IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON, Plaintiff, vs. CARL BRENT WORTHINGTON, Defendant.	Case No.: 08-00403 DEFENDANT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT, AND FOR OTHER RELIEF Hearing Date: January 7, 2009
STATE OF OREGON, Plaintiff, vs. RAYLENE MARIE WORTHINGTON, Defendant.	Case No.: 08-00404 DEFENDANT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT, AND FOR OTHER RELIEF Hearing Date: January 7, 2009

Defendants CARL BRENT WORTHINGTON and RAYLENE MARIE WORTHINGTON, through their counsel MARK C. COGAN and JOHN W. NEIDIG, respectively, move the Court to dismiss the Indictment, and for other relief. The Motion

is based on the authorities cited in the Memorandum being filed herein, as well as the Exhibits thereto, and the evidence to be presented at a hearing which has been scheduled to begin on January 7, 2009.

Respectfully submitted this 21st day of November, 2008

____
MARK C. COGAN
Attorney for Defendant Carl Brent Worthington

____
JOHN W. NEIDIG
Attorney for Defendant Raylene Marie Worthington

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON, Plaintiff, vs. CARL BRENT WORTHINGTON, Defendant.	Case No.: 08-00403 MEMORANDUM IN SUPPORT OF DEFENDANT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT, AND FOR OTHER RELIEF
STATE OF OREGON, Plaintiff, vs. RAYLENE MARIE WORTHINGTON, Defendant.	Case No.: 08-00404 MEMORANDUM IN SUPPORT OF DEFENDANT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT, AND FOR OTHER RELIEF

A. INTRODUCTION.

The instant prosecution implicates issues of religious freedom that go to the core of the fundamental liberty, values, and rights of conscience and worship of the State of Oregon and the United States of America, as guaranteed in our founding documents. Moreover, the instant prosecution challenges the fundamental right of parents to be the ones who make crucial decisions concerning the raising of their children.

It is seldom that a criminal prosecution raises such deep questions involving the most fundamental values of our State and our Nation. In order to understand how this prosecution implicates the religious freedom that is so cherished in our State and our Nation, it is necessary to dig deeply into the roots of the freedom that is established by the State and Federal Constitutions.

Carl and Raylene Worthington stand accused of Manslaughter in the Second Degree and Criminal Mistreatment in the Second Degree, arising from the death of their

daughter Ava on March 2, 2008. The State alleges that Ava's death was caused by criminal negligence by failing to provide "adequate medical care" which resulted from Mr. and Mrs. Worthington's adherence to their religious faith.

The prosecution of Mr. and Mrs. Worthington is premised on a 1999 amendment to the statutes which apply to the law of Manslaughter in the Second Degree, by which the Legislature removed an affirmative defense which applies to a person who is treated solely by spiritual means pursuant to religious beliefs or practices of a parent or guardian. Mr. and Mrs. Worthington maintain that their prosecution contravenes their right "to worship Almighty God according to the dictates of their own consciences", as guaranteed by the Constitution of the State of Oregon and the Constitution of the United States. Further, Mr. and Mrs. Worthington urge that this prosecution contravenes their fundamental right to raise their children without interference by the State.

This case is extraordinary in many respects. To begin, the prosecution of Mr. and Mrs. Worthington takes place in the context of Oregon's very expansive protections of religious freedom which are guaranteed by our State Constitution. Further, the prosecution of Mr. and Mrs. Worthington is the first known application of a 1999 legislative enactment which removed from our law an affirmative defense which was applicable to persons in the position of Mr. and Mrs. Worthington.

The motions being filed on behalf of Mr. and Mrs. Worthington address various reasons why we contend that the instant prosecution violates Mr. and Mrs. Worthington's right to practice their religion, and to raise their children without interference by the State, as guaranteed by the Oregon Constitution as well as the Constitution of the United States. A hearing is scheduled to commence on January 7, 2009, to address the points which are being raised herein.[1]

---

[1] Counsel acknowledges the assistance of Attorney John C. Lucy IV and Legal Research Assistant Jeffrey Turnoy for the assistance which they have provided in relation to the preparation of these motions.

B. THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE PROSECUTION OF MR. AND MRS. WORTHINGTON CONTRAVENES THEIR FREEDOM OF RELIGIOUS WORSHIP AS GRANTED BY THE OREGON CONSTITUTION.[2]

Oregon will soon celebrate, on February 14, 2009, the 150th anniversary of our Statehood. Oregon's Constitutional Convention of 1857 was the body that was responsible for drafting the Constitution which is largely in effect to this very day. Our Constitution has been amended frequently, but it still contains the original Bill of Rights, which goes far beyond the rights that are established in the United States Constitution.

The paradigm that pertains to the analysis of claims arising from the Bill of Rights provisions contained in the Oregon Constitution is one of "original intent." One of the more recent cases which follows the "original intent" methodology is the case of State v. Ciancanelli, 339 Or 282 (2005).

The Court's focus on the original intent of the Founders of the Oregon Constitution has its roots at least as far back as Priest v. Pearce, 314 Or 411, 415-416 (1992). In Priest, the Court declared that its search for the intent of the Founders must address three separate topics: the wording of the constitutional provision, the case law surrounding it, and the historical circumstances leading to its adoption. Cases following the Priest methodology of Constitutional interpretation include the following: Neher v. Chartier, 319 Or 417, 422-428 (1994) (Article I, Section 10); Greist v. Phillips, 322 Or 281, 296-297 (1995) (Article VII, Section 3); Vannatta v. Keisling, 324 Or 514, 529-536 (1997) (Article II, Section 8); State v. Vasquez, 336 Or 598, 604-613 (2004) (Article I, Section 10, and Article VII, Section 5).

In Ciancanelli, the Supreme Court held that live sex performances are protected

---

[2] We present our State Constitutional argument before our arguments arising from Federal law in keeping with the strong preference for adjudicating State Constitutional issues prior to examining those raised under the Federal Constitution. See generally, State v. Lajoie, 316 Or. 63, 72 (1993); Sterling v. Cupp, 290 Or. 611, 614 (1981).

under the freedom of expression that is guaranteed by Article I, Section 8 of the Oregon Constitution. The Court's analysis of the freedom of expression is instructive to the interpretation of the religious freedom provisions of the Oregon Constitution.

