital v. Patterson*, 128 N.J.Super. 498, 320 A.2d 518, 521 (1974) (The "power of the State is not exercised beyond the area where treatment is necessary for the sustaining of life or the prevention of grievous bodily injury."); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (the state may intervene only if the child's life is immediately imperiled by his physical condition, at least where the child himself opposes the treatment); *People in Interest of D. L. E.*, 645 P.2d 271, 276 (Colo. 1982) (State intervention does not violate the constitutional provisions protecting the free exercise of religion at least where a minor suffers from a life-threatening medical condition).

The state's right to force a child's medical care in civil court would logically come at a lower threshold than a legal duty for criminal liability purposes.[11] Even if the threshold were the same, a parent's duty to provide conventional medical care for criminal liability purposes comes much later than the instruction the trial court gave. As such, the instruction was not only incorrect, it misled the jury on the legal standard it was required to apply. For the same reasons

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11 See e.g. Wis. Stat. § 48.981(3)(c)4, which provides broad parental immunity in juvenile cases for healing by spiritual means but allows the state, nonetheless, to order medical services when the child's health "requires it." See also *Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanction.")

argued earlier, the error is not harmless.

Alternatively, the instruction given violates due process notice. The duty "to protect their children, to care for them in sickness and in health" is so broad and so vague it merely begs the question of what medical attendance is necessary and when. It provides no discernible standards, and thus fails to give a reasonable person warning of when they have a duty to act in order to avoid criminal liability. *Election Bd. Of State of Wisconsin,* 227 Wis.2d at 676-677. Likewise, the instruction provided no standards for the jury to adjudicate guilt. This relieved the state of having to prove a specific duty to act and a violation of that duty.

## III. THE REAL CONSTROVERSY WAS NOT FULLY TRIED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED.

The contested issue in this case was whether the subjective awareness element of "criminally reckless" conduct was met. The state had to prove that Dale was subjectively aware "*that his conduct* ***created*** the unreasonable and substantial risk of death or great bodily harm." (Emphasis added) (112:52). "Conduct," in this case, means an affirmative duty and a failure to act. The defense, in essence, was that if Dale sincerely believed treatment through prayer was the best means by which to heal his daughter, he could not, at the same time, have been subjectively "aware" his treatment by prayer was *causing* her death. The issue, essentially, is the subjective awareness of *causation*.

The state has acknowledged that a sincerely held belief in treatment by spiritual means may negate the subjective element. When the reckless homicide charge was challenged on constitutional notice grounds, the prosecutor remarked, in defense of the statute:

> I think that every [constitutional] concern that [defense counsel] brings up is addressed *because we have to deal with the subjective component of the crime charged, and if the jury believes those beliefs [in faith healing] were sincere, then the jury shouldn't get to the point of conviction.*
> …
> If[…]they [Neumanns] *think that a doctor would do more harm than good and a jury finds that sincere, then the state ought not meet that subjective element.*

(Emphasis added) (95:31, 40).

Trial counsel believed that treatment-through-spiritual means was the only viable defense. (A:37-39). The problem, however, is that the legal viability of this defense was never effectively communicated to the jury. The result was a jury ill-equipped to decide the true matter in controversy. There are several reasons for this.

First, the "religion" instruction the trial court gave could have easily misled the jury into believing there was *no* treatment through spiritual means defense. The trial court instructed the jury: "The constitutional freedom of religion is absolute as to beliefs *but not as to the conduct, which may be regulated for the protection of society*." (Emphasis added) (112:53). A jury could have easily equated faith healing with religious "conduct," which is "regulated for the protection of society." If so, it may have understood this instruction as preventing *any* defense based upon treatment by spiritual means. The trial court erred when it gave this instruction and trial counsel was deficient when he failed to object.

Second, the trial court's "duty" instruction communicated a broad, absolute parental duty to provide medical attendance whenever necessary to "protect" or "care" for one's children. (111:52). The jury had no reason to believe that treatment by spiritual means was consistent with this alleged duty to provide conventional medical care,

or was available as a defense. The instruction is also wrong, moreover, in that it completely ignores: 1) Wis. Stat. § 948.03, which provides a privilege to the those who treat by spiritual means, up to and including great bodily harm; and, 2) a parent's constitutional right (for religious or other reasons) to direct a child's medical care. (See argument *supra*, pp. 31-32). The trial court erred when it gave this instruction and trial counsel was deficient when he failed to object.

Third, the jury was not properly instructed when it asked during deliberations: "Was Dale's belief in faith-healing something that makes him not liable for not taking Kara to the hospital, even though he was aware to some degree she was not feeling well?" (113:4). The record does not reflect what the Court actually told the jury, but based upon the discussion between counsel and the court, the jury was simply told to re-read the instructions already given. (113:4). The jury requested guidance on this issue for the obvious reason it was confused about the relationship between spiritual healing and the subjective element of the offense. The trial court failed to clarify how treatment by spiritual means *could* constitute a defense to the subjective element because the parent did not believe he was *causing* a risk of great bodily harm or death, but rather, employing the best means at his disposal to prevent it. By not answering the question directly, the jury was effectively told no such defense existed.

Fourth, the jury was never directly instructed that a sincere belief in treatment by spiritual means may negate the subjective awareness element. The standard instruction is that a defendant must be "aware that his conduct created the unreasonable and substantial risk of death or great bodily harm." WIS-JI Criminal 1060. The standard instruction is just not specific enough for the average jury to have understood that Dale's sincere belief in faith healing could be

a complete defense. No juror could realistically be expected to understand, on its own, the relationship between the subjective awareness element and a sincerity of belief in treatment by spiritual means.

A proper jury instruction is a crucial component of the fact-finding process. *State v. Perkins*, 2001 WI 46, ¶41, 243 Wis.2d 141, 626 N.W.2d 762. Jury instructions must do more than simply state the elements of the crime. They must accurately convey the meaning of the statute *as applied to the facts of the case. State v. Ferguson*, 2009 WI 50, ¶¶14, 31, 317 Wis.2d 586, 767 N.W.2d 187. When jury instructions fail to provide a necessary explanation regarding an element of the offense, they effectively preclude a jury from rendering a verdict on that element. *Perkins,* at ¶55 (Wilcox, concurring). A court should reverse when the jury instruction "obfuscates the real issue or arguably caused the real controversy not to be fully tried." *Id*. at ¶12. See also *Gonzalez*, 2011 WI 63, ¶ 23-24 (defendant entitled to a new trial when jury likely applied the instruction in a way that denied the defendant "a meaningful opportunity for consideration by the jury of his defense ... to the detriment of the defendant's due process rights.") (See also pp. ---, *supra*, for additional authorities on jury instruction challenges).

The faith healing defense was the only viable defense Dale had. It was the only defense trial counsel argued in his closing. Trial counsel was deficient, and Dale was prejudiced, because trial counsel did not assure the jury was properly instructed. Alternatively, the real controversy was not fully tried. As the jury's question makes clear, it did not understand how Dale's defense applied to the elements of the offense. At best, the jury was at a loss when it came to whether a faith healing defense was even legally viable.

## IV. THE JURORS WERE OBJECTIVELY BIASED WHEN THE TRIAL COURT INFORMED THEM DEFENDANT'S WIFE HAD BEEN PREVIOUSLY CONVICTED OF THE SAME OFFENSE.

Dale and Leilani Neumann were both charged with second degree reckless homicide upon nearly identical facts. At the state's insistence, each were tried separately. Leilani was tried first, and convicted. Prior to voir dire in Dale's case, counsel met in chambers with the trial court to discuss how jury panel knowledge of Leilani's conviction, if any, would be treated. According to trial counsel, he objected to allowing any jurors with outside knowledge of the prior conviction on the panel. (118:7, 9, 10). Trial counsel firmly believed "that knowledge of the prior conviction would *have* to influence [the jurors'] decision," as the circumstances surrounding the two cases were "identical." (118:10). (Emphasis added). Both parents were faced "with the same observations…of their daughter's condition" and made their decisions "together." (118:10). Trial counsel testified it was "always [his] assumption," when discussing Dale's options concerning venue and speedy trial, "that jurors who had knowledge of the prior conviction would have been excused for cause." (118:19).

There is no record of this in-chambers discussion. There is no record of trial counsel's objection. In its postconviction decision, the trial court acknowledged that it probably "remarked off the record that prior knowledge [of Leilani's conviction] alone does not necessarily disqualify a juror." (85:9; A:29). The trial court "felt that an automatic disqualification for prior knowledge of the conviction would not be prior (sic) [proper?] without an individual inquiry of whether they were a reasonable person willing to set aside such prior knowledge…." (85:10; A:30). However stated, trial counsel understood the court's remark as a ruling—a ruling which would allow jurors with knowledge of the prior

conviction to sit on the jury. (118:8). The trial court does not deny trial counsel objected to this "ruling," or make a finding one way or the other.

With the prospect of some jurors having knowledge of the prior conviction and some not, both the prosecutors and defense counsel agreed it would be better to inform all potential jurors upfront rather than risk this fact being revealed during deliberations. As the trial court described it in its written decision:

> …on the first day of trial the attorneys advised the court in chambers, later placed on the record, that they had reached a stipulation. *Since prior knowledge of the case alone would not necessarily disqualify a juror*, both were concerned that there would be a mix of jurors on the panel; some that would have knowledge of the prior conviction and some that would not. Under those circumstances, they were concerned that there would be a realistic probability that during deliberations knowledge of the prior conviction might become known to the jurors that would have no prior knowledge that might then prejudice that juror requiring a mistrial at that late stage. Worse yet, it might cause such prejudice that might not be made known to the court and parties that might result in a tainted conviction. Both felt it would be better to face the challenge head-on and have a known impartial jury that all had the same knowledge concerning the prior conviction and could be questioned about any prejudicial effect it might have.

(Emphasis added) (85:11-12; A:31-32).

Trial counsel testified he did make a blanket objection to jurors being placed on the panel with knowledge of the prior conviction. (118:7, 9, 10). The trial court made no finding to the contrary. The issue, therefore, is preserved for appeal. If not preserved, Dale argues, in the alternative, that trial counsel was ineffective for not so objecting. There was no conceivable strategic or other reason for failing to object in the first instance. Once the decision was made to allow jurors on the panel with outside knowledge of the prior

conviction, however, Dale agrees that trial counsel's consent to inform each juror during voir dire was both strategically and objectively reasonable. His decision was only strategic, however, in the sense that the Court had made an adverse decision, and now he had to minimize the impact on his client:[12]

> I recall agreeing to essentially a limiting instruction *once the decision was made to …allow the jurors who had knowledge of the prior conviction to sit on the jury.* I believe it was appropriate to have a limiting instruction, and I do believe that Attorney Jacobson's representations of the instruction and how we were to address this with the jury was an agreement, was essentially what we decided in chambers to do. However, it was certainly my intention – prior to addressing a limiting instruction, it was my intention *to object to allowing any jurors to sit with such knowledge.* It was my position that that was impermissible – or could lead to impermissible bias against my client.

(118:8).

The trial court's decision to allow jurors with outside knowledge of the prior conviction to sit on the panel was error. The decision created a dilemma for defense counsel which ultimately resulted in his consent to the trial court informing each potential juror that Leilani, the defendant's wife, had already been convicted of the same charge for which the defendant was being tried. (See e.g. 102:71, 83, 92, 110, 123, 154, etc.).

Criminal defendants have a Sixth Amendment right to be tried by impartial and unbiased jurors. *United States v. Frost*, 125 F.3d 346, 379 (6th Cir.1997) (citing *Ross v.*

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12 See e.g. *State v. Faucher*, 220 Wis.2d 689, 702, 584 N.W.2d 157 (Ct. App. 1998) (When defendant was offered the choice of continuing his trial with a biased juror or having the jury reduced to 11, defendant did not waive his right to appeal by choosing to proceed with 11 jurors.)

*Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)). That right is compromised when jurors are told of prior convictions or guilty pleas resulting from the same or similar facts, involving the same defendant or his co-defendant(s). See *Leonard v. United States*, 378 U.S. 544, 545 (1964) (Jury panel which heard guilty verdict pronounced on similar charges in defendant's first trial implicitly biased[13] in second); *Quintero v. Bell*, 256 F.3d 409, 412-13 (6th Cir. 2001) (Trial counsel ineffective when he failed to exclude seven jurors in escape prosecution who had convicted co-escapees of same offense, as this violated right to impartial jury, even if jurors attest to their impartiality); *United States v. Maliszewski*, 161 F.3d 992, 1004 (6th Cir.1998) (Plain error when court informs jury that indicted co-defendants have pleaded guilty); see also *United States v. Hansen*, 544 F.2d 778, 780 (5th Cir. 1977) (Juror knowledge of co-conspirator guilty plea prejudicial); *United States v. Gillis*, 942 F.2d 707, 710 (10th Cir.1991) (Jurors who sat on voir dire panel from an earlier case in which the same defendant was tried and convicted on different charges implicitly biased); *Leroy v. Government of Canal Zone*, 81 F.2d 914, 914 (5th Cir. 1936) (Records of conviction against co-defendants, jointly charged with but tried separately from defendant, biased defendant's jury).

In Wisconsin, implied bias is referred to as "objective bias." See *State v. Tody*, 2009 WI 31, ¶ 36, 316 Wis.2d 689, 764 N.W.2d 737 ("A juror is objectively biased when a reasonable person in the juror's position could not be impartial. [FN omitted] 'To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial.' [FN omitted]. A juror therefore

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13 See e.g. *Smith v. Phillips*, 455 U.S. 209, 224 (1982), Justice O'Connor, concurring (U.S. Supreme Court retains the doctrine of implied bias in appropriate circumstances, citing *Leonard* as an example).

should be viewed as objectively biased if a reasonable person in the juror's position *could not avoid basing his or her verdict upon considerations extraneous to evidence put before the jury at trial.")* (Emphasis added). See also *State v. Funk*, 2011 WI 62, ¶¶38, 39 n.18, --- Wis.2d ---, --- N.W.2d --- (three non-exclusive factors articulated in *Delgado* only necessary in "lack of candor" type cases). "Objective bias," moreover, is not subject to harmless error. *Tody,* at ¶44.

The results of Leilani Neuman's trial should not have been made known to the jury. As the trial court noted in its pretrial decision, "the facts of both are the same…." (29:1 (n.1); A:1) The law is the same. The jurors all knew, in other words, that under these same facts, applying the same law, another jury had found Leilani Neuman guilty. This created an impermissible "objective" bias against the defendant before any evidence was heard.

The prejudicial impact is particularly telling in this case as the evidence against both defendants was nearly identical. The state has agreed the facts presented at both Neumann trials "were substantially similar." (84:10). The state also acknowledged that "the prior conviction of Leilani Neumann may well cause somebody to improperly believe that Dale Neumann should just plead guilty, because his wife was already convicted." (102:4-5). The state has repeatedly emphasized, moreover, the intense media coverage these jurors were exposed to beyond the mere fact of Leilani's conviction. At least several jurors admitted their knowledge of the prior case in voir dire. (See e.g. 102:163; 187; 196; 304; 103:74; 173). The state also admits that Leilani "was convicted in a trial that attracted immense media attention," and further, the jury questionnaires in Dale's case "demonstrated significant knowledge of both this and Leilani Neumann's cases by some of the prospective jurors…." (84:9).

Most telling, however, is the nature of the evidence itself. By the time the jurors reached deliberations, there would have been little doubt the case against each of the parents was virtually identical. As trial counsel noted:

> The circumstances surrounding both cases were identical. They were faced – Dale and Leilani were faced with the same observations…of their daughter's condition. They were together during parental decision making – they seemed to have made the decisions together. The cases were extremely, extremely, similar.

(118:10). The evidence as presented made little differentiation between the parents. Both were present at the house during the entire relevant period; both saw the same symptoms and progression of symptoms; both attended to Kara; both were involved in faith healing and contacting other church and family members; and both consulted with each other and made joint decisions. There was no evidence at trial to suggest one had material knowledge the other didn't. By the time the jurors were tasked to determine guilt or innocence, they would have known (or would have reasonably concluded) there was little factual or legal difference in the cases.

Finally, the state presumably will argue that limiting instructions would have cured any prejudice the jury would have had from its knowledge of the prior conviction.[14]

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14 Although the "cautionary instruction" to each potential juror differed somewhat, they were effectively told that Leilani's conviction could only be used to assess her credibility, assuming she testified; and that it could not be used to conclude Dale was guilty as well. It "may be a somewhat similar case, but the evidence as to this defendant and how he reacted to the situation may be different; therefore, there may be a different result. Do you understand that?" (see e.g. 102:165-166). Further, the jurors were asked if they could make a decision "based solely upon the evidence received during trial in this case?" (see e.g.102:166).

Limiting instructions, however, are a poor substitute for an untainted jury. While the legal presumption is that jurors will follow instructions, the law also recognizes that some information cannot be ignored. *State v. Schulter*, 39 Wis.2d 342, 159 N.W.2d 25 (1968) (Courts have recognized the limits of voir dire and judicial admonition to correct prejudice); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (Once an opinion has been formed, statements of impartiality can be given little weight).

In addition, the question here is one of "objective"[15] rather than "subjective" bias. While a "subjective" inquiry looks for bias from the individual juror's point of view, an "objective" inquiry focuses on a "reasonable person in the individual prospective juror's position." *State v. Jimmie R.R.*, 2000 WI App 5, ¶17, 232 Wis.2d 138, 606 N.W.2d 196. In other words, a subjective inquiry decides whether an individual prospective juror possesses a willingness and ability to be impartial, while an objective inquiry would look at that same juror's situation and ask whether a reasonable person in those circumstances *could be* impartial. *Id*. at ¶17. An objective analysis *goes beyond "what the juror asserts* in order to examine whether reasonable jurors could actually act in the manner the jurors stated they would act." *State v. Kiernan*, 227 Wis.2d 736, 747, n. 7, 596 N.W.2d 760 (1999). Cautionary instructions, therefore, are not relevant to an objective inquiry. In this case, the question is whether a "reasonable" person who knows that one of the parents has already been convicted by a local jury of the same charge, upon the same facts, would be capable of putting that knowledge aside. Defendant submits that no person could honestly do so, and many courts under similar circumstances have agreed. (See cases cited pp.38-39, *supra*). Indeed, it would be hard to imagine a case where knowledge of a prior conviction would have a greater impact than it did here.

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15 "Objective" bias encompasses the previously used terms of "implied" or "inferred" bias. *Faucher*, 220 Wis.2d at 716-17.

In short, Dale's jury was tasked with exactly the same decision the jury made in Leilani's case. Knowledge of Leilani's guilty verdict created an unacceptable risk the jury would not decide the case based *solely* on the evidence at trial. Whether consciously considered or not, no reasonable person in the juror's position could avoid being influenced by the prior result. *Tody*, 2009 WI 31 at ¶ 36. As such, the jury was objectively biased. The conviction should be reversed for a new trial.

## CONCLUSION

On the constitutional notice issue, the conviction should be reversed and the information dismissed. Alternatively, on the remaining issues, the conviction should be reversed and the case remanded for a new trial.

Respectfully submitted this 19th day of July, 2011.

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## CERTIFICATION

As to Form and Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is: Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line. The Statement of the Case, Statement of Facts, Argument and Conclusion portions of this brief contain 9980 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of July, 2011.

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## CERTIFICATION

As to Compliance with Rule 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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## CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on July 19, 2011. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 19th day of July, 2011

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I hereby certify that: I have submitted an electronic copy of this appendix, excluding the brief, which complies with the requirements of s. 809.19(13).
I further certify that: This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 19th day of July, 2011.

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# APPENDIX OF DEFENDANT-APPELLANT

## INDEX TO APPENDIX

STATE OF WISCONSIN CIRCUIT COURT MARATHON COUNTY
Branch 3

STATE OF WISCONSIN,
Plaintiff
v.

LEILANI E. NEUMANN
and DALE R. NEUMANN,
Defendants

DECISION; MOTION TO DISMISS
Freedom of Religion & Due Process

Case #08-CF-323
Case #08-CF-324

Each of the defendant's, Dale R. Neumann (Dale) and Leilani E. Neumann (Lelilani), are charged with Second Degree Reckless Homicide in causing the death of their daughter, Madeline Kara Neumann (Kara), by using prayer alone in her treatment.[1] Each have filed identical motions to dismiss on the ground that their prosecution is an unconstitutional "as applied" application of *Wis. Stat.* §*940.06(1)* under the First Amendment Freedom of Religion and, due to its interaction with Wisconsin's religious accommodation statute, is void for vagueness under the Fourteenth Amendment's requirement of Due Process, also as applied to them. For the reasons set forth herein, this court finds that this prosecution does not violate their rights under the First or Fourteenth Amendments to the U.S. Constitution and therefore their motions to dismiss are hereby denied.

## BACKGROUND

### Factual Background

On Easter morning, Sunday March 23, 2008, the Nuemann's 11 year old daughter, Kara, died of what was later determined to be Diabetic Keto Acidosis secondary to untreated Juvenile Onset Diabetes. Kara's last illness began at least two weeks earlier when she first appeared to be weak and tired easily. She next began to drink a lot of water and urinated frequently. When speaking with relatives about Kara's condition, the Neumanns would ask them to join them in

[1] These cases have not yet been formally consolidated but the facts of both are the same and the parties, collectively referred to as the Neumanns, rely upon the same arguments and briefs. Accordingly, just one decision to cover both cases is hereby issued.

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praying for her while rebuffing any suggestion about seeking medical assistance with a explanation that it would "take away from the glory of God" or that "she'll be fine, God will heal her."

On the weekend of her death Kara was listless and lethargic with difficulty swallowing and she could no longer walk or even talk. Her breathing became labored and deep. On Sunday morning the Neumanns called a friend, business and Bible reading associate to come to their home and help them pray for Kara's health. However, she lapsed into a coma. Emergency assistance was first summoned by a 911 call from a relative in California. At the hospital, the medical personnel noted that Kara was "very emaciated," weighing only 65 pounds, and was dehydrated. After all efforts to revive her failed, Kara was pronounced dead at 3:30 p.m.

The Neumanns' faith in the power of God continued even after Kara was pronounced dead. When he asked about funeral home arrangements, they responded "we won't need one, she will be alive tomorrow." When advised that Madeline's body would be taken to Madison for an autopsy, they responded "you won't need to do that, she will be alive by then."

**Legal Environment**

The Neumanns here challenge the constitutionality of this prosecution on the grounds that; (1) §*940.06(1)* violates due process by failing to define the prohibited conduct and standards of guilt, (2) that it fails to give fair notice due to the conflict between §§*940.06(1)* and *948.03(6)* and other religious accommodation measures, (3) §*940.06(1)* as applied violates their freedom of religion, and (4) that §*940.06(1)* violates the First Amendment Establishment of Religion Clause.[2]

All legislative acts are presumed constitutional and every presumption must be indulged to uphold the statute if at all possible, **Northwest Airlines v. Wis. Dept. of Revenue**; 2006 WI 88, ¶26; 293 Wis.2d 202; 717 N.W.2d 280. Therefore, it is the party that challenges a statute on constitutional grounds that must bear the burden to prove that the statute is unconstitutional beyond a reasonable doubt, **State v. Carpenter**; 197 Wis.2d 252, 263; 541 N.W.2d 105 (1995). Any doubt as to the statute's constitutionality will be resolved in favor of its validity, **State v. ex rel**

[2] They originally alleged a violation of their liberty interest but has withdrawn it, feeling that interest would be more properly raised and addressed in conjunction with the other claims.

**Mannermill Paper Co. v. La Plante**; 58 Wis.2d 32, 46; 205 N.W.2d 784 (1973). Moreover, a court will not construe a statute as violating the constitution if another reasonable construction is available, **United States v. X-Citement Video, Inc.**; 513 U.S. 64, 68 (1994). But here the Neumanns do not challenge the constitutionality of *Wis. Stat. §940.06(1)* but rather as it is applied to them. An "as-applied" challenge requires only proof that the statute is unconstitutional in the particular circumstances before the court, **State v. Joseph E.G.**; 2001 WI App 29, ¶5; 240 Wis. 2d 481; 623 N.W.2d 137.

## FREEDOM OF RELIGION

This nation was founded largely by God fearing men and women whose religious beliefs were persecuted in the Old World. United in their persecution, they became united in their tolerance for the religious beliefs of others in the New World. In due course, our founding fathers adopted a Bill of Rights contained in the first ten amendments to the United States Constitution. The First Amendment set forth some of the most basic and fundamental rights of our society and the first of these was that:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*

The Neumanns contend that *Wis. Stat. §940.06(1)* as applied to them violates both prongs of this right, infringing upon their right to freely exercise their religion and violating the establishment clause by excessive entanglement between government and religion.

### Free Exercise of Religion

The Neumanns first argue that they are being prosecuted because of their religious belief in the power of prayer in violation of the Free Exercise Clause of their First Amendment Right of Religion. They note that if they had instead placed their faith in orthodox medical treatment,

they would not be now prosecuted under *Wis. Stat. §940.06(1).*[3] Therefore, they contend, this prosecution is intended to chill and dissuade them and others from practicing their belief in prayer.

A. Compelling Circumstances-Strict Scrutiny Test: The Free Exercise Clause of the First Amendment protects religious belief, but not necessarily conduct. "Free exercise of religion does not necessarily mean the right to act freely in conformity with a religion. 'The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.'" **Lange v. Lange**; 175 Wis. 2d 373, 383-84; 502 N.W.2d 143 (CA, 1993) quoting **Employment Div., Dept. of Human Resources v. Smith**; 494 U.S. 872, 877 (1990). But it has also been long recognized that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." **Reynolds v. United States**; 98 U.S. 145 (1879).[4] While the right to free religion protects beliefs is absolute, religiously motivated practices or conduct "remains subject to regulation for the protection of society." **Cantwell v. Connecticut**; 310 U.S. 296, 303-304 (1940). Thus, courts have "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" on the basis that the individual's religion dictates a course of conduct at odds with the law, **Employment Div., Dept. of Human Resources v. Smith**; 494 U.S. 872, 879 (1990) [citation omitted].

Some cases in this area weighed the governmental interest served by the law at issue against the impact that law has on the relevant religious practice. See, e.g., **Sherbert v. Verner**; 374 U.S. 398, 403 (1963); **Wisconsin v. Yoder**; 406 U.S. 205, 214-15 (1972). However, that

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[3] This is not entirely correct. The first element of this offense is that the defendant's conduct caused – was a substantial factor – in the death. Therefore, if there was no medical treatment or cure, or if the odds of successful treatment were remote, the State may not be able to convince a jury, beyond a reasonable doubt, that his or her conduct was the cause of the death. Neither the person relying upon traditional medical treatment nor the one relying upon prayer could be prosecuted or convicted.

[4] *Reynolds* upheld laws against polygamy, a tenet of the Morman faith. There the court gave examples of a religious beliefs in human sacrifice or that woman must burn themselves on the "funeral pile" of her dead husband and asked if anyone would seriously contend that civil government could not interfere with placing those beliefs into practice. A modern day equivalent would be to argue that the government meant to protect religious freedom is, because of it, powerless to prevent an Islamic minority who believe in the destruction of all other religions through jihad from putting that belief into practice in American society.

balancing is not required when examining "an across-the-board criminal prohibition on a particular form of conduct." **Smith**; 494 U.S. at 884-85.[5] "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." **Church of the Lukumi Babalu Aye v. City of Hialeah**; 508 U.S. 520, 531 (1993), citing **Smith**. To do otherwise "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." **Reynolds**; 98 U.S. at 167.

The reckless homicide statute is neutral and of general applicability. Therefore, the court need not weigh the governmental interest supporting the reckless homicide statute[6] against the defendants' religious beliefs. The reckless homicide statute does not unconstitutionally hinder the defendants' right to freely exercise their religion, even in the context presented here.

Other courts, similarly facing a free exercise challenge in the context of parents who chose to pray over sick children, have reached the same conclusion. See, e.g., **People v. Pierson**; 68 N.E. 243, 210-12 (N.Y. 1903); **People ex rel. Wallace v. Labrenz**; 104 N.E. 2d 769, 773-74 (Ill. 1952); **State v. Perricone**; 181 A.2d 751, 755-57 (N.J. 1962); **Commonwealth v. Barnhart**; 497 A.2d 616, 622-25 (Pa. 1985); **Walker v. Superior Court**; 763 P.2d 852, 869-71 (Cal. 1988). Many of those courts have quoted from the U.S. Supreme Court's decision in **Prince v. Massachusetts**; 321 U.S. 158, 170 (1944): "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

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[5] In **Smith** the court abandoned the compelling circumstances and strict scrutiny test of **Sherbert**, at least with respect to criminal cases. It noted the test was developed for use in state unemployment claims and then continued by noting that the problem inherent in the balancing of compelling interests test outside that traditional area is that in the balancing any government compelling interest with what is "central" to one's religious faith involves a judicial determination of the importance of a religious belief and if it is central to his faith. "Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'" *Id.* at 887 citing **United States v. Lee**; 455 U.S. 252, 263 n.2 (Stevens, J., concurring). In other words, it very use involves an excessive governmental entanglement with religious beliefs.

[6] Although the reckless homicide statute need not be supported by a compelling governmental interest in order to withstand a free exercise challenge, it undoubtedly is supported by such an interest: the State's interest in safeguarding the lives of its citizens is so clear as to be beyond serious dispute.

The defendants have the constitutionally-protected right to freely exercise their religious belief in prayer to cure illness. However, their right to transfer religious belief into conduct must yield to neutral, generally applied criminal statutes designed to protect public safety including the reckless homicide statute.

**Establishment of Religion**

The prevailing test for violations of the Establishment Clause is the three-pronged test set forth in **Lemon v. Kurtzman**; 403 U.S. 602, 612-13 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" (Citations omitted). These three prongs serve to "focus on the three main evils from which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity." **Jackson v. Benson**; 218 Wis. 2d 835, 856; 578 N.W.2d 602 (1998) citing **Walz v. Tax Comm'n**; 397 U.S. 664, 668 (1970). While the Neumannns concede that the first prong is met here, the argue that the second and certainly the third is violated.

The first prong, a secular purpose, is met. Its purpose is to protect human life from criminally reckless conduct and by doing so, hope to deter such conduct and protect citizens from harm caused thereby.

The second prong, requiring a primary or principal purpose that neither advances nor inhibits religion, is also met. The primary or principal purpose of *Wis. Stat. §940.06(1)* remains the protection of human life. Its primary purpose certainly is not to dissuade persons from using prayer in the treatment of illness. Any effect that it may have in that area is purely incidental to its primary purpose.

A. Excessive Entanglement of Government In Religion: The third and final prong of the *Lemon* test is whether this prosecution for reckless homicide would foster an excessive degree of entanglement between government and religious practices. The Neumanns argue that the fact-

finder "will be required to determine whether the defendant[s]' decision to pray for [their] daughter created an objectively unreasonable and substantial risk of death" (*Defendants' Brief*, p. 18). That, in turn, "would require the jury to decide whether or not there was a reasonable likelihood of the defendant[s]' god interceding and healing [their] child" *Id.* All of this would necessarily require entry into the "forbidden domain" of deciding the truth or falsity of their religious belief, **United States v. Ballard**; 322 U.S. 78, 87 (1944).

The offense charged here alleges "criminally reckless conduct." The first two elements, (1) that the defendant's conduct created a risk of death or great bodily harm to another person, and (2) the risk of death or great bodily harm was unreasonable and substantial, involve an objective standard; what a reasonable person would be aware of. The third element, that the defendant was aware that his or her conduct created the unreasonable and substantial risk of death or great bodily harm, calls for a subjective determination of what the defendant actually was aware of. See *Wis. JI-Criminal, 1060.* But none of the three elements directly require any inquiry into religious beliefs but rather an just an awareness of the risk to another. In a case such as this, that requires only a person's powers of observation and an appreciation of another's deteriorating physical condition and what it might foretell. Therefore, the offense itself does not, by its terms, require any entanglement of government into religious concerns, much less an extensive involvement.

**B.** Good Faith Reliance: But in this case the jury will become aware that the Neumanns did not resort to orthodox medical treatment for Kara due to their religious belief in the power of prayer. The defense might argue that because of their religious belief in prayer they (1) had little medical knowledge and therefore were unable to appreciate the risk of Kara's condition and the potential for death and/or (2) did not appreciate that risk due to their conviction that prayer would be successful. The Neumanns' religious beliefs would affect their subjective awareness of the risk of harm to Kara. To counter that, the State wants to challenge the good faith or sincerity of their religious beliefs. Such inquiry may well result in the government's excessive entanglement with the Neumann's religious beliefs.

This court's analysis begins by noting that religion is based upon faith in that which cannot be proven. An excessive governmental involvement in religion, at the very least, would be to require someone to prove or disprove beliefs that are beyond proof. For that reason, any inquiry as to the truth, falsity or reasonableness of one's religious beliefs, including a belief in prayer, falls within the forbidden realm of the First Amendment. But the question of one's sincerity or good faith belief in the tenets of their religion may be difficult to divorce from the question of the truth or falsity of those beliefs.[7]

Yet, justice cannot give a "free pass" to anyone who claims that their religious beliefs blinded them to that which a reasonable person would be able to observe as a matter of fact. While the jury may find that to be the case, the State should be able to challenge such an assertion by inquiring into the source and strength of those beliefs - is it a longstanding and sincere belief in the prayer or is it a recent conversion that may indicate just a desire is to escape the consequences of the conduct alleged to be criminally reckless?

"Religion" has several generally recognized meanings. *Webster's New World Dictionary & Thesaurus, 4th Edition, 1999* gives three starting with a "[b]elief in or relationship to a superior being or beings" as in faith, belief, creed or spirituality. This involves faith in that which cannot be proven or disproved in court and clearly within the forbidden realm of the First Amendment.

Second, it might also mean an "[o]rganized worship or service of a deity" as in adoration, ritual, prayer, rites, liturgy or ceremony. Whether one participates in the particular worship services of a particular faith and for how long is factual and can be proven. But the power of prayer to heal, while common to nearly all religions, is beyond proof. The practice of medicine is now a "science" and based upon the facts that can be proven in this physical realm. But the healing power of prayer is in the spiritual realm that cannot be proven but may account for the

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[7] The court first reviewed **Ballard** where truth & falsity was excluded from the trial but the good faith challenge was allowed. The only issue before the Supreme Court was truth and falsity but Justice Jackson dissented, taking issue with the good faith claim. He expressed concern that any challenge to the intellectual honesty of one's religion would present "an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance" and that it would also raise profound psychological problems by noting that "[w]hen one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him." *J. Jackson Dissent*; 322 U.S. at 93. Therefore, he would have found the good faith inquiry also violated the First Amendment and would have reversed.

"miraculous" recoveries that are beyond medical explanation. Therefore, the power of prayer to heal is also within the "forbidden domain" of the First Amendment.

The third definition of religion means "[a] specific system of belief and worship" referring to a specific church, denomination or sect such as Christianity (Christian Science, Mormonism, etc.), Judaism (Orthodox, Reformed), or Islam (Sunni, Shiite). This would be an "organized religion" in which people of a similar religious faith band together for worship. Therefore, this is an area that can be inquired into in court to show the sincerity, the good faith, of one's belief in prayer. By limiting the inquiry to (1) whether they had a prior, or have a current, affiliation with a particular religious organization, (2) the length, level of participation in and financial support of that religious organization, and (3) whether part of that religious organization's tenets and system of beliefs included prayer in lieu of medical treatment, the forbidden realm of truth, falsity or reasonableness of the Neumanns' religious beliefs can be avoided. In that way the focus is not upon the Neumanns' spiritual belief in prayer in lieu of medical treatment, or the reasonableness of that belief, but rather merely upon their affiliation with a religion organization whose tenets include such a belief. Accordingly, there would be no excessive entanglement between government and religion in violation of the First Amendment.

C. As Applied Challenge: The U.S. Supreme Court in **Smith** also addressed the Neumanns claim that *Wis. Stat.* §*940.06(1)* is unconstitutional as applied to them under the facts of this case. There the court observed that:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," [citation omitted], and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order....The *First Amendment's* protection does not require this. **Smith**; 494 U.S. at 888-889 [underlined emphasis added].

The defendants here make a similar argument - that the government must accommodate their religious belief in the power of prayer, give up its role as *parens patriae* and allow them "to become a law unto [themselves]." But the First Amendment does not require this.

The real issue here is not the truth, falsity or reasonableness of relying on prayer but the exclusion of medical care that could have saved Kara. The reasonableness of that decision is measured objectively; the standard of care of the reasonable person that necessarily incorporates the values of the community in which the Neumanns live. To prevent that inquiry in cases like this would be to make each person a law unto himself, contrary to the warning of the U.S. Supreme Court. See, e.g., **Reynolds**; 98 U.S. at 167; **Smith**; 494 U.S. at 890.

Moreover, the outcome of the trial involves not only a determination of the reasonableness of the risk based upon an objective standard but also the defendants' conduct in light of their actual, subjective beliefs at the time. Under Wisconsin's standard for criminal recklessness, the defendants could not be found guilty if they did not have any actual, subjective awareness of an unreasonable and substantial risk of death. Thus, if they genuinely believed that prayer alone would save their daughter and that she was in no danger of dying without medical care, then they could not be found criminally negligent - regardless of what the trier of fact believes about the reasonableness of their belief.

Therefore, this court finds that *Wis. Stat.* §*940.06(1)* and the definition of reckless conduct does not require any inquiry regarding religious beliefs. It is a neutral criminal statute of general application. Any effect upon religious practices is only incidental to its primary purpose. If "good faith" is interpreted as above, it would not lead to an excessive entanglement between the government and religious beliefs. As limited, it would permit the trier of fact to determine the good faith of the Neumanns' religious belief in prayer without entering the forbidden realm of the First Amendment. Accordingly, this prosecution is not unconstitutional as applied to the Neumanns in this case.

## DUE PROCESS CLAUSE

### Due Process and its Notice Requirement

The defendants next contend that this prosecution violates their Due Process rights under the Fourteenth Amendment. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." **Grayned v. City of Rockford**; 408 U.S.

104, 108 (1972). "A statute is unconstitutionally vague if it either fails to afford proper notice of the prohibited conduct or fails to provide an objective standard for enforcement." **State v. Thomas**; 2004 WI App 115, ¶14; 274 Wis. 2d 513; 683 N.W.2d 497. Thus, cases have applied a two-pronged test for vagueness, **State v. Pittman**; 174 Wis. 2d 255, 276; 496 N.W.2d 74; cert. denied, 114 S. Ct. 137 (1993). First, due process requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." **Grayned**; 408 U.S. at 108; see also **State v. Ehlenfeldt**; 94 Wis. 2d 347, 355; 288 N.W.2d 786 (1980). Second, due process requires that a statute "be sufficiently definite to allow a judge or jury to objectively apply its terms to the conduct of a defendant in order to determine his guilt or innocence without having to create or apply standards of their own." **Ehlenfeldt**; 94 Wis.2d at 355.

However, a statute "'need not define with absolute clarity and precision what is and is not unlawful conduct.'" **Pittman**; 174 Wis.2d at 276 (quoting **State v. Hurd**; 135 Wis. 2d 266, 272; 400 N.W.2d 42 (CA, 1986)). "[I]t is neither necessary, nor possible, that a statute define the boundaries of the conduct which it seeks to proscribe with mathematical precision. A certain amount of vagueness and indefiniteness is inherent in all language and, if not permitted, nearly all penal statutes would be void." **Ehlenfeldt**; 94 Wis. 2d at 355. "Condemned to the use of words, we can never expect mathematical certainty from our language." **Grayned**; 408 U.S. at 110. All that is required of a statute has "[a] fair degree of definiteness." **State v. Courtney**; 74 Wis. 2d 705, 710; 247 N.W.2d 714 (1976); see also **State v. Armstead**; 220 Wis. 2d 626, 640; 583 N.W.2d 444 (CA, 1998).

**Void for Vagueness**

The Neumanns contend that *Wis. Stat. 940.06(1)* if void for vagueness because it does little to define the parameters of permissible and impermissible conduct in the parents' care for their children's health. *Wis. Stat. §940.06(1)* merely reads that "Whoever recklessly causes the death of another human being is guilty of a Class D felony." "Criminal recklessness" is further defined in the statutes "means that the actor creates an unreasonable and substantial risk of death or great

bodily harm to another human being and the actor is aware of that risk." *Wis. Stat.* §*939.24*. The Neumanns argue that these statutes, however, "provide no guidance as to when a parent is required to seek medical attention for their child," (*Defendant's Brief* at 6).

Wisconsin law is clear that crimes may be committed by omission as well as commission, when there is a legal duty to act. **State v. Williquette**; 129 Wis. 2d 239, 251-53; 385 N.W.2d 145 (1986); **State ex rel. Cornellier v. Black**; 144 Wis. 2d 745, 757-58; 425 N.W.2d 21 (CA, 1988). One such duty recognized by Wisconsin law is the duty of a parent to protect his or her child: "'It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary.'" **Williquette**; 129 Wis. 2d at 255 quoting **Cole v. Sears, Roebuck & Co.**; 47 Wis. 2d 629, 634; 177 N.W.2d 866 (1970), see also *Wis. Stat.* §*48.13(10)* [parental neglect to provide necessary care, including medical care, to child].

In other words, one of the things that the reckless homicide statute prohibits is causing the death of a child by a parent's failure to provide care for that child – "including medical attendance, if necessary" – when the parent's failure to provide care created an unreasonable and substantial risk of death or great bodily harm and the parent was aware of that risk. That is the standard that can be ascertained by reference to Wisconsin's statutory and case law, and it meets the requirement of "a fair degree of definiteness." It provides fair warning of the conduct that is prohibited: any act or omission with respect to one's own child that creates an unreasonable and substantial risk of death or great bodily harm, at least insofar as the parent is aware of that risk. Moreover, it provides adequate guidance to a jury assessing a defendant's innocence or guilt: the jury must objectively determine whether the risk of death or great bodily harm was unreasonable and substantial, and it must then determine the parent's subjective awareness of that risk. See Wis. Stat. §939.24, Judicial Council Note, 1988 (describing objective and subjective elements).

