

STATE OF WISCONSIN,

Plaintiff

v.

**DECISION; MOTION TO DISMISS
Freedom of Religion & Due Process**LEILANI E. NEUMANN
and DALE R. NEUMANN,
Defendants

Case #08-CF-323

Case #08-CF-324

Each of the defendant's, Dale R. Neumann (Dale) and Leilani E. Neumann (Leilani), 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 Neumann'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

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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.

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

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 Mormon 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 statute⁶ 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.”

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, its 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 Neumanns concede that the first prong is met here, they 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. II-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

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)* is 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.

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

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 statute¹¹ 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.

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 homicide¹² 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

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 nevertheless 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

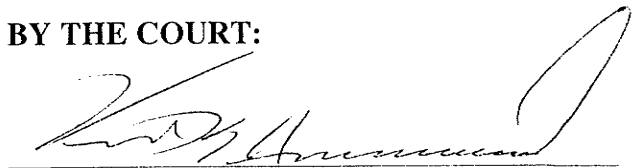
The defendants here argue that application of the Reckless Homicide Statute, *Wis. Stat. §940.06*, as applied to them under the facts of this case, is unconstitutional under their Right to Freedom under the First Amendment and void for vagueness under their right to fair notice under the Due Process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