The task of Constitutional interpretation focuses on examination of the intent of those who drafted and adopted the Constitution in the first instance. Attention must be given to (1) the wording of the constitutional provision, (2) the caselaw surrounding it, and (3) the historical circumstances leading to its adoption. 339 Or 282, 289. This methodology enables the Court "to understand the wording [of the constitutional provision] in the light of the way that the wording would have been understood and used by those who created the provision * * * and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise." Id.

Applying this methodology, the Court parsed the language of Article I, Section 8,[3] examining with care what the language was intended to signify by the Founders. Further, the Court reviewed the caselaw which had interpreted the language of the constitutional provision at issue. Finally, the Court closely analyzed the historical circumstances surrounding the adoption of the Oregon Constitution. In so doing, the Court examined how other American courts and legal treatises tended to treat the right of freedom of expression during the mid-19th Century.[4] Finally, the Court put its textual analysis together with its interpretation of mid-19th Century values, and concluded that the statute

---

[3] Article I, Section 8, provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[4] Sources for this information include William Blackstone, Commentaries on the Laws of England (1783 ed.), Joseph Story, Commentaries on the Constitution of the United States (1858), Thomas M. Cooley, A Treatise on the Constitutional Limitations (1868), Philip B. Kurland and Ralph Lerner, eds., The Founders' Constitution (1987), and William Rawle, A View of the Constitution of the United States of America (1829). A wide variety of other 19th Century sources are also cited in the Court's analysis of then-prevailing attitudes and practices concerning the freedom of expression.

in question violates Article I, Section 8, of the Oregon Constitution.[5]

1. The text of the Oregon Constitution evinces a strong protection of religious liberty.

Judging from the text alone, the guarantees of religious freedom which are found in the Oregon Constitution are even more dramatic and comprehensive than their counterpart in the First Amendment. Article I of the Oregon Constitution establishes a Bill of Rights that provides as follows:

> **Section 1. Natural rights inherent in people.** We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.
>
> **Section 2. Freedom of worship.** All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> **Section 3. Freedom of religious opinion.** No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.
>
> **Section 4. No religious qualification for office.** No religious test shall be required as a qualification for any office of trust or profit.
>
> **Section 5. No money to be appropriated for religion.** No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.
>
> **Section 6. No religious test for witnesses or jurors.** No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic]; nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony.
>
> **Section 7. Manner of administering oath or affirmation.** The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.

---

[5] Significantly, the Supreme Court was persuaded by the sweeping and categorical terminology contained in the Constitutional text. "In fact, the words are so clear and sweeping that we think that we would not be keeping faith with the framers who wrote them if we were to qualify or water them down, unless the historical record demonstrated clearly that the framers meant something other than what they said." 339 Or 282, 311. The words used in the religious freedom Sections of Article I are, if anything, even more sweeping and categorical than those respecting the freedom of expression.

Religion[6] is any set of beliefs no matter what the source ("Any system of faith and worship.") Noah Webster looks in part to the Bible for the definition of religion: "godliness or real piety in practice, consisting in the performance of all known duties to God and our fellow men, in obedience to divine command, or from love to God and his law."

Therefore, when the Constitution speaks of protecting the freedom of religion, it protects all people, of all faiths, from interference by the government in the free and unfettered exercise, practice or performance of an individual's beliefs that make up their religion. Any act of divine providence is shrouded with the protection from government intervention or interference.

The Oregon Constitution was established in 1857, some 66 years after the First Amendment was adopted in 1791. The delegates to the Constitutional Convention of 1857 were well aware of the diversity of religious belief that existed in the Oregon Country, and the political divisiveness that had accompanied it. Settlers migrating

---

[6] Noah Webster's *An American Dictionary of the English Language* (1828) includes the following in its definition of "religion":

RELIGION, n. relij'on. [L. religio, from religo, to bind anew; re and ligo, to bind. This word seems originally to have signified an oath or vow to the gods, or the obligation of such an oath or vow, which was held very sacred by the Romans.]

1. Religion, in its most comprehensive sense, includes a belief in the being and perfections of God, in the revelation of his will to man, in man's obligation to obey his commands, in a state of reward and punishment, and in man's accountableness to God; and also true godliness or piety of life, with the practice of all moral duties. It therefore comprehends theology, as a system of doctrines or principles, as well as practical piety; for the practice of moral duties without a belief in a divine lawgiver, and without reference to his will or commands, is not religion.

2. Religion, as distinct from theology, is godliness or real piety in practice, consisting in the performance of all known duties to God and our fellow men, in obedience to divine command, or from love to God and his law. James .1

3. Religion, as distinct from virtue, or morality, consists in the performance of the duties we owe directly to God, from a principle of obedience to his will. Hence we often speak of religion and virtue, as different branches of one system, or the duties of the first and second tables of the law.

Let us with caution indulge the supposition, that morality can be maintained without religion.

4. Any system of faith and worship. In this sense, religion comprehends the belief and worship of pagans and Mohammedans, as well as of christians; any religion consisting in the belief of a superior power or powers governing the world, and in the worship of such power or powers. Thus we speak of the religion of the Turks, of the Hindoos, of the Indians, &c. as well as of the christian religion. We speak of false religion, as well as of true religion.

5. The rites of religion; in the plural.

westward sought to escape religious oppression and to establish a safe haven.[7]

During the debates over the wording of the religion clauses, Matthew P. Deady, President of the Convention, noted that our "Country contains persons of all religious denominations as well as non-believers." Moreover, Delegate Fredrick Waymire stated, "the people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazed religious fanatic to the unbelieving atheist."[8]

The Oregon Constitutional Convention looked to the United States Constitution and the constitutions of many states for example and guidance. During the debates, the delegates recognized that whereas the United States Constitution limited the powers of the government, the Oregon Constitution had to incorporate protections of the individual. Judging from the text alone, the guarantees of religious freedom which are found in the Oregon Constitution are much more dramatic and comprehensive than their counterpart in the First Amendment. Proof that the religious freedoms of the Oregon Constitution are stronger than their counterpart in the First Amendment is borne out by the "repetitive, empathic and strongly prohibitive language" which was chosen by the Oregon Constitutional Convention. "Note, Meltebeke v. BOLI: The Oregon Supreme Court Adopts a Knowledge Standard for Religious Harassment in the Workplace," 75 OLR 1333, 1338 (1996).

The record of debates that led to the establishment of the Oregon Constitution was dominated by a constant preoccupation with issues pertaining to religious freedom. To be sure, religious freedom was not the only focus of the Constitutional Convention. This being said, any reader of the record of the Constitutional Convention will be struck by the level of interest, intensity, and fervor, that the Convention gave to issues pertaining to

---

[7] See generally, Hinkle, "Article I, Section 5: A Remnant of Prerevolutionary Oregon Constitutional Law", 85 OLR 541 (2006).