Accordingly, the reckless homicide statute, by itself, is not unconstitutionally vague as it is applied in this case.

**Fair Notice; Conflict Between Statutes**

The United States Supreme Court has said that "convicting a citizen for exercising a privilege which the State clearly told him was available to him" would be "the most indefensible sort of entrapment by the State." **Raley v. Ohio**; 360 U.S. 423, 438 (1959). Consequently, "[i]nexplicably contradictory commands in statutes ordaining criminal penalties have ... judicially been denied the force of criminal sanctions." *Id.* citing **United States v. Cardiff**; 344 U.S. 174 (1952).

Here, in addition to arguing that the reckless homicide statute is unconstitutionally vague when considered alone, the Neumanns have also argued that it is unconstitutionally vague when considered in conjunction with other statutes that permit parents to rely on religious methods of healing their children. In particular, they cite *Wis. Stat.* §*948.03(6)* that provides as follows;

> Treatment through prayer. A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4. or 448.03(6) in lieu of medical or surgical treatment.

This refers to a religious method of healing permitted under *Wis. Stat.* §*48.981(3)(c)4* that provides, in relevant part;[8]

> A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent, guardian, or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child. ... This subsection does not prohibit a court from ordering medical services for the child if the child's health requires it.

The Neumanns contend that *Wis. Stat.* §§*948.03(6)* and *48.981(3)(c)4*, when read in conjunction with the reckless homicide statute, "create impermissible confusion contrary to the protections of the Fourteenth Amendment." (Defendants' Brief, at p. 12). By their interaction, these statutes create ambiguity in that it informs the public that a certain course of conduct is at once both permitted and prohibited, and thus "creates a trap for the defendant[s]." *Id.* at p. 10.

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[8] *Wis. State §448.03(6)* is not applicable in this case since it concerns the practice of Christian Science.

In support of that argument, the defendants relied upon cases from other states that upheld similar due process challenges: **State v. McKown**; 475 N.W.2d 63 (Minn. 1991) and **Hermanson v. State**; 604 So. 2d 775 (Fla. 1992).

Both **McKown** and **Hermanson** involved the death of a child from untreated diabetes treated by religious means alone according to the tenets of the Christian Scientist faith. In **McKown** the Minnesota Supreme Court, like the lower appellate court and the trial court before it, agreed with the McKowns that the interaction between the manslaughter statute and the prayer exception of the child neglect statute violated due process. "The spiritual treatment and prayer exception to the child neglect statute expressly provided respondents the right to 'depend upon' Christian Science healing methods so long as they did so in good faith. Therefore the state may not now attempt to prosecute them for exercising that right." **McKown**; 475 N.W.2d at 68. The Florida Supreme Court, relying upon the reasoning of **McKown**, found that the interaction between the prayer exception in Florida's child abuse statute and Florida's third-degree murder statute rendered the statutes ambiguous, resulting in a denial of due process, **Hermanson**; 604 So.2d at 776, 781-82.

But **McKown** and **Hermanson** can be distinguished on the basis of statutory language. As another court has noted, "[t]he Minnesota and Florida legislatures specifically defined spiritual healing as accepted treatment for illness in children, raising it to the same level as conventional medical treatment." **Commonwealth v. Nixon**; 718 A.2d 311, 314 (Pa. Super. Ct. 1998); aff'd, 761 A.2d 1151 (Pa. 2000). The Minnesota statute, in exempting the use of spiritual means or prayer for the treatment of illness, specifically stated that "this treatment shall constitute 'health care' as used in clause (a)." *Minn. Stat.* §*609.378 (1988)*, cited in **McKown**; 475 N.W.2d at 64, fn. 3. The Florida statute was more subtle in indicating that a parent "legitimately practicing his religious beliefs" could not be considered abusive or neglectful. However, it placed both types of treatment on an equal footing by providing that the statute did not preclude a court from ordering either medical services by a physician or "treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-

recognized church or religious organization." **Hermanson**; 604 So.2d at 776 (emphasis added).[9] By putting spiritual healing practices on the same footing as medical treatment without limits, both Minnesota and Florida have spiritual substitution statutes.

By contrast, Wisconsin has adopted a spiritual accommodation statute that does not place spiritual healing on an equal footing with medical care. Under *Wis. Stat. §948.03(6)* reliance on religious methods of healing cannot be the sole basis for charging the crime of child abuse and under *Wis. Stat. §48.981(3)(c)4* such reliance may not be the sole basis for a social services determination that abuse or neglect has occurred. However, under both statutes, that willingness to accommodate religious healing ends when the child's health is endangered. *Section 48.981(3)(c)4*, incorporated in *Wis. Stat. §948.03(6)*, provide that a court may order "***medical services*** for the child if the child's health requires it" (emphasis added). This provision indicates that there is a limit to Wisconsin's willingness to accommodate religious means of treatment for illness with respect to children.

A contrasting line of cases are led by **Commonwealth v. Nixon**; 718 A.2d 311, 314 (Pa. Super. Ct. 1998) and **State v. Hays**; 964 P.2d 1042 (Or. Ct. App. 1998).[10] **Nixon**, as in **McKown**, **Hermanson** and this case, arose from the death of a child whose diabetes was treated only by prayer. There, as here, the defendants relied on **McKown** and **Hermanson**, arguing that the Pennsylvania Child Protective Services Act similarly rendered the boundaries of the

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[9] The Hermansons were charged with "child abuse resulting in third degree murder." **Hermanson**; 604 So.2d at 775. The court noted that "[t]he third-degree murder provision of section 782.04(4), Florida Statutes (1985), provides that the killing of a human being while engaged in child abuse constitutes murder in the third degree and is a felony of the second degree." *Id.* at 776. The Florida statute defining the crime of child abuse apparently did not make any direct reference to the social services statute quoted above, though, apparently, the two statutes were at one point contained within the same statutory chapter, *Id.* at 776-77.

[10] Other cases in this line include **Commonwealth v. Barnhardt**; 497 A.2d 616 (Penn. 1983), **Walker v. Superior Court of Sacramento County**; 763 P.2d 852 (Cal. 1988) and **Commonwealth v. Twitchell**; 617 N.E.2d 609 (Mass. 1993). The last two cases, however, relied in part upon the interpretation that the child abuse statute, although it had criminal penalties, was actually a child support statute.

involuntary manslaughter statute[11] unconstitutionally vague. The Child Protective Services Act stated, in relevant part,

> If, upon investigation, the county agency determines that a child has not been provided needed medical or surgical care because of seriously held religious beliefs of the child's parents, guardian or person responsible for the child's welfare, which beliefs are consistent with those of a bona fide religion, the child shall not be deemed to be physically or mentally abused. The county agency shall closely monitor the child and shall seek court-ordered medical intervention when the lack of medical or surgical care threatens the child's life or long-term health. **Nixon**; 718 A.2d at 314 quoting *23 Pa.C.S.A. §6303(b)(3)*.

The court concluded that the protective services and manslaughter statutes "are not in conflict in their plain meaning, as well as under a constitutional analysis. A plain reading of the statutes shows that an act which does not qualify as child abuse may still be done in a manner which causes death and thus qualifies as involuntary manslaughter." *Id.* The court, after observing that Minnesota and Florida had set spiritual healing on the same footing as medical treatment, found that Pennsylvania's protective services statute did no such thing: "rather, it merely exempts parents who treat their children in this manner from characterization as child abusers." *Id.* Finally, the court also noted that the exemption had a limit, the statute permitted the state to step in "when the lack of medical or surgical care threatens the child's life or long-term health." *Id.* In other words, this statute, like Wisconsin's, is willing to accommodate religious treatment but does not place it on an equal footing as conventional medical treatment.

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[11] The Pennsylvania involuntary manslaughter statute provided: "A person is guilty of involuntary manslaughter when as a direct result of doing an unlawful act in a reckless or grossly negligent manner or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." **Nixon**; 718 A.2d at 314 quoting 18 Pa.C.S.A. §2504.

In **Hays**, the defendant was convicted of criminally negligent homicide[12] after he failed to obtain medical care for his son who then died of acute leukemia. Under Oregon law, providing a child with spiritual treatment was a defense to a different offense, criminal mistreatment, but not to the offense for which Hays was convicted, criminally negligent homicide. There, as here, the defense argument (as summarized by the court) was: "Thus, so long as the child does not die, the parent has a defense to a criminal charge; once the child dies, the defense is gone. As a result, it is impossible, defendant argues, to tell at any particular moment whether his conduct was permissible or criminal." **Hays**; 964 P.2d at 1045. The court rejected that argument, finding no ambiguity in the interaction of the two statutes:

> [T]he statutes permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die.

*Id.* at 1046. The **Hays** court acknowledged "that it may be impossible to define in advance all the ways in which a person's actions can be a gross deviation from the standard of care of a reasonable person," and thus criminally negligent under Oregon law, but "[t]hat difficulty does not mean, however, that the legislature may not penalize such a gross deviation." **Hays**; 964 P.2d at 1046.

Similarly, our Wisconsin Supreme Court has held is that all due process requires is fair, but not absolute, notice. "The test does not demand that the line between lawful and unlawful conduct be drawn with absolute clarity and precision. Not every indefiniteness or vagueness is fatal to a criminal statute....A fair degree of definiteness is all that is required." **State v. Courtney**; 74 Wis.2d 705, 710;247 N.W.2d 714 (1976). As observed by Justice Holmes, "[the] law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." **Nash v. United States**; 229 U.S. 373, 377

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[12] Oregon law defined "criminal negligence" to mean that "a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstances exist. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." **Hays**; 964 P.2d at 1044-45 (quoting ORS 161.085(10)). Thus, unlike Wisconsin's standard for criminal recklessness, which has both objective and subjective elements, Oregon's criminal negligence standard appears to be strictly an objective one.

(1913). Justice Holmes later noted that, to some degree, the law recognizes that there are circumstances in which one may assume the risk that their conduct may become criminal.

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

**United States v. Wurzbach**, 280 U.S. 396, 399 (1930). "The 'matter of degree' that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more." **Walker v. Superior Court of Sacramento County**; 763 P.2d 852, 872 (Cal. 1988).

There admittedly is no line in the applicable statutes that would have given the Neumanns precise notice that their reliance upon its statute accommodating prayer for treating disease or illness was passing into the realm of criminal conduct. But it is not necessary to define such a line between lawful and unlawful conduct with mathematical precision. The spiritual and prayer accommodation statute gives notice to those who wish to take advantage of it that the exemption is not without limit. *Wis. Stat.* §*948.03(6)* is, by its terms, limited to "an offense under this section" which refers to only abuse and neglect, not the death, of children. It also had to be in accordance with a "religious method of healing" under *Wis. Stat.* §*48.981(3)(c)4* which gives notice that despite the accommodation Wisconsin was willing to afford them, a court might never-the-less step in and order "medical services for the child if the child's health requires it." The 2nd Degree Reckless Homicide statute, *Wis. Stat.* §*940.06(1)*, also gives notice that when an objectively reasonable person would become aware that their conduct would create an unreasonable risk of death or great bodily harm, they could be prosecuted if death would be caused by their conduct.

It is not the death of their child that makes the conduct criminal – only that which makes it a homicide. What makes it criminal is when the parent persists in conduct with the awareness that such conduct might result in death or great bodily harm to their child. The point where one relying upon the prayer accommodation statute has fair notice that their conduct might "cross the line" and become criminal is that point where an ordinarily reasonable person would become

aware of the risk of death or great bodily harm. Once they reach that point, they have also reached the point where they assume the risk of criminal prosecution if they persist in their conduct despite their awareness of that risk.

There is probable cause here that a reasonable person would have realized that Kara's medical condition had reached the point that death or great bodily harm might result if medical treatment continued to be withheld. The Neumanns, therefore, had fair notice that the limits of the prayer accommodation statute had been reached and that criminal prosecution might follow if they persisted in withholding medical treatment from Kara that might result in her death. Accordingly, this prosecution does not violate their constitutional right of due process as applied and their motion to dismiss is denied.

## CONCLUSION

The defendants here argue that application of the Reckless Homicide Statute, *Wis. Stat.* §*940.06*, as applied to them under the facts of this case, is unconstitutional under their Right to Freedom under the First Amendment and void for vagueness under their right to fair notice under the Due Process Clause of the Fourteenth Amendment.

Because a criminal statute need to be only neutral and generally applicable, and §*940.06(1)* is, it does not violate the Free Exercise Clause of the First Amendment. Since a good faith challenge to the sincerity of the defendants' religious beliefs can be limited to any past or present affiliation with a religious organization whose tenets include a belief in prayer in lieu of medical treatment, it would not involve any examination as to the truth, falsity or reasonableness of those beliefs. Therefore, it does not violate the Establishment Clause ban on excessive government entanglement with religious concerns. Finally, because there is a subjective analysis included, if the Neumanns genuinely believed that prayer alone would save their daughter and that she was in no danger of dying without medical care, then they could not be found criminally negligent – regardless of what the trier of fact believes about the reasonableness of their belief. Accordingly, this prosecution does not violate the Neumanns' Freedom of Religion as applied to them and hence their motions to dismiss under the First Amendment are denied.

The Neumanns also argued that since the Reckless Homicide statute failed to give them adequate notice of when their right as a parent to treat illness by prayer under *Wis. Stat.* §*948.03(6)* crosses the line between permitted and prohibited conduct, it violates their Right to Due Process under the Fourteenth Amendment. But due process requires only a fair degree of definiteness, not absolute and precise clarity. *Wis. Stat.* §*948.03(6)* and §*48.981(3)(c)4* provide fair notice that Wisconsin's willingness to accommodate their religious beliefs is not unlimited. It is specifically limited to instances of child abuse and neglect and permits a court to order medical treatment when a child's health needs require it. *Wis. Stat.* §*940.06* then gives fair notice that their conduct crosses from permitted to prohibited conduct when an objectively reasonable person would become aware that continued failure to provide medical treatment threatens their child with death or great bodily harm. Since this provides a fair degree of definiteness, this prosecution does not violate the Neumanns' Right to Due Process and their motion to dismiss under the 14th Amendment are also denied.

Dated at Wausau, Wisconsin this 1st day of December, 2008.

**BY THE COURT:**

Vincent K. Howard
Judge, Circuit Court Branch 3
Marathon County, Wisconsin

STATE OF WISCONSIN | CIRCUIT COURT Branch 3 | MARATHON COUNTY

STATE OF WISCONSIN,
Plaintiff
v.

LEILANI E. NEUMANN,
DALE R. NEUMANN,
Defendants

DECISION ON POST-CONVICTION MOTIONS

Case #08-CF-323
Case #08-CF-324

The defendants, Leilani E. Neumann (Leilani) and Dale R. Neumann (Dale)(collectively as Neumann) were tried separately but ultimately both were convicted of Second Degree Reckless Homicide of their eleven year old daughter, Madeline Kara Neumann (Kara), contrary to *Wis. Stat.* §*940.06*. Kara died of untreated diabetes on March 23, 2008 while her parents prayed for the restoration of her health in accordance with their religion. The Neumanns now each seek a new trial on the grounds of ineffective assistance of trial counsel. For the reasons set forth herein, those motions are each denied.

## LEGAL ENVIRONMENT

An ineffective assistance of counsel claim requires proof of two elements: (1) deficient performance by counsel and (2) prejudice to the defendant as a result of that deficient performance. **Strickland v. Washington**; 466 U.S. 668, 687 (1984); **State v. Roberson**; 2006 WI 80, ¶28; 292 Wis.2d 280; 717 N.W.2d 302. The defendant bears the burden of establishing both elements. *Strickland*; 466 U.S. at 687. To establish deficient performance, the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that it "might be considered sound trial strategy." *Id.* at 689. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The "reasonable probability" required under this test "is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The determination must be based upon a realization that "an accused is not entitled to the ideal, perfect defense or the best defense but only



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to one which under all the facts gives him reasonably effective representation," **State v. Harper**; 57 Wis.2d 543, 556-557; 205 N.W.2d 1 (1973).

Both allege their respective trial counsel were ineffective on the grounds that they; (1) failed to preserve a faith healing defense, (2) failed to object to the religion instruction given by the court, and (3) failed to submit an acceptable theory of defense instruction. Leilani also claims ineffectiveness for failure to make a sincere religious belief argument and also seeks a new trial in the interests of justice. Finally, Dale argues ineffectiveness of counsel for failure to object to advising the jury of Leilani's prior conviction on the charge and to propose an answer to a question asked by the jury during deliberations.

## FAITH HEALING DEFENSE

Both

Before trial both sought to dismiss the charges based upon a faith healing defense under *Wis. Stat.* §*948.03(3)(6)* providing a defense for "treatment by spiritual means through prayer alone." The court denied that motion on the grounds that (1) the defense provided that a person could not be found guilty "under this section," referring to physical abuse of a child; (2) that chapter, referring to crimes against children, includes crimes from bodily harm to children but none for causing death to a child, and; (3) it does not limit prosecutorial discretion to prosecute for such death of a child under Chapter 940 of the Wisconsin Statutes. Since the parties have now stipulated that both trial attorneys did preserve their objection, this will not be discussed further.

## RELIGION INSTRUCTION

Both

The court gave the following instruction to the jury concerning the effect of the constitutional freedom of religion on this case: "The constitutional freedom of religion is absolute as to beliefs but not as to conduct, which may be regulated for the protection of society." (*Trial Transcript, 5/22/09*, p. 70.) During the jury instructions conference, trial counsel for the parties had agreed that the instruction was accurate and neutral, but now argue that their counsel were deficient for failing to object to it contending that the instruction "incorrectly negated the sincere

belief defense." (*Defendant's Brief in Support of Motion for Post-Conviction Relief*, p. 6.) Both parties are mistaken.

"Free exercise of religion does not necessarily mean the right freely to act in conformity with a religion. 'The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.'" **Lange v. Lange**; 175 Wis. 2d 373, 383-84; 502 N.W.2d 143 (CA, 1993) quoting **Employment Div., Dept. of Human Resources v. Smith**; 494 U.S. 872, 877 (1990). However, courts have "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" on the basis that the individual's religion dictates a course of conduct at odds with the law. *Employment Div.* at 879 (quoted source omitted). The religion instruction given by this court gave correctly describes the limits of the religious freedom by distinguishing between beliefs and actions.

That distinction has been made repeatedly in First Amendment case law. As far back as 1879, the United States Supreme Court declared, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." **Reynolds v. United States**; 98 U.S. 145, 166 (1879). And over a hundred years later, the Court reiterated that point: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." **Employment Div.**; 494 U.S. at 878-79. While "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such ... the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" **Sherbert v. Verner**; 374 U.S. 398, 402-03 (1963) (emphasis and final alteration in original).

Therefore, since the instruction as given was accurate and correct neither trial attorney cannot have performed deficiently in failing to object to it.

## THEORY OF DEFENSE INSTRUCTION

Both

Both parties also claimed that their respective trial counsel were ineffective due to failing to propose an adequate theory of defense instructions. Leilani's trial counsel initially offered this theory-of-defense instruction: "If Leilani Neumann believed that prayer would heal her daughter, Madeline Kara Neumann, then you must find her not guilty." The court rejected that instruction, since it did not accurately reflect the law.[1] While Dale recognizes that the standard instruction for second degree reckless homicide contains a description of the subjective element, he argues that the jury "could not be expected to understand the relationship between the subjective awareness element and sincerity of belief in faith healing without specific direction that one is, in fact, related to the other" (*Postconviction Motion*, p. 8). He goes on to argue that failing to instruct the jury about that relationship was tantamount to instructing the jury that faith-healing was no defense at all. He argues that the jury should have been instructed that Dale's sincere belief in faith healing was a complete defense.

A "theory of defense" instruction must be given when; (1) it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense; (2) it is supported by the evidence, and; (3) it is not adequately covered by the other instructions in the case. **State v. Davidson**; 44 Wis.2d 177, 191-192; 170 N.W.2d 755 (1969); *Wis. JI-Criminal, 700.* A theory of defense may be found in the statutes or case law.

This court gave the religion instruction to clarify to the jury, in a general way, that which marks the line between one's Freedom of Religion and the government's right to regulate conduct for public safety. The modification to the standard instruction to meant to give a more precise line with respect to a parent's duty to provide medical treatment to their minor children.[2] A theory of

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[1] The court's reasons for finding that the instruction to be inaccurate differ from those offered by the State. The State argued that Leilani did not have any "sincere belief" defense available because even before Kara died she was in an ongoing state of great bodily harm and Leilani was aware of that state. The problem with that argument is that it ignores the need for awareness not only of Kara's condition but also of the causal link between that condition and Leilani's conduct. The point of the "sincere belief" defense is that Leilani's belief prevented her from seeing that causal link

[2] The court's preferred language would have relied upon language found in **State v. Williquette**; 129 Wis.2d 239, 255; 385 N.W.2d 145 (1986) quoting **Cole v. Sears, Roebuck & Co.**; 47 Wis.2d 629, 634; 177 N.W.2d 866 (1970). ["It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to car for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and

defense instruction would go one step further. But the theory the defendants advocated by them is that a sincere and honest religious belief alone is sufficient to constitute an absolute defense to the charge. That argument, however, reflects a fundamental misunderstanding about the role of religious belief in a faith-healing defense.

The focus of the crime charged here was upon Leilani's and Dale's subjective awareness of the risk of death or great bodily harm resulting from their belief and reliance upon prayer – not on their subjective belief in the effectiveness of prayer. *See Wis. Stat. §939.24(1)*. While the two are related, they are not the same. A person could believe sincere and honest belief in the power of prayer to heal but still be able to recognize when their child's medical condition is creating a risk of death or great bodily harm. A sincere religious belief in faith-healing could only be a complete defense if it was so absolute that it prevented the person from having a subjective awareness of the risk of death or great bodily harm. To be legally correct, a theory of defense instruction would have had to recognize that distinction. Without it, the jury would have also misunderstood the law.

A theory of defense instruction must also be supported by the evidence. The state presented considerable evidence indicating that despite their religious beliefs, the statements and acts of the Neumanns showed that the understood the risk of harm to Kara; that was why they were seeking prayer from so many people. The defense relied upon other evidence to show that both has a sincere, honest and deeply held belief in the power of prayer alone to heal. In viewing the evidence most favorably to the defense, a theory of defense instruction based upon a correct statement of the sincere belief in prayer instruction would have been supported by such evidence.

Finally, a theory of defense instruction requires that such a defense is not adequately covered by other instructions in the case. The standard instruction for Second Degree Reckless Homicide includes and explains the need for a subjective awareness element of the offense; that "the defendant was aware that (his)(her) conduct created the unreasonable and substantial risk of death or great bodily harm." *Wis. JI–Criminal 1060*. That instruction was given in this case.

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preservation, including medical attendance if necessary." The defense objected since they believed it emphasized an aspect of the case they did not want to emphasize.

(*Trial Transcript, 7/31/09*, p. 52). It advised the jury about the subjective awareness requirement, which Dale's trial counsel then argued extensively in his closing. A correct "sincere belief" defense is based upon one's belief leading to a state of mind that prevents a person to perceive and be aware of the risk of harm. Since the standard instruction for the offense explains the need for a subjective awareness of the risk, the theory of defense is covered by the standard instruction. Accordingly, a theory of defense instruction is not strictly required in this case.

The Civil Jury Instructions Committee cautioned that a rigid application of this framework may, in some cases, be counterproductive to an instruction that might be helpful in making the standard instructions more understandable.[3] *Wis. JI- Criminal, 700.* That might have been the case here. However, the defense request for a theory of defense instruction was legally incorrect and the court felt that a correct one might be criticized as over-emphasizing that which the defense did not wish to emphasize.

Because the jury was adequately advised about the law upon which the "sincere religious belief" defense was based when it was instructed about the subjective awareness element of criminal recklessness, trial counsel was not ineffective for failing to request a specific theory of defense instruction.

## ARGUE SINCERE RELIGIOUS BELIEF

Leilani

Leilani also argues that her trial counsel failed to present a sincere religious belief defense to the jury during his closing argument. But while the argument may not given the kind of emphasis that Leilani now argues it should have been given, it is inaccurate to say that it was not present at all.

To be sure, the words "sincere belief" did not appear in the closing argument. But a significant portion of the argument did focus upon Kara's condition and whether Leilani could or should have been aware of how serious it was; that was clearly related to the issue of her

[3] An example would be when the crime itself and its relationship to the defense is complicated or complex such that the jury would be aided by an instruction that helps focus their attention on the relevant and critcal issue of the case.

subjective awareness, though not in the same way as the "sincere belief" defense. But the "sincere belief" argument is present in statements like these:

- "The big point that I want to make is as soon as Leilani understood that Kara's condition was perhaps beyond prayer she acted. Remember, every doctor with the exception of one ... testified that the breathing was getting better. Sunday morning the breathing got better and she appeared to be coming out of it. I think any parent or anybody at that point would have been able to establish that, hey, she got better. Maybe the prayer is working. Maybe she is just getting better but it appeared to everyone that she is getting better and then she suddenly died. It was Leilani who instructed the Wormgoors to call 911." (*Trial Transcript, 5/22/09*, p. 45-46).

- "So she is the one that summonsed help when she realized that it was needed and beyond her control." (*Id.* at p. 47).

- "So as soon as she was aware that her breathing was not normal again, that it had taken a reversal, she had them call 9-1-1." (*Id.* at p. 48).

- "The guilt or innocence is based upon what was trying to be done to help Kara, what was Leilani trying to do. Was she trying to place her into a situation that it was more life threatening than she was already in or was she trying to help her. That's what it's about. . . . It is to some degree about prayer because they believe in prayer. They believe it helps." (*Id.* at pp. 53-54).

- "They are saying that in all essence Leilani Neumann killed Kara with her actions. I want you to take that as seriously as it is. Because this woman did everything she could to help her." (*Id.* at p. 56.)

As with the jury instructions, hindsight can sometimes reveal places where there is room for improvement. Trial counsel certainly could have better explained and emphasized the "sincere belief" defense and how it related to the subjective awareness element. But "room for improvement" is not the same as deficient performance. With the benefit of hindsight, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*; 466 U.S. at 689. But "[a] fair assessment of attorney performance requires that every

effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Such is the case here.

As Attorney Linehan rose to make his closing argument, the State had just closed it's argument contending that his client, Leilani, was a "religious extremist" with everything it connotes in our society today. It argued that with an awareness of the risk, Leilani had abandoned her parental duty to care for her daughter and how she labeled herself as more "radical" in her religious beliefs than most (*Trial Transcript*, 2/22/09, p. 36). It then stated;

> ...it is clear that Leilani Neumann was focused on herself and her beliefs that weekend of Kara's sickness and death. She told the detective it's not that I'm against doctors or medicines, but I just felt like, you know, my faith was being tested. I never went through an experience like that before in my whole life and I just thought, man, this is the ultimate test.
>
> Religious extremism can be dangerous. In this case it was fatal. This defendant made this situation about herself, about her faith, about her being tested, about her staying strong to pass the ultimate test. Unfortunately, she made her daughter the test subject. She abandoned her parental duty by failing to take actions to protect and care for her daughter and instead focused on her own interests. (*Trial Transcript*, 2/22/09, p. 37).

That is the context and perspective of trial counsel at that time. Trial counsel had to make a quick decision on the strategy to take in his closing argument; whether to emphasize or de-emphasize the "sincere belief" argument in light of the "religious extremist" arguement. To emphasize might also show her to be a blind to the consequences of what she said that she actually observed (weakness to the point of not being able to walk, labored breathing, unable to eat solid food and eventually taking liquids by syringe only, unconsciousness and unresponsiveness, etc.) and her actions (frantic phone calls to persons near and far to pray for Kara, etc.). The evidence shows that Kara's decline occurred over only three days and the doctors did testify that in some respects ketoacidosis may resemble the flu and that one suffering from it will actually show improved breathing just before they die, something a layperson probably would not know. Using that, while de-emphasizing the "sincere belief" defense, would just make her a mother who is also a devote Christian with a strong belief in prayer who subjectively "misinterpreted" the medical symptoms rather than a radical "religious extremist." We know that he elected to directly

challenge the "religious extremist" charge, to de-emphasize the sincere religious belief defense and that he lost in doing so.[4]

In hindsight, one can say that trial counsel might have been able to do a better job. But under the context and perspective of trial counsel at that time, the court finds that he made a reasonable tactical decision that cannot be said to be outside the "wide range of professionally competent assistance," even if another attorney would have given more prominence to the "sincere belief" aspect of the defense. Accordingly, trial counsel cannot be found to have deficiently performed as counsel by giving less emphasis to the "sincere belief" defense.

## LEILANI'S PRIOR CONVICTION

Dale

During voir dire in Dale's trial, prospective jurors were informed of his wife's previous conviction for the same offense and then questioned about their ability to decide this case entirely and independently based upon the evidence produced during his trial. Dale first appeared to claim ineffective assistance for failing to object to informing each prospective juror of the conviction but in its reply now seems to acknowledge that it was a strategic decision made necessary when the court indicated that a juror's prior knowledge of the conviction would not be an automatic disqualification.

### Disqualification for Prior Knowledge

The court cannot recall any real arguments concerning this issue and nothing appears on the record concerning such an argument or decision. If a real bone of contention, the arguments and the court's decision would have been placed on the record. Instead, the court probably just remarked off the record that prior knowledge alone does not necessarily disqualify a juror. But

[4] This court is aware that Attorney Linehan had heart and obvious breathing problems for years and had seen him try cases with those medical problems. It was also aware of his back problems during this trial and that he elected to not take pain medications during the trial that might effect his performance. The incident regarding security concerns occurred on the second day of trial and the individual involved was found and taken into custody within two days. His closing arguments required a quick reaction to that made by the State. But his response was immediate, on point and equally charged with emotion. It is typical of such a response that this court has seen Attorney Linehan perform many times before despite his health concerns. Those continuing conditions, and the back pains he experienced during this trial, did not result in any obvious reduced mental ability or legal acumen on Attorney Linehan's part.

that is the law. Whether a juror shows subjective bias requires an inquiry of "whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any *opinion* or *prior knowledge* that the juror might have." **State v. Keirnan**; 227 Wis.2d 736, ¶15; 596 N.W.2d 760 (1999) [emphasis added]. "Discerning whether a juror exhibits this type of bias depends upon that jurors verbal responses to questions at voir dire, as well as that juror's demeanor in giving those responses." *Id.* at ¶15.

Here the charge required an independent finding of each defendant's individual subjective awareness of whether their conduct presented a risk of death or great bodily harm to their daughter. While much of the evidence overlaps, there were some significant differences between them as well. For example, Dale indicated some question of whether they should take Kara to the hospital that was rejected by Leilani. Those facts would tend to show that Dale might be able to appreciate the degree of risk to Kara's health while at the same time indicating that Leilani could not. Therefore, the court felt that an automatic disqualification for prior knowledge of the conviction would not be prior without an individual inqury of whether they were a reasonable person willing to set aside such prior knowledge in assessing the guilt of a different person under evidence related to that person alone; a factor emphasized during the individual voir dire.

**Informing All Juror of Conviction**

It is admittedly extraordinary to actually inform potential jurors of a prior conviction of a co-defendant. But there is no real denying that these trials were also very extraordinary.

These cases involved a collision between the State's right to protect public safety by prosecuting possible criminal activity thereby generating intense media attention, community commentaries and public discussions, all focused in the defendants' county of residence. The State indicated that it probably would call Dale to testify at Leilani's trial necessitating two separate trials meaning media coverage of the first trial may affect the second trial. A change in venue and/or a delay between the two trials are the common ways to help reduce or eliminate pretrial publicity concerns. But both of the defendants demanded a jury of their peers selected from

Marathon county thereby eliminating the change of venue option.[5] Then the option of a significant delay between trials was also eliminated when Dale exercised his right to a speedy trial.[6] On top of that, there is always a risk in some cases in which an individual who indicated they had heard nothing about the case or would not have any prejudice learns that they do once trial has begun the evidence is introduced. Given all of those factors, the trial court faced not a smooth sea and fair winds but rather a perfect storm that would make it more difficult to keep upright the good ship "Fair Trial" upon a sea of impartial jurors.

Never-the-less the court, aware of case law on the subject, did not anticipate that the jury in Dale's trial would be informed of Leilani's prior conviction of the offense, as indicated by the short explanation of the case given in the jury questionnaire used in his case. What knowledge they might have about the case would be presented in the answers the potential juror gave and they could be questioned about during individual voir dire about any prejudicial effect it might have. But on the first day of trial the attorneys advised the court in chambers, later placed on the record, that they had reached a stipulation. Since prior knowledge about the case alone would not necessarily disqualify a juror, both were concerned that there would be a mix of jurors on the panel; some that would have at knowledge of the prior conviction and others that did not. Under those circumstances, they were concerned that there would be a realistic probability that during deliberations knowledge of the prior conviction might become known to the jurors that would have no prior knowledge that might then prejudice that juror requiring a mistrial at that late stage.[7] Worse yet, it might cause such prejudice that might not be made known to the court and parties that might result in a tainted conviction. Both felt that it would be better to face the challenge

[5] The court retained at least a hope that Dale might change his mind about an out-of-county jury after the results of the first trial became known to him.

[6] The court agrees that a defendant's choice to exercise these constitutional rights does not dilute, compromise or waive his constitutional right to a fair trial before an impartial jury. It is referred to only to indicate the extraordinary nature of the trial and decisions that had to be made to also guarantee the fair trial and impartial jury rights as well.

[7] Of course, potential jurors that did not indicate any prior knowledge of the conviction would not be informed of it and hence not questioned about what, if any, prejudicial effect it might have.

head-on and have an known impartial jury that all had the same knowledge concerning the prior conviction and could be questioned about any prejudicial effect it might have.

This was a real concern in this case. Here, the parties had contemplated the problem, discussed it between themselves and then arrived at a proposed solution to the problem that both agreed to.[8] In the ordinary case this court would have taken care not to disclose such disclosure a conviction to a jury and confident that Dale's trial counsel would have also insisted upon it. But Dale's decision to have a Marathon County jury and a speedy trial, in the face of intense publicity given to the case, presented extraordinary issues regarding a fair trial to both the trial court and counsel. Since these are constitutional rights, he had every right to exercise them without any dilution, compromise or waiver of his right to a fair trial before an impartial jury. But when faced with extraordinary issues, extraordinary solutions are also often necessary.

In the hindsight of a conviction it is easy to challenge this decision. But the court is required "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*; 466 U.S. 689. In doing so here, it appears to the court that trial counsel made a sound strategic decision made to an extraordinary situation that challenged Dale's right to a fair trial. Accordingly, the court cannot find that trial counsel's agreement to be defective performance.

## PROPOSE ANSWER TO JURY INQUIRY

Dale

During its deliberations, the jury sent out a question about Dale's faith-healing or "sincere belief" defense: "Was Dale's belief in faith-healing something that makes him not liable for not taking Kara to the hospital, even though he was aware to some degree she was not feeling well?" The State and Dale's trial counsel could not agree on an answer other than referring the jury back to the instructions given at the close of the trial. Dale now argues that his trial counsel should

[8] The court recalls inquiring in chambers about the possibility of an instruction during deliberations that, if selected, the juror would not disclose such knowledge to the other jurors but the parties felt the risk of inadvertent disclosure was still too great. However, that apparently was not placed on the record.

have offered "an answer explaining how a sincerely held religious belief in faith healing may constitute a defense under the subjective element." (*Postconviction Motion*, p. 8).

That certainly would have been an option and, in hindsight, it may be one that Dale wishes his attorney had taken. But again, the court is to eliminate the effects of hindsight but instead look at the circumstances and perspective of trial counsel at the time of the challenged conduct. Indeed, some proposals were bantered about without any agreement. The short form answer the defense wanted was "yes" while the State argued "no." But both would have been incorrect for different reasons. The question referred to an awareness that Kara was "not feeling well" when in fact the law requires an awareness of a risk of death or great bodily harm – but that is precisely what both trial defense attorneys most strenuously objected to throughout the proceedings.

The objection assumes that the court would have adopted and given any answer that the defense would have proposed. However, as explained above, a religious belief does not constitute an absolute defense to the charge unless so strong that it precludes a subjective awareness of the risk of death or great bodily harm is present. It is such a subjective awareness that is an element of the offense. But such an instruction is just what trial counsel was most strenuously opposed to. Trial counsel did well enough by arguing against the instruction the court was inclined to give and instead have the court do what it did; to just refer the jury back to the instruction given and counsels' arguments was the best the defense could have hoped for.[9] Therefore, trial counsel's failure to propose an answer to the jury's inquiry cannot constitute defective performance.

## PREJUDICIAL EFFECT

Both

The lack of deficient performance does not necessarily end this inquiry since the focus is not upon the outcome but rather on the reliability of the proceedings. Therefore courts may decide ineffective assistance claims based upon prejudice alone without considering whether counsel's performance was deficient, *Roberson*; 292 Wis.2d at ¶28 citing *Strickland*; 466 U.S. at 668. "To

[9] One thing this court has learned is that an instruction given with all other instructions at the jury charge has a more of an impartial affect. The court's answer to a jury inquiry directly upon the issue of the case, on the other hand, is inclined to have greater influence upon the jury and its ultimate effect. That to influenced the court's decision just to refer such sensitive inquiries back to the original instruction given on the issue regardless of whatever imperfections it might have.

establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome." *Roberson*; 292 Wis.2d at ¶29, citing *Strickland*, 466 U.S. 694. Under this standard, a defendant is not required to show by a preponderance of the evidence that the outcome would have been different, only that his or her conviction is unreliable because of a breakdown in the adversarial process, **State v. Johnson**; 126 Wis.2d 8, 13; 374 N.W.2d 637 (1985).

The court, in this case, most likely would not have found a reasonable probability sufficient to undermine confidence in the result. The primary issue here was whether each defendant (depending upon who was on trial) had a subjective awareness that Kara's medical condition presented a risk of death or great bodily harm or whether their belief in prayer was so strong so as to preclude such an awareness. Each defendant claimed that it was but the jury could make that determination based only upon the totality of what they acknowledge observing about her condition, what they said and what they did having a bearing on that inquiry. Both observed that Kara was to weak to walk or sit on the toilet and had to be carried from Saturday night, took liquids by a syringe, had labored breathing that got better on Sunday, but eventually was unable to communicate, was unconscious and unresponsive. As far as what was said, in phone calls to others (usually by Leilani), Kara was described as "seriously ill" on Saturday (Elvira Neumann & Jennifer Peaslee), but in a "coma" on Sunday (Elvira Neumann, Althea Wormgoor & Jennifer Peaslee) and that Kara was "hanging between life and death," (Althea Wormgoor[10]). While no author was disclosed, there also was an e-mail from the residence to family and friends stating "help, our daughter needs emergency prayer." The many frantic phone calls Saturday night and Sunday morning seeking prayer for Kara from family and friends are consistent with showing a significant concern over Kara's medical condition.

[10] While there is a question as to credibility by all witnesses, the jury would have to consider that there had been a falling out and "disassociation" between the Neumanns and the Wormgoors and that the Wormgoors where reluctant to come over to help pray for Kara when that was allegedly said.

Based upon that, the prejudicial effect of any deficient performance probably would be insufficient to undermine confidence in the outcome.

## INTERESTS OF JUSTICE

Leilani

Circuit courts have authority to grant convicted criminal defendants a new trial in the interest of justice in the course of a post-conviction motion under *Wis. Stat. §974.02*. **State v. Henley**; 2010 WI 97, ¶¶63-65; 328 Wis. 2d 544; 787 N.W.2d 350. "[A] new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." **State v. Hicks**; 202 Wis. 2d 150, 159-60; 549 N.W.2d 435 (1996). Leilani argues that, because her "sincere belief" defense was not put before the jury, the real controversy in this case has not been fully tried.

However, the "sincere belief" defense was, in fact, placed before the jury. It was simply not placed there in the manner that Leilani wishes it had been. The jury was properly advised of the subjective awareness element and it received evidence of Leilani's belief that prayer would be sufficient to heal her daughter. Under the circumstances, it is not accurate to say that the real controversy has not been tried.

## CONCLUSION

All parties agreed that the *faith healing defense* was adequately preserved for appeal. The *religion instruction* paraphrases a long line of U.S. Supreme Court cases on the distinction between religious belief, which is absolutely protected, and conduct based upon such belief that may be regulated if general in its application and made for public safety and protection. The *theory of defense instructions* advocated by the defense are legally incorrect and one which the court might have given would have only re-emphasized and expanded upon the subjective awareness element of the standard jury instruction. Accordingly, neither of the trial attorneys were ineffective in respect to them.

Leilani's trial attorney was not ineffective by failing to argue a *sincere belief* defense. Although the term was never used and clearly not given the emphasis Leilani may wish that had

been given, it was present in trial counsel's arguments. By de-emphasizing the "sincere belief" defense, counsel attempted to present Leilani as a devoted mother with strong Christian beliefs who subjectively misinterpreted the medical symptoms rather than as a radical "religious extremist" as portrayed by the state. That was a strategic decision made by counsel and hence does not constitute ineffective assistance of counsel. Moreover, since that defense was given to the jury, although not in the form and to the extent now desired by the defendant, it cannot be said that the real controversy had not been tried.