[8] Id., at 550.

religious freedom. Central to the concern of the members of the Constitutional Convention was the vital need to avoid any government entanglement in religion, or promotion of religion, or anything that interfered with the diversity of religious expression. The members of the Constitutional Convention borrowed heavily from the constitutions of various other States.

Even though Article I, Sections 2 and 3, of the Oregon Constitution were in large part patterned after the Indiana Constitution,[9] from the first day of the debates, it was clear that a majority of the delegates believed that a State Constitution in 1857 had to be more specific in its guarantees of religious liberty and protections than the Federal Constitution and earlier state constitutions had been.[10] Delegate Erasmus Shattuck, during the early sessions of the Constitutional Convention, stated : "The history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority ... then if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this Constitution." Carey, Oregon Constitution Proceedings and Debates of the Constitutional Convention of 1857, (1926 edition), p. 102.

Article I, Section 2 of the Oregon Constitution provides:

> All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

Section 2 begins with "All men shall be secure...". By starting off Section 2 with such a strong and definitive declaration, the Founding Fathers certainly did not allow doubt about their intent. Beyond that, in order to gather more information concerning the intent

---

[9] See generally, Burton, "Oregon Constitution's Legislative History", 37 WLR 469 (2001); Hinkle, "Article I, Section 5: A Remnant of Prerevolutionary Oregon Constitutional Law", 85 OLR 541 (2006).

[10] Hinkle, "Article I, Section 5: A Remnant of Prerevolutionary Oregon Constitutional Law", 85 OLR at 551).

of the Founders, we must examine reports of the debates leading up to the ratification of Indiana Constitutional Convention of 1850. The significance of the word "secure" was debated extensively during the Indiana Constitutional Convention of 1850. The delegates rejected an attempt to substitute the words "shall possess" for the words "shall be secured". The debate on this point included the following:

> Mr. Owen. The amendment offered by the gentleman from Jefferson declares that the right exists; but the section as it is reported not only declares that the right exists, but that its existence shall be secured to all men.
>
> Mr. Borden. That is the very objection which I have to the section. Suppose that the Legislature should have a majority which was not disposed to allow the right to be enjoyed. I think the amendment of the gentleman from Jefferson is proper one. We want to have it declared that we "possess" the right.
>
> Mr. Owen. No Legislature could ever refuse to secure to the people this right without a manifest violation of the Constitution, as the gentleman from Allen must perceive if he reflects for one moment. We provide herein our organic law that all men shall be secured in the right to worship Almighty God, &c. We intended by this that they should be so secured, and that it will be the duty of the Legislature to enact such laws as will prevent any and every religious society from being disturbed in their worship.
>
> Mr. Howe. I would ask, in the name of common sense, why assert the notorious truth, that all men in this country, and in every other country, have a right to worship Almighty God as they please? If you assert anything at all, therefore, why not assert that they shall be secured in that right? I feel satisfied that you cannot insert a more appropriate term. What does it mean? It means, that, inasmuch as all men have a right to worship God according to their own creed, they shall be protected in that right. For example, if their meetings should be wantonly disturbed, that the creating of such disturbance should be regarded as a criminal offense, and punished accordingly. The object of the provision is, that the law should recognize the right and protect it by proper legislation; that is all. It is simply tying up the hands of the Legislature so that they cannot decree otherwise. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana (1850), p. 965.

The word "secure"[11] in the phrase "all men shall be secure" is very bold, definitive, and far reaching. By deliberate design, the Framers of the Oregon Constitution chose the word "secure" or "secured" over a mere possession of a right or even the protection of the free exercise of religion. The Framers intended that all men shall be safe, free from danger, free from apprehension of danger, and confident in safety that the government will not interfere with the exercise of religion according to the dictates of their own conscience. The firm commitment of our Founding Fathers in the use of the word "secure" establishes that all people have "the Natural right, to worship Almighty God according to the dictates of their conscience."

"Worship"[12] as defined by Noah Webster and in the common usage of that day

---

[11] Noah Webster defines "secure" as:
SECU'RE, a. [L. securus.]
1. Free from danger of being taken by an enemy; that may resist assault or attack. Teh[sic] place is well fortified and very secure. Gibraltar is a secure fortress. In this sense, secure is followed by against or from; as secure against attack, or from an enemy.
2. Free from danger; safe; applied to persons; with from.
3. Free from fear or apprehension of danger; not alarmed; not disturbed by fear; confident of safety; hence, careless of the means of defense. Men are often most in danger when they feel most secure.
Confidence then bore thee on, secure
secured
Also relevant is Webster's definition of the word "secured" is :
SECU'RED, pp. Effectually guarded or protected; made certain; put beyond hazard; effectually confined; made fast.

[12] Noah Webster defines "worship" as
WORSHIP, n. [See Worth.]
* * *
4. Chiefly and eminently, the act of paying divine honors to the Supreme Being; or the reverence and homage paid to him in religious exercises, consisting in adoration, confession, prayer, thanksgiving and the like.
The worship of God is an eminent part of religion.
Prayer is a chief part of religious worship.
5. The homage paid to idols or false gods by pagans; as the worship or Isis.
6. Honor; respect; civil deference.
Then shalt thou have worship in the presence of them that sit at meat with thee. Luke 14.
7. Idolatry of lovers; obsequious or submissive respect.
WORSHIP, v.t.
1. To adore; to pay divine honors to; to reverence with supreme respect and veneration.
Thou shalt worship no other God. Exodus 34.
2. To respect; to honor; to treat with civil reverence.
Nor worshipd with a waxen epitaph.
3. To honor with extravagant love and extreme submission; as a lover.
With bended knees I daily worship her.
WORSHIP, v.i.
1. To perform acts of adoration.

encompassed a broad range of acts of religious exercise. Obviously, worship is an integral part of religion. The Framers further declared in unusually clear and emphatically precise terms that the right to worship is the right to worship "according to the dictates of their own conscience". The dictates[13] of one's "conscience" is an extremely inclusive concept that is defined only by a person's own individualized internal values and beliefs.

Where Section 2 adamantly declares "the Natural right to worship Almighty God according to the dictates of their own consciences", Section 3 is an even stronger prohibition on government, "in any case whatever" from interfering in any way with "the free exercise, and enjoyment of religeous [sic] opinions" or "with the rights of conscience."

The word "conscience"[14] requires extensive analysis because it appears to be

---

2. To perform religious service.
Our fathers worshiped in this mountain. John 4.

[13] Noah Webser defines "dictate" as
DICTATE, v.t. [L., to speak.]
1. To tell with authority; to deliver, as an order, command, or direction; as, what God has dictated, it is our duty to believe.
2. To order or instruct what is to be said or written; as, a general dictates orders to his troops.
3. To suggest; to admonish; to direct by impulse on the mind. We say, the spirit of God dictated the messages of the prophets to Israel. Conscience often dictates to men the rules by which they are to govern their conduct.
DICTATE, n.
1. An order delivered; a command.
2. A rule, maxim or precept, delivered with authority.
I credit what the Grecian dictates say.
3. Suggestion; rule or direction suggested to the mind; as the dictates of reason or conscience.

[14] Noah Webster defines "conscience" as:
CONSCIENCE, n. [L., to know, to be privy to.]
1. Internal or self-knowledge, or judgment of right and wrong; or the faculty, power or principle within us, which decides on the lawfulness or unlawfulness of our own actions and affections, and instantly approves or condemns them. Conscience is called by some writers the moral sense, and considered as an original faculty of our nature. Others question the propriety of considering conscience as a distinct faculty or principle. The consider it rather as the general principle of moral approbation or disapprobation, applied to ones own conduct and affections; alledging that our notions of right and wrong are not to be deduced from a single principle or faculty, but from various powers of the understanding and will.
Being convicted by their own conscience, they went out one by one. John 8.
The conscience manifests itself in the feeling of obligation we experience, which precedes, attends and follows our actions.

particularly important to the Framers of our Constitution as "conscience" is contained in Section 2 as well as Section 3. In using the term "conscience", the Founding Fathers rejected other concepts such as belief, religion, and most certainly, they rejected the benchmarks of majority opinion and popular standards. Without doubt, conscience is a particularly individual phenomenon.

"Conscience" is an innate moral sense. It is the faculty of judging the moral qualities of action, or of determining right and wrong and impelling one toward the right action. It is particularly applied to one's own perception and judgment of the moral qualities of his or her own conduct. It is the sense of right and wrong inherent in every person by virtue of his or her existence as a social entity. One's conscience is shaped by religious training and upbringing, family morals and values, and is tempered by reason and experience. It is beyond doubt that the Framers intended to give the broadest possible protection to the individual's exercise of the obligations of conscience.

In Meltebeke v. Bureau of Labor and Industries, 322 Or 132 (1995), the Oregon Supreme Court stressed the differences between the guarantees of religious freedom in the Oregon Constitution and in the United States Constitution:

> [Article 1, Section 2 and 3] are obviously worded more broadly than the Federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from government interference. From our current vantage point of a society that is religiously diverse and *relatively* unconcerned about that diversity, it is difficult to fully appreciate why

---

Conscience is first occupied in ascertaining our duty, before we proceed to action; then in judging of our actions when performed.
2. The estimate or determination of conscience; justice; honesty.
What you require cannot, in conscience, be deferred.
3. Real sentiment; private thought; truth; as, do you in conscience believe the story?
4. Consciousness; knowledge of our own actions or thought.
The sweetest cordial we receive at last, is conscience of our virtuous actions past.
[This primary sense of the word is nearly, perhaps wholly obsolete.]
5. Knowledge of the actions of others.
6. In ludicrous language, reason or reasonableness.
Half a dozen fools are, in all conscience, as many as you should require.
To make conscience or a matter of conscience, is to act according to the dictates of conscience, or to scruple to act contrary to its dictates.

> Oregon's pioneers approved these broad and adamant protections. However, the history of religious intolerance was fresh in the minds of those who settled Oregon, many of whom themselves represented relatively diverse religious beliefs. (Emphasis in original) Id., at 146.

It is clear from the text and context of the Oregon Constitution that the Framers intended to protect those who comport their life according to the dictates of their conscience. The criminal charges against Mr. and Mrs. Worthhington cannot stand because Oregon's "remarkable ... inclusiveness and adamancy with which rights of conscience are to be protected from government interference" would be violated.

2. The caselaw which has interpreted the religious freedom provisions of the Oregon Constitution reveals a dedication to protecting religious freedom.

The jurisprudence of the Oregon Supreme Court reflects a commitment to vigorously uphold the religious freedom guarantees which are found in our State Constitution. One of the more important decisions issued in relation to Oregon's protection of freedom of religion is Meltebeke v. BOLI, 322 Or 132 (1995). Meltebeke addresses whether an employer can be sanctioned for religious discrimination, arising from the discharge of an employee which resulted from the pressure which the employer had placed on the employee to adhere to the employer's religious practices.[15]

In its analysis of the Constitutional provisions at issue, the Supreme Court made the observation that Oregon's protections of religious freedom, as contained in Article I, Sections 2 and 3, are "obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference." 322 Or 132, 146. The Court noted

[15] Before addressing the specifics of the complaint, the Court traced the factual history of the disputes between employer and employee, in which numerous demands had been placed on the employee to conform to the employer's religious expectations. After 2 weeks of employment, the employee left the job and filed a complaint alleging that he was the victim of an unlawful employment practice which amounted to religious discrimination in the form of religious harassment. After conducting its own investigation, BOLI issued an order sustaining the employee's complaint, and rejected the employer's contention that its conduct was protected under the religious freedom provisions of the Oregon Constitution. BOLI imposed compensatory damages and ordered the employer not to discriminate against future employees on the basis of religion.

the centuries of religious intolerance which had been prevalent in England, to explain why Oregon's pioneers found it necessary to incorporate "these broad and adamant protections" in the State Constitution. Id.

In accordance with the demands of the Oregon Constitution, government must tolerate the entire spectrum of beliefs among believers and nonbelievers alike. Respect for religious pluralism is the fundamental demand of Oregon's Constitutional provisions with respect to religious freedom. It follows that any law which discriminates among religions or religious organizations must be struck down or interpreted in such a way as to be nondiscriminatory. The Court reasoned that a law which prohibits religious discrimination in employment, if properly applied, serves the valid purpose of fostering religious pluralism. The law prohibiting employment discrimination, and BOLI's regulations prohibiting religious harassment, are valid because they are part of a general regulatory scheme which is expressly neutral toward religion as such, and neutral among religions. Nevertheless, even though the purpose of the nondiscrimination law is to foster religious plurality, and thus supports the values protected by Article I, Sections 2 and 3, the Court was troubled by the fact that the employer could run afoul of the law absent proof that the employer had knowledge that his practice created an intimidating, hostile, or offensive working environment.