Nor was Dale's trial counsel ineffective in his defense. As originally presented, he was ineffective for not objecting to the jury being informed during voir dire of Leilani's prior conviction. When it came out that he affirmatively agreed to it, the argument was that it was but a reluctant strategic decision made only after the court erroneously indicated that potential jurors with knowledge of the conviction would not be automatically disqualified. But the question is not necessarily whether a potential juror expressed a prior opinion or had prior knowledge of the case but rather whether they are a reasonable person who is sincerely willing to set aside any opinion or prior knowledge of the case. In either event, it was a strategic decision made by counsel that another reasonable attorney in the same situation might have also made. Finally, trial counsel was not ineffective for proposing an answer to the jury's inquiry during deliberations since the answer proposed by the defense is legally inaccurate and not one that the court would have given.

Accordingly, the motions for a new trial based upon ineffective assistance of counsel or in the interest of justice are hereby denied.

Dated at Wausau, Wisconsin this 26 day of April, 2011.

**BY THE COURT:**

Vincent K. Howard
Judge, Circuit Court Branch 3
Marathon County, Wisconsin

the facts of the case supported that kind of an objective argument. I mean, in your view, was that a viable defense?

MR. JACOBSON: I'm going to object to relevancy.

THE COURT: Yeah, now you're asking for his opinion on what's a viable defense I guess.

MR. LICHSTEIN: Yes, Your Honor. I'm trying to get at to the extent that Mr. Linehan made some kind of strategic shift from the subjective defense to the objective defense, I want to get at why he might have made that decision and whether it was a reasonable decision, and I think Mr. Kronenwetter's view on that bears on whether such a shift was warranted.

THE COURT: I'll overrule the objection.

A. Okay. If you could ask one more time, I'm sorry.

Q. In your view, did the facts of the case create a viable defense on the objective standard if we define the objective standard as meaning what a reasonable person or would a person in their position have noticed that there was a severe illness? Was there a viable defense on that theory?

A. I think -- well, I mean, given the instruction on second degree reckless endangerment that we're dealing with, the elements of the offense, I don't think, are terribly conducive to a defense on the objective element. Give me a minute here, please. If the shift to a defense on the



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objective element is arguing that a reasonable person wouldn't have noticed illness, certainly that was then not a strong defense. You know, we had an individual who was unconscious for some time, who was not, you know -- the family was unable to roust her from her sleep. That is what the evidence indicated. So to argue that, you know, objectively you wouldn't have noticed she's sick, that's not a strong argument, I think, given the instructions. We had the jury instructions as proposed and as were likely, so trying to defend against the objectivity element of the offense was not a strong defense.

Q. Isn't that particularly the case given the very broad duty instruction that we discussed earlier?

A. Well, yes.

Q. And is it also fair to say that that kind of objective defense that you just laid out really wasn't consistent with what the Neumanns had been saying? In fact, isn't it the case that they said they recognized the severity of it but believed that prayer was the way to make it better? Is that essentially what their version was to you and Mr. Linehan throughout the case?

A. Well, I have trouble separating -- with this distance of time, I have a little trouble separating the testimony, the out-of-court testimony that was presented on video to the jury. I have some difficulty trying to separate out

precisely, you know, how things were expressed right there versus conversations in trial preparation and the like. So -- but it is my belief and understanding that even in what was presented to the jury, that videotaped interview that, yes, Leilani had expressed that they were trying to heal her through prayer. Certainly in our pretrial preparation that was, you know, their contention from the first second, that they recognized a problem and they did what they thought was right to solve the problem which was, you know, provide prayer and spiritual healing.

Q. So from that perspective, it is inconsistent to say that, in fact, the defense is they didn't recognize a problem?

A. Well, I guess certainly put in that -- in, you know, in those terms, yes.

Q. Is that part of the reason that you pursued the subjective awareness defense at Mr. Neumann's trial?

A. Well, I mean, ultimately the reason we -- I pursued the subjective awareness defense was because that was the truth. I don't know -- as far as the objective side, I mean, they recognized that there was a condition that needed to be addressed, they differed on the method of addressing it, so, yeah, that's why I would choose the subjective.

Q. Okay. Finally, on the question of Mr. Linehan's health, you testified that he -- when you raised your

allowed that risk to continue. The medical testimony of the four doctors is clear on that point. In this case both the risk of great bodily harm and death occurred.

Each matured into a reality.

The first component of the second element of the crime requires the conduct created a risk of death or great bodily harm. The first component of the second element of the crime has been established beyond a reasonable doubt.

The second component is that the risk of death or great bodily harm was unreasonable and substantial. Again, this component does not require that you consider the defendant's state of mind. You must use your collective wisdom and knowledge from the evidence to determine whether or not this component has been proven.

You can reach the conclusion it has from the medical testimony alone. The evidence showed you the risk was unreasonable and substantial. Again, in this case the conduct went beyond the risk. The risk should not have occurred. It did occur and it was allowed to continue, the great bodily harm, hour after hour after hour, to the point where Kara died.

In this case great bodily harm occurred

and it was ongoing. Once Kara reached a state where she could not walk, talk, eat, drink, move, and eventually was comatose, she was suffering from great bodily harm.

Great bodily harm means serious body injury. Serious body injury includes the protracted loss or impairment of bodily function, functions such as the ability to eat, the ability to drink, the ability to walk, the ability to talk, finally, the ability to be aware of the world around you, to be conscious.

Certainly by late Saturday Kara was suffering from great bodily harm. She had a serious bodily injury, and this poor girl, up to the point where she lost consciousness, had been suffering.

As Dr. Monaco said, with advanced diabetic ketoacidosis, acid is eating away at her body, a complete, whole body heartburn, nausea, blurred vision, headaches, abdominal pain, but Kara -- Kara couldn't tell anyone. She didn't have the ability to talk; she was so weak.

The defendant knew what her condition was. He was personally witnessing it, and he did nothing to put an end to her suffering and misery. The suffering and misery his daughter was silently

enduring.

The risk of great bodily harm in this case had become a reality. The reality was that Kara was suffering from great bodily harm, and the defendant watched and did nothing to put an end to that suffering.

The crime that you will be considering in your deliberations today was not meant only to punish those who ignore the possibility of death, but it was also created to allow for the prosecution of those who ignore the possibility of great bodily harm.

The risk of death increased as Kara's time went by. With each hour that passed, Kara was one step closer to death. In this case great bodily harm is a serious bodily injury that occurred with Kara for -- and was ongoing for hours. The risk was 100 percent. The risk was a reality.

The second component of the second element of the crime requires the risk of death or great bodily harm was unreasonable and substantial. The second component of the second element of the crime has been established beyond a reasonable doubt.

The third component requires that the defendant was aware that his conduct created the



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unreasonable and substantial risk of death or great bodily harm.

Dale Neumann was aware because he was witnessing how ill his child was. The evidence has shown that the defendant was aware that Kara was suffering from serious bodily injury. The defendant's awareness that his conduct created the unreasonable and substantial risk of great bodily harm is shown by what he is witnessing starting Friday and culminating in her death on Sunday afternoon.

During the times you see on the monitor the defendant was present. He was there. He was at the house from Friday night on. On Friday Kara eats her last food. She is reported weaker and slower than normal, and she is too tired to do her homework.

By Saturday morning Kara is becoming increasingly tired. She didn't go to work with her mom that morning because of her tiredness. She is drinking more water and going to the bathroom.

By Saturday afternoon she appears to sleep throughout the day, only getting up to drink more water and urinate -- or excuse me -- drink more water and urinate.

By 4:00, Kara's lying down. She is

hospital and the ambulance gets a flat tire and is delayed for a few minutes, that might be a factor in causing the person's death, but the substantial factor is that he was shot in the head.

That's the case here. The substantial factor is that Kara laid there for hours and hours and hours, not being given any medical treatment, not that when she is nearly dead at 2:00 somebody fumbles around with three phone calls for half an hour.

That's why the word "substantial" is used. That's why the law is written that way, and that points out the importance of language and words in a case such as this.

Prayer shows absolutely an awareness of risk, as to the other conduct I talked about earlier, and if you recall, when I -- early on in my closing argument, I suggested that you focus on the great bodily harm factor. I will concede that in the record some of you might have trouble and might want to acquit if you focus in on the death factor, the knowledge of death, that he knew death might occur. It would be fair that some of you might not think that has been proven to the requisite level the State needs to.

Focus on the great bodily harm factor.

That's why it says great bodily harm or death. Cross out the death. It doesn't matter. If you find the great bodily harm, you can convict and should convict in this case. And the reason is that great bodily harm matured. It was there. It was ongoing.

The defendant doesn't get to test his faith by letting his daughter lay there and languish in a state of great bodily harm for hour after hour after hour. It's about the suffering. It's about the great bodily harm. It's not about the death. You can find the death as a basis for a conviction, but you should find the great bodily harm as the reason for the conviction.

That Kara was breathing was getting better in no way means that she wasn't still in that condition of great bodily harm. She was limp. She couldn't walk. She couldn't talk. She couldn't move. She urinated herself. She was in great bodily harm all that time, and treating diabetes would have saved her, and at the time she is in that horrible state of agony until she is unconscious would have rendered her immediate relief. Insulin and fluids and the pain and the suffering ends, but it didn't. It continued to her death.

Look at the words and language in those

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2011AP1044-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE VINCENT K. HOWARD PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T  O F  A P P E A L S

DISTRICT III

Case No. 2011AP1044-CR

STATE OF WISCONSIN,

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ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE VINCENT K. HOWARD PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

## ISSUES PRESENTED

1. In view of Wis. Stat. § 948.03(6), does the application of the reckless homicide statute to Kara Neumann's death violate Dale Neumann's due process right to fair notice? (The circuit court answered: no.)

2. Was the "duty" instruction given to the jury unconstitutional as applied to the facts of this case? (The circuit court answered: no.)

3. Was the real controversy fully tried? (The circuit court answered: no.).

4. Was the jury objectively biased? (The circuit court answered: no.).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts. Publication is warranted because the application of these well-established legal principles to the present factual setting is novel in Wisconsin law.

## STATEMENT OF THE CASE

Untreated diabetes leads to diabetic ketoacidosis ("DKA") (107:231-32). Signs of advanced DKA include extreme weakness and thirst, decreased appetite, and sweet "acetone breath" (107:196; 108:4). Another "significant symptom" is "rapid and deep breathing," which is "prominent … alarming … and very concerning" (107:233). The advanced DKA sufferer appears dehydrated, is "cold to touch, … very weak, … unable to walk typically, or, if the person walks, will not have good balance" (108:5). The skin may appear white or blue (108:6). DKA eventually leads to coma, which "is defined as a state of unresponsiveness" or limpness (107:234; 108:8). End stage DKA is "without question" "noticeable" (108:12-13).

According to expert witness Dr. Ivan Zador, "severe DKA … untreated … invariably results in death," but the overall survival rate for treated DKA is 99.8 percent (107:233). DKA's effects are reversible even for comatose patients (108:9).

Defendant-appellant Dale Neumann[1] noticed that Madeline Kara Neumann ("Kara") was tired on the Saturday morning before she died; he invited her to rest in the master bedroom (111:127-28). She apparently slept all day (111:130).

Early Saturday evening, Leilani came home and found Kara extremely weak, pale, and cold (109:54). Frightened, Leilani immediately alerted Dale (109:59; 111:131). Dale noticed that Kara's legs were blue (111:131). At 4:58 p.m., Dale sent out an email to ubmadmin@americaslastdays.com stating: "We need agreement in prayer over our youngest daughter, who is very weak and pale at the moment with hardly any strength" (111:157). Kara's breathing became labored (109:70-71). At 7 or 8 p.m., Kara went to the bathroom unattended and collapsed on the floor (111:161-63). Dale had to carry her downstairs (*id.*; 109:73). Dale testified that Kara stopped walking and talking after that (111:165-68). The Neumanns stayed up late "non-stop praying and just continually trusting in the Lord" (111:137). According to her brother Luke, Kara was in a coma by Saturday's end (107:47).

At 5:00 a.m. on Sunday morning, Kara was silent and still except for her deep breathing (109:86). Dale thought her breathing was "normal" compared to Saturday night (111:138). Dale admitted that Kara was limp (111:139). He refused to acknowledge that she was unconscious, preferring to call it "a deep sleep" (111:164). Leilani said Kara was unconscious all day (109:90). Kara's sister Ariel thought she was in a coma (109:89). Leilani told her mother-in-law that Kara was in a coma (110:21). After a telephone conversation with Leilani that morning, Dan Peaslee had the impression that Kara was in a coma (109:220). Leilani told Althea Wormgoor that Kara was not eating, drinking, or talking, and was lying on the floor (109:245-46).

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[1]The State will refer to defendant-appellant as "Dale," and his wife, Leilani Neumann, as "Leilani."

Jennifer and Dan Peaslee arrived at the Neumanns' at noon on Sunday (109:203). Dan said Dale "was visibly upset. His eyes were red. He had been crying" (109:224). Kara was lying on the bathroom floor unmoving and unconscious (109:204, 225-26). Jennifer described her breathing as "deep labored," not "normal" (109:204). Dan described it as "wheezing" (109:226). Dan said Kara appeared "ashen" (109:226). They were "shocked" by Kara's condition (109:205, 227). Dan remembered "that a coma-like situation was conveyed to me [but] … I wasn't prepared for her to really be laying there and not responding" (109:227). Leilani's attempts to give Kara water were unsuccessful because Kara was unable to swallow (109:209). Dan picked Kara up; she was very light and "limp" (109:228).

The Wormgoors arrived after the Peaslees left. When they arrived, Kara's eyes were open, but she "wasn't seeing anybody" (109:252). She was breathing heavily, but not "overly" so (109:253). Her lip "twitched but in a very almost scary way, like she was gasping for air" (*id.*). Randall Wormgoor called 911 (109:258).

Kara was pulseless and non-breathing when the police arrived (107:88-90, 164). Dale was performing CPR on Kara when they got there (107:87).

People who knew Kara before she died agreed that she was naturally thin. But those who observed Kara on that Sunday saw something more extreme.

Everest Metro Police Officer Scott Martens said Kara was "extremely skinny" and "extremely light" (107:88, 92). EMT Jason Russ said she had a "bluish-gray color," looked "malnourished," and had "pronounced" eye sockets and cheekbones (107:113). "Every rib" and her "[p]elvic bone [were] very visible" (107:114). EMT Hyden Prausa said Kara appeared

> malnourished, very skinny, pale, white. She looked very sickly.
>
> ….

> … [H]er jaw was sunken in and defined. She was white and extremely skinny, beyond just normal skinny child. She was … bone-like, skeleton-like.

(107:165-66). EMT Russ and his colleagues noticed a sweet "fruity odor" on Kara's breath, which they recognized as a diabetes symptom (107:130).

Choon P'ng, the emergency room doctor who examined Kara, described her as "cachetic," which describes the appearance of a "cancer patient, very malnourished, thin, and smaller than you expect of the age" (107:187-88). She also looked "very dehydrated. Eyes [were] sunken. Skin turgor was poor" (107:190). Pediatrician Joseph Monaco, assisting Dr. P'ng, described Kara as "very emaciated," "wasted," and "shrunk" (110:37, 55). Pathologist Michael Stier, who performed Kara's autopsy, said Kara had a "wasted appearance … very thin, apparently malnourished" (109:173).

Kara died from "uncontrolled diabetes mellitus" (109:173). Dr. P'ng said Kara's was the most advanced case of juvenile DKA he had ever seen (107:208-09, 214). Dr. Zador, reviewing the case records, concluded that Kara was in the advanced stages of DKA by Saturday (108:14). At death, Kara's blood sugar, blood acid, and Hemoglobin A(1c) levels were abnormally elevated, indicating to Dr. P'ng that her "sugar control [had] been poor for an estimated amount of time, could be several weeks" (107:194-95).

The doctors agreed that DKA is survivable. Dr. P'ng called the prognosis for a still-breathing DKA patient with a heartbeat "very good" (107:201). Dr. Monaco said that the recovery rate for someone in an "entry state" of DKA is "virtually 100 percent," and "about 80 percent" for someone in an advanced stage (110:44). Dr. Zador believed that Kara's DKA was treatable and that her chances of survival were high until "well into the day of her death" (108:10-11). To the last moment, there was some "chance of survival" (108:11).

Kara was declared dead at 3:30 p.m. on Easter Sunday (110:41).

Dale testified at length about his religious beliefs (111:101-19, 133-42). He talked about miraculous cures he had witnessed (111:102-03). He compared using modern medicine to drinking alcohol—both are "socially acceptable" and "just the way we do things in our culture" (111:104).

> So you are going to go to doctors, because it's culturally accepted, but when there is a standard higher than going to doctors which is culturally accepted, you have the word of God, and then in knowing him we have got to learn to submit ourselves to his word. That's obedience. That is faith in action.
>
> You cannot separate faith from your works. Faith without works is dead …. [I]f I go to a doctor and I said, well, I'm praying, too. Well, my work is what? I'm putting the doctor before God. I'm not believing what he said he will do….
>
> If I go to any other source, that's idolatry. I'm putting something else in the place of God. That is idolatry. That is sin. Why? Because it's disobedience. Sin is disobedience.

(111:109-10; *accord* 111:118-19). Dale believed that the family's health improved after they gave up doctors (111:111).

On the day of Kara's death, Leilani told police that Dale thought about taking Kara to the doctor, but Leilani dissuaded him (88:exhs.28:44; 29:2). She retracted this statement in her trial testimony (109:151-52).

Dale said if he could relive Kara's final days he would do nothing differently (107:46; *see also* 88:exh.32:60-62).

Defense counsel Jay Kronenwetter emphasized Dale's religious beliefs in closing. The reckless-homicide statute requires proof that the defendant was aware that his

conduct created an unreasonable and substantial risk of death or great bodily harm to another person. Kronenwetter argued that Dale's belief in healing through prayer prevented him from forming the subjective awareness necessary for reckless-homicide liability.

> The State is arguing that he was criminally reckless in attempting faith-healing and following his beliefs on what would work … to heal his daughter. They didn't bring in one witness, not one that said Dale is a phoney, not one that said he is putting on an act here, he doesn't believe all he is saying….
>
> ….
>
> But then they say the reason he failed to take her to the doctor is irrelevant in this case. Well, of course it's relevant….
>
> The Judge is going to read you those elements … and as part of criminally reckless conduct, they must prove that the defendant was aware that not taking Kara to the doctor created the unreasonable and substantial risk of death or great bodily harm. I don't think they have offered a shred of evidence on that.

(112:39-40; *accord* 112:42, 44-47).

The State analyzed the evidence differently (112:6-9, 16, 22-36). The jury found Dale guilty of second-degree reckless homicide (70).

## ARGUMENT

### I. NOTWITHSTANDING WIS. STAT. § 948.03(6), THE APPLICATION OF THE RECKLESS HOMICIDE STATUTE TO KARA'S DEATH DOES NOT VIOLATE DALE'S DUE PROCESS RIGHT TO FAIR NOTICE.

#### A. Wisconsin Law Provides Fair Notice to Prayer-Treating Parents that They May Be Liable for Reckless Homicide if a Child Dies.

##### 1. Applicable Statutes.

*Second-degree reckless homicide.*

Under Wis. Stat. § 940.06(1), "[w]hoever recklessly causes the death of another human being is guilty of a Class D felony." "[R]ecklessly" is defined by Wis. Stat. § 939.24, which applies to most statutes requiring proof of a reckless state of mind. *See* Wis. Stat. § 939.24(2). Under § 939.24(1), "'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk …."

The reckless-homicide statute requires the State to prove three things. First, "the actor create[d] an *unreasonable and substantial risk of death or great bodily harm* to another …." That is the conduct that triggers liability. Second, the actor was "*aware* of that risk." That is the required mental state. Third, the actor "cause[d] the *death* of another." That is the required result of the reckless conduct. *Id.*

*Criminal child abuse.*

Wisconsin Stat. § 948.03 is the "[p]hysical abuse of a child" statute. It provides in pertinent part:

> (1) DEFINITIONS. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.
>
> ….
>
> (3) RECKLESS CAUSATION OF BODILY HARM. (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony.
>
> (b) Whoever recklessly causes bodily harm to a child is guilty of a Class I felony.
>
> (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class H felony.

Subsections 948.03(3)(a) and (b) require he State to prove three things. First, the actor "create[d] a situation of *unreasonable risk of harm* to … the child." That is the conduct triggering liability. Second, the creation of that risk "demonstrate[d] a *conscious disregard*" for the child's safety. That is the required mental state. Third, the actor "cause[d] *great bodily harm*" or "*bodily harm*" to the child. That is the required result of the reckless conduct.

Subsection (c) requires the State to prove three things. First, the actor's conduct was not only reckless as defined by the statute, but that it "create[d] a *high probability of great bodily harm*." The actor's mental state is the same as the other subsections, *i.e.*, "*conscious disregard*" for the child's safety. The required result of the reckless conduct is "*bodily harm.*"

The child-abuse statute differs from the reckless-homicide statute in three important respects. First, the recklessness provisions of the child-abuse statute do not

include conduct that creates "an unreasonable and substantial risk of death." Second, the actor's mental state is "conscious disregard" for the child's safety, not "aware[ness]" that he is creating an unreasonable and substantial risk of death or great bodily harm. Third, the punishable consequences of the actor's reckless conduct are limited to bodily harm and great bodily harm; they do not include death.

*Prayer-treatment exception.*

The child-abuse statute also differs from the reckless-homicide statute because it contains an exception for "[t]reatment through prayer":

> A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4. or 448.03(6) in lieu of medical or surgical treatment.

Wis. Stat. § 948.03(6). Wisconsin Stat. § 48.981(3)(c)4. is a Children's Code provision that a child-abuse or neglect determination may not be based solely on a parent's choice of prayer in lieu of medical treatment. Wisconsin Stat. § 448.03(6) refers specifically to "the Practice of Christian Science," and is therefore inapplicable to this case because Dale is not a Christian Scientist.[2]

2. The Due Process notice doctrine.

Due process requires that criminal statutes provide citizens with fair notice. "[A] criminal statute does not provide fair notice if it does not 'sufficiently warn people who wish to obey the law that their conduct comes near

[2]Dale cites several other prayer-related statutes. "These accommodative provisions … evince no legislative sanction of prayer for the treatment of children in life-threatening circumstances." *Walker v. Superior Court*, 763 P.2d 852, 863 (Cal. 1988) (in bank).

the proscribed area.'" *State v. Nelson*, 2006 WI App 124, ¶36, 294 Wis.2d 578, 718 N.W.2d 168 (citation omitted). However, it

> "'need not define with absolute clarity and precision what is and what is not unlawful conduct.'" "A statute … is not void for vagueness because in some instances certain conduct may create a question about its impact under the statute," or because "'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'"

*Nelson*, 294 Wis.2d 578, ¶36 (citations omitted). Only a "'fair degree of definiteness'" is required. *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citations omitted).

A statute is not unconstitutional merely "'because the boundaries of the prohibited conduct are somewhat hazy.'" *State v. McCoy*, 143 Wis.2d 274, 286, 421 N.W.2d 107 (1988) (citation omitted). Justice Holmes famously noted that the law sometimes requires individuals to assume the risk that their conduct may cross the line from permissible to prosecutable.

> Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk.

*United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

Every day, our statutes require us to moderate generally permissible behavior in order to stay within the law. We are allowed to consume alcohol, but if we reach a state of intoxication that injures others, we are criminally liable. *See*, *e.g.*, Wis. Stat. § 940.09. We are allowed to spank our children, but if our use of corporal punishment becomes injurious and "unreasonable," we are criminally liable. *See* Wis. Stat. § 939.45(5)(b). We are allowed sexual intimacy with young people, but if they are

under eighteen, we suffer strict criminal liability. *See* Wis. Stat. § 948.02. We are expected to recognize the line between permissible and prosecutable behavior. If the line is sometimes hard to see, the assumption of risk is ours.

3. Construed together, Wis. Stat. § 940.06(1) and § 948.03 provide fair notice.

Dale does not argue that the treatment-through-prayer privilege applies to the reckless-homicide statute. Nor could he. *See* Wis. Stat. § 948.03(6) (privilege applies to "offense[s] under *this section*"). He argues instead that the two statutes' directives overlap, thereby depriving him of "fair notice." In Dale's view, a prayer-treating parent cannot tell when the conduct protected by § 948.03(6) ends and the conduct punishable under § 940.06(1) begins. This lack of a discernible line between permissible and impermissible conduct, he concludes, violates his right to fair notice. Dale is wrong.

The centerpiece of Dale's argument is the phrase "great bodily harm." He contends that there is really no legal difference between "great bodily harm" and "death." He bases his theory on the statutory definition of "great bodily harm," as "bodily injury which creates *a substantial risk of death*, or" other enumerated injuries. Wis. Stat. § 939.22(14). He concludes that conduct that threatens "great bodily harm" is no different from conduct that threatens "death" since "great bodily harm" includes an injury that "creates a substantial risk of death." Therefore, there is no discernible line between the reckless homicide and child abuse statutes. The argument fails.

*First*, the reckless-homicide statute penalizes the reckless infliction of *death* on another person—not "great bodily harm." The child-abuse statute does not reach the infliction of death and does not purport to immunize the infliction of death. For this reason alone, the line between the two statutes is clearly discernible.

*Second*, the definition of recklessness applicable to § 940.06(1) punishes conduct that "creates an unreasonable and substantial risk of death *or* great bodily harm to another." Wis. Stat. § 939.24(1). If Dale is correct that conduct creating a "substantial risk of death" is no different from conduct creating a "substantial risk of … great bodily harm," the "death" language in § 939.24(1) is superfluous. Such a reading is contrary to the rules of statutory construction. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110. There is no justification for reading the alternative "death" basis for reckless conduct out of the definition of "recklessness." In this case, there was substantial evidence to support a jury conclusion that Dale's conduct created an unreasonable and substantial risk of death to Kara, not simply great bodily harm.

*Third*, the standards of criminal recklessness in the two statutes are explicitly different.

> [R]eckless child abuse requires [that] defendant's actions *demonstrate* a conscious disregard for the safety of a child, not that the defendant was subjectively aware of that risk. Wis. Stat. § 948.03(1). In contrast, "criminal recklessness" is defined as when "the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Wis. Stat. § 939.24(1). Thus, "recklessly" causing harm to a child under § 948.03(b) [sic] is distinguished from "criminal recklessness," because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component.

*State v. Williams*, 2006 WI App 212, ¶26, 296 Wis.2d 834, 723 N.W.2d 719 (parenthetical omitted); *accord State v. Hemphill*, 2006 WI App 185, ¶¶9-11, 296 Wis.2d 198, 722 N.W.2d 393.

In other words, the recklessness standard in the child-abuse statute is much lower than the general

standard of recklessness applicable to the reckless-homicide statute.

The treatment-through-prayer privilege must be understood in the context of this relatively low standard of recklessness. The privilege was inserted into the statute to protect parents like Dale from criminal liability for conduct that may appear to "demonstrate[] a conscious disregard for the safety of the child" to those who do not share their religious beliefs. The exception balances the interests of parents who believe that prayer, rather than medicine, is the best hope for healing with the State's police power interest in the protection of all children from bodily harm. Because of this legislative accommodation, a parent immunized by the treatment-through-prayer privilege is not liable for criminal child abuse even if he was "reckless" under the terms of the child abuse statute. *See* Wis. Stat. § 948.03(6).

In contrast, when a parent "creates an unreasonable and substantial risk of death or great bodily harm" to his child, is "aware" of that grave risk, and causes death, the treatment-through-prayer privilege is unavailable. Wis. Stat. §§ 939.24(1); 940.06(1). That is clear on the face of the statutes. There is no ambiguity. This is not simply because the privilege by its terms is applicable only to criminal child abuse. *See* Wis. Stat. § 948.03(6). It is also because the level of recklessness that the State must prove under the reckless-homicide statute is qualitatively higher than the level of recklessness envisioned by the child-abuse statute. A parent who is "aware" that his conduct may cause death or great bodily harm has no statutory protection.

A parent like Dale has ample notice of when his conduct crosses the line from protected to unprotected activity. For example, if a child is lethargic, excessively thirsty, and urinating frequently, the use of prayer instead of medical treatment may be privileged even if the risk of harm to the child is unreasonable and even if the child suffers great bodily harm and even if the parent consciously disregarded the risk. However, if that same

child lapses into a coma, turns cold and blue in her extremities, and has serious trouble breathing, the privilege is no longer available where the parent is "aware" that the "risk of death or great bodily harm" to the child is "unreasonable and substantial." If the child dies, the parent may be found guilty of reckless homicide.

4. The limitations of Wis. Stat. § 948.03(6).

Dale's fair-notice argument also fails because § 948.03(6)'s protections are narrower than he suggests.

Wisconsin Stat. § 948.03(6) refers to § 48.981(3)(c)4., the Children's Code provision outlining the duties of county departments in child-abuse and neglect cases. Under this section:

> A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent … selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child…. This subdivision does not prohibit a court from ordering medical services for the child if the child's health requires it.

This section represents a legislative accommodation between prayer-treating parents and the State's police power. A parent who "relies on prayer … for treatment of disease" cannot be found abusive or negligent on that ground alone. As a consequence, such a parent is spared an investigation into whether his child is abused or neglected, *see generally* Wis. Stat. § 49.981(3)(c), which could otherwise bring about a finding that the child is in need of protection or services, *see id.*, which would lead in turn to the juvenile court's assertion of jurisdiction over the child, *see* Wis. Stat. § 48.13, which could result in any number of dispositions, including the child's removal from the parent. *See* Wis. Stat. § 48.345. However, the court, "if the child's health requires it," may nevertheless "order[] medical services for the child." Wis. Stat. § 48.981(3)(c)4. Thus, although the parent may avoid the consequences of an abuse or

neglect determination, the protection of his choice to treat his child with prayer is limited by the child's health needs. The court may order medical intervention in appropriate circumstances.

It is this limited protection of a parent's choice to rely on prayer that is imported into the criminal child-abuse statute. If the Children's Code privilege is limited by the child's health requirements, the Wis. Stat. § 948.03(6) privilege is similarly limited by the reckless-homicide statute's sanction against reckless conduct causing death.

In both statutes, the prayer privilege is limited by the word "solely." Section 948.03(6) provides that a person is not guilty of criminal child abuse "*solely* because he or she provides a child with treatment by spiritual means through prayer alone." Section 48.981(3)(c)4. provides that an abuse or neglect determination "may not be based *solely* on the fact that the child's parent … relies on prayer … for treatment of disease." In this context, "solely" means that the prayer privilege does not apply where some additional aggravating circumstance exists. For example, a criminal child-abuse prosecution or a civil child neglect/abuse proceeding where a parent relied on prayer alone *and* was aware that doing so placed his child in a life-threatening condition would not be based "solely" on the parent's reliance on prayer. It would also be based on the life-threatening condition created by the parent.

The California and Colorado Supreme Courts reached this conclusion in construing child-welfare statutes providing that, where a parent relies on prayer in lieu of medical treatment, a child-neglect finding cannot be made "for that reason alone."

The Colorado Court found that

> the statutory language, "for that reason alone," is quite clear. It allows a finding of dependency and neglect for other "reasons," such as where the child's life is in imminent danger, despite any

> treatment by spiritual means. In other words, a child who is treated solely by spiritual means is not, for that reason alone, dependent or neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering condition, the child may be adjudicated dependent and neglected under the statutory scheme.

*In re D.L.E.*, 645 P.2d 271, 274-75 (Colo. 1982) (footnote omitted).

The California court agreed that this language "must be construed to signify that treatment by prayer will not constitute neglect for purposes of the child welfare services chapter except in those instances when such treatment, coupled with a sufficiently grave health condition, present 'a specific danger to the physical … safety of the child.'" *Walker v. Superior Court*, 763 P.2d 852, 864 (Cal. 1988) (in bank). The court noted that California's Welfare & Institutions Code, while generally deferring to a parent's choice of prayer treatment, allowed the juvenile court to "'assume jurisdiction [if] *necessary to protect the minor from suffering serious physical harm or illness.*'" *Id.* at 865 (citation omitted). The same is true under the Wisconsin Children's Code. *See* Wis. Stat. § 48.981(3)(c)4.

In sum, Dale's foundational assumption that a parent's choice of prayer over medicine is absolutely protected by § 948.03(6) is questionable. Under both § 948.03(6) and § 48.981(3)(c)4., the legislature's willingness to accommodate religious healing ends when the child's health is endangered. This is consistent with the State's public policy interest in protecting the health and lives of children. See *In re R.W.S.*, 162 Wis.2d 862, 873 n.5, 471 N.W.2d 16 (1991) ("Public policy considerations exert a significant influence on the process of statutory interpretation by the courts."). Exclusive reliance on prayer for medical treatment is beyond statutory protection where the parent is aware that his conduct is creating a life-threatening situation for his child.

5. Homicide is different.

An obvious difference between the child-abuse and homicide statutes is the result of the actor's recklessness. The abuse statute punishes the actor when bodily harm or great bodily harm results. Wis. Stat. § 948.03(3). The homicide statute punishes the actor when death results. Wis. Stat. § 940.06(1). The prayer-treatment privilege is available in the first case but not the second. In balancing parental interests with the State's police power interest, the legislature essentially said "this far and no further." It was willing to accommodate prayer-treating parents if their children suffered great bodily harm, but not if their children died. At that point, the State's police power interest in protecting the lives of all the State's children trumps some parents' interest in relying on prayer alone. *See R.W.S.*, 162 Wis.2d at 873 n.5.

The differential legislative treatment of criminal conduct on the basis of whether or not death results is not unique to these statutes. The legislature has decided time and again that homicide is different.

Certain affirmative statutory defenses to criminal liability are either unavailable or restricted in cases of homicide. Coercion and necessity supply an absolute defense to *any crime* "except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide." Wis. Stat. §§ 939.46(1), 939.47. The self-defense privilege is available even in cases of homicide, and "extends … to the unintended infliction of harm upon a 3rd person." Wis. Stat. § 939.48(3). However,

> if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire … the actor is liable for whichever one of those crimes is committed.

*Id.*

These affirmative defenses provide blanket immunity to persons who reasonably believe they must violate the criminal law under certain extreme circumstances. However, such persons must calibrate their response to those circumstances in order to enjoy this immunity. They may commit any crime with impunity except for homicide. Similarly, a parent treating his child with prayer in lieu of medicine must calibrate his conduct. If his reliance on prayer creates an "unreasonable risk of harm to" his child and the child suffers "bodily harm" or "great bodily harm," the parent is immune. Wis. Stat. § 948.03(1), (3), (6). However, if that same reliance creates an "unreasonable and substantial risk of death or great bodily harm to" the child *and the child dies*, he has no immunity. Wis. Stat. §§ 939.24(1), 940.06(1).

6. Foreign case law supports the State's interpretation.

Other courts have addressed this fair-notice argument. Although there is a split in authority, the better-reasoned opinions support the State's position.

Laurie Walker was convicted of involuntary manslaughter and felony child endangerment when her choice of prayer over medicine caused her daughter's death. The California Penal Code exempts prayer-treating parents from misdemeanor liability for failing to provide medical treatment (among other necessities) to their children. *Walker*, 763 P.2d at 856. Walker claimed she had no notice of where the exemption ended and criminal liability began.

Quoting Justice Holmes, the California Supreme Court rejected Walker's contention:

> "[T]he law is full of instances where a man's fate depends on his estimating rightly … some matter of degree…. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor."

> The "matter of degree" that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more.

*Id.* at 872 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)) (other citations omitted).

The court explained that the statutes revealed a deliberate balancing of the prayer-treating parents' interests and the State's police power interest.

> The … legislative intent is clear: when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield….
>
> ….
>
> … The legislative design appears consistent: prayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability.

*Walker*, 763 P.2d at 866. "California's statutory scheme reflects not an endorsement of the efficacy or reasonableness of prayer treatment for children battling life-threatening diseases but rather a willingness to accommodate religious practice when children do not face serious physical harm." *Id.* at 868.

The fair-notice argument in *State v. Hays*, 964 P.2d 1042 (Or. Ct. App. 1998), was based on the line between the negligent-homicide and criminal-mistreatment statutes. The latter exempts parents relying on treatment by prayer or other spiritual means from the general duty to provide necessary medical care to their children. *Id.* at 1045. The court held that the statutes were not "legally ambiguous." *Id.* at 1046.

> [T]he statutes permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable

> person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die.

*Id.* The *Hays* court acknowledged that although "it may be impossible to define in advance all the ways in which a person's actions can be a gross deviation from the standard of care of a reasonable person," the legislature may nevertheless "penalize such a gross deviation." *Id.*

*Commonwealth v. Twitchell*, 617 N.E.2d 609 (Mass. 1993), arose from involuntary-manslaughter convictions following the death of the Twitchells' son. Massachusetts' child-neglect statute recognizes a spiritual-treatment exemption from the general requirement that parents provide medical care to their children. *Id.* at 612 & n.4. The Twitchells argued they "lacked 'fair warning'" that spiritual treatment could result in a manslaughter prosecution. *Id.* at 616. The court disagreed.

> There is no mixed signal from the coexistence of the spiritual treatment provision and the common law definition of involuntary manslaughter. The spiritual treatment provision protects against criminal charges of neglect and of willful failure to provide proper medical care and says nothing about protection against criminal charges based on wanton or reckless conduct. The fact that at some point in a given case a parent's conduct may lose the protection of the spiritual treatment provision and may become subject to the application of the common law of homicide is not a circumstance that presents a due process of law "fair warning" violation.

*Id.* at 617 (citations omitted).

*Commonwealth v. Nixon*, 718 A.2d 311, 314 (Pa. Super. Ct. 1998), *aff'd*, 761 A.2d 1151 (2000), involved the line between the child-abuse statute (containing a "seriously held religious belief" exception in medical-care

cases) and the involuntary-manslaughter statute. The court concluded:

> A plain reading of the statutes shows that an act which does not qualify as child abuse may still be done in a manner which causes death and thus qualifies as involuntary manslaughter. This precise situation occurred in this case. While the Nixons were not considered child abusers for treating their children through spiritual healing, when their otherwise lawful course of conduct led to a child's death, they were guilty of involuntary manslaughter.

*Id.*

As the State argued above, these cases hold that a statutory structure granting a prayer exemption in a child-neglect or abuse statute does not deprive a prayer-treating parent of fair notice that he may be criminally liable under the homicide statutes if his child dies. Further, as argued above, these cases recognize that such a statutory structure is a legislative accommodation between the interests of parents who choose to provide prayer treatment and the interest of the State in protecting all children from death or great bodily harm. As one court wrote, prayer is "an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability." *Walker*, 763 P.2d at 866.

Dale argues that these cases are distinguishable and relies instead on *State v. McKown*, 475 N.W.2d 63 (Minn. 1991), and *Hermanson v. State*, 604 So.2d 775 (Fla. 1992). These cases are inapposite.

The Minnesota statute analyzed in *McKown* provides that a parent "who willfully deprives a child of necessary … health care" is guilty of child neglect, but if she "in good faith selects and depends upon spiritual means or prayer for treatment or care of disease … this treatment shall constitute 'health care.'" Minn. Stat. § 609.378 (1988). Unlike Minnesota, Wisconsin does not

equate prayer treatment with health care. The court did not focus on this aspect of the Minnesota exception. Instead, it concluded that the language was too broad to give prayer-treating parents fair notice that they could be prosecuted for second-degree manslaughter (based on "culpable negligence" and the creation of an "unreasonable risk") if their child died. *McKown*, 475 N.W.2d at 65 n.4, 68. As the dissent explained, the court failed to address the fact that the two statutes at issue (like those here) provided distinct mens rea standards to guide parents in their health-treatment decisions. *See id.* at 69 (Coyne, J., dissenting).

*Hermanson* involved the interplay of three statutes. First was the child-dependency statute, defining an abused or neglected child in part as one harmed by a parent's acts or omissions. 604 So.2d at 776. The statute defines "harm" as failure to supply, *inter alia*, "health care."

> "[H]owever, a parent … practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone …."

*Id.* (citation and emphasis omitted). The second statute was a child abuse provision making it a crime to deprive a child of medical treatment. *Id.* The third was a statute "provid[ing] that the killing of a human being while engaged in the commission of child abuse constitutes murder in the third degree." *Id.*

The Hermansons' daughter died from DKA when her parents chose to combat her condition with prayer. They were convicted of felony child abuse and third-degree murder. The court agreed with the Hermansons that Florida's statutes denied them due process by failing to "give them fair warning of the consequences of practicing their religious belief." *Id.* at 780, 783.

The statutes construed in *Hermanson* are very different from those at issue here. In combination, the child-dependency and criminal child-abuse statutes

essentially removed prayer treatment from the definition of child abuse and "raised spiritual intervention to a level equal to that of medical treatment." *Nixon*, 718 A.2d at 314. The third-degree murder statute explicitly based liability on "child abuse," which the child-abuse statute explicitly defined as withholding medical care, which the child-dependency statute explicitly permitted prayer-treating parents to do. In contrast, Wisconsin's reckless-homicide statute is based on a generic definition of recklessness, and does not invoke any specific criminal act such as child abuse. A definition of child abuse from elsewhere in the Wisconsin Statutes is not even arguably incorporated into the reckless-homicide statute.

Although appellate courts have split on the fair-notice issue, this court should follow the decisions of California, Oregon, Massachusetts, and Pennsylvania. The statutes considered there are parallel to those involved here and the courts' analyses are thoughtful and germane to the present case. The Minnesota and Florida decisions provide little guidance because the statutes they analyze are critically distinguishable from the applicable Wisconsin statutes.

B. Analysis.

As shown, the statutes draw a clear line between privileged and unprivileged "reckless" behavior. The question for the parent is whether he is creating an "unreasonable risk of harm" in "conscious disregard" of his child's safety, or whether he is "aware" that he is creating an "unreasonable and substantial risk of death or great bodily harm" to his child. Wis. Stat. §§ 948.03(1), 939.24(1), 940.06(1). The trial evidence demonstrates that Dale had sufficient warning that he had crossed the border from protected into unprotected conduct hours before Kara died.