BOLI had expressly rejected an affirmative defense arising from the employer's lack of such knowledge, and the Supreme Court held that such contravened the employer's rights under Article I, Sections 2 and 3. The Court declared that, under the principle established in Smith v. Employment Division, 301 Or 209 (1986), rev'd, 494 U.S. 872 (1990), on remand, 310 Or 376 (1990), "a person against whom a sanction is to be imposed for conduct that constitutes a religious practice must know that the conduct causes an effect forbidden by law." 322 Or 132, 151 (emphasis in original). The Court explained that, under BOLI practices, the agency will sustain a complaint if the employer

acts in a discriminatory fashion because of the employee's religion or nonreligion. In other words, the agency will take action if the employer "should have known" that the conduct causes a forbidden effect, regardless of whether or not the employer actually did know. This, according to the Court, is an insufficient standard. In order to constitute an unlawful employment practice, the employer must know that the activity created an intimidating, hostile, or offensive working environment. The Court specifically rejected the agency's contention "that state constitutional religious values are adequately protected by using a reasonable person's perspective and reaction to the activity." 322 Or 132, 152. Consistent with Constitutional standards provided by Article I, Sections 2 and 3, in order to sanction the employer, BOLI must establish that the employer knew in fact that his actions in exercise of his religious practice had an effect forbidden by the regulation. 322 Or 132, 153.

The application of Meltebeke to the instant case is obvious. Mr. and Mrs. Worthington are being prosecuted for Manslaughter in the Second Degree, pursuant to ORS 163.125(1)(c), and Criminal Mistreatment in the Second Degree, pursuant to ORS 163.200(1), based on the contention that they acted with "criminal negligence", which is defined by ORS 161.085(10) as a mental state wherein "***a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. 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***." The definition of "criminal negligence" thus lacks the knowledge requirement employed by the Supreme Court in Meltebeke. In order to satisfy the Constitutional standard established in Meltebeke, the State must establish that Mr. and Mrs. Worthington acted with knowledge that their conduct would cause the death of their child. The mental state of knowledge is defined as a mental state wherein "***a person acts with an awareness that the conduct of the person is of a nature so described or***

that a circumstance so described exists." See, ORS 161.085(8). Inasmuch as the Indictment fails to allege that Mr. and Mrs. Worthington acted with knowledge that their conduct would cause the death of their child, the Indictment fails to comport with the requirements of the Oregon Constitution, and therefore should be dismissed.

The knowledge requirement which was established in Meltebeke has a counterpart in another of the leading decisions of the Oregon Supreme Court in the application of the religious freedom guarantees which are found in the Oregon Constitution. In Smith v. Employment Division, supra, 301 Or 209, the Supreme Court upheld the denial of unemployment compensation to be paid to a Native American employed as a substance abuse treatment program counselor, on the basis that the counselor was fired because he used peyote in a religious ceremony. The employer opposed unemployment compensation for the counselor on the ground that the employee was discharged because of misconduct. The Oregon Supreme Court wrote that Oregon's Constitutional protections for freedom of worship are independent of those found in the First Amendment. However, the Court concluded that claimant failed to demonstrate that his right to worship according to the dictates of his conscience was infringed upon by the denial of unemployment benefits. The claimant was disqualified for misconduct (namely, consumption of peyote) that patricularly conflicted with the claimant's duties of substance abuse counselor. Crucial to the Supreme Court's analysis was the finding that the employee had been warned in his employment documents that use of peyote was incompatible with his duties as a substance abuse counselor. Thus, the employee had knowledge that his conduct violated the rules of the workplace. The knowledge requirement which is inherent to the Court's analysis in Smith is similar to the knowledge requirement which is found in Meltebeke. See, "Note, Meltebeke v. BOLI: The Oregon Supreme Court Adopts a Knowledge Standard for Religious Harassment in the Workplace," 75 OLR 1333, 1341 (1996).

The State, by viewing as "misconduct" the substance abuse counselor's consumption of peyote, in violation of the employer's explicit warning forbidding such behavior, does not engage in religious-based discrimination. The Court took care to limit the scope of its decision, by declaring that the ruling does not "imply that a governmental rule or policy disqualifying a person from employment or from public services or benefits by reason of conduct that rests on a religious belief or a religious practice could not impinge on the religious freedoms guaranteed by Article I, Sections 2 and 3." 301 Or 209, 216. Although the Oregon Constitutional claim was rejected, the Court ruled that the First Amendment mandated the granting of unemployment benefits. This holding was later rejected by the U.S. Supreme Court.

The Oregon Supreme Court's zealous application of the religious freedom guarantees of the Oregon Constitution has also been seen in relation to a trilogy of decisions which involve the tax laws. In Salem College & Academy v. Employment Division, 298 Or 471 (1985), an interdenominational Christian primary and secondary school challenged an order requiring the school to pay unemployment compensation tax assessment. The Supreme Court discussed the religious freedom provisions of the Oregon Constitution, and wrote that religious pluralism was a primary motivation for the provisions which protect religion from government regulation. The Court quoted Matthew P. Deady, president of the Constitutional Convention, who stated that "the country contains persons of all religious denominations, as well as nonbelievers." The Court also noted the declaration of Constitutional Convention delegate Waymire: "The people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazed fanatic to the unbelieving atheist." Fundamental to Oregon's provisions respecting religion is the requirement that all religious institutions must be treated equally in the eyes of the law. Thus, the Court concluded that all religious schools had to be treated equally, regardless whether they are affiliated or

unaffiliated with a church.

The doctrine of Salem College was followed in Employment Division v. Rogue Valley Youth for Christ, 307 Or 490 (1989), in which the Supreme Court addressed the issue of unemployment taxes being levied against a religious organization. The Court upheld "the equality among pluralistic faiths and kinds of religious organizations embodied in the Oregon Constitution's guarantees of religious freedom," which had been recognized in Salem College, and struck down a distinction between religious organizations which had been established by statute. In order to make the statute satisfy the requirements of the Oregon Constitution, the Court interpreted the unemployment compensation law to apply to all religious organizations, and not merely those classified as churches.