By Saturday night, Kara's condition was sufficiently grave that Dale's decision to withhold medical care created an "unreasonable and substantial risk of death or great bodily harm" to Kara—and Dale knew it. At 4:58

p.m., he sent a mass email alerting others to the gravity of Kara's condition (111:157). Dale saw that Kara was pale and cold and that her legs were blue (109:59; 111:131). Kara stopped walking and talking and her breathing was labored (109:70-71; 111:165-68). After she collapsed in the bathroom, Dale had to carry her (111:161-63). Kara lapsed into a coma that night (107:47). At the very least, these symptoms informed Dale that Kara was in "substantial risk of … great bodily harm"; at most, they informed him that Kara was in "substantial risk of death."

Any doubt that Kara was at death's door was gone by Sunday morning. During trial, Leilani backed away from the word "coma," but admitted that Kara was unconscious *all day* (109:90). Dale preferred to call her state a "deep sleep," but admitted that her body was "limp" (111:139, 164). The description of Kara's condition by Althea Wormgoor and the Peaslees confirm the coma assessment. All three said Kara was nonresponsive (109:204, 225, 227, 252). Althea noticed that her eyes were open, but unseeing (109:252). Leilani's efforts to hydrate Kara were unsuccessful because of Kara's inability to swallow (109:209). When the Peaslees arrived, Dale was weeping over Kara's condition (109:224).

If Kara had died on Friday, Dale's fair-notice argument might have some plausibility. However, by late Saturday—*and certainly by Sunday morning*—it was clear that Dale's choice of prayer posed an "unreasonable and substantial risk of *death* or great bodily harm" to Kara and that Dale was aware of that risk. Wis. Stat. § 939.24(1). The stage at which Dale's choice posed only a protected "unreasonable risk of harm" in "conscious disregard of [Kara's] safety" was over by the time Kara turned cold and blue, suffered labored breathing, and lapsed into a coma. Wis. Stat. § 948.03(1). The Wisconsin Statutes unquestionably provided fair notice to Dale Neumann.

## II. THE "DUTY" INSTRUCTION WAS PROPER AND CONSTITUTIONAL.

The circuit court instructed the jury on the first element of reckless homicide as follows:

> First, the defendant caused the death of Madeline Kara Neumann.
>
> Cause means that the defendant's conduct was a substantial factor in producing the death. Conduct can be either by an act or omission, when the defendant has a duty to act. One such duty is the duty of a parent to protect their children, to care for them in sickness and in health.

(112:52).

As originally proposed, the instruction ended with the phrase: "and to do whatever may be necessary for the care, maintenance, and preservation, including medical attendance, if necessary'" (112:64). On Kronenwetter's objection, the court removed that language (112:65).

Dale contends that the instruction given was improper. His arguments fail.

*First,* although Dale quotes the instruction actually given, his argument appears to rely on the language originally proposed and ultimately removed by the court. Dale says the "duty instruction erroneously communicated a broad, absolute parental duty to provide medical attendance whenever necessary to 'protect' or 'care' for one's children." Dale's Brief at 29. But that critique makes sense only against the original version of the instruction—the one containing the words "medical attendance" and "necessary" (112:64). Further, Dale repeatedly complains that the instruction said he had a "legal duty" "to provide" Kara "with conventional medical care." Dale's Brief at 23, 27, 29, 30, 33. But, again, that complaint is not relevant to the instruction actually given.

The instruction actually given says nothing about providing Kara with "conventional medical care." On the contrary, it told the jury that Dale had a more general duty to protect Kara "in sickness and in health" (112:52). The instruction was broad enough to embrace both the State's theory (that medical intervention was necessary to protect Kara's health) and Dale's (that prayer provided the appropriate means for protecting Kara's health). It is not surprising that Kronenwetter endorsed this language, as it was consistent with his defense theory (112:39-47).

*Second,* Dale argues that the scope of parental duty articulated in *State v. Williquette*, 129 Wis.2d 239, 385 N.W.2d 145 (1986), "is clearly superseded" by § 948.03(6), and the instruction was therefore improper. Dale's Brief at 25. The argument is puzzling because the instruction does not conflict with the statutory language. The instruction says that a parent has a duty to care for his child "in sickness and in health" (112:52). The statute says that a parent who "provides a child with treatment by spiritual means through prayer alone for healing … in lieu of medical or surgical treatment" is not guilty of criminal child abuse. Wis. Stat. § 948.03(6). Without the originally-proposed "medical attendance" language, there is not even an arguable conflict between the instruction and the statutory language.

Moreover, Dale's premise, that § 948.03(6) defines the limits of a parent's duty to provide his child with medical care, is mistaken. Section 948.03(6) provides prayer-treating parents with a limited privilege to be free from prosecution for criminal child abuse under certain limited conditions. *See supra* at 15-17. It does not release them from the duty common to all Wisconsin parents to provide their children with the medical treatment necessary to preserve their lives. That duty is broadly defined under Wisconsin law. *See Williquette*, 129 Wis.2d at 256. A parent's limited immunity under the child-abuse statute does not exempt him from his broader legal duty.

*Third,* Dale's contention that the "duty instruction … violates a parent's [C]onstitutional right to direct the medical care of his child" has no basis. Dale's Brief at 30. Neither the federal nor the Wisconsin Constitution precludes the State from imposing medical obligations on a parent necessary to preserve his child's life. But even under Dale's view of his constitutional rights, the broad instruction—referring to the obligation to care for children "in sickness and in health" but not mentioning "medical care" (112:52)—is unobjectionable.

*Finally,* in an undeveloped argument, Dale asserts that the instruction provides "no discernible standards." Dale's Brief at 32. This argument is a non-starter. If the instruction is standardless, that is because Kronenwetter successfully eliminated the more specific language about providing "medical attendance" (112:64). Dale cannot claim error for an instruction he requested. Moreover, the instruction allowed both the prosecutor and Kronenwetter to argue their interpretations of the facts and law (112:6-9, 16, 22-36, 39-47). *See supra* at 26. The instruction was not standardless.

Even a legally correct instruction may warrant a new trial if a defendant can prove that it was "'ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt'" or "denied the defendant 'a meaningful opportunity for consideration by the jury of his defense.'" *State v. Gonzalez*, 2011 WI 63, ¶24, 802 N.W.2d 454 (citations omitted). Dale has not shown a reasonable likelihood that the challenged instruction relieved the State of its burden of proof. Considered with the other instructions, it directed the jury to find Dale guilty only if it found he had a subjective awareness that his conduct constituted a failure to care for Kara "in sickness and in health." Nor has Dale shown that the instruction denied him a meaningful opportunity to have the jury consider his sincere-belief defense. The instruction allowed Kronenwetter to argue that defense, and permitted the jury

to find Dale not guilty if it found that his reliance on prayer satisfied his duty of caring for Kara "in sickness and in health" (112:39-47).

The duty instruction was neither erroneous nor ambiguous. Dale's contention that it conveyed a conventional-medical-care requirement is unreasonable on its face. A new trial is unwarranted.

## III. THE REAL CONTROVERSY WAS FULLY TRIED.

### A. Law.

To prove an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and prejudicial to the defense. *See Strickland v. Washington,* 466 U.S. 668 (1984). The defendant must prove both elements. *See State v. Moats,* 156 Wis.2d 74, 100-01, 457 N.W.2d 299 (1990). If the defendant fails on one prong, the court need not consider the other. *See Strickland*, 466 U.S. at 697.

To establish deficient performance, the defendant must demonstrate serious attorney errors that cannot be justified under an *objective* standard of reasonable professional judgment. *See Strickland*, 466 U.S. at 688. A lawyer's strategic decisions are "virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶20, 307 Wis.2d 429, 744 N.W.2d 919.

An attorney does not perform deficiently by foregoing a meritless argument. *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Further, ""the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized…."" *State v. Maloney*, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583 (citations omitted). Instead, counsel can be ineffective only "where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v.*

*McMahon*, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). This rule is consistent with *Strickland*'s objective standard of performance. *State v. Van Buren*, 2008 WI App 26, ¶19, 307 Wis.2d 447, 746 N.W.2d 545.

The defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis.2d 758, 774, 596 N.W.2d 749 (1999). The test is whether "counsel's errors were so serious as to deprive the [client] of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

This court may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried." Wis. Stat. § 752.35. A "real controversy" claim may be based on erroneous jury instructions. *See State v. Grobstick*, 200 Wis.2d 242, 253, 546 N.W.2d 187 (Ct. App. 1996). Where a "real controversy" claim is based on errors by counsel, "the *Strickland* test is the proper test to apply." *State v. Mayo*, 2007 WI 78, ¶60, 301 Wis.2d 642, 734 N.W.2d 115.

B. Analysis.

Dale makes a hybrid claim that the real controversy was not fully tried and that defense counsel was ineffective. His failure to cite the legal basis for this claim violates the Rules of Appellate Procedure. *See* Wis. Stat. § (Rule) 809.19(1)(e).

Dale's claim is based on Kronenwetter's alleged failure to insure proper instruction on Dale's defense, *i.e.*,

> if Dale sincerely believed treatment through prayer was the best means by which to heal his daughter, he could not, at the same time, have been subjectively

> "aware" his treatment by prayer was *causing* her death.

Dale's Brief at 32.

The court instructed the jury that it could find Dale guilty of second-degree reckless homicide only if it found that he "was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm" (112:52). Kronenwetter argued in closing that Dale's religious beliefs precluded the subjective awareness necessary for a guilty verdict (112:39-47). The State argued that Dale did have the subjective awareness of the risk created by his conduct (112:6-9, 16, 22-36). The jury agreed with the State's interpretation of the evidence and rejected Dale's (70; 113:12).

Dale fails to identify the legal basis of a specific defense instruction that goes beyond the subjective-awareness language of the standard reckless-homicide instruction. He cites pretrial comments made by the prosecution as part of its argument that § 940.06(1) is constitutional as applied to this case (95). Dale's Brief at 33. The State was not suggesting that Dale was entitled to a prayer-specific instruction in addition to the standard instruction (95:31-34). Indeed, two pages after the first sentence quoted by Dale, the prosecutor denied that he was suggesting "that the jury should be instructed on affirmative defense of good-faith religious beliefs" (95:33).[3]

The instructions, the trial evidence, and Kronenwetter's closing effectively put Dale's defense before the jury. *See State v. McDowell*, 2003 WI App 168, ¶76, 266 Wis.2d 599, 669 N.W.2d 204 (court reviews challenged "instruction in the context of the entire trial").

[3]Dale mischaracterizes the second sentence of the prosecutor's remarks, which follows a hypothetical about a parent with "a non-religious belief that just all doctors are quacks; therefore, I'm not going to take someone to a doctor" (95:40). Dale's insertion of the word "Neumanns" in the quotation is misleading.

The jury was clearly informed that, if Dale's religious beliefs prevented him from being subjectively aware of the risk to Kara caused by his conduct, it must find him not guilty. The real controversy was fully tried.

The State now responds to each of the individual instructional "errors" identified by Dale.

*Religion instruction*: The court instructed the jury that "[t]he constitutional freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society" (112:53). Kronenwetter did not object (112:67).

The instruction correctly states the law. *See Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Dale does not dispute this, but contends that the instruction

> could have easily misled the jury into believing there was *no* treatment through spiritual means defense.… A jury could have easily equated faith healing with religious "conduct," which is "regulated for the protections of society." If so, it may have understood this instruction as preventing *any* defense based upon treatment by spiritual means.

Dale's Brief at 33.

Each sentence in this three-sentence argument is fallacious. First, there *is no* "treatment through spiritual means defense." The State knows of none, and Dale cites no legal authority recognizing one. Therefore, the instruction could not "misle[a]d" the jury to a false conclusion. Second, faith healing *is* "religious 'conduct,' which is 'regulated for the protections of society.'" *See Walker*, 763 P.2d at 869-71. Therefore, the instruction could not have led the jury to a false "equat[ion]." Third, Dale's conclusion that the instruction could have prevented the jury from considering *any* spiritual-treatment defense is baseless. There is no reason to conclude that this instruction would have precluded the jury from finding Dale not guilty if it found that his religious beliefs prevented him from having a subjective

awareness that his conduct created an unreasonable and substantial risk to Kara. To reach this conclusion, the jury would have had to ignore the subjective-awareness instruction and Kronenwetter's argument based on that instruction.

Kronenwetter did not perform deficiently because there was no legal basis for objecting to the religion instruction. *See McMahon*, 186 Wis.2d at 85. Dale fails to show that the non-objection was prejudicial. Kronenwetter was not ineffective and the instruction did not prevent the real controversy from being tried. *See Mayo*, 301 Wis.2d 642, ¶60.

*Duty instruction*: The duty instruction was not erroneous. *See supra* at 26-29. Therefore, Kronenwetter did not perform deficiently by not objecting to it. *See Toliver*, 187 Wis.2d at 346. The instruction did not prejudice the defense. On the contrary, it allowed Kronenwetter to argue that Dale's reliance on prayer proved that he fulfilled his duty to care for Kara "in sickness and in health" (112:39-47). Kronenwetter was not ineffective and the instruction did not prevent the real controversy from being tried. *See Mayo*, 301 Wis.2d 642, ¶60.

*Jury question*: During deliberations, the jury asked: "Was Dale's belief in faith-healing something that makes him not liable for not taking Kara to the hospital, even though he was aware to some degree she was not feeling well?" (113:3-4). The jury was essentially asking the court how it should apply the reckless-homicide instruction to the facts of the case.

The court and counsel had the following discussion:

> [ADA LAMONT] JACOBSON: I think you just have to tell them that they have to consider the instructions as given.
>
> THE COURT: That's what my thought was.

> ….
>
> MR. JACOBSON: ... Just tell them they have to reread the instructions and consider them as given.
>
> MR. KRONENWETTER: … [W]e would consider that to be an appropriate instruction, your Honor. Otherwise, I don't think the State and defense will come to an agreement on any answer to that one.
>
> MR. JACOBSON: No. I could fashion and answer, but you wouldn't like it. I'm sure you could fashion one I might not appreciate….
>
> MR.KRONENWETTER: I'm certain of that. You know that.
>
> MR. JACOBSON: We will stay neutral.

(113:4-5). The court redirected the jury to the original instructions (113:6).

During deliberations, a circuit court "*may* reinstruct the jury as to all or any part of the instructions previously given, or *may* give supplementary instruction as it deems appropriate." Wis. Stat. § 805.13(5). "[T]he necessity for, the extent of, and the form of re-instruction" is within the trial court's discretion. *State v. Hubbard*, 2008 WI 92, ¶57, 313 Wis.2d 1, 752 N.W.2d 839. If the given instructions as a whole correctly state the law, the court's discretionary decision to redirect the jury to those instructions does not warrant a new trial. *See id.*

The court did not exercise its discretion erroneously. The instructions originally given stated the law correctly—they told the jury that Dale's subjective awareness that his conduct was causing a severe risk to Kara was necessary to a finding of guilt (112:52). The court discussed the jury's question with counsel. Both agreed that (1) a rereading of the given instructions was appropriate, and (2) they would be unable to agree on an appropriate instruction. The sufficiency of the original instructions, the court's consultation with counsel, and counsel's agreement that the jury be redirected to the

original instructions support a finding that the court exercised its discretion appropriately.

Dale suggests no legally correct instruction the court could have used to answer the jury's question that would have satisfied him. Dale does not address the difficulty of fashioning a response that would be acceptable to both parties. Because Dale has failed to brief these issues adequately, this court need not address them. *See State v. Pettit,* 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Instead of language, Dale provides a concept: "treatment by spiritual means *could* constitute a defense to the subjective element because the parent did not believe he was *causing* a risk of great bodily harm or death, but rather, employing the best means at his disposal to prevent it." Dale's Brief at 34. This is not a statement of law, it is an argument for how a fact-finder could apply the legal subjective-awareness standard to the facts of this case. "[O]nly a recital of the legal theory, as opposed to the evidentiary facts offered in support of that theory, may properly be offered to the jury." *State v. Hess*, 99 Wis.2d 22, 34, 298 N.W.2d 111 (Ct. App. 1980). "A recital of the latter by the trial court must be avoided as it constitutes an impermissible comment on the evidence by the court." *State v. Pruitt*, 95 Wis.2d 69, 81, 289 N.W.2d 343 (Ct. App. 1980). No proper instruction could be based on Dale's concept.

Dale fails to show that Kronenwetter was ineffective. He identifies no legally correct jury instruction that Kronenwetter failed to proffer. Therefore, he has failed to prove that Kronenwetter performed deficiently. *See McMahon*, 186 Wis.2d at 85. Furthermore, Kronenwetter's decision to rely on the earlier instructions, given the difficulty of crafting a supplementary instruction that the prosecutor would agree to, is a tactical decision entitled to this court's deference. *See Westmoreland*, 307 Wis.2d 429, ¶20. Dale has failed to prove prejudice. Without the text of a legally correct instruction, this court can only speculate about whether the result of the trial

would have been different; speculation does not satisfy *Strickland*. *See Erickson*, 227 Wis.2d at 774. The original instruction on the subjective-awareness requirement was sufficient to assure that Dale's trial was fair (112:52). There was no prejudice. *See Strickland*, 466 U.S. at 687.

Kronenwetter provided effective assistance of counsel and the real controversy was fully tried. *See Mayo*, 301 Wis.2d 642, ¶60.

*Theory-of-defense instruction*: A criminal defendant is entitled to a theory-of-defense instruction that relates to a legal theory of defense rather than an interpretation of the evidence; is supported by the evidence; and is not adequately covered by other instructions. *State v. Coleman*, 206 Wis.2d 199, 212-13, 556 N.W.2d 701 (1996). An instruction that essentially instructs the jury that the State has failed to prove an element of the crime does not meet this criterion. Thus, in *Pruitt*, 95 Wis.2d 69, Pruitt's proposed instruction explaining the difference between first- and second-degree murder was unnecessary because Pruitt's "'theory' … was simply that he lacked the requisite intent to commit first-degree murder. Therefore, his 'theory' was adequately explained to the jury through the general instructions given on intent." *Id.* at 81 (citations omitted).

Dale asserts that counsel was ineffective and the real controversy not fully tried because "the jury was never directly instructed that a sincere belief in treatment by spiritual means may negate the subjective awareness element." Dale's Brief at 34.

Dale's argument must be rejected. Dale assumes that he was entitled to an unspecified sincere-belief instruction. But he provides no case authority supporting his assumption. That is unacceptable. *See Pettit,* 171 Wis.2d at 646. In order to meaningfully address the merits of Dale's argument, the State would first have to research whether a sincere-belief defense has been recognized in

any context and determine whether it could apply here.[4] It is not the duty of the State to do Dale's research for him. Dale's argument is also fatally underdeveloped. *See id.* Without the text of an instruction that Kronenwetter should have proposed, the State has nothing to respond to. It is not the State's duty to develop Dale's argument for him.

Dale's default on the substantive issue is also a default on the procedural issue. He does not explain how the unarticulated instruction would have satisfied *Coleman*'s requirements. Without specific language, how can this court determine whether the unproffered instruction related to a legal theory of defense rather than an interpretation of the evidence, was supported by the evidence, and was not adequately covered by other instructions? *See Coleman*, 206 Wis.2d at 212-13.

We know that Dale wishes the jury had been specifically told that "treatment by spiritual means *could* constitute a defense to the subjective element because the parent did not believe he was *causing* a risk of great bodily harm or death, but rather, employing the best means at his disposal to prevent it." Dale's Brief at 34. But, as discussed above, that is an interpretation of the evidence, it is not a legal theory of defense. Meanwhile, the jury was instructed that it could find Dale guilty only if it found that he was subjectively aware that his conduct created a severe risk to Kara (112:52). That correct legal instruction—combined with the trial evidence and Kronenwetter's argument that Dale's beliefs precluded his development of the necessary mental state—adequately instructed the jury on this core principle of reckless-homicide liability. *See Pruitt*, 95 Wis.2d at 81. Therefore, Dale was not entitled to a theory-of-defense instruction along these lines. *See Coleman*, 206 Wis.2d at 212-13.

[4]The foreign cases discussed earlier do not address this defense. *See supra* at 19-24.

Dale's briefing deficiencies are especially troubling in the ineffective-assistance context. The failure to make a meritless argument is not deficient performance. *See Toliver*, 187 Wis.2d at 360. Nor is a failure to advance a proposition that lacks the support of binding precedent. *See Maloney*, 2005 WI 74, ¶23. Unless there was a sincere-belief defense instruction both meritorious and clearly available under Wisconsin law or United States Supreme Court precedent, Kronenwetter did not perform deficiently by not proposing one. *See State v. Ambuehl*, 145 Wis.2d 343, 352, 425 N.W.2d 649 (Ct. App. 1988). Because the burden of proving Kronenwetter's deficiency is on Dale, it was his obligation to prove the existence of such an instruction and to describe it with specificity. *See Moats*, 156 Wis. 2d at 100-01.

Kronenwetter provided effective assistance of counsel and the real controversy was fully tried. *See Mayo*, 301 Wis.2d 642, ¶60.

## IV. THE JURY WAS NOT OBJECTIVELY BIASED.

### A. Background.

Leilani was convicted on May 22, 2009 (Leilani's Record 71). Dale's trial began on July 23, 2009 (102).

At a June 9, 2009 scheduling conference, the court and counsel discussed the substantial media attention Leilani's trial generated in Marathon County (101:6-10). Concerned about Dale's right to a fair trial, the court suggested two possible solutions: change of venue or trial postponement (101:10-11). Dale rejected both suggestions, asserting his right to a speedy trial in Marathon County (101:12-13).

Jury selection began on July 23. The court held an in-chambers conference regarding the fair-trial problem. On the record, ADA Jacobson summarized the parties' agreement:

> [F]rom the jury questionnaires, we know that some of the potential jurors had knowledge of the prior conviction while others didn't; that the possibility would exist that someone might end up on the panel with no knowledge of that prior conviction and someone who knew of the prior conviction and that perhaps during jury deliberations that would become known to the one that didn't and affect them and their ability to serve as an impartial juror.
>
> So I think it was decided by the parties that during individual voir dire each [prospective] juror will be apprised of the fact that there was the prior conviction, instructed that that conviction will be made known at trial but only for the purposes of assessing it and determining Leilani Neumann's credibility and that no other purpose would be appropriate and then making inquiries as to whether or not they would be influenced either way by that knowledge improperly, meaning either one of two things.
>
> And I could assert for both the defense and the State, one, that the prior conviction of Leilani Neumann may well cause somebody to improperly believe that Dale Neumann should just plead guilty, because his wife was already convicted.
>
> The flip side of that coin would be the family suffered enough already and by putting him through this trial, after having gone through his wife's trial with the result that occurred in that case, would be unfair and perhaps make it impossible for a person to serve under either of those scenarios as an impartial juror and follow the Court's instructions.

(102:4-5). Kronenwetter responded: "That sounds like our discussion, your Honor" (102:5).

The court informed each impaneled juror about Leilani's conviction, told each that the information could be used only to assess Leilani's credibility, and obtained from each an assurance that he or she would decide Dale's case solely upon the evidence presented (102:83-84, 110-11, 165-66, 180-81, 189-90, 197-99, 220-22, 238-39, 245-50; 103:40-41, 51-52, 75, 163-64, 174-75).

In the postconviction hearing, Kronenwetter testified that he had intended "to object to the jury being told of Leilani's prior conviction" and thought he had (118:7).

Dale sought postconviction relief on the ground that the disclosure of Leilani's conviction created an objectively biased jury (82:2-4). The court found that "automatic disqualification for prior knowledge of the conviction would not be [proper] without an individual inquiry of whether [the juror was] a reasonable person willing to set aside such prior knowledge in assessing the guilt of a different person under evidence related to that person alone" (85:10). It further found that the disclosure of Leilani's conviction to the venire and the subsequent questioning of each juror's ability to be impartial were appropriate (85:11-12). Finally, the court concluded that Kronenwetter was not ineffective for failing to object (85:12).

B. Law.

Prospective jurors are presumptively impartial. *State v. Meehan*, 2001 WI App 119, ¶35 n.7, 244 Wis.2d 121, 630 N.W.2d 722. Prior knowledge about a case does not necessarily create bias. *See Mu'Min v. Virginia*, 500 U.S. 415, 418-21 (1991); *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961); *State v. Oswald*, 2000 WI App 3, ¶19, 232 Wis.2d 103, 606 N.W.2d 238.

"Objective bias"

> can be detected "from the facts and circumstances surrounding the … juror's answers" notwithstanding … statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge."

*State v. Kiernan*, 227 Wis.2d 736, 745, 596 N.W.2d 760 (1999) (citations omitted).

The "trial court's determination of objective bias will be reversed only if, as a matter of law, a reasonable [court] could not have reached the same conclusion. This is a higher standard of review than the clearly erroneous standard but still very deferential …." *Oswald*, 232 Wis.2d 103, ¶5.

The defendant must object on the record to an allegedly prejudicial communication to the jury venire; failure to do so waives the issue for appeal. *See State v. Lewis*, 2010 WI App 52, ¶26, 324 Wis.2d 536, 781 N.W.2d 730. Similarly, failure to object to the impaneling of a biased juror waives the issue for appeal. *See State v. Williams*, 2000 WI App 123, ¶¶19-21, 237 Wis.2d 591, 614 N.W.2d 11. "The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court." *State v. Caban*, 210 Wis.2d 597, 604, 563 N.W.2d 501 (1997).

C. Analysis.

Dale has not satisfied his burden of proving that he objected to either the disclosure of Leilani's conviction to the jury venire, or the impaneling of any juror on the ground of objective bias. The issues are waived.

To obtain relief, Dale must prove that Kronenwetter provided ineffective assistance of counsel.

Kronenwetter's performance was not deficient. Notwithstanding his comments at the postconviction hearing, the trial record clearly reveals that the parties jointly agreed to the disclosure of Leilani's conviction (102:4-5). They did so for the reasons stated by ADA Jacobson on the record and specifically confirmed by Kronenwetter (*id.*). Agreeing to the disclosure was a reasonable strategic decision by Kronenwetter that should not be "second-guess[ed]." *Westmoreland*, 307 Wis.2d 429, ¶20.

Kronenwetter's performance was not deficient for another reason. There is no controlling authority from a

Wisconsin appellate court or the United States Supreme Court either precluding the disclosure of Leilani's conviction or compelling an objective-bias objection on the basis of facts shown here. Kronenwetter did not perform deficiently because he had no clear duty to perform in the manner urged on appeal. *See McMahon*, 186 Wis.2d at 85.

Dale cites several cases. The first, *Leonard v. United States*, 378 U.S. 544 (1964), is factually distinguishable. Leonard was convicted of forgery in two separate trials. The first jury announced its guilty verdict in the presence of the venire for Leonard's second jury. The Court held that jurors who witness a verdict in such circumstances should be "automatically disqualified" if a contemporaneous objection is made *Id.* at 545. Here, *two different defendants* are involved and there was no objection.

The other cases cited are non-controlling and distinguishable.[5] In *United States v. Gillis*, 942 F.2d 707 (10th Cir. 1991), members of Gillis's jury had served on the venire for his previous trial on similar charges. The court found reversible error because (1) Gillis unequivocally objected to the jurors' presence and (2) the court failed to question the jurors to determine bias. This case involves *two different defendants*, there was no objection, and the court questioned the jurors adequately.

*United States v. Hansen*, 544 F.2d 778 (5th Cir. 1977), found reversible error where the jury was told that Hansen's co-defendant pleaded guilty. The court ruled that the prejudicial impact of a "self-confessed [co-defendant] is obvious." *Id.* at 780. *United States v. Maliszewski*, 161 F.3d 992 (6th Cir. 1998), found plain but not reversible error in similar circumstances. The court concluded that a curative instruction could have eliminated any prejudice. *Id.* at 1004. Leilani's jury

[5]The judgment in *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), was vacated by the Supreme Court. *See* 535 U.S. 1109 (2002).

verdict is clearly distinguishable from co-defendants' guilty pleas. Further, unlike *Hansen* and *Maliszewski*, the critical question here was whether Dale (as opposed to Leilani) had the subjective awareness necessary for a reckless-homicide conviction. In *Leroy v. Canal Zone*, 81 F.2d 914 (5th Cir. 1936), the convictions of Leroy's co-defendants were held inadmissible in evidence for the obvious reason that "[t]he previous conviction of others charged with the same criminal offense is not proof of appellant's guilt of that offense." *Id.* The disclosure of Leilani's conviction during voir dire did not purport to act as trial evidence of Dale's guilt.

The law does not require that the jury be ignorant of the case. *See*, *e.g.*, *Oswald*, 232 Wis.2d 103, ¶19. The law requires that the jury be able to judge the case fairly, by putting aside any previous knowledge or preconceived notions it might have. *See Kiernan*, 227 Wis.2d at 745. Here, the impaneled jurors said they could do that. *See supra* at 38-40. To overcome the presumption that these jurors were unbiased, Dale must show that a "'reasonable person in the juror's position could [not] set aside the opinion or prior knowledge.'" *Kiernan*, 227 Wis.2d at 745. Dale's brief lacks any plausible argument satisfying this standard. *See* Dale's Brief at 40-42.

A reasonable person could certainly remain unbiased in these circumstances. Most importantly, the court in its jury instructions and counsel in their arguments made it very clear that the issue in this case was whether Dale was *subjectively* "aware" that *his* "conduct" "create[d] an unreasonable and substantial risk of death or great bodily harm" to Kara (112:6-9, 16, 22-36, 39-47, 52). Leilani's prior conviction, based on *Leilani's subjective awareness*, did not address *Dale's state of mind*. Significantly, during Leilani's testimony, whenever she was asked about Dale's views on anything, she essentially answered: "you'll have to ask Dale" (109:56-57, 92, 110, 128-30, 145).

Granted, there was substantial evidentiary overlap between the two cases. But the jury didn't know that. Indeed, the jurors were told "that the evidence presented in this trial may be different than the evidence presented in [Leilani's] trial" (*e.g.*, 102:110). Besides, much of the overlap consisted of uncontested evidence—that Kara had many symptoms of DKA at the end of her life, that DKA killed her, and that the Neumanns and their friends prayed for her. Wholly absent from Leilani's trial was the 112 pages of Dale's own testimony, in which he explained his religious beliefs and Kara's last days to the jury (111:64-176). Kronenwetter relied on Dale's testimony when trying to convince the jury that Dale lacked the individual, subjective awareness necessary for a reckless-homicide conviction (112:39, 42-43, 46-47).

Notable as well is the fact that the jury took more than fifteen hours over a two-day period to reach its verdict (Criminal Court Record 18-19). An "objectively biased" jury would not engage in such lengthy deliberations.

Dale has failed to prove that his jury was objectively biased. Therefore, he has also failed to prove that the circuit court's conclusion that the jury was not objectively biased was unreasonable. If the court's decision was reasonable, it is not reversible. *See Oswald*, 232 Wis.2d 103, ¶5. He has also failed to prove that Kronenwetter was ineffective for handling the pretrial-publicity problem as he did. As shown above, Kronenwetter did not perform deficiently. Dale has also failed to prove that Kronenwetter's actions were prejudicial because Dale has failed to prove that he had an objectively biased jury based on the facts of this case and the law of objective bias. Dale did not receive ineffective assistance of counsel.

## CONCLUSION

Respondent respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 17th day of October, 2011.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 12,447 words.

_____
Maura FJ Whlean
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of October, 2011.

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**STATE OF WISCONSIN**

**C O U R T O F A P P E A L S**

DISTRICT III

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Appeal No. 11 AP 1044

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

---

# DEFENDANT-APPELLANT'S REPLY BRIEF

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On appeal from the Circuit Court
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Circuit Judge, presiding.

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Appeal No. 11 AP 1044

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

---

**DEFENDANT-APPELLANT'S REPLY BRIEF**

---

## ARGUMENT

### I. THE RECKLESS HOMICIDE STATUTE VIOLATES DUE PROCESS NOTICE BECAUSE IT CRIMINALIZES THE SAME CONDUCT EXPRESSLY AUTHORIZED UNDER WIS. STAT. § 948.03(6).

Wis. Stat. § 948.03(6) extends the faith-healing privilege to all conduct criminalized by that statute. That is not disputed. Rather, the state argues the scope of Wis. Stats. § 948.03 and 940.06 are not co-extensive.

The state alleges three distinctions between the statutes which allegedly give "notice" that conduct falls outside the faith healing privilege of Wis. Stat. § 948.03.

First, the state distinguishes the recklessness standard in Wis. Stat. § 940.06 because it requires the defendant to create a substantial risk of death or great bodily harm, rather than an "unreasonable risk of harm."

The main problem with this argument is that, without a resulting death, a defendant who creates a "substantial risk of great bodily harm or death" remains privileged under Wis. Stat. § 948.03. When a person's conduct remains firmly within the scope of the faith-healing privilege, he does not have "notice" he crossed a line into reckless homicide.

The other problem is that the faith-healing privilege in Wis. Stat. § 948.03(6) extends to *causing* "great bodily harm," which includes "bodily injury which creates *a substantial risk of death*,...." (Emphasis added). Wis. Stat. § 939.22(14). The distinction between *causing* a "substantial risk of death" under Wis. Stat. § 948.03; versus knowingly *creating* a "substantial risk of great bodily harm or death" under Wis. Stat. § 940.06; is not only hard to fathom at a conceptual level, but is, for all practical purposes, a distinction without a difference. In other words, it would be a very rare circumstance when someone actually causes bodily injury which creates a substantial risk of death without knowing it. More importantly, the state's hyper-technical elements analysis fails to provide anything resembling notice from the standpoint of the average person trying to conform his conduct to the law.

Second, the state distinguishes the statutes based upon "mental state," arguing that an *awareness* one has created a "substantial risk of great bodily harm or death" is a much higher standard of recklessness than a "conscious disregard" for a child's safety. (State's Brief, p.24).

Again, the short answer is that even if the standards are different, a "conscious disregard" for a child's safety would clearly encompass proof that a defendant was "aware" he created a "substantial risk of great bodily harm or death." Absent a death, such an awareness would not take a defendant outside the privilege contained in Wis. Stat. § 948.03.

Third, the state argues that the privilege under Wis. Stat. § 948.03 does not extend to death. The problem with this argument is that the happenstance of death is typically an unintended result which, by its very nature, cannot give advanced notice as to liable conduct. Constitutionally adequate notice requires that a person of average intelligence have sufficient information to conform his *conduct* to what the law requires. As the trial court noted, "[i]t is not the death of the child that makes conduct criminal...." Rather, a person must have "fair notice that *their conduct* might 'cross the line'...." (Emphasis added) (29:18).

According to the state, the "line" that gives a person notice is the self-awareness one has caused a substantial risk of great bodily harm or death. This "line" that allegedly gives a person "fair warning," however, consists of the same conduct expressly privileged under Wis. Stat. § 948.03. Absent death, Dale would have been immune from prosecution.

In fact, a jury could have reasonably concluded Dale's conduct was privileged until Kara stopped breathing. With no knowledge of what was causing her condition, there was no boundary, no line, no discernible moment when Dale was on notice that his "conduct" (i.e. his failure to provide conventional medical care) had crossed a line between immunity under Wis. Stat. § 948.03 (up to and including a substantial risk of death) and liability under Wis. Stat. § 940.06 (death).

The state makes the same mistake when it analyzes the relevant case law. It cites *State v. Hays*, 964 P.2d 1042 (Or.Ct.App. 1998) and *Walker v. State*, 763 P. 2d 852 (Cal.1988), as well as others, for the proposition that the spiritual treatment privilege applies only so long as the child's condition is not life threatening. (State's brief, pp.19-22). What the state conveniently ignores throughout its brief, however, is the substantial gap in these cases between the scope of privileged conduct on the one hand, and the elements of the homicide charge on the other. In *Walker*, for example, the faith-healing privilege only covered the routine provision of dependent support. The privilege did not come anywhere protecting conduct causing a substantial risk of death. *Walker*, at 143-144. In *Hays*, the privilege extended to the maltreatment of dependents, the worst of which was causing "physical injury." Defendant's notice argument was rejected because the privilege in the criminal maltreatment statute clearly did not, according to the court, apply to "life threatening" illness. *Id.*,at 1046. In contrast, the scope of Wis. Stat. § 948.03 extends far beyond the privileged conduct at issue in either *Walker* or *Hays*, or any of the other cases cited by the parties (pro or con).

## II. ALTERNATIVELY, THE JURY WAS IMPROPERLY INSTRUCTED AS TO DEFENDANT'S LEGAL DUTY TO PROVIDE MEDICAL CARE TO HIS CHILD.

The state does not dispute it bears the burden of proving "a known duty to act" in an omission based prosecution. Nor does it dispute that Dale's treatment by prayer qualified him for the spiritual treatment privilege contained in Wis. Stat. § 948.03. Rather, the state makes two main arguments:[1] (1). The privilege under Wis. Stat. §

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1 The state conceded at the postconviction hearing that the duty to provide conventional medical care, as articulated in pages 10-15 of

948.03 does not "release" the faith healing parent "from the duty common to all Wisconsin parents to provide their children with the medical treatment necessary to preserve their lives." (State's Brief, p.27); and (2) there is no "arguable conflict" between the instruction the trial court gave and the statutory language of Wis. Stat. § 948.03. (State's Brief, p.26-27).

As a threshold observation, the "duty common to all Wisconsin parents," now advocated by the state, differs radically from the instruction actually given. The jury heard nothing about a duty to provide medical treatment when "necessary to preserve" the child's life. Rather, the jury was instructed the parent has a duty to "protect their children, to care for them in sickness and in health." If the state's position is that Dale did not have a duty to provide conventional medical care until it was necessary to preserve the child's life, it has confessed error.

Whatever a parent's "common duty" may be, however, Wis. Stat. § 948.03 clearly supersedes it. Dale had no enforceable duty to provide conventional medical care up to and including the point Kara suffered from "bodily injury which creates *a substantial risk of death*." The state makes no effort to explain how Dale could have a "known duty" to provide conventional medical care under some amorphous standard pulled from a 40-year-old civil case while, at the same time, Wis. Stat. § 948.03 very specifically, and expressly, grants him a statutory privilege to rely exclusively on faith-healing.

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Dale's postconviction motion, was preserved by trial counsel for appeal. (84:19; 118:3; 24:12). Consequently, the trial court did not address the issue in its postconviction decision. Any argument the state makes concerning trial strategy or whether trial counsel was "ineffective" or not is irrelevant.

Dale, moreover, was clearly prejudiced by the trial court's instruction. The instruction provided no standards for a jury to determine *when* Dale's duty to provide conventional medical care arose. The instruction is so broad, a jury could have easily interpreted it as requiring Dale to provide medical attention long before he was legally required to do so under Wis. Stat. § 948.03 (or, for that matter, under the state's proposed definition). By failing to provide any standards at all, much less standards consistent with the privilege contained in Wis. Stat. § 948.03, the instruction effectively relieved the state of proving Dale had a "known" duty to act.

On the other hand, had the jury been informed Dale did not have a duty to provide conventional medical care up to and including a substantial risk of death, it could have concluded no duty arose at all. The jury could have reasonably concluded Kara's overt medical condition never went beyond "a substantial risk of death" until she stopped breathing, and 911 was called. The instruction given, on the other hand, allowed the jury to set its own standards as to when the duty arose.

Alternatively, if the state is correct that the instruction as given "embrace[s]" Dale's theory "that prayer provided the appropriate means for protecting Kara's health," then the prosecution fails entirely. (State's Brief, p.27). There is no dispute Dale believed in the efficacy of treatment by prayer,[2] and further, provided that treatment to Kara. If, as the state suggests, Dale could meet his duty to "protect [his] children, to care for them in sickness and in health" through treatment by prayer, then the evidence was clearly insufficient to convict.

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2 The efficacy of treatment by prayer must be assumed for constitutional reasons. See *United States v. Ballard*, 322 U.S. 78, 82, 86 (1944).

## III. THE REAL CONTROVERSY WAS NOT FULLY TRIED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED.

The state addresses this issue solely on the basis of *Strickland*, contending that "[w]here a 'real controversy' claim is based upon errors by counsel, 'the *Strickland* test is the proper test to apply.'" The state cites *State v. Mayo*, 2007 WI 78, ¶60, 301 Wis.2d 642, 734 N.W.2d 115. (State's Brief, p.30). The state mischaracterizes *Mayo's* holding. *Mayo* held it was "necessary" for the court "to review the record to determine if a new trial is warranted in the interest of justice or due to plain error" *in addition to* deciding defendant's ineffective assistance of counsel claim. *Mayo*, at ¶¶28, 30. *Mayo* also considered the totality of the alleged errors for "their cumulative effect...." *Id.*, at ¶66. See also *State v. Hicks*, 202 Wis.2d 150, 152-153, 549 N.W.2d 435 (1996) (Court of Appeals reversed on ineffective assistance of counsel grounds; Supreme Court reversed on discretionary reversal grounds (real controversy not fully tried) using same evidentiary basis).

The fundamental disagreement on appeal is whether the instructions informed the jury that Dale could rely on the sincerity of his belief in faith-healing as a defense to the "subjective awareness" element of reckless homicide. Defendant has argued that the instructions, combined with the trial court's failure to answer the jury's question, prevented the real controversy from being tried. (see Dale's Brief-in-Chief, pp.33-35).

The state, on the other hand, employs the same have-it-both-ways approach it used at the trial level. It repeatedly argues "[t]here is no 'treatment through spiritual means defense.'" (See e.g. State's Brief, p.32). The jury's instruction, moreover, was properly limited to whether Dale "was subjectively aware that his conduct created a severe

risk to Kara," without any reference to the role his religious beliefs may play. (State's Brief, p.37). The state then concludes, nonetheless, that this instruction "clearly informed" the jury that "if Dale's religious beliefs prevented him from being subjectively aware of the risk to Kara caused by his conduct, it must find him not guilty." (State's Brief, p.32).

The jury did not, however, consider itself "clearly informed." The jury expressed its uncertainty by asking the trial court: "Was Dale's belief in faith-healing something that makes him not liable for not taking Kara to the hospital, even though he was aware to some degree she was not feeling well?" (113:4). What the jury wanted to know was whether Dale's defense could actually be considered. Was it legitimate? Was it legally possible for Dale's belief in faith-healing to have negated, as a matter of law, his subjective awareness? The trial court's response was to have the jury re-read the instructions they had already found unhelpful.

When a jury "makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *State v. Hubbard*, 2007 WI App 240, 306 Wis.2d 356, ¶14, 742 N.W.2d 893. As the *Hubbard* court notes: "Jury instructions must have two key characteristics in order to protect the integrity of our jury system: (1) legal accuracy, and (2) comprehensibility." *Id.*, at ¶19. Jurors "cannot follow instructions that they do not comprehend." *Id.* Unclear instructions, moreover, "lead to uncertainty about how to apply the law to the facts, which may invite the jury to decide the case without regard to the facts or the law." *Id.* While jury instructions may be legally accurate, the real controversy is not fully tried when the jury admits in its questions to the court it did not understand a key legal concept of the charge before it. *Id*

Whether Dale's belief in faith-healing negated the subjective element of reckless homicide was the key—and only—issue in dispute. The jury's confusion on this question prevented the real controversy from being fully tried.

## IV. THE JURORS WERE OBJECTIVELY BIASED WHEN THE TRIAL COURT INFORMED THEM DEFENDANT'S WIFE HAD BEEN PREVIOUSLY CONVICTED OF THE SAME OFFENSE.

The state first argues this issue was waived because Dale "has not proven" he objected to the disclosure of Leilani's conviction to the jury. Further, the state argues Dale's trial counsel actually agreed to disclose Leilani's conviction to the jury panel.

Apparently, the sworn testimony of trial counsel is not "proof." Kronenwetter testified that to the best of his recollection, he objected to having any jurors placed on the panel with knowledge of the prior conviction. (118:7,9). He acknowledged the objection was probably made in chambers, off the record. *Id.* He further articulated his firm belief that knowledge of the prior conviction was prejudicial. (118:8). He always assumed, when discussing Dale's options with him, that "jurors who had knowledge of the prior conviction would have been excused for cause." (118:19). Kronenwetter also made clear that his "agreement" with prosecutors to inform the entire jury panel of Leilani's conviction was a tactical choice made only after the trial judge decided to allow jurors with prior knowledge on the panel. (85:11-12; 118:8).

Kronenwetter's post-conviction testimony was not contradicted. The trial court, moreover, neither disputed Kronenwetter's testimony, nor made any findings to the contrary. In fact, the trial court corroborated Kronenwetter's version by acknowledging it probably "remarked off the

record that prior knowledge alone does not disqualify a juror." (85:9).

If the Court finds Kronenwetter did not preserve this issue as he believes he did, or at least intended to, he was ineffective for failing to do so.

The state next attempts to distinguish the cases Dale cites in support of his objective bias contention. While each stands on its own facts and none, of course, are identical to the facts here, the overriding theme of each case still applies: jury knowledge of a prior judicial finding of guilt—whether of a co-defendant under similar charges and facts, or the defendant under similar charges and facts—creates objective bias.

The state then argues Dale's brief "lacks any plausible argument satisfying" the objective-bias standard. While the state concedes a "substantial evidentiary overlap" between the two cases, it nonetheless contends "the jury didn't know that." In addition, Leilani's prior conviction turned on *her* subjective awareness, which did not address *Dale's* state of mind.

None of these arguments are persuasive. The state's evidence was nearly identical in both cases, and so was the defense. In his brief-in-chief, Dale discusses how the jury either knew, or would have easily surmised, the factual overlap of the cases, including the evidence addressing subjective awareness. (See pp.40-41, Brief-in-Chief). Suffice it to say, it would be hard to imagine two trials more similar in terms of the charges, the state's evidence, and the defense.

The state next argues the jury could not have been objectively biased because it took 15 hours to reach its verdict. It may be true that an objectively biased jury would

spend less time deliberating than one that is not. It may also be true, however, that an unbiased jury would have acquitted. At a minimum, the degree of objective bias necessary to prejudice the outcome in a close case such as this is far less than a case where the result is a foregone conclusion.

Finally, the state argues the standard of review is one of deference to the trial court. As long as the trial court's decision was "reasonable, it is not reversible."

Unlike subjective bias, objective bias is a question of law. Although the reviewing court does not typically defer to the trial court's decision on a question of law, "where the factual and legal determination are intertwined as they are in determining objective bias, we give weight to the circuit court's legal conclusion." *State v. Funk*, 2011 WI 62, ¶30, 335 Wis.2d 369, 799 N.W.2d 421.

In this case, however, Dale is alleging a "per se" objective bias. See *Funk*, at ¶63 (court could find juror was "per se" biased against defendant without specific proof of partiality); *State v. Faucher*, 227 Wis.2d 700, ¶50, 596 N.W.2d 770 (whether extraneous information creates a "reasonable possibility" of prejudice "upon a hypothetical average juror" is a question of law.) In this case, deference to the trial court is not warranted because "per se" bias is a purely objective determination based on a hypothetical juror. In addition, the trial court itself caused exposure to this "extraneous" information, and therefore was not ideally situated to judge whether prejudice occurred. See e.g *State v. Tody*, 2009 WI 31, ¶29-31, 316 Wis.2d 689, 764 N.W.2d 737 (No deference paid to trial court when its relationship to potential juror was source of potential bias.)

## CONCLUSION

On the constitutional notice issue, the conviction should be reversed and the information dismissed with prejudice. Alternatively, on the remaining issues, the conviction should be reversed and the case remanded for a new trial.

Respectfully submitted this 2nd day of November, 2011.

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## CERTIFICATION
As to Form and Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is: Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line. The Statement of the Case, Statement of Facts, Argument and Conclusion portions of this brief contain 2998 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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## CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on November 2, 2011. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2011AP001105 - CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEILANI E. NEUMANN,

Defendant-Appellant.

---

ON REVIEW OF A JUDGMENT OF CONVICTION AND DECISION DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, HON. VINCENT K. HOWARD PRESIDING

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, LEILANI E. NEUMANN

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## ISSUES PRESENTED

I. As applied to Mrs. Neumann in this case, do the legal requirements concerning prayer treatment violate Due Process because they fail to give sufficient notice as to when prayer treatment becomes illegal?

   The trial court concluded that there was sufficient notice.

II. Alternatively, was the jury improperly instructed as to Mrs. Neumann's legal duty to provide medical care to her child?

   The trial court concluded that the jury was properly instructed as to Mrs. Neumann's duty to provide medical care.

III. Was the real controversy—whether Mrs. Neumann had a "sincere belief" in prayer treatment that negated the subjective element of reckless homicide—not fully tried because of incorrect jury instructions and ineffective assistance of counsel?

   The trial court concluded that the real controversy was fully tried and that there was no ineffective assistance of counsel.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mrs. Neumann believes that the briefs will adequately address the relevant issues, but welcomes oral argument to clarify any questions the court may have. Publication appears warranted because the major issues in the case have not yet been addressed in Wisconsin caselaw.

## STATEMENT OF THE CASE AND FACTS

Dale and Leilani Neumann met in California, where Dale was pursuing his B.A. in theology and missions from Christian Life College (112:11, Dale record 111:89, 91)[1]. They soon married, and had four children. The youngest, Madeline Kara Neumann[2], was born February 7, 1997. They originally moved around as a family, but eventually returned to Wisconsin (112:11-12). The Neumanns were a close-knit family; they ran a family business, the coffeehouse "Monkey Mo's," and home-schooled their children. The whole family attended a Bible study together and hosted their own Bible studies (113:20; 114:99-101; 113:30).

While leading these Bible studies, the Neumanns taught that illness is a spiritual, not a physical, infliction (113:34). This was one of their fundamental religious beliefs (Dale record 109:35,36,129-133,142,208,213-214,267,285; Dale record 111:19,33). The Neumanns did not use medicine beyond aspirin, and prayed for their children if they became ill (113:35). According to Dale's trial testimony, the Neumanns have previously seen cancer, infertility, and other serious medical conditions healed after they treated with only prayer, and their own family's health improved when they stopped using medical services (Dale record 109:143; Dale record 111:102-103,111,115). In at least one previous instance in 2008, one of their children fell ill, only to become healthy again when the Neumanns treated the illness with prayer alone (113:77).

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[1] Some of the background facts are taken from the record in Dale Neumann's trial. They will be referenced as "Dale record." The State asked for consolidation of the two records during Mrs. Neumann's post-conviction hearing (127:73-74).

[2] Madeline Kara is usually referred to by her middle name in the record.

Two weeks before her death, Kara began experiencing symptoms of fatigue, thirst, and frequent urination (112:29-30, 97:Ex.32:3:34-3:50). She also appeared skinny, but not abnormally so (113:71-72). Mrs. Neumann noticed the fatigue, but told a friend she believed it was a symptom of puberty that one of her other daughters had also experienced (97:Ex.32:4:24-4:35)[3]. One of the State's experts testified that such symptoms are commonly interpreted as the flu (112:140). It was stipulated at trial that, "to the casual observer, Kara Neumann would have appeared healthy on Thursday, March 20," less than three days before her death (123:72).

On Friday, March 21, the only sign of deteriorating health was that Mrs. Neumann noticed that Kara was very tired while Kara was doing her homework, and told Kara to lay down on the couch and rest. (97:Ex.32:12:11-12:48). Kara's sister Ariel, a State's witness, testified that Kara seemed "perfectly fine" on Friday (114:119). Kara was able to eat one McChicken and drink half a shake (Dale record 111:134). Nobody who had been close to Kara that day believed she was suffering from a serious illness (112:29; 113:71-72,91,144; 118:57-58, 75-76,119,123,158,162).

On the morning of Saturday, March 22, Mrs. Neumann spoke with Kara, who told her she was feeling tired; Mrs. Neumann decided Kara should stay home and rest rather than working at the family coffee shop (97:Ex.32:18:48-18:55). When Mrs. Neumann returned from work, Kara was laying down on her bed (*Id.* 19:30-19:37). Mrs. Neumann noticed that her legs were skinny and blue (*Id.* 23:27-28; 25:35). Mr. and Mrs.

[3] This citation refers to the recorded interrogation of Mrs. Neumann, which was played at trial. 97 is the document number, Ex. 32 is the exhibit number, and 4:24-4:35 is the location on the recording. The numbers referring to location on the recording are approximate, because the recording does not include a timer.

Neumann prayed over Kara, and Mrs. Neumann massaged her legs. (*Id.* 23:32-46). Mrs. Neumann was shocked by the sudden drop in health, and believed that Kara was under "spiritual attack" and that prayer was the only answer (*Id.* 29:29-34). Mrs. Neumann gave Kara a smoothie, which she drank, along with water (*Id.* 31:20-47).

The family also turned to others to help them in prayer that day. They emailed an online community of prayer treatment practitioners, asking them to pray for their daughter and to forward their prayer request to David Eells, the founder of the community (97:Ex.18; 113:189). They received an email back from a member, stating, in part, "Confess therefore your sins one to another, and pray one for another, that ye may be healed" (97:Ex.18).

They also contacted Mrs. Neumann's mother-in-law, Elvira, and informed her that Kara was ill (118:192). Elvira believed the symptoms were the flu, and did not tell the Neumanns to get Kara to a doctor (118:192). The Neumanns called Leo Gomez and Ariel Neff, family members in California, and they prayed for Kara (112:40). The Neumanns also called the Neuen family, who had been attending their Bible study, and spoke to Carolyn Neuen (118:91). The Neumanns were not fully aware of what was happening to Kara, as Dale testified, "I didn't know what specifically was wrong with her. It could have been the flu. It could have been the fever. It could have been so many different other things. But whatever it was, she was very sleepy, so it needed attention so we prayed" (Dale record 111:135-136).

The family took a break from prayer to eat dinner, during which Kara moved herself to the bathroom (97:Ex.32:37:50-38:29). Kara fell off the toilet, and was found by her sister Ariel (*Id.*). The family then moved Kara to a nearby couch where she would be more visible (*Id.* 39:50-40:05).

Later that night and the following day (Easter Sunday), there were signs that Kara's health was improving. During the night, she repeatedly kicked the covers off her, which the Neumann children thought was her attempt to go to the bathroom (TAPE 43:10-44:23; Dale record 109:85). Kara's breathing, which was once irregular and difficult, became easier and more regular Sunday morning (118:168; 97:Ex.32:35:45-50). Furthermore, her hands were much warmer than they were on Saturday (97:Ex.32:43:40-44:00). Mrs. Neumann saw this as a sign that Kara was "okay and going to make it" (97:Ex.32:44:00-44:05).

The Neumanns called more friends to pray for Kara that day. Lynn Wilde was the first to arrive at 9 a.m., and remained there to pray for 3.5 hours (Dale record 111:23-24,58). Lynn also believed that Kara had an illness similar to the flu. She was limp but she would move her head and respond to communication (Dale record 111:32,49,53).

The Neumanns also called the Peaslee family, who they know through their Bible study, to come over to pray over Kara with them (112:204; 118:32). After a sponge bath administered by Mrs. Neumann and Mrs. Wilde, Dan Peaslee carried Kara to a futon (112:212-215; Dale record 109:93, 95, 204, 205, 222). Kara was still vocalizing when Mr. Peaslee carried her downstairs (112:213). They prayed for Kara together with the Neumanns, and took communion by her side (112:216; 118:38, 56). When they left they did not call an ambulance, testifying that they believed that Kara would be healed (112:220; 118:63). Lynn Wilde had left at the same time, and testified that she expected she would get a call later telling her that, "[Kara] was fine, walking around. I had peace about it. Otherwise, I would not have left" (Dale record 111:38).

They called Elvira Neumann again, to inform her that Kara was in a coma (118:192). Leilani asked Elvira to pray for Kara, which Elvira agreed to do while at Easter Sunday service (118:193).

Mrs. Neumann also called the Wormgoor family, whom the Neumanns had been feuding with (113:44). Believing that the unforgiveness between the two families might be causing Kara's illness, she explained the situation to Mrs. Wormgoor, and asked her to come over and pray (113:50). The Wormgoors came over at 1:30 and prayed (Dale record 109:250-251,255,277; 113:52-54). At around 2:30, Mr. Wormgoor heard his daughter say that Kara had stopped breathing, and he called 911 (Dale record 109:258,283 113:57). While on the phone, Mr. Wormgoor instructed Dale on performing CPR (112:57). When emergency personnel arrived, Dale was still performing CPR (112:78).

Kara was taken to the hospital, with the Neumann family close behind (113:154). Kara was pronounced dead at 3:30 that day, the cause of death being diabetic ketoacidosis (113:163). Emergency personnel informed the Neumanns of Kara's death, and described the family as "in shock" and "very upset" (112:89; 113:164). Mrs. Neumann told police later that day that she still had faith that Kara would be resurrected (97:E.32: 30:25-43).

Just over one month later, the State charged both Mr. and Mrs. Neumann with second degree reckless homicide. They were tried separately and convicted after jury trials. The circuit court sentenced both to 10 years probation, with six months in the county jail. Each parent was required to serve 30 days during the month of March, every other year, for six years.

Mr. and Mrs. Neumann filed separate post-conviction motions. After separate hearings, the court denied both motions in a single written decision (96; App.B).

## ARGUMENT

### *Introduction*

The Neumanns have been prosecuted not for causing the illness that led to their daughter's death, but for the parental choice they made in how to treat that illness. Consistent with their sincere faith, the Neumanns chose to treat their daughter through prayer, rather than conventional medicine. This decision, admittedly, is one that most parents would disagree with. But it is a decision that the Wisconsin state legislature has explicitly recognized as legitimate under most circumstances: as set forth in detail below, a parent has explicit statutory protection to choose prayer treatment up to and including the point at which a child experiences a "substantial risk of death."

The Neumanns' conviction for choosing prayer treatment violates Due Process notice requirements. There is no language in any statute stating that there will be criminal liability if a parent's legislatively-protected choice of prayer treatment is unsuccessful and the child dies. More importantly, the reckless homicide statute creates criminal liability under the very same circumstances protected by the prayer treatment exception—when there is "a substantial risk of death or great bodily harm." The Neumanns' conduct is therefore protected by one statute but criminalized by another. The only dividing line between legality and illegality is the happenstance of death. Finally, even if it is theoretically possible to concoct a fine line outside the prayer treatment exception beyond which criminal liability could

hypothetically attach, such a line is too vague and unclear to provide sufficient notice in this case.

Apart from these statutory notice problems, there is another notice problem created by the trial court's definition of the legal duty to provide medical care. The trial court instructed the jury that the Neumanns had a duty to "protect their children, to care for them in sickness and in death, and to do whatever is necessary for their preservation, including medical attendance, if necessary" (123:69). If this is an accurate description of parental duty, then it appears to conflict with the prayer treatment exception, and makes it impossible to know when criminal liability may attach. No matter how much one disagrees with the Neumann's parental decision, the law owes them a clearer message as to when their choice of prayer treatment is illegal.

Even if this Court rejects the above arguments, this Court should still conclude that the trial court's duty instruction was overly broad. The statutory prayer treatment exception should be a limiting factor in determining the scope of the parental duty to provide medical care—because of the exception, such a duty can attach only when a child's condition goes beyond substantial risk of death (the injury covered under the prayer treatment exception). The trial court instead told the jury that a parent must provide medical care under a potentially much broader set of circumstances where doing so is necessary for the child's "protection," "care," and "preservation." This makes it likely that the jury found the Neumann's guilty based on a statutorily impermissible theory.

Finally, because of other erroneous jury instructions and ineffective assistance of counsel, the Neumanns were unable to present the only viable defense. Pre-trial, both the State and the court acknowledged that the Neumanns could not be guilty if they sincerely believed that prayer treatment would

heal their daughter. But the jury instructions obscured this critical legal issue, and defense counsel failed to adequately present that defense to the jury.

## I. As applied to Mrs. Neumann in this case, the legal requirements concerning prayer treatment violate Due Process because they fail to give sufficient notice as to when prayer treatment becomes illegal.

### A. When read together with the prayer treatment exception in the child abuse statute, the reckless homicide statute does not give sufficient notice as to when Mrs. Neumann's parental choice of prayer treatment became illegal.

Due Process requires that people who wish to follow the law must be able to discern the boundary between what is legal and illegal. ***Elections Bd. of State of Wisconsin v. Wisconsin Manufactures and Commerce***, 227 Wis. 2d 650, 676-677, 597 N.W.2d 721 (1999)(quoting ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972)("Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly"). A greater degree of specificity is required of criminal statutes than civil ones. ***Winters v. New York***, 333 U.S. 507, 515 (1948).

Conflicting legal provisions may violate Due Process by failing to provide fair notice of what conduct is legal. ***United States v. Cardiff***, 344 U.S. 174, 176-177 (1952)("We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal

without fair and effective notice"); ***Raley v. Ohio***, 360 U.S. 423, 438-9 (1959)(finding notice violation based on "contradictory commands in statutes ordaining criminal penalties"); ***Cox v. Louisiana***, 379 U.S. 559, 571 (1965)(finding notice violation based on "convicting a citizen for exercising a privilege which the State had clearly told him was available to him").

In determining the sufficiency of notice provided under criminal statutes, courts examine the statute in light of the conduct. ***Robinson v. United States***, 324 U.S. 282 (1945). A statute may provide sufficient notice as to some conduct, but fail to provide sufficient notice as to other conduct; if so, a court may find the statute unconstitutional only as applied to a particular case. ***Palmer v. City of Euclid***, 402 U.S. 544 (1971).

Here, no hypothetical parent who pursues faith healing would be put on notice that they could be held criminally liable should the treatment fail. As a starting point, a parent who wanted to determine the legality of prayer treatment would find legislative protection for prayer treatment in numerous areas of the law. Wis. Stat. §46.90(7)(elder abuse); Wis. Stat. §48.82(4)(adoption); Wis. Stat. §938.505(2)(a)1 (juvenile correctional supervision); Wis. Stat. §940.285(1m)("at-risk" individuals); Wis. Stat. §102.42 (workers compensation); Wis. Stat. §949.01(4)(victim compensation); Wis. Stat. §155.01(7)(power of attorney).[4]

[4] Nor is Wisconsin at all unique among the states in providing statutory support for prayer treatment. Donna K. LeClair, "Faith Healing and Religious Treatment Exemptions to Child Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children? 13 U.DAYTON L.REV. 79, 80 n.4 (1987)("parents who substitute religious treatment for medical care are protected from criminal liability by exemptions in nearly every [child neglect] state statute").

Most relevant to this case, the child abuse statute provides express statutory protection for prayer treatment. Wis. Stat. §948.03. The statute contains a broad exception to liability when a parent, in good faith, relies on prayer treatment:

> A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4. or 448.03(6) in lieu of medical or surgical treatment.

Wis. Stat. §948.03(6).[5]

Wisconsin's child abuse statute covers a wide range of potential harm, and as such the prayer exception simultaneously protects prayer treatment under the same set of circumstances. The most severe form of child abuse covered by §948.03 is the reckless infliction of "great bodily harm." "Great bodily harm" is defined as "bodily injury which creates a *substantial risk of death*, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." Wis. Stat. §939.22(14)(emphasis added). Thus, prayer treatment is explicitly protected up to and including when the child experiences "great bodily harm," which means, among other things, a substantial risk of death.

Further, the reckless homicide statute does not limit the above reasonable parent's interpretation. The statutes do not address prayer treatment in any way. An average, reasonably

[5] The "religious method of healing" cited within Wis. Stat. 948.03 is one in which, "a parent in good faith selects and relies on prayer for treatment of disease […] of [a] child." Wis. Stat. § 48.981(3)(c)4.

intelligent person is therefore left with two key pieces of information: 1) the very broad faith healing protection in the child abuse statute, and 2) the lack of any language in either the child abuse statute or the homicide statutes creating criminal liability if the child dies.[6] Most reasonable parents would stop there, feeling safe in the conclusion that the legislature has protected their parental decision to treat their children in accordance with their religious beliefs.

But there is another, even more compelling, basis for believing that prayer treatment is protected and that there is nothing within the criminal code that limits it—the harm protected by the prayer treatment exception within the child abuse statute entirely overlaps with the definition of reckless homicide. Under the reckless homicide statute, a person may be found guilty if her conduct creates a "substantial risk of death or great bodily harm." This "substantial risk of death" that creates criminal liability under reckless homicide is the same "substantial risk of death" explicitly protected in the prayer treatment exception. There cannot be sufficient notice when one statute tells parents that certain conduct is legal, while the other statute tells them it is illegal.

The trial court entirely missed this point. In finding that the reckless homicide statute provided sufficient notice, the court wrote:

> [The reckless homicide statute] provides fair warning of the conduct that is prohibited: any act or omission with respect to one's own child that creates *an unreasonable and substantial risk of death or great bodily harm.*

[6] That fact by itself has been deemed sufficient to create a notice problem by at least one other state supreme court considering a very similar prayer treatment exception. ***State v. McKown***, 475 N.W. 2d 63, 67 (Minn. 1991)("The exception is broadly worded, stating that a parent may in good faith 'select and depend upon' spiritual treatment and prayer, without indicating a point at which doing so will expose the parent to criminal liability").

….

> The point where one relying upon the prayer accommodation statute has fair notice that their conduct might 'cross the line' and become criminal is the point where an ordinarily reasonable person would become aware of *the risk of death or great bodily harm*. Once they reach that point, they have also reached the point where they assume the risk of criminal prosecution if they persist in their conduct despite their awareness of that risk.

(20:12,18-19)(emphasis added).

As indicated above, that analysis is legally incorrect. While the reckless homicide statute creates criminal liability based on the "substantial risk of death or great bodily harm," the prayer treatment exception explicitly protects prayer treatment *in the same exact situation*.

Apart from the overlap in statutory definitions, the principle underlying the prayer treatment exception conflicts with an interpretation that would allow homicide prosecution when prayer fails. The statutory protection is based not on the premise that prayer treatment is medically effective—rather, the statute protects parental autonomy for religiously motivated parents who, *in good faith*, treat their children in a well-intentioned, albeit potentially ineffective way. It would be a bizarre statutory trap for the legislature to protect such good faith reliance on prayer treatment, but to then criminalize such treatment simply because it fails. It makes little sense for the legislature to encourage reliance on prayer treatment for people who believe such treatment will be effective, but to then make them objectively evaluate the efficacy of prayer treatment when the child's condition

approaches death. Those who rely on prayer in good faith—and who have been encouraged to do so by legislative protection—are unlikely to abandon it when risk increases.

Despite the overlap in the prayer treatment exception and the reckless homicide statute, it may be theoretically possible to concoct an interpretation of these statutes that allows for criminal liability. Potentially, one can argue that criminal liability exists in the undefined area where a child remains alive but his/her condition progresses beyond the "substantial risk of death."

It is difficult to imagine, much less describe, such a condition with specificity or clarity. The "substantial risk of death" is clearly quite close to death itself, so it is hard to articulate a condition that lies between the two. No statute or case currently defines this area of criminal liability. No prosecutor, defense attorney, or judge in the lower court articulated such a theory. If such a category exists, to this point it certainly has not been stated in the law with the specificity and clarity necessary for sufficient notice under Due Process. For that reason, Mrs. Neumann's conviction in this case must be reversed.

However, if this Court recognizes a separate area of criminal liability which exists beyond substantial risk of death, wherein death is so imminent as to go beyond this line, such a line is too vague under the facts in this case. The condition of the Neumanns' daughter was serious, but it did not stem from an obvious trauma, and even at times close to her death she seemed to improve. Further, once her breathing stopped, a friend at the house called 911. Under these circumstances, it was not possible for the Neumanns to discern the difference between a "substantial" or "imminent" risk of death.

In a future case with different facts, such a line might be clear enough. For instance, in the case of traumatic injury where a child is obviously very likely to die—such as a car accident or serious fall—a parent could conceivably be on notice that the child's condition goes beyond merely substantial risk of death, and thus requires medical intervention. Thus, ruling in Mrs. Neumann's favor here need not bar all future prosecutions in prayer treatment cases.

### B. The trial court's definition of Mrs. Neumann's duty to provide medical care is unconstitutionally vague, both on its own and when read in conjunction with the prayer treatment exception.

There is another reason that, under the facts of this case, the reckless homicide statute is unconstitutionally vague based on the interplay with the prayer treatment exception. The problem stems from the trial court's interpretation of the "duty" requirement for omission-based liability.

Because this was an "omission-based" prosecution, stemming from *not* taking a particular act, the Neumanns could be found guilty of reckless homicide only if they violated "a known duty to act." ***State ex rel. Cornellier v. Black***, 144 Wis. 2d 745, 758, 425 N.W.2d 21 (Ct. App. 1988). As discussed in more detail in the next section, the trial court (based on a torts case from 1970) instructed the jury that a parent has a duty to "protect their children, to care for them in sickness and in death, and to do whatever is necessary for their preservation, including medical attendance, if necessary" (123:69)

That description of duty is unconstitutionally vague. The concepts of "protecting one's children," "caring for them in sickness and in death," and providing medical care "whenever necessary" are simply too general to give sufficient

guidance—to either Mrs. Neumann or a jury—as to when medical care, rather than prayer treatment, is required. These general phrases only beg more specific questions: What do "protect" and "care for" mean? How serious must a "sickness" be in order to risk a child's "preservation"? Such vague standards delegate to the jury the task of defining what conduct is criminal. *See* ***Giaccio v. Pennsylvania***, 382 U.S. 399 (1966) (invalidating state statute allowing juries to assess costs without prescribing definite standards to govern jury's determination).

Further, even if that description of duty is deemed sufficiently clear, then it appears to conflict with the prayer treatment exception. On the one hand, the trial court's description of duty requires medical care for a child's "preservation," while the prayer treatment exception protects the rejection of medical care even when there is a substantial risk of death. Reading these two legal provisions together, it is not possible to know when prayer treatment is legal.

### C. Prayer treatment cases from other jurisdictions support the Neumanns' claim that Due Process was violated in this case.

While no Wisconsin appellate court has addressed a prayer treatment case similar to this one, appellate courts in other jurisdictions have addressed prayer treatment cases and have ruled in favor of Mrs. Neumann's above claims. Both the Minnesota and Florida State Supreme Courts have granted defendants relief under claims similar to the Due Process notice claim in this case.

In ***McKown***, the Minnesota Supreme Court granted relief under a statutory scheme that provided more adequate notice than Wisconsin's. ***State v. McKown***, 475 N.W. 2d 63 (Minn. 1991). Just as in this case, the child in *McKown* died of

diabetic ketoacidosis. ***Id.*** at 63-64. The child's parents treated his illness through prayer rather than conventional medicine. ***Id.*** The State charged the parents with second degree manslaughter, which was defined as causing death by "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." ***Id.*** at 65. Like Wisconsin, the Minnesota manslaughter statute contained no prayer treatment exception, but the child neglect statute did in fact afford such protections.

Minnesota's child neglect statute stated the following:

> a) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and which deprivation substantially harms the child's physical or emotional health, is guilty of neglect of a child…

***Id.*** at 65. This same section provided an exception to liability where a parent relied on prayer treatment:

> If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment shall constitute "health care" as used in clause (a).

Thus, the Minnesota child neglect statute protected prayer treatment even when doing so would "substantially harm[] the child's physical or emotional health." The defendant argued, based on the prayer treatment exception, that there was insufficient notice as to when prayer treatment became illegal.

The Minnesota Supreme Court agreed that there was insufficient notice. The Court first stated:

> The [prayer treatment] exception is broadly worded, stating that a parent may in good faith 'select and depend upon' spiritual treatment and prayer, without indicating a point at which doing so will expose the parent to criminal liability. The language of the exception therefore does not satisfy the fair notice requirement inherent to the concept of due process.

***Id.*** at 68. The Court continued:

> Further, the indictments issued against respondents violate the long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct…
>
> The spiritual treatment and prayer exception to the child neglect statute expressly provided respondents the right to "depend upon" Christian Science healing methods so long as they did so in good faith. Therefore the state may not now attempt to prosecute them for exercising that right…[W]e hold that in this particular instance, where the state has clearly expressed its intention to permit good faith reliance on spiritual treatment and prayer as an alternative to conventional medical treatment, it cannot prosecute respondents for doing so without violating their rights to due process.

***Id.*** at 68-69 (internal citations omitted).

The argument for lack of notice is even stronger in reference to Mrs. Neumann's case and the Wisconsin criminal code. In

***McKown***, there is at least some gap between the prayer treatment exception (which protects parents only up to and including "substantial harm" to the child's physical health) and the manslaughter statute (which requires risk of "death or great bodily harm"). Thus, one could conceivably have argued in ***McKown*** that there was fair notice of criminal liability once the child's condition went beyond "substantial harm" and progressed to the type of risk that was encompasses by the manslaughter statute and not by the child neglect statute, i.e. that of a risk of "death or great bodily harm." Here, there is no gap at all between the prayer treatment exception and the homicide statute: the exception protects parents up to and including "substantial risk of death," and that is the same standard criminalized in the reckless homicide statute. If there was insufficient notice in ***McKown***, there is insufficient notice here.

The Florida Supreme Court reached a similar result. ***Hermanson v. State***, 604 So. 2d 775, 17 Fla. L. Weekly S 385 (1992). In ***Hermanson***, the defendant's daughter also died of diabetic ketoacidosis after her parents chose prayer treatment. ***Id.*** at 775-776. The defendants were convicted of child abuse leading to third-degree murder, under a statute which created criminal liability for anyone who "willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment…and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child." ***Id.*** at 776. This statute contained no prayer treatment exception.

However, a separate statute defining the term "abused or neglected child" exempted from that definition a child who did not receive medical attention due to the child's parents' religious beliefs:

> (1) "Abused or neglected child" means a child whose physical or mental health or welfare is harmed, or threatened with harm, by the acts or omissions of the parent or other person responsible for the child's welfare.
>
> …
>
> (7) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:
>
> …
>
> (f) Fails to supply the child with adequate food, clothing, shelter, *or health care,* although financially able to do so or although offered financial or other means to do so; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone.

***Id.*** The Florida Supreme Court ruled that, because of the prayer treatment exception in the definition of "abused or neglected child," parents did not have sufficient notice as to when prayer treatment was protected. The Court stated:

> [The child abuse/third-degree murder statutes, which do not include a spiritual healing exemption] and [the other statute which exempts spiritual healing from the definition of abused child], when considered together, are ambiguous and result in a denial of due process because the statutes in question fail to give parents notice of the point at which their reliance on spiritual treatment loses statutory approval and becomes culpably negligent. We further find that a person of ordinary

> intelligence cannot be expected to understand the extent to which reliance on spiritual healing is permitted and the point at which this reliance constitutes a criminal offense under the subject statutes. The statutes have created a trap that the legislature should address.

***Id.***

The argument for insufficient notice is even stronger in Mrs. Neumann's case than it was in ***Hermanson***. In ***Hermanson*** (as in ***McKown***), there is space between the prayer treatment exception (which protects a parent from liability when her child is "harmed") and the homicide statute at issue (which created liability for "great bodily harm, permanent disability, or permanent disfigurement"). One could perhaps have argued that the parent in ***Hermanson*** had notice that criminal liability would attach once the child's condition went beyond "harm" and progressed to "great bodily harm." Here in Wisconsin, as stated previously, there is no difference between the condition protected under the prayer treatment exception and the condition used to create liability under the homicide statute. If there was no notice in ***Hermanson***, there was no notice here.

Admittedly, appellate courts in other states have rejected the claims of prayer treatment practitioners, but these were cases involving significantly and substantively different claims than those presented in this case. In one case, a conviction was upheld for a parent who had relied on faith healing where the particular state's statutory regime *did not* include any express statutory protection for prayer treatment. ***Commonwealth v. Barnhart***, 345 Pa. Super. 10, 19, 497 A.2d 616 (Super. Ct. 1985). In a different case, there was express statutory protection for prayer treatment, but no Due Process notice claim was raised on appeal. ***Hall v. State***, 493 N.E.2d 433, 435 (Ind. 1986). In yet another case, there was neither express

statutory protection for prayer treatment, nor was a Due Process notice claim raised on appeal. ***Commonwealth v. Nixon***, 563 Pa. 425, 761 A.2d 1151 (2000).

In fact, only two of the prayer treatment claims rejected in other states involved both express statutory protection for prayer treatment and a Due Process notice claim, but both cases are distinguishable from this case because the statutory protection for prayer treatment was not nearly as broad as it is in this case. ***State v. Hays***, 155 Ore. App. 41, 44-46, 964 P.2d 1042 (Ct. App. 1998); ***Walker v. State***, 47 Cal. 3d 112, 763 P. 2d 852 (1988).

In ***Hays***, relied on by the trial court in this case, the defendant was charged with "criminally negligent homicide"[7] for relying on prayer treatment rather than conventional medical care to treat his son's illness. 155 Ore. App. at 44. A separate statute penalizing "criminal mistreatment" expressly exempted prayer treatment from prosecution. ***Id.*** at 45. The defendant argued, based on the prayer treatment exemption in the criminal mistreatment statute, that he did not have sufficient notice of when prayer treatment became illegal. The Court rejected his claim, but only because it was clear that the prayer treatment exemption only applied to charges of "mistreatment" and did not apply to "life threatening" illness. ***Id.*** The Court stated:

> …the statutes permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care,

[7] The statute defined "criminal negligence" as follows: "a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstances exists [sic]. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." ***Id.*** at 44.

> or allow it to be provided, at the risk of criminal sanctions if the child does die. The statute is not vague.

***Id***. at 47. Thus, because of the limitation in the prayer treatment exception, parents had notice that prayer treatment was protected for minor illnesses, but not for more serious "life threatening" illnesses.

That is not the case in Wisconsin. The Wisconsin prayer exception applies even to "great bodily harm," which includes the "substantial risk of death." Wis. Stat. § 948.03. While parents in Oregon are never told that they may use prayer treatment even in the case of "life threatening" illness, parents in Wisconsin *are* told that they may use prayer treatment even when there is a substantial risk of death. This is a crucial difference that renders ***Hays***'s notice analysis inapplicable here. The trial court did not address this difference.

***Walker*** is similarly easily distinguished. There, the defendant was charged with manslaughter and child endangerment for treating her child through prayer rather than conventional medicine. 47 Cal. 3d 112, 119, 763 P. 2d 852 (1988). There was no prayer treatment exception in the manslaughter statute; however, the child neglect statute, which punished "willfully omitting…necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child," did contain an explicit exception for prayer treatment. ***Id***. at 120. The defendant argued, based on the prayer treatment exception in the child neglect statute, that she did not have sufficient notice as to when prayer treatment was no longer protected. ***Id***. at 142. The Court rejected this argument, but, similar to ***Hays***, only because the prayer treatment exception concerned a narrow "fiscal support provision" rather than a provision dealing with substantial risk of death. ***Id***. at 143-144. The Court described the legislative scheme as follows:

> The legislative design appears consistent: prayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability.

***Id***. at 134. The Court returned to this theme in specifically rejecting the notice argument:

> …the purposes of the statutes here at issue are evidently distinguishable: [the manslaughter and child endangerment statutes] protect against grievous and immediate physical harm while [the child neglect statute, which included the prayer treatment exception] assures the routine provision of child support at parental expense.

***Id***. at 143-144. Thus, the Court rejected the notice argument because it was clear that prayer treatment was protected in relation to providing routine support, but not in relation to grievous physical harm. For that reason, ***Walker*** is distinguishable on the same basis as ***Hays***: in Wisconsin, unlike either Oregon or California, the prayer treatment exception explicitly applies to severe physical injury, including injury that creates a substantial risk of death. The notice problem is much more acute under Wisconsin's statutory scheme.

## II. Alternatively, the jury was improperly instructed as to Mrs. Neumann's legal duty to provide medical care to her child.

A legally inaccurate jury instruction "warrants reversal and a new trial […] if the error [is] prejudicial.'" ***State v. Fonte***, 2005 WI 77, ¶15, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted). "'An error is prejudicial if it probably […] misled the jury.'" The beneficiary of the error has the burden of proving lack of prejudice. ***State v. Harvey***, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189.

### A. Wis. Stat. § 948.03 defines the legal duty necessary for omission liability under Wis. Stat. § 940.06(1).

There is no dispute that, because this was an omission-based prosecution, the Neumanns could be found guilty only if they violated a "legal duty" to provide conventional medical care to their children. The trial court gave the following jury instruction concerning this duty:

> One such duty is the duty of a parent to protect their children, to care for them in sickness and in death, and to do whatever is necessary for their preservation, including medical attendance, if necessary.

(123: 69).

That instruction appears to expand the legal duty protected under the prayer treatment privilege, which negates any duty to provide conventional medical care up to, and including, the point at which a child suffers great bodily harm. The Neumanns, therefore, had no legal duty to provide conventional medical care until after their daughter's condition went *beyond* great bodily harm (which includes "substantial risk of death"). The instruction given by the judge appears to go beyond that, creating a broader, generalized duty to provide medical care for the child's "protection," "care," and "preservation." Instead, the jury

should have been instructed that if it found the Neumanns were providing their daughter "with treatment by spiritual means through prayer alone for healing…in lieu of medical or surgical treatment," they had no legal duty to provide conventional medical care until their daughter's condition went *beyond* great bodily harm, meaning *beyond* a substantial risk of death.

The trial court drew its chosen instruction from a 40-year-old tort case, ***Cole v. Sears, Roebuck & Co.***, 47 Wis. 2d 629, 634, 177 N.W. 2d 866 (1970), that dealt with entirely different issues. Even if the language in ***Cole*** might have potential relevance to criminal cases under some circumstances, that language is surely trumped in this case by a specific statute, Wis. Stat. § 948.03(6), that addresses the exact conduct at issue here. In a prosecution based on prayer treatment, it makes no sense to rely on the language in ***Cole*** rather than the prayer treatment statute as the source of the legal duty.

There is a substantial risk that Mrs. Neumann was prejudiced by improper duty instruction. The State argued in closing that its theory of the case depended in part on the duty that exists when there is "great bodily harm":

> 'Great bodily harm' means serious bodily injury […] [T]he conduct here was the defendant's failure to get medical treatment [..] In this case, the great bodily harm is unreasonable and substantial. It is occurring. It is ongoing. In this case, great bodily harm, that is serious bodily injury, occurred and is ongoing for hours[…] The evidence has shown that the defendant was aware Kara was suffering great bodily harm because of how she reacts[,] by her words and her reactions.

(123:14-15).

As extensively explained above, this argument contradicts the prayer treatment privilege. Mrs. Neumann *could not* be found guilty just because she was aware of an ongoing condition of great bodily harm. Because there is a risk that the jury convicted Mrs. Neumann under the State's improper theory of the case, Mrs. Neumann is owed a new trial wherein the jury is instructed to the proper duty—that if there was any duty, it began where Kara's condition progressed beyond a substantial risk of death.

### B. **Alternatively, the trial court's duty instruction is contrary to Constitutional standards.**

Even if this Court concludes the prayer treatment exception somehow does not limit the legal duty to provide medical care, the duty instruction is also legally erroneous for the alternative reason that it violates a parent's Constitutional right to direct the medical care of her child.

The Due Process clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." ***Troxel v. Granville***, 530 U.S. 57, 66 (2000). No doubt a "parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care." ***PJ ex rel Jensen v. Wagner***, 603 F.3d 1182, 1197 (10th cir. 2010). See also ***Dubbs v. Head Start, Inc.***, 336 F.3d 1194, 1203 (10th Cir. 2003).