Likewise, in Newport Church of the Nazarene v. Hensley, 335 Or 1 (2002), the Court issued a third decision relating to unemployment taxation and religious organizations, closely following the analysis in Salem College and Rogue Valley, and reaffirmed that, in accordance with the Oregon Constitution's protections of religious freedom, "it is impermissible for a statute to draw a distinction between churches and nonchurch religious organizations." 335 Or 1, 10. To the extent that ORS 657.072(1)(b) provides otherwise, the statute must be interpreted in such a way as to remove the Constitutional infirmity. 335 Or 1, 16.

3. A review of the historical background reveals that the period which produced the religious freedom guarantees contained in the Oregon Constitution was characterized by a strong commitment to protecting the right of freedom of worship, and extreme skepticism toward medical treatment.

One of the core issues presented by this prosecution is whether the State shall be allowed to impose its policies concerning medical care on an individual whose religious beliefs countenance reliance on prayer, pursuant to the Holy Scriptures. If the prosecution of Mr. and Mrs. Worthington is to be allowed, the State's policies in support

of promoting medical care must be allowed to trump the individual's interest in freedom of worship. We maintain that this prosecution contravenes the right of Mr. and Mrs. Worthington to freedom of worship as guaranteed by the Oregon Constitution. In order to understand and apply the guarantees of religious freedom that are granted by the Oregon Constitution, as they pertain to the instant prosecution, it is necessary to understand the view of religion and the view of medicine that was prevalent at the time that the Oregon Constitution was adopted.

a. The Historical Circumstances Surrounding the Adoption of the Oregon Constitution Included Strong Deference to the Right of the Individual to Worship Almighty God According to the Dictates of the Individual's Own Conscience.

The Oregon Constitution was a product of the age in which it was established. Life in mid-19th Century America was anchored by a strong devotion to traditional religious values. Religious worship during this period formed an important part of the life of the individual, the family, and the community. The religious devotion that was characteristic of the 19th Century was an important backdrop to the strong protection for religious worship that is guaranteed by the Oregon Constitution.

Oregon was settled largely as a result of the activities of religiously motivated groups. Indeed, most of the settlers in the 1830's and 1840's were motivated by religious fervor. Burton, "Oregon Constitution's Legislative History," 40 WLR 225, 227 (2000). In 1839, a Methodist newspaper announced "let the church awake from her slumbers and go forth to the salvation of these wandering sons of our native forests" (referring to the Native Americans), and starting the following year, a small contingent of Methodists arrived to settle in this area. The Methodists established a mission by 1840, and put down roots in various parts of the territory which later became Oregon. See, David Paterson del Mar, Oregon's Promise: An Interpretive History (2003), p. 47-56. Presbyterians led by missionary Marcus Whitman headed for the Columbia plateau starting in 1836, and

attempted to establish missions. Id., at 57. Emigrant leaders on the Oregon Trail made efforts to require every man "to carry with him a Bible and other religious books" in order to avoid barbarism. Id. at 70. Once they arrived in the Oregon Territory, Whigs interested in religion and reforming government played an active role in society, by passing laws to punish drunkards and Sabbath breakers. Id., at 87.

Beginning at the end of the 18th Century, intense religious interest emerged throughout the country, and became known as the Second Great Awakening. The first three decades of the 19th Century saw a period of great religious fervor sweep across America. Camp meetings, revivals, and sectarian controversies were seen throughout the country. Hinkle, "Article 1, Section 5: A Remnant of Prerevolutionary Oregon Constitutional Law", 85 OLR 541, 545 (2006). The migration to Oregon was, to a great extent, an outgrowth of the religious enthusiasm which broke out throughout the United States during the first half of the 19th Century. In all, missions were established at The Dalles, Clatsop Plains, Oregon City, Fort Nisqually, and French Prairie. Catholic missionaries arrived in 1838.

The Oregon Institute was founded by Methodist missionaries in 1842, and later became Willamette University. The goal of the University was to "promote piety and morality, as essential in forming the character of the young for eminence and usefulness, every possible attention will be bestowed upon the manners, morals and habits of all connected with the school." Source: Article by the Reverend David Leslie, published in the Oregon Spectator on August 10, 1846. Religious instruction was important, and Cyrus Shepard became head teacher, whose stated goal was "the salvation of souls." All students were required to attend public worship services. The City of Salem was established by missionaries. The name was chosen because Salem signifies peace. Source: Mission Mill Museum.

The goal of the Whitman Mission was not only to Christianize natives, but to

"civilize" them as well, including instruction in farming and education. Schwantes, The Pacific Northwest: An Interpretive History (2000), p. 74. The "Oregon Fever", which became prevalent in the United States, was described as a quickening of the Protestant conscience as a result of the revivalism promoted by Charles G. Finney and other evangelists, starting in the mid-1820's. Id., at 79. One common belief among Oregon pioneers was that the less respectable overlanders sought quick fortune in the California goldfields, while conservative, orderly, family-oriented folk sought Oregon. Id., at 90. Missionaries valued education as part of their religious program, and they continued to support private and parochial schools even after public education became established. Id., at 222-223.

Methodist clergy associated with the American Bible Society became politically active, and formed the Oregon Temperance Party. Johnson, Founding of the Far West: California, Oregon, Nevada, 1840-1890 (1992), p. 59. During the Constitutional Convention of 1857, part of the entertainment that was offered to the conventioneers involved religious lectures and a moral play. Id., at 68-69. Many debates at the Constitutional Convention focused on religious issues, such as whether a chaplin would give prayer before each session, and the nature of the relationship between religion and government. Id., at 173.

Among the earliest legislative enactments following Statehood were a statute that punished as arson the burning of a church, for which a prison sentence of 5 to 15 years would be issued (1862), laws punishing working on Sunday, prostitution, adultery, and the disruption of religious services with unnecessary noise or profane discourse (1864).

Throughout Oregon history, close knit religious communities have found home here. The Sisters of St. Mary of Oregon was founded in Sublimity, in 1886. Oregon has provided home to the Mennonites, who have established 25 churches, at least one of which is situated in Clackamas County. Russian Old Believers have established a home

in Woodburn. The Amish presence in Oregon dates back to 1895, in McMinnville and Hubbard. The Followers of Christ Church, in Oregon City, has been home to Mr. and Mrs. Worthington and their forebears for several generations. The Followers of Christ Church maintains fundamental Scripture-based beliefs and practices, corresponding to the literal text of the King James Bible.

b. The Historical Circumstances Surrounding the Adoption of the Oregon Constitution Included Strong Skepticism Toward Medical Care.