The scope of this parental right—to control a child's medical care—has not been delineated by the U.S. Supreme Court or Wisconsin Supreme Court, but other courts have found that the right ends when medical treatment is necessary to save the child's life. *See e.g.* ***Custody of a Minor***, 379 N.E.2d 1053, 1062 (Mass. 1978)(Courts which have considered the "natural rights" of the parents have "uniformly decided that State

intervention is appropriate where the medical treatment sought *is necessary to save the child's life*." (Emphasis added)). ***Muhlenberg Hospital v. Patterson***, 128 N.J.Super. 498, 320 A.2d 518, 521 (1974) (The "power of the State is not exercised beyond the area where treatment is necessary for the sustaining of life or the prevention of grievous bodily injury.").

The trial court's instruction in this case thus infringes on parents' Constitutional rights. Under the Constitution, parents have the right to direct a child's medical care at least until the child's life is seriously at risk; but the trial court in this case instructed the jury that the Neumanns had a broader duty to provide medical care whenever necessary for the child's "preservation." As such, the duty instruction in this case contradicted Constitutional standards and likely misled the jury.

## III. The real controversy—whether Mrs. Neumann had a "sincere belief" in prayer treatment that negated the subjective element of reckless homicide—was not fully tried because of incorrect jury instructions and ineffective assistance of counsel.

Before trial, the parties and the court seemed to agree that the critical issue in the case was the sincerity of Mrs. Neumann's belief in prayer treatment—there was broad agreement that such belief in prayer treatment, if sincere, meant that the State could not prove the "subjective awareness" element of reckless homicide (123:69)(to meet subjective element, State had to prove that Mrs. Neumann was aware that her "*conduct created* a risk of death or great bodily harm")(emphasis added). In rejecting the defense's Constitutional pre-trial motions to dismiss, the Court stated that the prosecution could go forward without violating the Constitution because the issue was the sincerity of the Neumanns' belief:

> [I]f they genuinely believed that prayer alone would save their daughter and that she was in no danger of dying without medical care, then they could not be found criminally negligent – regardless of what the trier of fact believes about the reasonableness of their belief.

(20:19). The prosecutor agreed with this assessment of the sincere belief issue:

> I think that every [constitutional] concern that [defense counsel] brings up is addressed because we have to deal with the subjective component of the crime charged, and if the jury believes those beliefs were sincere, then the jury shouldn't get to the point of conviction.
>
> …
>
> If […]they think that a doctor would do more harm than good and a jury finds that sincere, then the state ought not meet that subjective element.

(104:31,40). Commentators have recognized such a "sincere belief" defense in prayer treatment cases. LaFave & Scott, Criminal Law, p. 590, fn. 23 (1972)("an honest belief that prayer is a better cure than medicine, that Providence can heal better than doctors, might serve to negative the awareness of risk which is required for manslaughter in those states which use a subjective test of criminal negligence").

At Mrs. Neumann's post-conviction evidentiary hearing, her husband's trial attorney, Jay Kronenwetter, explained that both he and Mrs. Neumann's trial attorney, Gene Linehan (who passed away after the trial), planned on presenting such a sincere belief defense. Kronenwetter testified:

> My understanding of Mr. Linehan's intent, as far as the subjective element of the offense goes, is that the faith healing aspect of the case, the absence or presence of a genuine belief in the ability of faith healing to cure illness, you know, that was a primary element of our defense, that Dale and Leilani both believed strongly in power of prayer…

(127:11).

Kronenwetter testified that it was Linehan's intent to argue that:

> [T]heir belief in prayer and faith healing prevented them from recognizing that their behavior was creating any risk to their daughter. In fact, quite the opposite; that their belief in faith healing and the power of prayer to heal meant that they affirmatively did not see any risk, and in fact, they thought they were doing what would heal their daughter.

(127:12).

This was also the defense that Mrs. Neumann wanted. David Shea, Mr. Linehan's paralegal who was a constant participant in developing Mrs. Neumann's defense, testified at the post-conviction hearing:

> [T]hey had complete faith that their daughter would be healed and so when we started discussing the different elements, specifically the subjective awareness element, they were very clear that at no point during this entire thing did they ever believe God would deliver or heal her, and they wanted that used, you know, to defend them.

(127:58). Kronenwetter summarized these sentiments during the postconviction hearing: "I'm not sure how you defend the case without going after the subjective element" (127:44). He said, "I pursued the subjective awareness defense *because that was the truth*. (127:48.)(Emphasis added).

Thus, as all parties seemed to agree before trial, the issue at trial should have been whether the Neumanns had a sincere belief in prayer treatment that negated the subjective awareness element of reckless homicide. However, this was not the case put before the jury, either in the jury instructions or counsel's arguments. There are several reasons for this. First, the "religion" instruction the Court gave essentially prohibited any defense based upon religious conduct, including treatment through spiritual means. Second, the duty instruction communicated a broad, absolute parental duty to provide medical attendance whenever necessary to "protect" or "care" for one's children, regardless of any religious practice. Third, the jury should have been specifically instructed that a sincere belief in prayer treatment may negate the subjective awareness element. Fourth, defense counsel's arguments to the jury did not make the sincere belief defense clear.

Mrs. Neumann raises these issues in both the context of interest of justice discretionary reversal and ineffective assistance of counsel. Wis. Stat. § 752.35. Three of the four reasons listed above involve either incorrect, misleading, or missing jury instructions. A proper jury instruction is a crucial component of the fact-finding process. ***State v. Perkins***, 2001 WI 46, ¶41, 243 Wis.2d 141, 626 N.W.2d 762. The validity of the jury's verdict depends upon the completeness of the instructions. ***Id***. Jury instructions must do more than simply state the elements of the crime. They must accurately convey the meaning of the statute *as applied to the facts of the case.* ***State v. Ferguson***, 2009 WI 50, ¶¶14, 31,

317 Wis.2d 586, 767 N.W.2d 187. When jury instructions fail to provide a necessary explanation regarding an element of the offense, they effectively preclude a jury from rendering a verdict on that element. ***Perkins***, at ¶55 (Wilcox, concurring). A court should reverse when the jury instruction "obfuscates the real issue or arguably caused the real controversy not to be fully tried." ***Id***. at ¶12.

Further, as this Court is well aware, a defendant establishes ineffective assistance of counsel when he shows that counsel's performance was deficient, and that the deficient performance prejudiced the defense. ***Strickland v. Washington,*** 466 U.S. 668 (1985). In order for conduct to be deficient, it must fall "below an objective standard of reasonableness." ***Id.*** at 688. Counsel's conduct is prejudicial if but for the error, there is a reasonable probability of a different outcome. ***Id.*** at 694. If this Court finds multiple deficiencies in defense counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. ***State v. Thiel***, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.

### A. Religion Instruction.

The only instruction the Court provided the jury with regard to Mrs. Neumann's religious defense was as follows: "The constitutional freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society" (123:70). Whether an accurate statement of the law or not, this instruction strongly implied that no defense may be based upon religious conduct. A jury could have very likely interpreted this instruction as preventing *any* defense based upon treatment by spiritual means. Rather than informing the jury that a sincerely held belief in treatment by spiritual means is a defense to the

subjective element of reckless homicide, this instruction did the opposite. The trial court erred when it gave this instruction and trial counsel was deficient to the extent that he failed to adequately object to it.

### B. Duty Instruction

As indicated previously, the trial court instructed the jury that parents' duty is to "protect their children, to care for them in sickness and in death, and to do whatever is necessary for their preservation, including medical attendance, if necessary" (123:69). This instruction communicated a broad, absolute parental duty to provide conventional medical services to "protect" or "care" for one's children. The instruction provided no exception for religious beliefs or practice. The jury would have had no reason to believe that a sincerely held belief in prayer treatment is available or consistent with this duty instruction.[8]

### C. Defense Instruction.

The jury was never instructed, clearly or directly, that a sincerely held belief in prayer treatment could negate the subjective element of the reckless homicide statute. The standard instruction that the defendant must be "aware that his conduct created the unreasonable and substantial risk of death or great bodily harm" is simply not specific enough to inform the jury that Mrs. Neumann's sincere belief in prayer treatment could be a complete defense. The jury should have been given a direct, specific instruction on this issue.[9] The

[8] Further, as indicated above in section II, the instruction is wrong because it is overly broad. The legal duty to provide medical care exists, if at all, only at some point beyond "substantial risk of death."

[9] There is no one correct way to phrase such an instruction. The Neumanns' trial attorneys offered one alternative before trial (92:Ex.1).

jury could not realistically be expected to understand, on its own, the direct relationship between the subjective awareness element and sincerity of belief in prayer treatment.[10]

In rejecting these arguments during the post-conviction proceedings, the trial court essentially concluded—contrary to what the court had said during pre-trial proceedings—that there was no such sincere belief defense. The court held:

> The focus of the crime charged here was upon Leilani's and Dale's subjective awareness of the risk of death or great bodily harm resulting from their belief and reliance upon prayer – not on their subjective belief in the effectiveness of prayer. *See Wis. Stat.* §939.24(1). While the two are related, they are not the same. A person could believe [sic] sincere and honest belief in the power of prayer to heal but still be able to recognize when their [sic] child's medical condition is creating a risk of death or great bodily harm. A sincere religious belief in faith-healing could only be a complete defense if it was so absolute that it prevented the person from having a subjective awareness of the risk of death or great bodily harm.

(96:5).

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The post-conviction offered a second, more conservative, alternative during the post-conviction proceedings (93:5).

[10] Without a direct "sincere belief" instruction, there is a substantial likelihood that the jury instead assessed the objective reasonableness of prayer treatment. If so, then the lack of a "sincere belief" instruction encouraged the violation of First Amendment rights, which prohibit juries from assessing the truth or falsity of a defendant's religious beliefs. ***United States v. Ballard***, 322 U.S. 78, 86 (1944)("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury").

Under that analysis, the subjective element would be satisfied by proving only that the Neumanns were aware their daughter was experiencing great bodily harm. But that is simply not the legal standard: the Neumanns must be aware not only that their daughter was experiencing great bodily harm, but that *their conduct was causing* the great bodily harm (123:69). If the Neumanns believed that their conduct—prayer treatment—was the proper way to cure their daughter's illness, then they could not possibly have been aware that their choice of prayer treatment was causing the great bodily harm. LaFave, *supra* ("an honest belief that prayer is a better cure than medicine, that Providence can heal better than doctors, might serve to negative the awareness of risk which is required for manslaughter in those states which use a subjective test of criminal negligence").

### D. Defense counsel's failure to present a sincere belief defense in closing argument.

Although the Court, the prosecutor, the clients, and the defense attorneys expected that the trial would be about the sincere belief defense, Mrs. Neumann's trial counsel simply did not present that defense during the trial. Counsel's closing argument, like the jury instructions, is devoid of a clear explanation that Mrs. Neumann could not be guilty if she sincerely believed that prayer would heal her daughter. Counsel did not explain the connection between prayer treatment and the subjective element of the reckless homicide statute.

In denying Mrs. Neumann's post-conviction claim on this issue, the trial court agreed that there was "room for improvement" in trial counsel's presentation of the sincere belief defense, but the court nonetheless concluded that the defense had been presented well enough (96:6-8; App.B:6-8). As support for that conclusion, the court cited five portions of

counsel's closing argument in which counsel supposedly presented something akin to the sincere belief defense (96:7; App.B:7). But those examples merely prove Mrs. Neumann's point. None of the five examples even mentions the legal elements of the offense, much less applies the facts to those elements or explains how Mrs. Neumann's belief in prayer is relevant to those elements. The first three of the five merely make the point that Mrs. Neumann eventually called 911; while that point is generally helpful to the defense, it does not come close to clarifying the sincere belief defense. The other two points are factual assertions that Mrs. Neumann did all she could to help Kara. Again, this point is generally helpful to the defense, but it does not explain the sincere belief defense.

Alternatively, the trial court concluded that counsel made a strategic decision to de-emphasize the sincere belief defense, because counsel allegedly did not want to reinforce the State's argument that Mrs. Neumann was a "religious extremist" (96:8-9; App.B:8-9). As a starting point, there is no solid evidence that counsel made such a strategic decision. Neither co-counsel (Attorney Kronenwetter) nor counsel's paralegal (David Shea) remotely suggested that counsel was considering or had decided upon a shift away from the sincere belief defense. But more importantly, the basis for such a hypothetical strategic decision is entirely unconvincing: Mrs. Neumann was not on trial for being a "religious extremist," but rather for allegedly committing reckless homicide. Further, there was simply no getting around the fact that the Neumanns have unusual religious beliefs. Those beliefs were the subject of a large portion of the trial, and there was no way counsel could have hoped to avoid addressing those beliefs in his closing argument.

At the same time, the alternative strategy that defense counsel allegedly chose was extraordinarily weak when compared

with the sincere belief defense. While counsel tried to assert that Mrs. Neumann would not have been able to know that her daughter's medical condition was very serious, there was uncontradicted evidence to the contrary—during the period close to her death, Kara was in a comatose and unresponsive state (113:205-208; 121:19-20). As the State argued, Kara was undeniably experiencing a serious medical problem, and her parents necessarily would have been aware of this (123:14-15). Indeed, Mrs. Neumann herself readily acknowledged in her police interview that she was aware Kara was experiencing a serious medical problem—that is the very reason she and Dale fervently prayed over her and enlisted others to pray for her. Counsel's argument was thus contradicted by the Neumanns' own statements.

Contrary to the trial court's reasoning, the only viable defense was to acknowledge the Neumanns' sincere beliefs, and to use those beliefs as a strong basis for acquittal. That argument was supported by the facts, readily available under the law, and true to what the clients had been saying all along. The Neumanns were aware that the situation was very serious, but they were dealing with it in the best way they knew. Testifying at the post-conviction hearing, Attorney Kronenwetter agreed:

> If the shift to a defense on the objective element is arguing that a reasonable person wouldn't have noticed illness, certainly then that was not a strong defense.
>
> ….
>
> [The Neumanns] recognized there was a condition that needed to be addressed, they differed on the method of addressing it.

(127:47,48).

Thus, there is no solid evidence, or compelling rationale, supporting the notion that counsel made a conscious strategic shift away from the sincere belief defense. Rather, the more likely explanation is that counsel simply made a mistake in failing to make the proper argument. Testimony from the post-conviction hearing suggests that counsel's failing health may have played a role in this. As counsel's paralegal, David Shea, explained, counsel had pre-existing health issues in the years before the trial. Shea said that, during these years, counsel appeared to be "suffering every day that he was awake. And some days extremely so" (127:64).

These health issues became more of a problem leading up to Mrs. Neumann's trial. Attorney Kronenwetter agreed that Linehan was "fatigued" and "tired" leading up to and during trial (127:24). Shea noticed that Linehan required more sleep and breaks leading up to Mrs. Neumann's trial (127:66). Kronenwetter was aware of these daytime naps, and was aware of Linehan's use of Vicodin and what Linehan referred to as "narco" (127:22).

During trial, these health concerns culminated to a near breaking point. Shea testified that although he was concerned about Linehan's health "the whole time" during the case, Linehan's symptoms were "far more pronounced during the trial" (127:67). Shea testified that "observing him in court, as I had done so many times before, to me it was quite apparent that he was not feeling well to the point where I noticed it more than any other time" (127:67). Kronenwetter recommended to Linehan that he consider requesting a continuance at least twice during the trial (127:24).

Besides health concerns, on the evening of the first day of trial an individual stole Linehan's gun, came to his office, and threatened Linehan's wife (127:70). This required dealing

with law enforcement until nearly 11:00 PM during that first day of trial. (127:71). Shea noticed that Linehan's health problems appeared particularly acute the next morning. (127:71). Kronenwetter testified that this incident obviously would have been a distraction for Linehan. (127:26).

The combination of health concerns and personal crisis likely affected Linehan's ability to work on Mrs. Neumann's case. When asked whether the gun incident and ongoing health issues affected Linehan's ability to concentrate and put on a proper defense, David Shea responded, "I believe so. With absolute certainty, as much as I can believe it, I believe that." This reduced physical ability to concentrate coincided with, and likely led to, counsel's failure to present the sincere belief defense.

On the whole, whether viewed individually or cumulatively, the above issues critically impaired the fairness of the trial, and thus warrant a new trial either in the interest of justice or based on ineffective assistance of counsel. The ultimate question, regardless of which procedural mechanism is used, is whether the jury actually understood it *could* acquit Mrs. Neumann based upon her belief in, and practice of, prayer treatment. From the jury instructions and closing argument, the answer is no, because it simply would not have been clear to an average juror how Mrs. Neumann's sincere belief in prayer interacted with the legal elements of the offense. For that reason, this Court should order a new trial in the interest of justice.

To the extent defense counsel failed to request proper instructions, or failed to properly argue the sincere belief defense, counsel was ineffective. Based on the facts, the sincere belief defense was the only viable defense—it was the defense the clients wanted, the defense the lawyers had agreed to pursue before trial, and the defense that even the

prosecutor and court had acknowledged. Counsel had an obligation to ensure that the jury instructions and the closing arguments made clear how the defense operated under the law, and how it applied to the facts. Any significant failure to do so constituted deficient performance.

Any such deficiency prejudiced Mrs. Neumann. It is very likely that the jurors did not understand or consider the sincere belief defense. Had they done so, they likely would have had reasonable doubt. The evidence demonstrated that Mrs. Neumann resorted to prayer because she knew her daughter was very sick and wanted to heal her. The State presented no evidence that Mrs. Neumann's belief in prayer treatment was anything but sincere. Had the jurors understood that this sincere belief was a defense, there would have been a reasonable probability of reasonable doubt.

The trial court concluded that, even if it accepted that there was deficient performance, it "most likely" would not have found prejudice (96:14; App.B:14). But the trial court reached this conclusion only by again misconstruing the sincere belief defense. The court stated that the subjective awareness prong asks only whether the Neumanns had a "subjective awareness that Kara's medical condition presented a risk of death or great bodily harm" (96:14; App.B:14). As previously explained, the reckless homicide statute requires more than mere awareness of the illness; it requires that the defendant is aware that *her conduct is causing the illness*. There can be no such awareness of causation if a person believes that prayer, not conventional medicine, is the most likely healing method.

## CONCLUSION

Mrs. Neumann respectfully requests that this Court reverse her conviction.

Respectfully submitted this ___ day of _____, 2011.

_____

Byron C. Lichstein

State Bar No. 1048483

_____

Erin K. Deeley
State Bar No. 1084027

_____

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## CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is _____ words.

_____

Byron C. Lichstein
State Bar No. 1048483

## CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

_____

Byron C. Lichstein
State Bar No. 1048483

## CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

Byron C. Lichstein
State Bar No. 1048483

## TABLE OF APPENDICES

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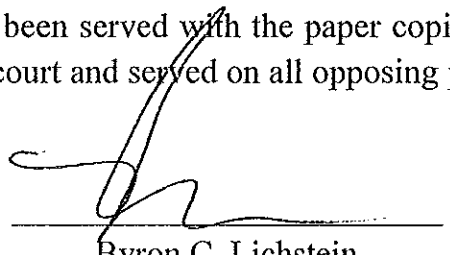

Byron C. Lichstein
State Bar No. 1048483

## TABLE OF APPENDICES

TATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | MARATHON COUNTY

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FILED
2009
MARATHON COUNTY
CIRCUIT COURTS

tate of Wisconsin vs. Leilani E Neumann

**Judgment of Conviction**
Corrected
Sentence Withheld, Probation Ordered

ate of Birth: 02-25-1968

Case No.: 2008CF000323

The defendant was found guilty of the following crime(s):

| t. | Description | Violation | Plea | Severity | Date(s) Committed | Trial To | Date(s) Convicted |
|---|---|---|---|---|---|---|---|
| | [939.05 PTAC, as a Party to a Crime] | | | | | | |
| | 2nd Degree Reckless Homicide | 940.06(1) | Not Guilty | Felony D | 03-23-2008 | Jury | 10-06-2009 |

**IT IS ADJUDGED** that the defendant is guilty as convicted and sentenced as follows:

| t. | Sent. Date | Sentence | Length | Agency | Comments |
|---|---|---|---|---|---|
| | 10-06-2009 | Probation, Sent Withheld | 10 YR | Department of Corrections | |

onditions of Sentence or Probation

**Obligations:** (Total amounts only)

| Fine | Court Costs | Attorney Fees | ☐ Joint and Several Restitution | Other | Mandatory Victim/Wit. Surcharge | 5% Rest. Surcharge | DNA Anal. Surcharge |
|---|---|---|---|---|---|---|---|
| | 546.80 | | TBD | | 85.00 | | |

**Conditions**

| Ct. | Condition | Length | Agency/Program | Begin Date | Begin Time | Comments |
|---|---|---|---|---|---|---|
| 1 | Jail Time | 180 DA | | | | during the first 6 years of probation she will serve 30 days alternating the months of March and September with Dale Neumann. With an additional 6 months - stayed to be used for rule violations.<br>Motion to stay jail pending appeal - GRANTED |
| 1 | Community Service 120 HR | | | | | Community Service each year of probation. |

| Ct. | Condition | Agency/Program | Comments |
|---|---|---|---|
| 1 | Restitution | | for the emergency transportation |
| 1 | Costs | | Court costs<br>Witness fees |
| 1 | Other fees | | Sheriff process fees |
| 1 | Other | | Protect children until they reach the age of majority.<br>Take children to doctor if; injury causing profuse bleeding; child so weak he/she cannot talk, walk or consume beverages or if child is non responsive.<br>Continue health checks for the children on a quarterly basis and nurse to provide random checks.<br>Pay supervision fees. |

**ursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:**

he Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.

he Defendant is ☐ is not ☐ eligible for the Earned Release Program.

App. A-1

TATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | MARATHON COUNTY | *For Official Use Only*

tate of Wisconsin vs. Leilani E Neumann

**Judgment of Conviction**
Corrected
Sentence Withheld, Probation Ordered

ate of Birth: 02-25-1968

Case No.: 2008CF000323

**IT IS ADJUDGED** that 0 days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

**IT IS ORDERED** that the Sheriff shall deliver the defendant into the custody of the Department.

BY THE COURT:

**Distribution:**

Vincent K. Howard, Judge
LaMont K Jacobson, District Attorney
Gene Linehan, Defense Attorney

Circuit Court Judge/Clerk/Deputy Clerk

11/10/09

Date

A-2

STATE OF WISCONSIN CIRCUIT COURT MARATHON COUNTY

Branch 3

STATE OF WISCONSIN,
Plaintiff

v.

LEILANI E. NEUMANN,
DALE R. NEUMANN,
Defendants

DECISION ON POST-CONVICTION MOTIONS

Case #08-CF-323
Case #08-CF-324

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The defendants, Leilani E. Neumann (Leilani) and Dale R. Neumann (Dale)(collectively as Neumann) were tried separately but ultimately both were convicted of Second Degree Reckless Homicide of their eleven year old daughter, Madeline Kara Neumann (Kara), contrary to *Wis. Stat.* §*940.06*. Kara died of untreated diabetes on March 23, 2008 while her parents prayed for the restoration of her health in accordance with their religion. The Neumanns now each seek a new trial on the grounds of ineffective assistance of trial counsel. For the reasons set forth herein, those motions are each denied.

## LEGAL ENVIRONMENT

An ineffective assistance of counsel claim requires proof of two elements: (1) deficient performance by counsel and (2) prejudice to the defendant as a result of that deficient performance. **Strickland v. Washington**; 466 U.S. 668, 687 (1984); **State v. Roberson**; 2006 WI 80, ¶28; 292 Wis.2d 280; 717 N.W.2d 302. The defendant bears the burden of establishing both elements. *Strickland*; 466 U.S. at 687. To establish deficient performance, the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that it "might be considered sound trial strategy." *Id.* at 689. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The "reasonable probability" required under this test "is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The determination must be based upon a realization that "an accused is not entitled to the ideal, perfect defense or the best defense but only

App. B-1

to one which under all the facts gives him reasonably effective representation," **State v. Harper**; 57 Wis.2d 543, 556-557; 205 N.W.2d 1 (1973).

Both allege their respective trial counsel were ineffective on the grounds that they; (1) failed to preserve a faith healing defense, (2) failed to object to the religion instruction given by the court, and (3) failed to submit an acceptable theory of defense instruction. Leilani also claims ineffectiveness for failure to make a sincere religious belief argument and also seeks a new trial in the interests of justice. Finally, Dale argues ineffectiveness of counsel for failure to object to advising the jury of Leilani's prior conviction on the charge and to propose an answer to a question asked by the jury during deliberations.

## FAITH HEALING DEFENSE

Both

Before trial both sought to dismiss the charges based upon a faith healing defense under *Wis. Stat.* §*948.03(3)(6)* providing a defense for "treatment by spiritual means through prayer alone." The court denied that motion on the grounds that (1) the defense provided that a person could not be found guilty "under this section," referring to physical abuse of a child; (2) that chapter, referring to crimes against children, includes crimes from bodily harm to children but none for causing death to a child, and; (3) it does not limit prosecutorial discretion to prosecute for such death of a child under Chapter 940 of the Wisconsin Statutes. Since the parties have now stipulated that both trial attorneys did preserve their objection, this will not be discussed further.

## RELIGION INSTRUCTION

Both

The court gave the following instruction to the jury concerning the effect of the constitutional freedom of religion on this case: "The constitutional freedom of religion is absolute as to beliefs but not as to conduct, which may be regulated for the protection of society." (*Trial Transcript, 5/22/09*, p. 70.) During the jury instructions conference, trial counsel for the parties had agreed that the instruction was accurate and neutral, but now argue that their counsel were deficient for failing to object to it contending that the instruction "incorrectly negated the sincere

belief defense." (*Defendant's Brief in Support of Motion for Post-Conviction Relief*, p. 6.) Both parties are mistaken.

"Free exercise of religion does not necessarily mean the right freely to act in conformity with a religion. 'The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.'" **Lange v. Lange**; 175 Wis. 2d 373, 383-84; 502 N.W.2d 143 (CA, 1993) quoting **Employment Div., Dept. of Human Resources v. Smith**; 494 U.S. 872, 877 (1990). However, courts have "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" on the basis that the individual's religion dictates a course of conduct at odds with the law. *Employment Div.* at 879 (quoted source omitted). The religion instruction given by this court gave correctly describes the limits of the religious freedom by distinguishing between beliefs and actions.

That distinction has been made repeatedly in First Amendment case law. As far back as 1879, the United States Supreme Court declared, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." **Reynolds v. United States**; 98 U.S. 145, 166 (1879). And over a hundred years later, the Court reiterated that point: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." **Employment Div.**; 494 U.S. at 878-79. While "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such ... the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" **Sherbert v. Verner**; 374 U.S. 398, 402-03 (1963) (emphasis and final alteration in original).

Therefore, since the instruction as given was accurate and correct neither trial attorney cannot have performed deficiently in failing to object to it.

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## THEORY OF DEFENSE INSTRUCTION

Both

Both parties also claimed that their respective trial counsel were ineffective due to failing to propose an adequate theory of defense instructions. Leilani's trial counsel initially offered this theory-of-defense instruction: "If Leilani Neumann believed that prayer would heal her daughter, Madeline Kara Neumann, then you must find her not guilty." The court rejected that instruction, since it did not accurately reflect the law.[1] While Dale recognizes that the standard instruction for second degree reckless homicide contains a description of the subjective element, he argues that the jury "could not be expected to understand the relationship between the subjective awareness element and sincerity of belief in faith healing without specific direction that one is, in fact, related to the other" (*Postconviction Motion*, p. 8). He goes on to argue that failing to instruct the jury about that relationship was tantamount to instructing the jury that faith-healing was no defense at all. He argues that the jury should have been instructed that Dale's sincere belief in faith healing was a complete defense.

A "theory of defense" instruction must be given when; (1) it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense; (2) it is supported by the evidence, and; (3) it is not adequately covered by the other instructions in the case. **State v. Davidson**; 44 Wis.2d 177, 191-192; 170 N.W.2d 755 (1969); *Wis. JI-Criminal, 700.* A theory of defense may be found in the statutes or case law.

This court gave the religion instruction to clarify to the jury, in a general way, that which marks the line between one's Freedom of Religion and the government's right to regulate conduct for public safety. The modification to the standard instruction to meant to give a more precise line with respect to a parent's duty to provide medical treatment to their minor children.[2] A theory of

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[1] The court's reasons for finding that the instruction to be inaccurate differ from those offered by the State. The State argued that Leilani did not have any "sincere belief" defense available because even before Kara died she was in an ongoing state of great bodily harm and Leilani was aware of that state. The problem with that argument is that it ignores the need for awareness not only of Kara's condition but also of the causal link between that condition and Leilani's conduct. The point of the "sincere belief" defense is that Leilani's belief prevented her from seeing that causal link

[2] The court's preferred language would have relied upon language found in **State v. Williquette**; 129 Wis.2d 239, 255; 385 N.W.2d 145 (1986) quoting **Cole v. Sears, Roebuck & Co.**; 47 Wis.2d 629, 634; 177 N.W.2d 866 (1970). ["It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to car for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and

defense instruction would go one step further. But the theory the defendants advocated by them is that a sincere and honest religious belief alone is sufficient to constitute an absolute defense to the charge. That argument, however, reflects a fundamental misunderstanding about the role of religious belief in a faith-healing defense.

The focus of the crime charged here was upon Leilani's and Dale's subjective awareness of the risk of death or great bodily harm resulting from their belief and reliance upon prayer – not on their subjective belief in the effectiveness of prayer. *See Wis. Stat. §939.24(1).* While the two are related, they are not the same. A person could believe sincere and honest belief in the power of prayer to heal but still be able to recognize when their child's medical condition is creating a risk of death or great bodily harm. A sincere religious belief in faith-healing could only be a complete defense if it was so absolute that it prevented the person from having a subjective awareness of the risk of death or great bodily harm. To be legally correct, a theory of defense instruction would have had to recognize that distinction. Without it, the jury would have also misunderstood the law.

A theory of defense instruction must also be supported by the evidence. The state presented considerable evidence indicating that despite their religious beliefs, the statements and acts of the Neumanns showed that the understood the risk of harm to Kara; that was why they were seeking prayer from so many people. The defense relied upon other evidence to show that both has a sincere, honest and deeply held belief in the power of prayer alone to heal. In viewing the evidence most favorably to the defense, a theory of defense instruction based upon a correct statement of the sincere belief in prayer instruction would have been supported by such evidence.

Finally, a theory of defense instruction requires that such a defense is not adequately covered by other instructions in the case. The standard instruction for Second Degree Reckless Homicide includes and explains the need for a subjective awareness element of the offense; that "the defendant was aware that (his)(her) conduct created the unreasonable and substantial risk of death or great bodily harm." *Wis. JI-Criminal 1060.* That instruction was given in this case.

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preservation, including medical attendance if necessary." The defense objected since they believed it emphasized an aspect of the case they did not want to emphasize.

(*Trial Transcript, 7/31/09*, p. 52). It advised the jury about the subjective awareness requirement, which Dale's trial counsel then argued extensively in his closing. A correct "sincere belief" defense is based upon one's belief leading to a state of mind that prevents a person to perceive and be aware of the risk of harm. Since the standard instruction for the offense explains the need for a subjective awareness of the risk, the theory of defense is covered by the standard instruction. Accordingly, a theory of defense instruction is not strictly required in this case.

The Civil Jury Instructions Committee cautioned that a rigid application of this framework may, in some cases, be counterproductive to an instruction that might be helpful in making the standard instructions more understandable.[3] *Wis. JI- Criminal, 700.* That might have been the case here. However, the defense request for a theory of defense instruction was legally incorrect and the court felt that a correct one might be criticized as over-emphasizing that which the defense did not wish to emphasize.

Because the jury was adequately advised about the law upon which the "sincere religious belief" defense was based when it was instructed about the subjective awareness element of criminal recklessness, trial counsel was not ineffective for failing to request a specific theory of defense instruction.

## ARGUE SINCERE RELIGIOUS BELIEF — Leilani

Leilani also argues that her trial counsel failed to present a sincere religious belief defense to the jury during his closing argument. But while the argument may not given the kind of emphasis that Leilani now argues it should have been given, it is inaccurate to say that it was not present at all.

To be sure, the words "sincere belief" did not appear in the closing argument. But a significant portion of the argument did focus upon Kara's condition and whether Leilani could or should have been aware of how serious it was; that was clearly related to the issue of her

[3] An example would be when the crime itself and its relationship to the defense is complicated or complex such that the jury would be aided by an instruction that helps focus their attention on the relevant and critcal issue of the case.

subjective awareness, though not in the same way as the "sincere belief" defense. But the "sincere belief" argument is present in statements like these:

- "The big point that I want to make is as soon as Leilani understood that Kara's condition was perhaps beyond prayer she acted. Remember, every doctor with the exception of one ... testified that the breathing was getting better. Sunday morning the breathing got better and she appeared to be coming out of it. I think any parent or anybody at that point would have been able to establish that, hey, she got better. Maybe the prayer is working. Maybe she is just getting better but it appeared to everyone that she is getting better and then she suddenly died. It was Leilani who instructed the Wormgoors to call 911." (*Trial Transcript, 5/22/09*, p. 45-46).

- "So she is the one that summonsed help when she realized that it was needed and beyond her control." (*Id.* at p. 47).

- "So as soon as she was aware that her breathing was not normal again, that it had taken a reversal, she had them call 9-1-1." (*Id.* at p. 48).

- "The guilt or innocence is based upon what was trying to be done to help Kara, what was Leilani trying to do. Was she trying to place her into a situation that it was more life threatening than she was already in or was she trying to help her. That's what it's about. . . . It is to some degree about prayer because they believe in prayer. They believe it helps." (*Id.* at pp. 53-54).

- "They are saying that in all essence Leilani Neumann killed Kara with her actions. I want you to take that as seriously as it is. Because this woman did everything she could to help her." (*Id.* at p. 56.)

As with the jury instructions, hindsight can sometimes reveal places where there is room for improvement. Trial counsel certainly could have better explained and emphasized the "sincere belief" defense and how it related to the subjective awareness element. But "room for improvement" is not the same as deficient performance. With the benefit of hindsight, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*; 466 U.S. at 689. But "[a] fair assessment of attorney performance requires that every

effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Such is the case here.

As Attorney Linehan rose to make his closing argument, the State had just closed it's argument contending that his client, Leilani, was a "religious extremist" with everything it connotes in our society today. It argued that with an awareness of the risk, Leilani had abandoned her parental duty to care for her daughter and how she labeled herself as more "radical" in her religious beliefs than most (*Trial Transcript*, 2/22/09, p. 36). It then stated;

> ...it is clear that Leilani Neumann was focused on herself and her beliefs that weekend of Kara's sickness and death. She told the detective it's not that I'm against doctors or medicines, but I just felt like, you know, my faith was being tested. I never went through an experience like that before in my whole life and I just thought, man, this is the ultimate test.
>
> Religious extremism can be dangerous. In this case it was fatal. This defendant made this situation about herself, about her faith, about her being tested, about her staying strong to pass the ultimate test. Unfortunately, she made her daughter the test subject. She abandoned her parental duty by failing to take actions to protect and care for her daughter and instead focused on her own interests. (*Trial Transcript*, 2/22/09, p. 37).

That is the context and perspective of trial counsel at that time. Trial counsel had to make a quick decision on the strategy to take in his closing argument; whether to emphasize or de-emphasize the "sincere belief" argument in light of the "religious extremist" arguement. To emphasize might also show her to be a blind to the consequences of what she said that she actually observed (weakness to the point of not being able to walk, labored breathing, unable to eat solid food and eventually taking liquids by syringe only, unconsciousness and unresponsiveness, etc.) and her actions (frantic phone calls to persons near and far to pray for Kara, etc.). The evidence shows that Kara's decline occurred over only three days and the doctors did testify that in some respects ketoacidosis may resemble the flu and that one suffering from it will actually show improved breathing just before they die, something a layperson probably would not know. Using that, while de-emphasizing the "sincere belief" defense, would just make her a mother who is also a devote Christian with a strong belief in prayer who subjectively "misinterpreted" the medical symptoms rather than a radical "religious extremist." We know that he elected to directly

challenge the "religious extremist" charge, to de-emphasize the sincere religious belief defense and that he lost in doing so.[4]

In hindsight, one can say that trial counsel might have been able to do a better job. But under the context and perspective of trial counsel at that time, the court finds that he made a reasonable tactical decision that cannot be said to be outside the "wide range of professionally competent assistance," even if another attorney would have given more prominence to the "sincere belief" aspect of the defense. Accordingly, trial counsel cannot be found to have deficiently performed as counsel by giving less emphasis to the "sincere belief" defense.

## LEILANI'S PRIOR CONVICTION Dale

During voir dire in Dale's trial, prospective jurors were informed of his wife's previous conviction for the same offense and then questioned about their ability to decide this case entirely and independently based upon the evidence produced during his trial. Dale first appeared to claim ineffective assistance for failing to object to informing each prospective juror of the conviction but in its reply now seems to acknowledge that it was a strategic decision made necessary when the court indicated that a juror's prior knowledge of the conviction would not be an automatic disqualification.

### Disqualification for Prior Knowledge

The court cannot recall any real arguments concerning this issue and nothing appears on the record concerning such an argument or decision. If a real bone of contention, the arguments and the court's decision would have been placed on the record. Instead, the court probably just remarked off the record that prior knowledge alone does not necessarily disqualify a juror. But

[4] This court is aware that Attorney Linehan had heart and obvious breathing problems for years and had seen him try cases with those medical problems. It was also aware of his back problems during this trial and that he elected to not take pain medications during the trial that might effect his performance. The incident regarding security concerns occurred on the second day of trial and the individual involved was found and taken into custody within two days. His closing arguments required a quick reaction to that made by the State. But his response was immediate, on point and equally charged with emotion. It is typical of such a response that this court has seen Attorney Linehan perform many times before despite his health concerns. Those continuing conditions, and the back pains he experienced during this trial, did not result in any obvious reduced mental ability or legal acumen on Attorney Linehan's part.

that is the law. Whether a juror shows subjective bias requires an inquiry of "whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any *opinion* or *prior knowledge* that the juror might have." **State v. Keirnan**; 227 Wis.2d 736, ¶15; 596 N.W.2d 760 (1999) [emphasis added]. "Discerning whether a juror exhibits this type of bias depends upon that jurors verbal responses to questions at voir dire, as well as that juror's demeanor in giving those responses." *Id.* at ¶15.

Here the charge required an independent finding of each defendant's individual subjective awareness of whether their conduct presented a risk of death or great bodily harm to their daughter. While much of the evidence overlaps, there were some significant differences between them as well. For example, Dale indicated some question of whether they should take Kara to the hospital that was rejected by Leilani. Those facts would tend to show that Dale might be able to appreciate the degree of risk to Kara's health while at the same time indicating that Leilani could not. Therefore, the court felt that an automatic disqualification for prior knowledge of the conviction would not be prior without an individual inqury of whether they were a reasonable person willing to set aside such prior knowledge in assessing the guilt of a different person under evidence related to that person alone; a factor emphasized during the individual voir dire.

**Informing All Juror of Conviction**

It is admittedly extraordinary to actually inform potential jurors of a prior conviction of a co-defendant. But there is no real denying that these trials were also very extraordinary.

These cases involved a collision between the State's right to protect public safety by prosecuting possible criminal activity thereby generating intense media attention, community commentaries and public discussions, all focused in the defendants' county of residence. The State indicated that it probably would call Dale to testify at Leilani's trial necessitating two separate trials meaning media coverage of the first trial may affect the second trial. A change in venue and/or a delay between the two trials are the common ways to help reduce or eliminate pretrial publicity concerns. But both of the defendants demanded a jury of their peers selected from

Marathon county thereby eliminating the change of venue option.[5] Then the option of a significant delay between trials was also eliminated when Dale exercised his right to a speedy trial.[6] On top of that, there is always a risk in some cases in which an individual who indicated they had heard nothing about the case or would not have any prejudice learns that they do once trial has begun the evidence is introduced. Given all of those factors, the trial court faced not a smooth sea and fair winds but rather a perfect storm that would make it more difficult to keep upright the good ship "Fair Trial" upon a sea of impartial jurors.

Never-the-less the court, aware of case law on the subject, did not anticipate that the jury in Dale's trial would be informed of Leilani's prior conviction of the offense, as indicated by the short explanation of the case given in the jury questionnaire used in his case. What knowledge they might have about the case would be presented in the answers the potential juror gave and they could be questioned about during individual voir dire about any prejudicial effect it might have. But on the first day of trial the attorneys advised the court in chambers, later placed on the record, that they had reached a stipulation. Since prior knowledge about the case alone would not necessarily disqualify a juror, both were concerned that there would be a mix of jurors on the panel; some that would have at knowledge of the prior conviction and others that did not. Under those circumstances, they were concerned that there would be a realistic probability that during deliberations knowledge of the prior conviction might become known to the jurors that would have no prior knowledge that might then prejudice that juror requiring a mistrial at that late stage.[7] Worse yet, it might cause such prejudice that might not be made known to the court and parties that might result in a tainted conviction. Both felt that it would be better to face the challenge

[5] The court retained at least a hope that Dale might change his mind about an out-of-county jury after the results of the first trial became known to him.

[6] The court agrees that a defendant's choice to exercise these constitutional rights does not dilute, compromise or waive his constitutional right to a fair trial before an impartial jury. It is referred to only to indicate the extraordinary nature of the trial and decisions that had to be made to also guarantee the fair trial and impartial jury rights as well.

[7] Of course, potential jurors that did not indicate any prior knowledge of the conviction would not be informed of it and hence not questioned about what, if any, prejudicial effect it might have.

head-on and have an known impartial jury that all had the same knowledge concerning the prior conviction and could be questioned about any prejudicial effect it might have.

This was a real concern in this case. Here, the parties had contemplated the problem, discussed it between themselves and then arrived at a proposed solution to the problem that both agreed to.[8] In the ordinary case this court would have taken care not to disclose such disclosure a conviction to a jury and confident that Dale's trial counsel would have also insisted upon it. But Dale's decision to have a Marathon County jury and a speedy trial, in the face of intense publicity given to the case, presented extraordinary issues regarding a fair trial to both the trial court and counsel. Since these are constitutional rights, he had every right to exercise them without any dilution, compromise or waiver of his right to a fair trial before an impartial jury. But when faced with extraordinary issues, extraordinary solutions are also often necessary.

In the hindsight of a conviction it is easy to challenge this decision. But the court is required "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*; 466 U.S. 689. In doing so here, it appears to the court that trial counsel made a sound strategic decision made to an extraordinary situation that challenged Dale's right to a fair trial. Accordingly, the court cannot find that trial counsel's agreement to be defective performance.

## PROPOSE ANSWER TO JURY INQUIRY

Dale

During its deliberations, the jury sent out a question about Dale's faith-healing or "sincere belief" defense: "Was Dale's belief in faith-healing something that makes him not liable for not taking Kara to the hospital, even though he was aware to some degree she was not feeling well?" The State and Dale's trial counsel could not agree on an answer other than referring the jury back to the instructions given at the close of the trial. Dale now argues that his trial counsel should

[8] The court recalls inquiring in chambers about the possibility of an instruction during deliberations that, if selected, the juror would not disclose such knowledge to the other jurors but the parties felt the risk of inadvertent disclosure was still too great. However, that apparently was not placed on the record.

have offered "an answer explaining how a sincerely held religious belief in faith healing may constitute a defense under the subjective element." (*Postconviction Motion*, p. 8).

That certainly would have been an option and, in hindsight, it may be one that Dale wishes his attorney had taken. But again, the court is to eliminate the effects of hindsight but instead look at the circumstances and perspective of trial counsel at the time of the challenged conduct. Indeed, some proposals were bantered about without any agreement. The short form answer the defense wanted was "yes" while the State argued "no." But both would have been incorrect for different reasons. The question referred to an awareness that Kara was "not feeling well" when in fact the law requires an awareness of a risk of death or great bodily harm – but that is precisely what both trial defense attorneys most strenuously objected to throughout the proceedings.

The objection assumes that the court would have adopted and given any answer that the defense would have proposed. However, as explained above, a religious belief does not constitute an absolute defense to the charge unless so strong that it precludes a subjective awareness of the risk of death or great bodily harm is present. It is such a subjective awareness that is an element of the offense. But such an instruction is just what trial counsel was most strenuously opposed to. Trial counsel did well enough by arguing against the instruction the court was inclined to give and instead have the court do what it did; to just refer the jury back to the instruction given and counsels' arguments was the best the defense could have hoped for.[9] Therefore, trial counsel's failure to propose an answer to the jury's inquiry cannot constitute defective performance.

## PREJUDICIAL EFFECT

Both

The lack of deficient performance does not necessarily end this inquiry since the focus is not upon the outcome but rather on the reliability of the proceedings. Therefore courts may decide ineffective assistance claims based upon prejudice alone without considering whether counsel's performance was deficient, *Roberson*; 292 Wis.2d at ¶28 citing *Strickland*; 466 U.S. at 668. "To

[9] One thing this court has learned is that an instruction given with all other instructions at the jury charge has a more of an impartial affect. The court's answer to a jury inquiry directly upon the issue of the case, on the other hand, is inclined to have greater influence upon the jury and its ultimate effect. That to influenced the court's decision just to refer such sensitive inquiries back to the original instruction given on the issue regardless of whatever imperfections it might have.

establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome." *Roberson*; 292 Wis.2d at ¶29, citing *Strickland*, 466 U.S. 694. Under this standard, a defendant is not required to show by a preponderance of the evidence that the outcome would have been different, only that his or her conviction is unreliable because of a breakdown in the adversarial process, **State v. Johnson**; 126 Wis.2d 8, 13; 374 N.W.2d 637 (1985).

The court, in this case, most likely would not have found a reasonable probability sufficient to undermine confidence in the result. The primary issue here was whether each defendant (depending upon who was on trial) had a subjective awareness that Kara's medical condition presented a risk of death or great bodily harm or whether their belief in prayer was so strong so as to preclude such an awareness. Each defendant claimed that it was but the jury could make that determination based only upon the totality of what they acknowledge observing about her condition, what they said and what they did having a bearing on that inquiry. Both observed that Kara was to weak to walk or sit on the toilet and had to be carried from Saturday night, took liquids by a syringe, had labored breathing that got better on Sunday, but eventually was unable to communicate, was unconscious and unresponsive. As far as what was said, in phone calls to others (usually by Leilani), Kara was described as "seriously ill" on Saturday (Elvira Neumann & Jennifer Peaslee), but in a "coma" on Sunday (Elvira Neumann, Althea Wormgoor & Jennifer Peaslee) and that Kara was "hanging between life and death," (Althea Wormgoor[10]). While no author was disclosed, there also was an e-mail from the residence to family and friends stating "help, our daughter needs emergency prayer." The many frantic phone calls Saturday night and Sunday morning seeking prayer for Kara from family and friends are consistent with showing a significant concern over Kara's medical condition.

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[10] While there is a question as to credibility by all witnesses, the jury would have to consider that there had been a falling out and "disassociation" between the Neumanns and the Wormgoors and that the Wormgoors where reluctant to come over to help pray for Kara when that was allegedly said.

Based upon that, the prejudicial effect of any deficient performance probably would be insufficient to undermine confidence in the outcome.

## INTERESTS OF JUSTICE Leilani

Circuit courts have authority to grant convicted criminal defendants a new trial in the interest of justice in the course of a post-conviction motion under *Wis. Stat. §974.02*. **State v. Henley**; 2010 WI 97, ¶¶63-65; 328 Wis. 2d 544; 787 N.W.2d 350. "[A] new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." **State v. Hicks**; 202 Wis. 2d 150, 159-60; 549 N.W.2d 435 (1996). Leilani argues that, because her "sincere belief" defense was not put before the jury, the real controversy in this case has not been fully tried.

However, the "sincere belief" defense was, in fact, placed before the jury. It was simply not placed there in the manner that Leilani wishes it had been. The jury was properly advised of the subjective awareness element and it received evidence of Leilani's belief that prayer would be sufficient to heal her daughter. Under the circumstances, it is not accurate to say that the real controversy has not been tried.

## CONCLUSION

All parties agreed that the *faith healing defense* was adequately preserved for appeal. The *religion instruction* paraphrases a long line of U.S. Supreme Court cases on the distinction between religious belief, which is absolutely protected, and conduct based upon such belief that may be regulated if general in its application and made for public safety and protection. The *theory of defense instructions* advocated by the defense are legally incorrect and one which the court might have given would have only re-emphasized and expanded upon the subjective awareness element of the standard jury instruction. Accordingly, neither of the trial attorneys were ineffective in respect to them.

Leilani's trial attorney was not ineffective by failing to argue a *sincere belief* defense. Although the term was never used and clearly not given the emphasis Leilani may wish that had

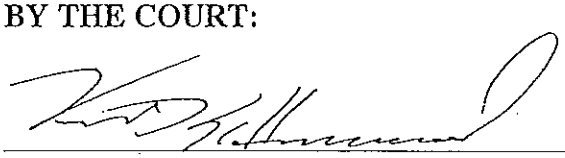
been given, it was present in trial counsel's arguments. By de-emphasizing the "sincere belief" defense, counsel attempted to present Leilani as a devoted mother with strong Christian beliefs who subjectively misinterpreted the medical symptoms rather than as a radical "religious extremist" as portrayed by the state. That was a strategic decision made by counsel and hence does not constitute ineffective assistance of counsel. Moreover, since that defense was given to the jury, although not in the form and to the extent now desired by the defendant, it cannot be said that the real controversy had not been tried.

Nor was Dale's trial counsel ineffective in his defense. As originally presented, he was ineffective for not objecting to the jury being informed during voir dire of Leilani's prior conviction. When it came out that he affirmatively agreed to it, the argument was that it was but a reluctant strategic decision made only after the court erroneously indicated that potential jurors with knowledge of the conviction would not be automatically disqualified. But the question is not necessarily whether a potential juror expressed a prior opinion or had prior knowledge of the case but rather whether they are a reasonable person who is sincerely willing to set aside any opinion or prior knowledge of the case. In either event, it was a strategic decision made by counsel that another reasonable attorney in the same situation might have also made. Finally, trial counsel was not ineffective for proposing an answer to the jury's inquiry during deliberations since the answer proposed by the defense is legally inaccurate and not one that the court would have given.

Accordingly, the motions for a new trial based upon ineffective assistance of counsel or in the interest of justice are hereby denied.

Dated at Wausau, Wisconsin this 26 day of April, 2011.

BY THE COURT:



Vincent K. Howard
Judge, Circuit Court Branch 3
Marathon County, Wisconsin

B-16

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2011AP1105-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEILANI E. NEUMANN,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE VINCENT K. HOWARD PRESIDING

# BRIEF OF PLAINTIFF-APPELLANT

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C O U R T  O F  A P P E A L S

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# BRIEF OF PLAINTIFF-APPELLANT

## ISSUES PRESENTED

1. In view of Wis. Stat. § 948.03(6), does the application of the reckless homicide statute to Kara Neumann's death violate Leilani Neumann's due process right to fair notice? (The circuit court answered: no.)

2. Was the "duty" instruction improper or unconstitutional? (The circuit court answered: no.)

3. Did Leilani Neumann receive ineffective assistance of counsel or, alternatively, is she entitled to a new trial in the interest of justice? (The circuit court answered: no.)

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts. Publication is warranted because the application of these well-established legal principles to the present factual setting is novel in Wisconsin law.

## STATEMENT OF FACTS

Tiredness, thirst, frequent urination, and weight loss are early signs of diabetes (113:205; 121:19). Untreated diabetes leads to diabetic ketoacidosis ("DKA") (113:212). Before DKA sets in, there "are weeks of symptoms" (113:205). Signs of advanced DKA are extreme weakness, extreme thirst, and "sweet acetone breath" (112:135-36, 140, 173, 188). The patient also begins to experience very "deep breathing" (121:19). Ultimately, DKA leads to loss of consciousness or coma (112:136, 173). According to expert witness Dr. Ivan Zador, the "overall survival rate for treated DKA is 99.8 percent and untreated [DKA] invariably results in death" (113:208).

For weeks before she died, Madeline Kara Neumann ("Kara") experienced "excessive thirst" and "frequent urination," and grew increasingly tired (112:29-30; 113:205; 118:27, 59-60, 113-18, 157; 121:13).

Defendant-appellant Leilani Neumann[1] noticed these changes (exh. 30:3-6).[2]

Kara woke up very tired and weak on the Saturday before she died (118:124, 163). When Leilani came home that afternoon, she "felt a spirit of death throughout. She got scared, ran in the house, ran upstairs to Kara, and felt her arm, and was relieved to feel there was still warmth left in her arm" (112:17-18). Immediately, the family "started praying and … didn't stop praying until suppertime" (112:18). For the first time, Leilani saw how skinny Kara had become (exh. 30:13-14). She noticed that Kara's legs were blue and cold (exh. 30:14). At 4:58 p.m., the Neumanns emailed a mass appeal seeking prayer support for "our youngest daughter who is very weak and pale at the moment, with hardly any strength" (113:189).

By Saturday night, Kara was unable to walk or talk (112:40, 82; 118:131-32; exh. 30:21-22). After collapsing on an unaccompanied trip to the bathroom, she had to be carried to the bathroom because she was too weak to go on her own (118:129, 134; exh. 30:24-25). Her breathing was labored (121:14; exh. 30:22). She seemed dehydrated; when Leilani's father suggested using Pedialyte, Leilani said "that would be taking the glory from God" (112:39). Kara's brother Luke said that Kara was in a coma on Saturday night (112:18).

On Sunday morning, Leilani told her mother that she believed "Kara may be in a coma" (112:41). At 6:50 a.m., Leilani called Althea Wormgoor and told her that Kara was "laying on the floor" and not talking or eating (113:45-46). Later that morning, Leilani told Althea that Kara was comatose and "'hanging between life and death'" (113:49-50, 93). Leilani told Dan Peaslee that Kara was in a coma and needed prayer (112:205). At

---

[1]The State will refer to defendant-appellant as "Leilani" and her husband Dale Neumann as "Dale."

[2]A police interview with Leilani videotaped the day Kara died was played to the jury (118:224). The interview transcript was the State's "Exhibit 30" (118:222). The State will use the prefix "exh. 30:" to cite to the transcript.

around 10:00 a.m., Leilani told her mother-in-law that Kara was in a coma (118:192-94). Kara's sister Ariel also thought she was comatose (118:143-46). After Kara died, Leilani and Dale told the police that Kara was in "a coma state" that morning, "unable to move, walk, or talk" (112:83, 96).

When the Peaslees arrived at the Neumanns' house before noon, Kara was lying on the bathroom floor (112:210-11). Her eyes were closed; she was unmoving and nonresponsive (118:33). Dan Peaslee said she was "pale, ashen," and was breathing in a labored or wheezing manner (112:211-12). Jennifer Peaslee said her breathing was not normal, but "[v]ery pronounced … very deep and very long" (118:35). The Peaslees were "shock[ed]" by Kara's condition (112:217; 118:37). Dan picked Kara up—her body was "[c]ompletely and utterly limp" (112:213-14). When Leilani attempted to give her some water, the unconscious Kara did not react (112:219; 118:41). Jennifer observed that Kara could not open her mouth unassisted; she thought Kara swallowed nothing (118:41). Dan thought maybe half a cup got "into her stomach" (112:218).

The Wormgoors arrived about 1:30 p.m., after the Peaslees' departure (113:52, 86). They said that Kara's eyes were partially open, but "she wasn't seeing anything" (113:53, 129). Kara was unmoving and nonresponsive (113:54, 129). Raising her hands, Leilani said: "'I am prophesying that God is going to bring her back from this coma and make her ten times better than she was before'" and "'God is going to show his power through this'" (113:54-55; *accord* 113:131). Leilani thought her "faith was being tested … the ultimate test" (exh. 30:33). Next, Althea saw Kara's mouth twitch and gasp for air (113:56). Shortly thereafter Randall Wormgoor called 911 (113:57, 135-36). When help arrived, Kara was pulseless and non-breathing (113:243).

People who knew Kara before she died agreed that she was naturally thin. But those who observed Kara on the Sunday she died saw something more extreme.

Everest Metro Police Officer Scott Martens said Kara "appeared to be extremely malnourished … skinny and … frail" (112:75). EMT Jason Russ described her as "grayish blue in color" with sunken eyes (113:242-43). He also thought she was severely dehydrated (113:170). EMT Hyden Prausa described Kara as "very dehydrated, cyanotic, and … very ill" (113:266). "Her jaw was very sunken in and defined. Her body was skin and bones, exposing her ribs…. [She] looked like she had been ill for some period of time" (113:266-67). "She looked beyond skinny" (113:267). Choon P'ng, the emergency room doctor who examined Kara, described her as "very thin, cachetic looking" (113:173). "Cachetic" describes the appearance of an "advanced cancer patient … or malnourished patient" (113:176).

Pathologist Michael Stier, who performed Kara's autopsy, observed "severe physical wasting" in Kara (112:163).

> She looked malnourished. The adipose tissue under the skin was in very very low amount, if not negligible. Her muscle development was, in my opinion, not what it should be for an 11-year-old. She looked wasted.
>
> She had sunken cheeks, sunken eyes, and that is prototypic for someone who is starving. Madeline was not starving because she didn't have food. She was starving because she lacked that key, insulin, to allow glucose to go from the bloodstream into the tissues.

(112:162-63).

EMT Russ and his colleagues noticed a sweet "fruity odor" or "acetone" smell on Kara's breath, which "indicate[d] a hypoglycemic episode" (113:251).

Kara died of "complications of diabetes mellitus," (112:154). Dr. Stier found "a plethora of abnormalities that indicate a process that was not sudden, that was ongoing for some time" (112:157). Dr. P'ng concurred (113:162). Pediatrician Joseph Monaco, who assisted Dr.

P'ng, concluded that Kara "had been progressing over days, if not weeks, into a diabetic state" (121:20). Dr. Zador, reviewing the case records, concluded that Kara was in the advanced stages of DKA by Saturday (113:215). At death, Kara's blood sugar, blood acid, and Hemoglobin A(1c) levels were abnormally high (112:136-37, 157), indicating to M.E. Larson that her condition had been "ongoing … not an acute onset" (112:137).

Dr. Stier explained that, consistent with the typical progress of the disease, Kara's condition had affected all her major organs and circulatory system (112:157-62, 171, 174-75; 113:207). Despite these widespread effects, he concluded that medical intervention could have saved Kara shortly before her death "even perhaps within minutes or hours of [her] actually dying" (112:175). Emergency room doctors Monaco and P'ng agreed that DKA is survivable (113:166, 208; 121:29). Dr. Zador believed that Kara's DKA was treatable and survivable until "very late into the day of her death" and that "[t]he chances of survival would have been very good" (113:225).

Kara was declared dead at 3:30 p.m. on Easter Sunday (121:16).

## ARGUMENT

### I. NOTWITHSTANDING WIS. STAT. § 948.03(6), THE APPLICATION OF THE RECKLESS HOMICIDE STATUTE TO KARA'S DEATH DOES NOT VIOLATE LEILANI'S DUE PROCESS RIGHT TO FAIR NOTICE.

#### A. Wisconsin Law Provides Fair Notice to Prayer-Treating Parents that They May Be Liable for Reckless Homicide if a Child Dies.

##### 1. Applicable Statutes.

*Second-degree reckless homicide.*

Under Wis. Stat. § 940.06(1), "[w]hoever recklessly causes the death of another human being is guilty of a Class D felony." "[R]ecklessly" is defined by Wis. Stat. § 939.24, which applies to most statutes requiring proof of a reckless state of mind. *See* Wis. Stat. § 939.24(2). Under § 939.24(1), "'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk …."

The reckless-homicide statute requires the State to prove three things. First, "the actor create[d] an *unreasonable and substantial risk of death or great bodily harm* to another." That is the conduct that triggers liability. Second, the actor was "*aware* of that risk." That is the required mental state. Third, the actor "cause[d] the *death* of another …." That is the required result of the reckless conduct. *Id.*

*Criminal child abuse.*

Wisconsin Stat. § 948.03 is the "[p]hysical abuse of a child" statute. It provides in pertinent part:

> (1) DEFINITIONS. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.
>
> ….
>
> (3) RECKLESS CAUSATION OF BODILY HARM. (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony.
>
> (b) Whoever recklessly causes bodily harm to a child is guilty of a Class I felony.
>
> (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class H felony.

Subsections 948.03(3)(a) and (b) require the State to prove three things. First, the actor "create[d] a situation of *unreasonable risk of harm* to … the child." That is the conduct triggering liability. Second, the creation of that risk "demonstrate[d] a *conscious disregard*" for the child's safety. That is the required mental state. Third, the actor "cause[d] *great bodily harm*" or "*bodily harm*" to the child. That is the required result of the reckless conduct.

Subsection (c) requires the State to prove three things. First, the actor's conduct was not only reckless as defined by the statute, but that it "create[d] a *high probability of great bodily harm*." The actor's mental state is the same as the other subsections, *i.e.*, "*conscious disregard*" for the child's safety. The required result of the reckless conduct is "*bodily harm.*"

The child-abuse statute differs from the reckless-homicide statute in three important respects. First, the recklessness provisions of the child-abuse statute do not

include conduct that creates "an unreasonable and substantial risk of death." Second, the actor's mental state is "conscious disregard" for the child's safety, not "aware[ness]" that she is creating an unreasonable and substantial risk of death or great bodily harm. Third, the punishable consequences of the actor's reckless conduct are limited to bodily harm and great bodily harm; they do not include death.

*Prayer-treatment exception.*

The child-abuse statute also differs from the reckless-homicide statute because it contains an exception for "[t]reatment through prayer":

> A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4. or 448.03(6) in lieu of medical or surgical treatment.

Wis. Stat. § 948.03(6). Wisconsin Stat. § 48.981(3)(c)4. is a Children's Code provision that a child-abuse or neglect determination may not be based solely on a parent's choice of prayer in lieu of medical treatment. Wisconsin Stat. § 448.03(6) refers specifically to "the Practice of Christian Science," and is therefore inapplicable to this case because Leilani is not a Christian Scientist.[3]

2. The Due Process notice doctrine.

Due process requires that criminal statutes provide citizens with fair notice. "[A] criminal statute does not provide fair notice if it does not 'sufficiently warn people who wish to obey the law that their conduct comes near

[3]Leilani cites several other prayer-related statutes. "These accommodative provisions … evince no legislative sanction of prayer for the treatment of children in life-threatening circumstances." *Walker v. Superior Court*, 763 P.2d 852, 863 (Cal. 1988) (in bank).

the proscribed area.'" *State v. Nelson*, 2006 WI App 124, ¶36, 294 Wis.2d 578, 718 N.W.2d 168 (citation omitted). However, it

> "'need not define with absolute clarity and precision what is and what is not unlawful conduct.'" "A statute … is not void for vagueness because in some instances certain conduct may create a question about its impact under the statute," or because "'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'"

*Nelson*, 294 Wis.2d 578, ¶36 (citations omitted). Only a "'fair degree of definiteness'" is required. *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citations omitted).

A statute is not unconstitutional merely "'because the boundaries of the prohibited conduct are somewhat hazy.'" *State v. McCoy*, 143 Wis.2d 27, 286, 421 N.W.2d 107 (1988) (citation omitted). Justice Holmes famously noted that the law sometimes requires individuals to assume the risk that their conduct may cross the line from permissible to prosecutable.

> Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk.

*United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

Every day, our statutes require us to moderate generally permissible behavior in order to stay within the law. We are allowed to consume alcohol, but if we reach a state of intoxication that injures others, we are criminally liable. *See*, *e.g.*, Wis. Stat. § 940.09. We are allowed to spank our children, but if our use of corporal punishment becomes injurious and "unreasonable," we are criminally liable. *See* Wis. Stat. § 939.45(5)(b). We are allowed sexual intimacy with young people, but if they are

under eighteen, we suffer strict criminal liability. *See* Wis. Stat. § 948.02. We are expected to recognize the line between permissible and prosecutable behavior. If the line is sometimes hard to see, the assumption of risk is ours.

3. Construed together, Wis. Stat. § 940.06(1) and § 948.03 provide fair notice.

Leilani does not argue that the treatment-through-prayer privilege applies to the reckless-homicide statute. Nor could she. *See* Wis. Stat. § 948.03(6) (privilege applies to "offense[s] under *this section*"). She argues instead that the two statutes' directives overlap, thereby depriving her of "fair notice." In Leilani's view, a prayer-treating parent cannot tell when the conduct protected by § 948.03(6) ends and the conduct punishable under § 940.06(1) begins. This lack of a discernible line between permissible and impermissible conduct, she concludes, violates her right to fair notice. Leilani is wrong.

The centerpiece of Leilani's argument is the phrase "great bodily harm." She contends that there is really no legal difference between "great bodily harm" and "death." She bases her theory on the statutory definition of "great bodily harm," as "bodily injury which creates *a substantial risk of death*, or" other enumerated injuries. Wis. Stat. § 939.22(14). She concludes that conduct that threatens "great bodily harm" is no different from conduct that threatens "death" since "great bodily harm" includes an injury that "creates a substantial risk of death." Therefore, there is no discernible line between the reckless-homicide and child-abuse statutes. The argument fails.

*First*, the reckless-homicide statute penalizes the reckless infliction of *death* on another person—not "great bodily harm." The child-abuse statute does not reach the infliction of death and does not purport to immunize the

infliction of death. For this reason alone, the line between the two statutes is clearly discernible.

*Second*, the definition of recklessness applicable to § 940.06(1) punishes conduct that "creates an unreasonable and substantial risk of death *or* great bodily harm to another." Wis. Stat. § 939.24(1). If Leilani is correct that conduct creating a "substantial risk of death" is no different from conduct creating a "substantial risk of … great bodily harm," the "death" language in § 939.24(1) is superfluous. Such a reading is contrary to the rules of statutory construction. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110. There is no justification for reading the alternative "death" basis for reckless conduct out of the definition of "recklessness." In this case, there was substantial evidence to support a jury conclusion that Leilani's conduct created an unreasonable and substantial risk of death to Kara, not simply great bodily harm.

*Third*, the standards of criminal recklessness in the two statutes are explicitly different.

> [R]eckless child abuse requires [that] defendant's actions *demonstrate* a conscious disregard for the safety of a child, not that the defendant was subjectively aware of that risk. Wis. Stat. § 948.03(1). In contrast, "criminal recklessness" is defined as when "the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Wis. Stat. § 939.24(1). Thus, "recklessly" causing harm to a child under § 948.03(b) [sic] is distinguished from "criminal recklessness," because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component.

*State v. Williams*, 2006 WI App 212, ¶26, 296 Wis.2d 834, 723 N.W.2d 719 (parenthetical omitted); *accord State v. Hemphill*, 2006 WI App 185, ¶¶9-11, 296 Wis.2d 198, 722 N.W.2d 393.

In other words, the recklessness standard in the child-abuse statute is much lower than the general standard of recklessness applicable to the reckless-homicide statute.

The treatment-through-prayer privilege must be understood in the context of this relatively low standard of recklessness. The privilege was inserted into the statute to protect parents like Leilani from criminal liability for conduct that may appear to "demonstrate[] a conscious disregard for the safety of the child" to those who do not share their religious beliefs. The exception balances the interests of parents who believe that prayer, rather than medicine, is the best hope for healing and the State's police power interests in protecting all children from bodily harm. Because of this legislative accommodation, a parent immunized by the treatment-through-prayer privilege is not liable for criminal child abuse even if she was "reckless" under the terms of the child-abuse statute. *See* Wis. Stat. § 948.03(6).

In contrast, when a parent "creates an unreasonable and substantial risk of death or great bodily harm" to her child, is "aware" of that grave risk, and causes death, the treatment-through-prayer privilege is unavailable. Wis. Stat. §§ 939.24(1); 940.06(1). That is clear on the face of the statutes. There is no ambiguity. This is not simply because the privilege by its terms is applicable only to criminal child abuse. *See* Wis. Stat. § 948.03(6). It is also because the level of recklessness that the State must prove under the reckless-homicide statute is qualitatively higher than the level of recklessness envisioned by the child-abuse statute. A parent who is "aware" that her conduct may cause death or great bodily harm has no statutory protection.

A parent like Leilani has ample notice of when her conduct crosses the line from protected to unprotected activity. For example, if a child is lethargic, excessively thirsty, and urinating frequently, the use of prayer instead of medical treatment may be privileged even if the risk of harm to the child is unreasonable and even if the child

suffers great bodily harm and even if the parent consciously disregarded the risk. However, if that same child lapses into a coma, turns cold and blue in her extremities, and has serious trouble breathing, the privilege is no longer available where the parent is "aware" that the "risk of death or great bodily harm" to the child is "unreasonable and substantial." If the child dies, the parent may be found guilty of reckless homicide.

4. The limitations of Wis. Stat. § 948.03(6).

Leilani's fair-notice argument also fails because § 948.03(6)'s protections are narrower than she suggests.

Wisconsin Stat. § 948.03(6) refers to § 48.981(3)(c)4., the Children's Code provision outlining the duties of county departments in child-abuse and neglect cases. Under this section:

> A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent … selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child…. This subdivision does not prohibit a court from ordering medical services for the child if the child's health requires it.

This section represents a legislative accommodation between prayer-treating parents and the State's police power. A parent who "relies on prayer … for treatment of disease" cannot be found abusive or negligent on that ground alone. As a consequence, such a parent is spared an investigation into whether her child is abused or neglected, *see generally* Wis. Stat. § 49.981(3)(c), which could otherwise bring about a finding that the child is in need of protection or services, *see id.*, which would lead in turn to the juvenile court's assertion of jurisdiction over the child, *see* Wis. Stat. § 48.13, which could result in any number of dispositions, including the child's removal from the parent. *See* Wis. Stat. § 48.345. However, the court, "if the child's health requires it," may nevertheless "order[] medical services

for the child." Wis. Stat. § 48.981(3)(c)4. Thus, although the parent may avoid the consequences of an abuse or neglect determination, the protection of her choice to treat her child with prayer is limited by the child's health needs. The court may order medical intervention in appropriate circumstances.

It is this limited protection of a parent's choice to rely on prayer that is imported into the criminal child-abuse statute. If the Children's Code privilege is limited by the child's health requirements, the Wis. Stat. § 948.03(6) privilege is similarly limited by the reckless-homicide statute's sanction against reckless conduct causing death.

In both statutes, the prayer privilege is limited by the word "solely." Section 948.03(6) provides that a person is not guilty of criminal child abuse "*solely* because he or she provides a child with treatment by spiritual means through prayer alone." Section 48.981(3)(c)4. provides that an abuse or neglect determination "may not be based *solely* on the fact that the child's parent … relies on prayer … for treatment of disease." In this context, "solely" means that the prayer privilege does not apply where some additional aggravating circumstance exists. For example, a criminal child-abuse prosecution or a civil child neglect/abuse proceeding where a parent relied on prayer alone *and* was aware that doing so placed her child in a life-threatening condition would not be based "solely" on the parent's reliance on prayer. It would also be based on the life-threatening condition created by the parent.

The California and Colorado Supreme Courts reached this conclusion in construing child-welfare statutes providing that, where a parent relies on prayer in lieu of medical treatment, a child-neglect finding cannot be made "for that reason alone."

The Colorado Court found that

> the statutory language, "for that reason alone," is quite clear. It allows a finding of dependency and neglect for other "reasons," such as where the child's life is in imminent danger, despite any treatment by spiritual means. In other words, a child who is treated solely by spiritual means is not, for that reason alone, dependent or neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering condition, the child may be adjudicated dependent and neglected under the statutory scheme.

*In re D.L.E.*, 645 P.2d 271, 274-75 (Colo. 1982) (footnote omitted).

The California court agreed that this language "must be construed to signify that treatment by prayer will not constitute neglect for purposes of the child welfare services chapter except in those instances when such treatment, coupled with a sufficiently grave health condition, present 'a specific danger to the physical … safety of the child.'" *Walker v. Superior Court*, 763 P.2d 852, 864 (Cal. 1988) (in bank). The court noted that California's Welfare & Institutions Code, while generally deferring to a parent's choice of prayer treatment, allowed the juvenile court to "'assume jurisdiction [if] *necessary to protect the minor from suffering serious physical harm or illness.*'" *Id.* at 865 (citation omitted). The same is true under the Wisconsin Children's Code. *See* Wis. Stat. § 48.981(3)(c)4.

In sum, Leilani's foundational assumption that a parent's choice of prayer over medicine is absolutely protected by § 948.03(6) is questionable. Under both § 948.03(6) and § 48.981(3)(c)4., the legislature's willingness to accommodate religious healing ends when the child's health is endangered. This is consistent with the State's public policy interest in protecting the health and lives of children. See *In re R.W.S.*, 162 Wis.2d 862, 873 n.5, 471 N.W.2d 16 (1991) ("Public policy

considerations exert a significant influence on the process of statutory interpretation by the courts."). Exclusive reliance on prayer for medical treatment is beyond statutory protection where the parent is aware that her conduct is creating a life-threatening situation for her child.

5. Homicide is different.

An obvious difference between the child-abuse and homicide statutes is the result of the actor's recklessness. The abuse statute punishes the actor when bodily harm or great bodily harm results. Wis. Stat. § 948.03(3). The homicide statute punishes the actor when death results. Wis. Stat. § 940.06(1). The prayer-treatment privilege is available in the first case but not the second. In balancing parental interests with the State's police power interests, the legislature essentially said "this far and no further." It was willing to accommodate prayer-treating parents even if their children suffered great bodily harm, but not if their children died. At that point, the State's police power interest in protecting the lives of all the State's children trumps some parents' interest in relying on prayer alone. *See R.W.S.*, 162 Wis.2d at 873 n.5.

The differential legislative treatment of criminal conduct on the basis of whether or not death results is not unique to these statutes. The legislature has decided time and again that homicide is different.

Certain affirmative statutory defenses to criminal liability are either unavailable or restricted in cases of homicide. Coercion and necessity supply an absolute defense to *any crime* "except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide." Wis. Stat. §§ 939.46(1), 939.47. The self-defense privilege is available even in cases of homicide, and "extends … to the unintended infliction of harm upon a 3rd person." Wis. Stat. § 939.48(3). However,

> if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire … the actor is liable for whichever one of those crimes is committed.

*Id.*

These affirmative defenses provide blanket immunity to persons who reasonably believe they must violate the criminal law under certain extreme circumstances. However, such persons must calibrate their response to those circumstances in order to enjoy this immunity. They may commit any crime with impunity except for homicide. Similarly, a parent treating her child with prayer in lieu of medicine must calibrate her conduct. If her reliance on prayer creates an "unreasonable risk of harm to" her child and the child suffers "bodily harm" or "great bodily harm," the parent is immune. Wis. Stat. § 948.03 (1), (3), (6). However, if that same reliance creates an "unreasonable and substantial risk of death or great bodily harm to" the child *and the child dies*, she has no immunity. Wis. Stat. §§ 939.24(1), 940.06(1).

### 6. Foreign case law supports the State's interpretation.

Other courts have addressed this fair-notice argument. Although there is a split in authority, the better-reasoned opinions support the State's position.

Laurie Walker was convicted of involuntary manslaughter and felony child endangerment when her choice of prayer over medicine caused her daughter's death. The California Penal Code exempts prayer-treating parents from misdemeanor liability for failing to provide medical treatment (among other necessities) to their children. *Walker*, 763 P.2d at 856. Walker claimed she had no notice of where the exemption ended and criminal liability began.

Quoting Justice Holmes, the California Supreme Court rejected Walker's contention:

> "[T]he law is full of instances where a man's fate depends on his estimating rightly … some matter of degree…. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor." The "matter of degree" that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more.

*Id.* at 872 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)) (other citations omitted).

The court explained that the statutes revealed a deliberate balancing of the prayer-treating parents' interests and the State's police power interests.

> The … legislative intent is clear: when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield….
>
> ….
>
> … The legislative design appears consistent: prayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability.

*Walker*, 763 P.2d. at 866. "California's statutory scheme reflects not an endorsement of the efficacy or reasonableness of prayer treatment for children battling life-threatening diseases but rather a willingness to accommodate religious practice when children do not face serious physical harm." *Id.* at 868.

The fair-notice argument in *State v. Hays*, 964 P.2d 1042 (Or. Ct. App. 1998), was based on the line between the negligent-homicide and criminal-mistreatment

statutes. The latter exempts parents relying on treatment by prayer or other spiritual means from the general duty to provide necessary medical care to their children. *Id.* at 1045. The court held that the statutes were not "legally ambiguous." *Id.* at 1046.

> [T]he statutes permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die.

*Id.* The *Hays* court acknowledged that although "it may be impossible to define in advance all the ways in which a person's actions can be a gross deviation from the standard of care of a reasonable person," the legislature may nevertheless "penalize such a gross deviation." *Id.*

*Commonwealth v. Twitchell*, 617 N.E.2d 609 (Mass. 1993), arose from involuntary-manslaughter convictions following the death of the Twitchells' son. Massachusetts' child-neglect statute recognizes a spiritual-treatment exemption from the general requirement that parents provide medical care to their children. *Id.* at 612 & n.4. The Twitchells argued they "lacked 'fair warning'" that spiritual treatment could result in a manslaughter prosecution. *Id.* at 616. The court disagreed.

> There is no mixed signal from the coexistence of the spiritual treatment provision and the common law definition of involuntary manslaughter. The spiritual treatment provision protects against criminal charges of neglect and of willful failure to provide proper medical care and says nothing about protection against criminal charges based on wanton or reckless conduct. The fact that at some point in a given case a parent's conduct may lose the protection of the spiritual treatment provision and may become subject to the application of the common law of homicide is not a

> circumstance that presents a due process of law "fair warning" violation.

*Id.* at 617 (citations omitted).

*Commonwealth v. Nixon*, 718 A.2d 311, 314 (Pa. Super. Ct. 1998), *aff'd*, 761 A.2d 1151 (2000), involved the line between the child-abuse statute (containing a "seriously held religious belief" exception in medical-care cases) and the involuntary-manslaughter statute. The court concluded:

> A plain reading of the statutes shows that an act which does not qualify as child abuse may still be done in a manner which causes death and thus qualifies as involuntary manslaughter. This precise situation occurred in this case. While the Nixons were not considered child abusers for treating their children through spiritual healing, when their otherwise lawful course of conduct led to a child's death, they were guilty of involuntary manslaughter.

*Id*.

As the State argued above, these cases hold that a statutory structure granting a prayer exemption in a child-neglect or abuse statute does not deprive a prayer-treating parent of fair notice that she may be criminally liable under the homicide statutes if her child dies. Further, as argued above, these cases recognize that such a statutory structure is a legislative accommodation between the interests of parents who choose to provide prayer treatment and the interests of the State in protecting all children from death or great bodily harm. As one court wrote, prayer is "an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability." *Walker*, 763 P.2d at 866.

Leilani argues that these cases are distinguishable and relies instead on *State v. McKown*, 475 N.W.2d 63

(Minn. 1991), and *Hermanson v. State*, 604 So.2d 775 (Fla. 1992). These cases are inapposite.

The Minnesota statute analyzed in *McKown* provides that a parent "who willfully deprives a child of necessary … health care" is guilty of child neglect, but if she "in good faith selects and depends upon spiritual means or prayer for treatment or care of disease … this treatment shall constitute 'health care.'" Minn. Stat. § 609.378 (1988). Unlike Minnesota, Wisconsin does not equate prayer treatment with health care. The court did not focus on this aspect of the Minnesota exception. Instead, it concluded that the language was too broad to give prayer-treating parents fair notice that they could be prosecuted for second-degree manslaughter (based on "culpable negligence" and the creation of an "unreasonable risk") if their child died. *McKown*, 475 N.W.2d at 65 n.4, 68. As the dissent explained, the court failed to address the fact that the two statutes at issue (like those here) provided distinct mens rea standards to guide parents in their health-treatment decisions. *See id.* at 69 (Coyne, J., dissenting).

*Hermanson* involved the interplay of three statutes. First was the child-dependency statute, defining an abused or neglected child in part as one harmed by a parent's acts or omissions. 604 So.2d at 776. The statute defines "harm" as failure to supply, *inter alia*, "health care."

> "[H]owever, a parent … practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone …."

*Id.* (citation and emphasis omitted). The second statute was a child-abuse provision making it a crime to deprive a child of medical treatment. *Id.* The third was a statute "provid[ing] that the killing of a human being while engaged in the commission of child abuse constitutes murder in the third degree." *Id.*

The Hermansons' daughter died from diabetic ketoacidosis when her parents chose to combat her condition with prayer. They were convicted of felony child abuse and third-degree murder. The court agreed with the Hermansons that Florida's statutes denied them due process by failing to "give them fair warning of the consequences of practicing their religious belief." *Id.* at 780, 783.

The statutes construed in *Hermanson* are very different from those at issue here. In combination, the child-dependency and criminal child-abuse statutes essentially removed prayer treatment from the definition of child abuse and "raised spiritual intervention to a level equal to that of medical treatment." *Nixon*, 718 A.2d at 314. The third-degree murder statute explicitly based liability on "child abuse," which the child-abuse statute explicitly defined as withholding medical care, which the child-dependency statute explicitly permitted prayer-treating parents to do. In contrast, Wisconsin's reckless-homicide statute is based on a generic definition of recklessness, and does not invoke any specific criminal act such as child abuse. A definition of child abuse from elsewhere in the Wisconsin Statutes is not even arguably incorporated into the reckless-homicide statute.

Although appellate courts have split on the fair-notice issue, this court should follow the decisions of California, Oregon, Massachusetts, and Pennsylvania. The statutes considered there are parallel to those involved here and the courts' analyses are thoughtful and germane to the present case. The Minnesota and Florida decisions provide little guidance because the statutes they analyze are critically distinguishable from the applicable Wisconsin statutes.

B. Analysis.

As shown, the statutes draw a clear line between privileged and unprivileged "reckless" behavior. The question for the parent is whether she is creating an "unreasonable risk of harm" in "conscious disregard" of her child's safety, or whether she is "aware" that she is creating an "unreasonable and substantial risk of death or great bodily harm" to her child. Wis. Stat. §§ 948.03(1), 939.24(1), 940.06(1). The trial evidence demonstrates that Leilani had sufficient warning that she had crossed the border from protected into unprotected conduct hours before Kara died.

By Saturday night, Kara's condition was sufficiently grave that Leilani's decision to withhold medical care created an "unreasonable and substantial risk of death or great bodily harm" to Kara—and Leilani knew it. Upon her entry into the family home that evening, Leilani "felt a spirit of death" (112:17). At 4:58 p.m., she and Dale sent a mass email alerting others to the gravity of Kara's condition (113:189). Leilani saw the extent to which Kara had wasted away (exh. 30:13-14). Leilani observed and felt Kara's cold blue legs (exh. 30:14). Kara could not walk or talk; her breathing was labored; she was dehydrated (112:39-40, 82; 118:131-32; 121:14; exh. 30:22). Kara lapsed into a coma that night (112:18). At the very least, these symptoms informed Leilani that Kara was in "substantial risk of … great bodily harm"; at most, they informed her that Kara was in "substantial risk of death."