The mid-19th Century was a period in which the medical community was justifiably held in very low esteem. The germ theory of disease had yet to be discovered. Indeed, the year that Oregon's Constitution was adopted coincidentally was the year that Louis Pasteur commenced his studies of fermentation which, decades later, led to the establishment of the science of microbiology.[16] The Framers of the Oregon Constitution could not have been aware of the revolutionary scientific work of Charles Darwin, for Darwin's first works were not published until 1857. It was not until decades after Statehood that the study of the diseases of the day was undertaken and treatments could be developed.[17] Throughout the 19th Century, mankind was afflicted by epidemics that were not at all understood by medicine, and there was no treatment for the terrifying plagues that were prevalent.

In the period of the Constitutional Convention of 1857, medical treatments that were in vogue actually caused great harm. For some ailments, doctors inflicted substances that caused loss of bodily fluids, whether by uncontrolled bleeding,

---

[16] Ackerknecht, A Short History of Medicine (Revised Edition, 1982), 177-180.

[17] At the time that Oregon's Constitution was established, there was no understanding, much less viable treatment, of many of the diseases of the day. The following list includes the year in which science first developed an understanding of the leading diseases of the 19th century: amebic dysentery (1875), gonorrhea (1879), typhoid fever, leprosy and malaria (1880), tuberculosis and glanders (1882), erysipelas and cholera (1883), diptheria, tetanus and pneumonia (1884), epidemic meningitis and malta fever (1887), soft chancre (1889), gas gangrene (1892), botulism (1894), bacillary dysentery (1898), sleeping disease (1901), syphilis (1905), and whooping cough (1906). Ackerknecht, A Short History of Medicine, (revised edition, 1982), p. 180.

dehydration, or vomiting, that hastened the patient's death. In other cases, doctors administered to their patients toxic doses of harmful substances, such as mercury. Anesthetic was not widely used or understood. Undoubtedly, the thought of undergoing what was perceived as medical treatment must have been terrifying to the general public, as well as the members of Oregon's Constitutional Convention. The primitive state of medicine of that age was such that life expectancy in the United States was actually on the decline.[18]

Indeed, the state of medicine was so dismal that doctors frequently inflicted disease on their patients as a result of their lack of understanding concerning sanitation. One infamous study, in a leading European hospital of the age, established that a leading cause of infection and death of patients arose as a result of the common practice of the physicians and medical students, who conducted autopsies, and then performed medical procedures, without even washing their hands. The whistle-blowing scientist who disclosed that the practice of the medical staff was likely responsible for contagion was rewarded for his labors by termination of his employment at that medical facility.[19] The hospitals of the mid-19th Century, when they existed at all, were largely places where poor people went in order to die.

During the 19th Century, possibly because of the primitive state of medical science, treatment models such as chiropratic and homeopathy became more widely accepted. Homeopathy aims to regulate vital energy to stimulate the body's healing powers, based on the law of similars and law of the minimum dose. Remedies are derived from plants, animals, minerals, and other sources. Homeopathy is used as a treatment for many conditions, including sinusitis, bronchitis, vertigo, varicose veins, flu, ADHD, and ear infections. One historian of medicine commented that, even though

---

[18] Howe, What Hath God Wourght: The Transformation of America, 1815-1848 (2007), p. 473.

[19] Ackerknecht, A Short History of Medicine (Revised Edition, 1982), p. 187.

homeopathy was a practice that lacks scientific rigor, it was probably no more erroneous than any of the other systems of its age, and probably did less harm than "the heroic and often fatal orthodox therapeutic methods of the age, which still consisted of extensive bloodletting, purging, large doses of toxic drugs, and induced vomiting." Ackerknecht, A Short History of Medicine (Revised Edition, 1982), p. 143-144.

Homeopathy and chiropratic both involved spiritual elements. And, of course, there was always prayer. Indeed, throughout recorded history, religion has always been a source of help for those who are ill. Even to this day, Oregon soil provides fertile ground to a diversity of medical treatments that are outside the framework of conventional Western medicine. For example, Oregon is home to the Oregon College of Oriental Medicine, the Oregon School of Naturopathic Medicine, and Western States Chiropratic, all leading institutions in their fields. Oregon College of Oriental Medicine teaches Traditional Chinese Medicine, which is based on the theory of yin and yang, such that the healer uses techniques including acupuncture, herbal remedies, exercise and nutrition, in order to bring about healing. Traditional Chinese Medicine treatments address a host of ailments in the human body, including disorders of the liver, heart, spleen, lung, kindey, insomnia, lower back pain, as well as headache, diabetes, chronic pain, HIV, and cancer.

Without question, the state of medical care at the time of the Constitutional Convention of 1857 was very poor.[20] The dominant medical theory of the day was that the human being was governed by the Four Humors, which was part of an ancient belief that the world was composed of four elements: air, earth, fire, and water. Each element was represented by one of the Four Humors in the human body: choler, black bile, blood

[20] Because of the dismal state of medical care during the 19th Century, the leading thinkers of the day expressed deep skepticism concerning the ability of doctors to provide healing. Oliver Wendell Holmes, Sr., an accomplished writer and physician, and the father of the renowned jurist, famously opined: "I firmly believe that if the whole materia medica, as now used, could be sunk to the bottom of the sea, it would be so much the better for mankind, and all the worse for the fishes." Napoleon Bonaparte III, French emperor, declared: "Medicine is a collection of uncertain prescriptions, the results of which, taken collectively, are more fatal than useful to mankind."

and phlegm. In addition to bleeding, doctors would try to bring the patient's Humors into balance by administering a laxative to cause diarrhea or an emetic to cause vomiting. Excess Humors would be drawn off by raising blisters on the skin using poultices of ground chili peppers or cayenne pepper. In certain cases, doctors would use a technique known as "cupping", which involved placing heated glass cups to the patient's skin. As the cups cooled, the air pressure inside the cup would drop, and the partial vacuum would raise large red welts, which were believed to concentrate and draw off toxins from the body. Cupping would sometimes be used in combination with bleeding. Thus, after one or two aggressive bleeding treatments, a patient's blood pressure would drop so low that the blood would no longer spurt out, and heated cups would be placed over the incisions to enable the drawing of more blood. Source: The End of the Oregon Trail Interpretive Center, Oregon City, Oregon (www.endoftheoregontrail.org).