Any doubt that Kara was at death's door was gone by Sunday morning. Indeed, Leilani herself said that Kara was "'hanging between life and death"' (113:93). She told her mother, her mother-in-law, the Wormgoors, and the Peaslees that Kara was in a coma early on Sunday morning (112:41, 205; 113:49-50; 118:192-94). Kara's sister, Ariel, shared this judgment, and Leilani and Dale repeated it to the police after Kara died (112:83, 96; 118:143-46). The description of Kara's condition by the

Wormgoors and the Peaslees confirm the coma assessment. Both couples saw that Kara was nonresponsive (113:53-54, 129; 118:33). The Wormgoors noticed that her eyes were open, but "she wasn't seeing anything" (113:53, 129). Dan Peaslee said Kara's body was "utterly limp" (112:214). Leilani's efforts to hydrate Kara were unsuccessful because of Kara's inability to swallow (112:218-19; 118:41). Leilani's description of Kara's condition as the "ultimate test" of her faith reveals her awareness that Kara was in "substantial risk of death" (exh. 30:33).

If Kara had died on Friday, Leilani's fair-notice argument might have some plausibility. However, by late Saturday—*and certainly by Sunday morning*—it was clear that Leilani's choice of prayer posed an "unreasonable and substantial risk of *death* or great bodily harm" to Kara and that Leilani was aware of that risk. Wis. Stat. § 939.24(1). The stage at which Leilani's choice posed only a protected "unreasonable risk of harm" in "conscious disregard of [Kara's] safety" was over by the time Kara turned cold and blue, suffered labored breathing, and lapsed into a coma. Wis. Stat. § 948.03(1). The Wisconsin Statutes unquestionably provided fair notice to Leilani Neumann.

In this section of her brief, Leilani argues that the fair-notice problem was exacerbated by the State's reliance on "omission-based liability." Leilani's Brief at 15. Leilani fails to explain how the omission issue supports her statutory overlap argument. The State will respond to Leilani's omission arguments in the next section of this brief.

## II. THE "DUTY" INSTRUCTION WAS PROPER AND CONSTITUTIONAL.

The circuit court instructed the jury on the first element of reckless homicide as follows:

> First, the defendant caused the death of Madeline Kara Neumann. "Cause" means that the defendant's conduct was a substantial factor in producing the death. Conduct can be either by an act or an omission when the defendant has a duty to act.
>
> One such duty is the duty of a parent to protect their children, to care for them in sickness and in death, and to do whatever is necessary for their preservation, including medical attendance, if necessary.

(123:69).

Leilani contends that this instruction was improper. Her arguments fail.

*First*, Leilani appears to argue that the instruction is "vague" wholly apart from its implications for her choice to rely on prayer. Leilani's Brief at 15-16. This argument is minimally developed so requires only a minimal response. The instruction clearly states that a parent has a "duty" to "preserv[e]" her child's life—*i.e.*, save it—from the consequences of sickness, by "medical attendance" if necessary (123:69). Leilani wonders how serious the sickness must be to trigger this duty. Leilani's Brief at 16. The next paragraph of the instructions answers that question: when "the conduct create[s] a risk of death or great bodily harm" (123:69). The language used, including "preservation," is not vague when read in context.

*Second*, Leilani argues that, even if the duty instruction is "sufficiently clear," it "appears to conflict with the prayer treatment exception." Leilani's Brief at

16. Leilani is confounding her arguments. The duty instruction defines the basis for Leilani's liability under the reckless-homicide statute. The prayer-treatment exception is inapplicable to that statute. *See* Wis. Stat. § 948.03(6). There is no conflict between a legally correct definition of a parent's duty under one statute and a limited privilege provided in an unrelated statute. *See Twitchell*, 617 N.E.2d at 613-16 (neglect statute's prayer-treatment privilege "provides no complete protection … against a charge of involuntary manslaughter" based on "omission" to provide medical care). Even if Leilani's fair-notice analysis were correct, it would not extend the reach of § 948.03(6) to redefine a parent's duty to provide medical treatment when necessary to preserve her child's life.

*Third*, Leilani argues that the duty instruction "appears to expand the legal duty protected under the prayer treatment privilege." Leilani's Brief at 25. Leilani assumes, incorrectly, that § 948.03(6) limits her legal duty to protect her child's health to the use of prayer alone as she sees fit. On the contrary, § 948.03(6) provides Leilani with a limited privilege to be free from prosecution for criminal child abuse under certain limited conditions. *See supra* at 14-17. This section does not release her from the duty common to every Wisconsin parent to provide her children with the medical treatment necessary to preserve their lives. That duty is broadly defined under Wisconsin law. The fact that one class of parents—believers in prayer treatment—enjoy a privilege under the child-abuse statute does not exempt them from that general duty.

*Fourth*, Leilani misleadingly suggests that the court drew the duty instruction from inapposite case law. Leilani's Brief at 26. The instruction comes from a case interpreting an earlier version of Wisconsin's criminal child-abuse statute. *See State v. Williquette*, 129 Wis.2d 239, 385 N.W.2d 145 (1986). *Williquette* held that a mother who failed to protect her children from their abusive father could be prosecuted for criminal child abuse because "[t]he relationship between a parent and a

child exemplifies a special relationship where the duty to protect is imposed." *Id.* at 255. The court incorporated the tort standard of parental duty into the criminal law.

> "It is the right and duty of parents … to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent. The child has the right to call upon the parent for the discharge of this duty, and public policy for the good of society will not permit or allow the parent to divest himself irrevocably of his obligations in this regard or to abandon them at his mere will or pleasure."

*Williquette*, 129 Wis.2d at 255-56 (quoting *Cole v. Sears, Roebuck & Co.*, 47 Wis.2d 629, 634, 177 N.W.2d 866 (1970)). The *Cole* standard is part of our criminal law. *See* Wis. JI-Criminal 2108A, Comment; Wis. JI-Criminal 2106, Comment.

*Fifth*, Leilani's contention that "the duty instruction … violates a parent's Constitutional right to direct the medical care of her child" has no legal basis. Leilani's Brief at 27. Parents have a fundamental right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). That general right does not restrict the State from imposing medical obligations on a parent necessary to preserve her child's life. Leilani cites no legal authority precluding this assertion of state power. There is no constitutional guarantee allowing a parent to knowingly impose a risk of death or great bodily harm on her child on the basis of religion. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (parents are not free to "make martyrs of their children").

The duty described in the jury instruction is neutrally and universally applicable to all Wisconsin parents—including Leilani Neumann. Leilani relies on Wis. Stat. § 948.03(6) to show that this duty of care does not apply to her. But § 948.03(6), by its very terms, is

limited to criminal child-abuse prosecutions. It does not purport to define a different standard of care for prayer-treating parents under any other criminal statute. Leilani also relies on a non-existent constitutional right to treat her child's illness as she chooses. Here, Leilani's prayer-based treatment of Kara's DKA *threatened* Kara with death and great bodily harm and ultimately *caused* her death. The Constitution does not protect such conduct. The instruction was proper.

## III. LEILANI RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AND IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

### A. Ineffective Assistance of Counsel.

#### 1. Law.

To prove an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and prejudicial to the defense. *See Strickland v. Washington,* 466 U.S. 668 (1984). The defendant must prove both elements. *See State v. Moats,* 156 Wis.2d 74, 100-01, 457 N.W.2d 299 (1990). If the defendant fails on one prong, the court need not consider the other. *See Strickland*, 466 U.S. at 697.

To establish deficient performance, the defendant must demonstrate serious attorney errors that cannot be justified under an *objective* standard of reasonable professional judgment. *See Strickland*, 466 U.S. at 688. A lawyer's strategic decisions are "virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶20, 307 Wis.2d 429, 744 N.W.2d 919.

An attorney does not perform deficiently by foregoing a meritless argument. *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

Further, ""“the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized….”"" *State v. Maloney*, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583 (citations omitted). Instead, counsel can be ineffective only "where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). This rule is consistent with *Strickland*'s objective standard of performance. *State v. Van Buren*, 2008 WI App 26, ¶19, 307 Wis.2d 447, 746 N.W.2d 545.

The defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis.2d 758, 774, 596 N.W.2d 749 (1999). The test is whether "counsel's errors were so serious as to deprive the [client] of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

2. Analysis.

Leilani argues that defense counsel Gene Linehan was ineffective by failing to pursue a "sincere religious belief" defense. Leilani's Brief at 28-32. She points to four specific failures: the failure to object to the "duty" instruction; the failure to object to the "religion" instruction; the failure to seek an instruction that "a sincere belief in prayer treatment may negate the subjective awareness element" of reckless homicide; and the failure to make a clear "sincere belief defense" argument in closing. Leilani's Brief at 31.

a. Performance.

i. Instructions.

*Duty instruction*: The parties stipulated that Linehan preserved Leilani's objection to the duty

instruction (94:1). The State has shown that the instruction was proper. Linehan did not perform deficiently in this regard.

*Religion instruction*: The court instructed the jury as follows: "The Constitutional Freedom of Religion is absolute as to beliefs but not as to conduct which may be regulated for the protection of society" (123:70). The court had originally intended to give a far more detailed instruction, which Linehan objected to (51:7; 121:64).

> [I]t overemphasizes the religious factor which hasn't been tremendously emphasized to point today, and in the Court denying us the right to call witnesses to prove that faith-healing is an adequate model … I think that that overemphasizes the medical model, completely denies us our right to put on our religious model, and should not be permitted.

(121:65). The court decided to use the simpler instruction (121:67). Linehan observed: "I think that's the law, and I think that's neutral" (*id.*).

This instruction correctly states the law. *See Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). The State feared that the jury might draw unguided conclusions about the legal relationship between Leilani's beliefs and her conduct (121:63-67). The instruction simply and effectively alerted the jury to the difference between protected beliefs and unprotected conduct.

Linehan did not perform deficiently in this regard.

*Theory-of-defense instruction*: A criminal defendant is entitled to a theory-of-defense instruction that relates to a legal theory of defense rather than an interpretation of the evidence; is supported by the evidence; and is not adequately covered by other instructions. *State v. Coleman*, 206 Wis.2d 199, 212-13, 556 N.W.2d 701 (1996). An instruction that essentially instructs the jury that the State has failed to prove an element of the crime does not meet this criterion. Thus, in *State v. Pruitt*, 95 Wis.2d 69, 81, 289 N.W.2d 343 (Ct.

App. 1980), Pruitt's proposed instruction explaining the difference between first- and second-degree murder was unnecessary because Pruitt's "'theory' … was simply that he lacked the requisite intent to commit first-degree murder. Therefore, his 'theory' was adequately explained to the jury through the general instructions given on intent." *Id.* at 81 (citations omitted).

Leilani argues that Linehan should have requested a theory-of-defense instruction "that a sincerely held belief in prayer treatment could negate the subjective element of the reckless homicide statute." Leilani's Brief at 33.

Linehan proposed the following instruction, which was rejected by the court: "If Leilani Neumann believed that prayer would heal her daughter, Madeline Kara Neumann, then you must find her not guilty" (92:2; 121:53). In her postconviction motion brief, Leilani proposed a far lengthier instruction, which she characterized as "in line with the Court's and State's own understanding of the law" [4] (93:5). She does not include the text of this proposed instruction in her appellate brief. Leilani does not expressly endorse either instruction on appeal. Instead, she states generally that "[t]here is no one correct way to phrase such an instruction." Leilani's Brief at 33 n.9.

Leilani's argument must be rejected. Leilani assumes that she was entitled to an unspecified sincere-religious-belief instruction. But she provides no case authority supporting her assumption. That is unacceptable. *See State v. Pettit,* 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In order to meaningfully address the merits of Leilani's argument, the State would first have to research whether a sincere-belief defense has been recognized in any context and determine whether it

[4]Neither the State nor the court agreed that the alternative instruction correctly stated the law (94:4; 96:5).

could apply here.[5] It is not the duty of the State to do Leilani's research for her. Leilani's argument is also fatally underdeveloped. *See id.* Without the text of an instruction that Linehan should have proposed, the State has nothing to respond to. It is not the State's duty to develop Leilani's argument for her.

Leilani cites pretrial comments by the court and the prosecution to prove the existence of a sincere-religious-belief defense. Leilani's Brief at 28-29. Such remarks are not proof that a legal defense exists. Nor is a forty-year-old suggestion by a legal commentator that such a defense "might" exist. *See id.* at 29. The court's observation was made in the context of ruling that Wis. Stat. § 940.06(1) is constitutional as applied to this case (20:10). The prosecutor's comments were made in that same context. Neither the court nor the State suggested that Leilani was entitled to a prayer-specific instruction beyond the subjective-awareness language of the standard reckless-homicide instruction (*id.*; 104:31-34; 123:78). Indeed, two pages after the first sentence quoted by Leilani, the prosecutor denied that he was suggesting "that the jury should be instructed on affirmative defense of good-faith religious beliefs" (104:33).[6]

Leilani's default on the substantive issue is also a default on the procedural issue. She does not explain how the unspecified instruction would have satisfied *Coleman*'s requirements. Without specific language, how can this court determine whether an instruction not offered by Linehan related to a legal theory of defense, was supported by the evidence, and was not adequately covered by other instructions? *See Coleman*, 206 Wis.2d at 212-13.

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[5]The foreign cases discussed earlier do not address this defense. *See supra* at 18-23.

[6]Leilani takes the second sentence of the prosecutor's remarks out of context. This comment referred to a hypothetical parent with "a non-religious belief that just all doctors are quacks; therefore, I'm not going to take someone to a doctor" (104:40).

The instruction Linehan originally requested fails the first *Coleman* requirement because an instruction that the jury must find Leilani not guilty if she believed prayer would heal Kara is not a legal theory, it is an interpretation of the evidence. The subjective-awareness requirement is a legal principle subject to instruction; whether a belief in prayer makes subjective awareness impossible is an interpretation of the evidence. As the trial court noted, the requested instruction was tantamount to a directed verdict (121:53). Leilani cannot meet the second requirement because she has not described the trial evidence about her religious beliefs supporting a sincere-religious-belief instruction. Finally, the court adequately instructed the jury on the core principle that the State must prove that Leilani "was aware that [her] conduct created an unreasonable and substantial risk of death or great bodily harm'" (93:5). Thus, an additional theory-of-defense instruction was unnecessary. *See Pruitt*, 95 Wis.2d at 81.

These deficiencies are especially troubling in the ineffective-assistance context. The failure to make a meritless argument is not deficient performance. *See Toliver*, 187 Wis.2d at 360. Nor is a failure to advance a proposition that lacks the support of binding precedent. *See Maloney*, 2005 WI 74, ¶23. Unless there was a sincere-religious-belief defense instruction both meritorious and clearly available under Wisconsin law or United States Supreme Court precedent, Linehan did not perform deficiently by not proposing one. *See State v. Ambuehl*, 145 Wis.2d 343, 352, 425 N.W.2d 649 (Ct. App. 1988). Because the burden of proving Linehan's deficiency is on Leilani, it was her obligation to prove the existence of such an instruction and to describe it with specificity. *See Moats*, 156 Wis.2d at 100-01.

The court explained that Leilani's theory of defense was wrong as a matter of law and did not satisfy *Coleman* (96:5-6). Leilani quotes the paragraph from the court's decision beginning: "The focus of the crime charged here was upon Leilani's … subjective awareness of the risk of

death or great bodily harm resulting from [her] belief and reliance upon prayer ….” (96:5). Leilani’s Brief at 34. She then interprets the paragraph as being contrary to the controlling legal standard, which she describes as “the Neumanns must be aware not only that that their daughter was experiencing great bodily harm, but that *their conduct was causing* great bodily harm.” *Id.* at 35. Leilani’s interpretation of the quoted paragraph is puzzling, because the court recited the very legal standard Leilani says is the right one.

In order to carry her burden of proving that Linehan performed deficiently by failing to request a special sincere-religious-belief instruction, Leilani must articulate a foregone instruction that is both legally correct and factually supported. She has proffered no such instruction. She hints that the instruction suggested in her postconviction motion might have been sufficient, but chooses not to defend it explicitly on appeal. The court cannot tell if that instruction is supported by the law because Leilani has not revealed what the law is. The court cannot tell if it is supported by the trial evidence because Leilani has not explained how her specific beliefs supported that instruction. Even more severe is the court’s inability to evaluate instructions that have never been articulated anywhere but which Leilani nevertheless asserts would have been sufficient. *See* Leilani’s Brief at 33-34 n.9.

ii. Closing.

Leilani argues that Linehan was ineffective for failing to close with a sincere-religious-belief argument. Linehan did not perform deficiently. Linehan made a strategic decision to make a different set of arguments. “Defense counsel may select a particular defense from available alternative defenses ….” *State v. Snider*, 2003 WI App 172, ¶22, 266 Wis.2d 830, 668 N.W.2d 784. This court will not “second-guess a trial attorney’s ‘considered selection of trial tactics … in the face of alternatives that have been weighed.’” *State v. Elm*, 201 Wis.2d 452, 464-

65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted), *quoted in State v. DeLain*, 2004 WI App 79, ¶20, 272 Wis.2d 356, 679 N.W.2d 562.

Leilani claims there "is no solid evidence that counsel" made a strategic decision "to de-emphasize the sincere belief defense." Leilani's Brief at 36. However, in opposing the court's proposed religion instruction, Linehan argued that

> the religious factor which hasn't been tremendously emphasized to point today, and in the Court denying us the right to call witnesses to prove that faith-healing is an adequate model by which people believe in health care and allowing the State to put the model of medical health care on, I think that that overemphasizes the medical model, completely denies us our right to put on our religious model, and should not be permitted.
>
> ….
>
> I have consciously stayed away from the religious model in this case, and to reemphasize it without being allowed to call [an] expert to explain the validity of the religious model I think would be reversible.

(121:65-67).

The disallowed expert was Thurman Scrivner, proffered by Linehan because:

> Our theory on that is the State is working from a medical model, saying that medical [sic] should have been obtained prior to Kara's death.
>
> Our feeling is that faith healing is a legitimate exercise of discretion that a reasonable person within the faith community would exercise and that it is successful, that neither the medical model nor the faith model are 100 percent successful, but that … faith healing … is an option exercised by many people ….

(108:3-4). Before the court decided whether Scrivner could testify, Linehan remarked that a negative ruling

"might alter whether or not I actually pursue a religious defense…. I might just take them on a medical model, which might be my preference any how" (110:158).

The court barred Scrivner's testimony (111:54-58). In response, Linehan stated: "We're just asking that we can explain to the jury through the expert witness that she could not satisfy the necessity of intent because of her belief system, much the way that anybody else could claim the same thing for any given set of facts" (111:59). At the postconviction hearing, Linehan's paralegal testified that the Scrivner ruling caused Linehan to switch from a "religious model" defense to a "medical model" defense (127:60-63).

Linehan's reasons for calling Scrivner, his reaction to the court's rejection of Scrivner, his objection to the court's suggested religion instruction, and his paralegal's testimony all support the conclusion that Linehan made a strategic decision to deemphasize the sincere-religious-belief aspect of the case. As the court observed, Linehan also had to follow the State's closing, which ended, among other things, with the implication that Leilani was a religious extremist (96:8; 123:37-39). "That is the context and perspective of trial counsel at that time" (96:8). Linehan did not perform deficiently by fashioning his argument in light of that "context and perspective." *See State v. Nielsen*, 2001 WI App 192, ¶44, 247 Wis.2d 466, 634 N.W.2d 325.

Linehan's principal theme in closing was that Leilani was not reckless because she lacked the subjective awareness that her choice of prayer over medical care was life-threatening to Kara because she didn't understand the severity of Kara's condition.

> We don't have the opportunity to have 50 years of medical experience in our living room to advise us or to advise the Neumanns on the condition of their children. Now, virtually every doctor indicated that the pre-signs of ketoacidosis before it becomes fatal are very similar to the flu. So you take the flu. You take puberty. I think there

> is every right with the getting better to think that they are not in a life/death situation.

(123:52).

Linehan emphasized Leilani's belief that Kara's condition was improving because her breathing had quieted, and her claim that she asked the Wormgoors to call 911 (123:45-48, 51, 59). He rejected many of the State's factual conclusions, arguing that there was no indication that Leilani knew about the email seeking prayer assistance (123:39-40); that in the weeks before her death no one noticed anything wrong with Kara (123:45); and that her illness was sudden (123:51).

Linehan's secondary theme was an attack on the State's purported "religious extremism" argument (123:38, 54). Linehan attempted to show that Leilani was a good Christian who reasonably relied on prayer until she subjectively realized that Kara's condition called for medical intervention (123:39, 43, 45-48). As part of his effort to portray Leilani as a normal person who made a grievous error, Linehan pointed out that all the Neumann "children had been to the doctor … for everything that was required by law, for education, school, shots, vaccinations, [s]o on and so forth" (123:54). Leilani applied antibiotic cream to Kara's hand a few days before she died (123:58). "So I don't think that you can add to the situation the fact that they hadn't been to the doctor and show a hatred for doctors. That's not [the] case at all. God created doctors, too" (123:54).

Third, Linehan portrayed the State's reaction to Kara's death as overzealous. He cited the call to the police from the Neumanns' California niece, Ariel Neff (123:42). Because of that call, "[w]hen Kara died and while she was in the hospital, the house was already marked as a crime scene" (123:42). "So at that point it was assumed that a crime was committed, and law enforcement had to substantiate the fact that a crime was committed, and it just followed all the way through to where we are today" (123:43). Ariel gave the police the

impression that Leilani was a "religious fanatic who was going to fight them to stop them from administering aid to her daughter, and that's the vision that this case develop, and that's why we have courts" (123:48).

Linehan acknowledged Leilani's religious beliefs, but chose to emphasize her understanding of Kara's medical condition instead. Linehan's choice was appropriate given the court's evidentiary rulings, the trial evidence, and the jury instructions. He made his decision with a full understanding of the law and the facts. Granted, Linehan's arguments did not prevail.[7] But that does not mean he performed deficiently by choosing those arguments. *See Snider*, 266 Wis.2d 830, ¶22.

iii. Personal problems.

Linehan performance was not deficient just because he had personal problems. *See* Leilani's Brief at 38-39. The court concluded that these issues "did not result in any obvious reduced mental ability or legal acumen on Linehan's part" (96:9 n.4). This is a factual finding, which this court will not disturb unless clearly erroneous. *See State v. Mayo*, 2007 WI 78, ¶32, 301 Wis.2d 642, 734 N.W.2d 115. The finding is not clearly erroneous and Leilani does not argue that it is.

b. Prejudice.

The jury instructions were not prejudicial.

The legally correct duty and religion instructions could not have prevented the jury from fairly evaluating whether Leilani was subjectively aware that her conduct of choosing prayer over medical treatment threatened Kara with great bodily harm or death. Therefore, any failure to object to them was not prejudicial.

[7]Unsurprisingly, the State disagrees with most of Linehan's characterizations of the evidence.

The court instructed the jury that to find Leilani guilty of reckless homicide it must find that "the risk of death or great bodily harm [to Kara] was unreasonable and substantial, and *the defendant was aware that her conduct created the unreasonable and substantial risk of death or great bodily harm*" (123:78) (emphasis added). This instruction clearly informed the jury that it could not find Leilani guilty if she lacked the subjective awareness that her conduct created a life-threatening risk to Kara. Leilani could have lacked this subjective awareness either because she did not understand the severity of Kara's condition or because her religious beliefs prevented her from understanding the necessity of medical intervention. Either way, the instruction adequately conveyed the State's burden of proof. Therefore, Linehan's failure to obtain a theory-of-defense instruction was not prejudicial.

Linehan's closing was not prejudicial.

Dale's trial counsel made a serious-religious-belief argument in closing (Dale's Record 112:39-47). Nevertheless, Dale, like Leilani, was convicted of second-degree reckless homicide (Dale's Record 70). This is definitive evidence that Linehan's alternative strategy for Leilani's closing was not prejudicial. Leilani's contention that a different closing would have given the jury a reasonable doubt about her guilt is "rank speculation" and insufficient under *Strickland.* *Erickson*, 227 Wis.2d at 774.

3. Conclusion.

For these reasons, Leilani has not proven that Linehan was ineffective.

### B. Leilani is not entitled to a new trial in the interest of justice.

This court may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35. The statute comprises two distinct standards. A "real controversy" claim may also be based on erroneous jury instructions. *See State v. Grobstick*, 200 Wis.2d 242, 253, 546 N.W.2d 187 (Ct. App. 1996). The miscarriage of justice standard requires the appellant to show "a substantial degree of probability that a new trial would produce a different result." *State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis.2d 558, 614 N.W.2d 543 (citations and punctuation omitted).

"[T]he statute was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense at a new trial merely because the defense presented at the first trial proved ineffective." *State v. Hubanks*, 173 Wis.2d 1, 29, 496 N.W.2d 96 (Ct. App. 1992); *accord State v. Maloney*, 2006 WI 15, ¶37, 288 Wis.2d 551, 709 N.W.2d 436; *Van Buren*, 307 Wis.2d 447, ¶20; *State v. Flynn*, 190 Wis.2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994). Moreover, where a "real controversy" claim is based on errors by counsel, "the *Strickland* test is the proper test to apply." *Mayo*, 301 Wis.2d 642, ¶60.

Leilani summarizes her argument as follows: "the issue at trial should have been whether the Neumanns had a sincere belief in prayer treatment that negated the subjective awareness element of reckless homicide. However, this was not the case put before the jury, either in the jury instructions or counsel's arguments." Leilani's Brief at 31. She is not entitled to relief under § 752.35.

*First*, Leilani's interest-of-justice theory is that Linehan should have pursued a sincere-religious-belief

defense instead of the defense he did pursue. According to *Hubanks* and its progeny, § 752.35 does not authorize a new trial on that ground.

*Second*, Leilani has failed to prove that the real controversy was not fully tried. Leilani's interest-of-justice argument is based on Linehan's purported ineffectiveness. The State has already shown that Linehan was not ineffective under *Strickland*. Therefore, Leilani is not entitled to a new trial under the real-controversy standard according to *Mayo.*

*Third*, Leilani cannot prevail under the miscarriage-of-justice standard because she cannot show a substantial probability of a different result at a new trial. *See Cleveland*, 237 Wis.2d 558, ¶21. Dale's counsel made a sincere-religious-belief argument in closing and Dale was convicted nonetheless. Further, Leilani fails to show that there was anything lacking in the jury instructions. On the one hand, she fails to show that the legally correct duty and religion instructions were erroneous or could have prevented the jury from determining whether Leilani was subjectively aware that her conduct "create[d] an unreasonable and substantial risk of death or great bodily harm to" Kara. Wis. Stat. § 939.24(1). On the other hand, she fails to prove (1) the existence of a sincere-religious-belief defense and (2) that her beliefs would have guaranteed her acquittal had the jury been instructed on that hypothetical defense.

Accordingly, this court should not grant Leilani a new trial in the interest of justice.

## CONCLUSION

Respondent respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 17th day of October, 2011.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 11,660 words.

_____

Maura FJ Whelan
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of October, 2011.

_____

Maura FJ Whelan
Assistant Attorney General

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2011AP001105 - CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEILANI E. NEUMANN,

Defendant-Appellant.

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ON REVIEW OF A JUDGMENT OF CONVICTION AND DECISION DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, HON. VINCENT K. HOWARD PRESIDING

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# REPLY BRIEF OF DEFENDANT-APPELLANT, LEILANI E. NEUMANN

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## ARGUMENT

### I. Clarifications regarding State's Statement of Facts.

Several points warrant emphasis in response to the State's Statement of Facts. First, Kara's illness had a very rapid onset, and did not become obviously severe until the day before her death. The State asserts that Kara experienced thirst, frequent urination, and fatigue "for weeks before she died" (State's Brief at 2). But no one close to Kara interpreted these early symptoms as indicating a serious illness. The parties stipulated at trial that Kara "would have appeared healthy" just days before her death (123:72), and a prosecution expert acknowledged that the early signs of diabetes are commonly interpreted as the flu (112:140). The State's account of Kara's more severe symptoms does not begin until Saturday, the day before her death (State's Brief at 3).

Most importantly for resolving the legal arguments in this case, Leilani's decision to employ prayer was statutorily protected *even when Kara's illness became very serious*: the prayer treatment exception protected Leilani even when Kara was experiencing a "substantial risk of death." The severe symptoms that Kara experienced starting on Saturday fall within the protected realm of "substantial risk of death." There is no clear discernible moment—other than when Kara stopped breathing and died—that her condition went beyond the protected sphere. Leilani thus had no way of knowing when her conduct crossed the line from protected to unprotected.

## II. The overlap between the prayer treatment exception and the reckless homicide statute means that Leilani did not have sufficient notice that her choice of prayer could create criminal liability.

### A. Contrary to the State's argument, general principles of Due Process notice support Leilani's position.

The State ignores the fact that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). The State also ignores the authorities cited in Leilani's brief-in-chief at 9-10, making clear that contradictory statutory commands create a notice problem.

Here, the line is not merely hazy. There is no way a reasonable person viewing the various statutes at issue would have known when prayer treatment became illegal. To begin with, a reasonable person would not have known from reading the statutes that there is any line at all—on its face, the prayer treatment exception applies through "substantial risk of death," and nothing in the text of either the child abuse statute or the homicide statute even implies that criminal liability will attach if prayer fails and the child dies. Indeed, a reasonable person might well conclude that the legislature would not want to trap prayer-treating parents by protecting them through the substantial risk of death, but then criminalizing them if prayer fails and the child dies.

But even if there is a line in theory, that line is simply too difficult to define or conceptualize. The State makes no attempt to define a category in between the "substantial risk of death" and death itself. A reasonable person could not be expected to recognize or conform to such a line. None of the

State's examples (intoxication, corporal punishment, or sex with minors) reflect contradictory statutory commands. Rather, each involves an objective standard between legal and illegal behavior (in the case of intoxication and sex with minors, the standard is numerical: BAC or the victim's age).

### B. It is immaterial to Leilani's notice argument that the child abuse statute does not list death as one of the injuries that can be criminalized under that statute.

The State argues in two places[1] that there is fair notice because the child abuse statute "does not reach the infliction of death," while the homicide statute does (State's Brief at 8-10).

The State's argument misses Leilani's basic point. As the State concedes elsewhere in its brief, Leilani has never argued that the prayer treatment exception in the child abuse statute applies directly to the homicide statute. Rather, she has argued that the interplay between the two statutes prevents fair notice under the facts of this case. Up until the moment her daughter stopped breathing, Leilani's choice of prayer treatment was a statutorily-protected response to the "substantial risk of death" that her daughter was experiencing. The only clear, discernible moment at which that protection ended was death itself, and that moment obviously cannot be proof of adequate notice. Leilani's notice argument does not imply that the child abuse statute and the prayer treatment exception directly apply to the infliction of death.

[1] The State's organization of this point is confusing, in that this same point—that the child abuse statute does not reach death—is listed as the third point in a list of three points on pages 8-9, but is also listed as the first point in a different list of three points on p. 11-12. Regardless, the point appears to be the same in both places.

### C. It is immaterial to Leilani's notice argument that there are minor linguistic differences in the definition of "recklessness" between the child abuse statute and the reckless homicide statute.

The State argues that, unlike the homicide statute, the "recklessness provisions of the child-abuse statute do not include conduct that creates 'an unreasonable and substantial risk of death'" (State's Brief at 8-9). But that is true in only the most hypertechnical sense. While the specific definition of "recklessness" applicable to child abuse does not include the substantial risk of death, a different part of the child abuse statute *does* cover substantial risk of death (because it covers "a high probability of great bodily harm," which, as explained above, includes a "substantial risk of death"). As a whole, the prayer treatment exception clearly does apply to the "substantial risk of death." It is irrelevant that the "substantial risk of death" is included further down in the statute rather than in the definition of recklessness.

Second, the State argues that the child abuse statute requires merely a "conscious disregard for the safety of the child" while the reckless homicide statute requires "awareness" that the actor is creating an unreasonable and substantial risk of death or great bodily harm (State's Brief at 9). But this difference, too, is irrelevant to Leilani's notice argument. It may be true that the minimum recklessness required for child abuse is a lower standard than for homicide, but a parent who meets the higher mental state required for homicide still has protection under the prayer treatment exception.

Finally, the State contends that Leilani's "reading" of the term "great bodily harm" is impermissible because it renders superfluous certain language in the reckless homicide statute (State's Brief at 12). Specifically, the State points out that the homicide statute punishes a defendant for creating an

"unreasonable and substantial risk of death *or* great bodily harm," and thus, apparently, the term "great bodily harm" must mean something other than "substantial risk of death" (State's Brief at 12). The State's argument does not follow logically. Leilani's position rests on two premises: 1) prayer treatment is protected even when a child is experiencing great bodily harm, which includes "substantial risk of death," but, simultaneously 2) the homicide statute allows prosecution under the exact same circumstances, when there is a "substantial risk of death." The State's argument about superfluous language in the homicide statute changes neither of these two premises. Further, whether its language is superfluous or not, the homicide statute plainly allows prosecution at the same point—"substantial risk of death"—protected in the child abuse statute.

### D. The State's arguments essentially re-write the prayer treatment exception.

The State argues that, because the prayer treatment exception in the child abuse statute references a provision in the Children's Code (Wis. Stat. § 48.981(3)(c)4), this entire provision of the Children's Code is automatically "imported" into the child abuse statute (State's Brief at 14-15). The State argues that, because the Children's Code provision allows a court to require conventional medical care "when the child's health requires it," this somehow necessarily means that the prayer treatment exception in the child abuse statute is similarly limited. That argument re-writes the statute. By its plain terms, the prayer treatment exception applies in situations where a child's health is at risk (bodily harm and great bodily harm certainly put health at risk). There is no way the legislature meant to grant such broad statutory protection for prayer treatment but then take it away merely by referencing an entirely separate statute in the Children's Code. The reference to the Children's Code was clearly for

defining protected conduct as "a parent in good faith select[ing] and rel[ying] on prayer for treatment of disease," Wis. Stat. § 48.981(3)(c)4, not to undermine the entire structure and purpose of the statute.[2]

### E. Homicide is not different when it comes to Due Process notice.

The State argues that "homicide is different," and points to several affirmative defenses which the legislature has treated differently when homicide is at issue (State's Brief at 17-18). Tellingly, in each situation the legislature *explicitly specified* the homicide-related circumstances in which the affirmative defense would not be available. That alone distinguishes this situation, because here neither the child abuse statute nor the homicide statute contains any explicit language suggesting that prayer treatment is prosecutable if the child dies.

### F. Cases from other states support Leilani's notice argument.

Leilani's brief-in-chief summarized and applied the notice cases from other states. The State's arguments do nothing to change that analysis.

Unlike the State, Leilani's brief accepted that the other state court decisions—both those in favor of defendants and those against—were correct for their unique statutory schemes.[3] Leilani explained why notice was a problem under some

[2] The State implies that the prayer exception only applies to the Practice of Christian Science (State's Brief at 9). But that ignores §948.03's reference to Wis. Stat. § 48.981(3)(c)4, which includes "a parent in good faith select[ing] and rel[ying] on prayer for treatment of disease."

[3] Although the State does not explicitly say that it disagrees with the Minnesota Supreme Court's ruling in *McKown*, 475 N.W.2d 63, (Minn, 1991), the State relies on the dissent from that case, leading to the conclusion that it believes *McKown* to be incorrectly decided.

statutory schemes but not under others, and why, based on a comparison with those other statutory schemes, notice clearly is a problem in Wisconsin. The State ignores the differences in the states' statutory schemes, and, for that reason, the State's reliance on cases from California, Colorado, Massachusetts, and Pennsylvania is misplaced. The prayer treatment exceptions in those states are not nearly as broad as Wisconsin's. ***Walker***, 763 P.2d. at 868)(no protection when "children battling life-threatening diseases" or "serious physical harm"); ***In re D.L.E.***, 645 P.2d 271 275 (Colo. 1982)(no protection when child has a "life-endangering condition"); ***Twitchell***, 416 Mass. 114, 116, 617 N.E.2d 609 (Mass. 1993)(protection applies only to accusations of neglect or failing to provide physical care).

The homicide laws in Pennsylvania and Massachusetts were objective standards. This is critical, as parents are put on notice ahead of time that, should they deviate from the standards of the community, they will be found criminally liable. ***Twitchell***, *supra*; ***Commonwealth v. Nixon***, 718 A.2d 311 (Pa. Super. Ct. 1998), *aff'd,* 761 A.2d 1151 (Pa. 2000) Wisconsin's subjective standard offers no such notice.

## III. Alternatively, the jury was improperly instructed as to Leilani's legal duty to provide medical care to her child.

Leilani argued in her brief-in-chief that the duty instruction was overly broad for several reasons. The State responds in several ways. Leilani reaffirms the arguments made in her brief-in-chief. Only a few of the State's arguments require a response here.

First, Leilani argued in her brief-in-chief that the duty instruction was overly broad because it entirely ignored the explicit protection for prayer treatment contained in the child

abuse statute. The State gives this argument short shrift, claiming that Leilani is "confounding her arguments," because, according to the State, the prayer treatment exception is "limited to criminal child-abuse prosecutions" and therefore irrelevant to the scope of the legal duty to provide medical care in this case (State's Brief at 29).

The State's position is difficult to understand. In trying to define the legal duty to provide medical care in a prayer treatment prosecution, one would naturally look to *a criminal statute on that exact subject.* A parent's duty in a prayer treatment prosecution is obviously informed by what criminal statutes say about prayer treatment. The mere fact that this was a homicide prosecution rather than a child abuse prosecution does not render the prayer treatment exception irrelevant to defining the legal duty to provide medical care. Rather, assuming that a duty to provide medical care exists at some point, the prayer treatment exception is essential to defining when that duty begins.

Further, while ignoring the criminal statute that addresses prayer treatment, in its place the State relies on language drawn from a 40 year-old tort case that had nothing to do with prayer treatment. If that language is relevant at all, it is certainly cabined by the much more relevant language in the prayer treatment exception.[4]

[4] The duty instruction given by the trial court may also run afoul of the abolition of common law crimes contained in Wisconsin Stat. § 939.10, as it directly contradicts the prayer exception of Wisconsin Stat. § 948.03.

## IV. The real controversy was not fully tried because of incorrect jury instructions and ineffective assistance of counsel.

Leilani argued in her brief-in-chief that the critical issue at trial should have been the sincerity of her belief in prayer treatment. She argued that the prosecutor and the court agreed before trial that such belief in prayer treatment, if sincere, meant that the State could not prove the subjective awareness element of reckless homicide (123:69). She argued, however, that this defense was not made clear through the jury instructions or closing arguments.

The State devotes much of its argument in this section to whether the trial court erred in failing to give a sincere belief theory of defense instruction. First, the State argues at length that Leilani has "defaulted" this issue by not specifying the exact language of such an instruction (State's Brief at 31-35). But ***Coleman***, the very case relied upon by the State, demonstrates that a defendant need not specify the precisely correct instruction in order to establish trial court error for failing to give *some* instruction. 206 Wis. 2d 199, 215, 556 N.W.2d 701 (1996)("We note, however, that the instructions requested by Coleman--coercion, self-defense, defense of others, and defense of property--are substantively different than the five-part test we have adopted here today. Nonetheless, the circuit court committed error by refusing to give **any** instruction on Coleman's theory of the defense")(bold in original).

Further, there is no mystery about what the content of such an instruction should have been. There are at least two possibilities in the record, one proffered by trial counsel, the other proffered by the undersigned during post-conviction proceedings. All the instruction needed to do was explain the

relationship between the subjective awareness element and sincere belief in prayer.

The State also suggests that such a theory of defense instruction was not factually or legally supported. The State implies that Leilani has not supplied sufficient "proof that a legal defense exists" (State's Brief at 33). Seven pages later, however, the State appears to concede that such a defense does exist, acknowledging that Leilani may have lacked the necessary subjective awareness because "her religious beliefs prevented her from understanding the necessity of medical intervention" (State's Brief at 40). In any event, it should be clear from the pre-trial comments of the prosecutor and court—not to mention a plain reading of the statute—that such a defense does exist. As to the factual support for the defense, the trial record and appellate briefs are replete with evidence and arguments that Leilani sincerely believed prayer would heal her daughter.[5]

Apart from problems with the jury instructions, Leilani also argued in her brief-in-chief that defense counsel failed, without justification, to present the sincere belief defense in closing argument. The State, essentially conceding that counsel did not argue the sincere belief defense, instead argues that counsel had a valid strategic reason for not doing so (State's Brief at 36-38). Leilani believes, for reasons stated in her brief-in-chief, that counsel made no such strategic decision, and that even if counsel did make such a decision, the decision was unreasonable. Finally, even if this Court concludes that counsel made a valid strategic shift away from the sincere belief defense, this Court may still consider the

[5] 113:34,77;112:216;118:38,56;127:47,48;97:Ex.32:23:32-23:46,29:29-29:34,31:20-31:47,44:00-44:05; Dale record 109:35,36,129-133,142,208,213-214,267,285;111:19,33;109:143;111:102-103,111,115; Brief-in-chief at 2-6,28-37.

absence of that defense in determining whether to order a new trial in the interest of justice.

The State also argues that the outcome of Leilani's trial would not have been different even if the sincere belief defense had been presented more effectively in jury instructions and argument (State's Brief at 40). The State points to the fact that Dale was convicted even though his lawyer "made a serious-religious-belief [sic] argument in closing" (State's Brief at 40). The State omits, however, that the jury in Dale's trial asked a question directly inquiring about the sincere belief defense. As Dale argues in his appeal, the trial court refused to answer the question. The most likely explanation for these events is that the sincere belief argument in Dale's trial led the jury to ask whether such a defense existed, and the outcome of that trial likely would have been different had the court given a legally correct answer. Thus, the events at Dale's trial strengthen, not weaken, Leilani's sincere belief arguments.

On the whole, the best and most obvious defense simply did not receive a fair hearing. This Court should order a new trial either in the interest of justice or based on ineffective assistance of counsel.

## CONCLUSION

Leilani respectfully requests that this Court reverse her conviction and dismiss with prejudice on the notice issue, or simply reverse her conviction.

Respectfully submitted this ___ day of _____, 2011.


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## CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is _____ words.

_____

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## CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

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