Reflecting the very primitive state of medicine in that age, Oregon's first decade of Statehood did not see any legislation pertaining to medicine. In 1870, the legislature enacted a law which punished a health officer for negligence or inefficiency. It was not until 1889 that Oregon created a Board of Medical Examiners and began to regulate surgery and medicine.

c. Considering the Strong Reliance on Religious Faith and the Deep Skepticism Toward Medical Care, There Can Be No Doubt That The Founders of the Oregon Constitution Preferred Faith Over Secular Medicine.

Taking into account the historical record, there can be no doubt that the Oregon Constitution was established in an age in which there was a strong belief in the necessity to protect the diversity of religious worship, and a deep skepticism concerning the medical treatments that were available. It follows that, given a choice between prayer and medicine, the Founders would have chosen religion over secular medicine.

Indeed, it is clear that faith healing is a practice that has been a part of religious

observance in all cultures throughout human history. "Healing (according to Lawrence Sullivan, Professor of Theology at the University of Notre Dame) occupies a singular and prominent place in religious experience throughout the world." The Encyclopedia of Religion (2nd ed., 2005), vol. 6, p. 38.08. See, generally, Ackerknecht, A Short History of Medicine (Revised Edition 1892), p. 11-18, 27–34, 47-54; Kennedy, A Brief History of Disease, Science & Medicine (2004), p. 1-78; Porter, ed., The Cambridge History of Medicine (2006), p. 51, 55. During the modern era, healing continues to constitute an important object of religious observance. Many religions, including Christianity and Judaism, devote attention to healing as a part of religious worship. The Bible relates numerous healing miracles performed by Jesus and the Apostles, and is replete with references to the healing that comes about as a result of prayer.[21] The Catholic Church grants sainthood only to those who have performed at least two miracles, and the usual type of miracle that is performed is one of healing.

The Oregon Revised Statutes are always subject to the mandates imposed by the Constitution of Oregon consistent with the Oregon Supreme Court's ruling in State v. Ciancanelli, 339 Or 282 (2005), and reaffirmed in State v. Wheeler, 343 Or. 652 (2007) whereby: "In construing the Oregon Constitution, we seek to determine the meaning of the constitutional text by examining the wording of the constitutional provision at issue, the case law surrounding it, and the historical circumstances leading to its adoption. State v. Ciancanelli, 339 Or. 282, 289 (2005); Priest v. Pearce, 314 Or. 411, 415-16 (1992). "The purpose of our inquiry under the Priest methodology is `to understand the wording [of the constitutional provision] in the light of the way that the wording would have been understood and used by those who created the provision * * * and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise.'". Ciancanelli, 339 Or. at 289 (quoting Smothers v. Gresham

[21] See, for example, Acts 28:8; James 5:13-15; Mark 5:23; Mark 6:13; Mark 16:17-19.

Transfer, Inc., 332 Or. 83, 90-91 (2001))."

In order to understand the state of the law as it existed at the time of the 1857 Constitutional Convention, it is instructive to consider efforts to apply the common-law of Manslaughter, which was adopted in America, to the situation of a parent who abstains from administering medical care to a child. Contemporaneous to the establishment of the Oregon Constitution, there were a series of prosecutions in England based on faith-healing conduct of certain individuals, who were members of a sect known as the Peculiar People, a branch of Protestant Christianity who abstained from the use of medical care. The prosecution's theory was that the defendants had committed the crime of common-law Manslaughter by failing to administer medical care to their child. Significantly, in every case that we have found, the defendant was found Not Guilty of common-law Manslaughter. It follows that, from the standpoint of established common-law at the time of Oregon's Constitutional Convention of 1857, it is highly doubtful that a person who withheld medical care from a child would face criminal sanctions.[22]

Healthcare is not a right in Oregon. In fact, Oregon fails to provide healthcare to much of its indigent population through the unequally provided coverage of the Oregon Health Plan, but no prosecution has ever been mustered against the State for failing to provide such care for its citizenry, which include children, and undoubtedly, no such suit could succeed. Healthcare was certainly not a requirement at common-law in 1857 and accordingly, the State's effort to prosecute Mr. and Mrs. Worthington cannot withstand the judicial scrutiny required to overcome the religious right to freedom of worship which

[22] It was not until after the 1868 Poor Law Amendment Act [(31 & 32 Vict. c.122) s. 37] that the first defendant was convicted of Manslaughter. Campbell, "Christian Science and the Law," 10 Virginia Law Register 285, 294 (1904); see, Queen v. Robert Downes, vol. I, Queen's Bench Division 25 (decided on November 18, 1875) (the court's analysis reflects that the reason the court was able to uphold the defendant's conviction was because of legislation that modified the common-law crime of Manslaughter). The Downes decision, as well the reported decisions in the cases of Thomas Hines, Cecilia Hurry, George Hurry, Mary Wagstaff, and Thomas Wagstaff, in which defendants were found Not Guilty of common law Manslaughter, are being furnished to the Court herein as an Exhibit. See also, Trescher and O'Neill, "Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist," 109 Penn. L. Rev. 203 (1960).

is guaranteed by the Oregon Constitution.

Of course, the Constitutional protections of liberty are of greatest significance when it comes to protecting the rights of the minority. The will of the majority is a threat only to the rights of those who are disfavored. A minority faith, such as that subscribed to by Mr. and Mrs. Worthington, will be without protection in the face of the majority which seeks to suppress and destroy it, acting with the power of the government and the force of law. The import of religious freedom to worship and exercise freedom of conscience was not a lightly established constitutional provision. The Founding Fathers of Oregon well knew the oppressive character of the majoritarian religions, having in many instances come to Oregon to escape religious intolerance, and sought to establish a State in which all are free to practice and preach their religion not according to the whims of the State.

In the face of the inability of medicine to address the epidemics of the age, in the period leading up to the Oregon Constitutional Convention of 1857, Congress called upon the President to proclaim a day of national "prayer, fasting and humiliation."[23] Accordingly, it is clear that healing as a result of prayer was not foreign to the leaders of our Nation at the time of the establishment of the State of Oregon. The Founding Fathers of Oregon were more than familiar with the nature and practice of seeking healing and treatment from God, as all men of the time were familiar, but would have shown quite more hesitation in placing their faith in "modern medicine" given the uncertain outcomes and treatment which often were worse than the disease.[24]

---

[23] Howe, What Hath God Wrought: The Transformation of America, 1815-1848 (2007), p. 470.

[24] Under no circumstances should we assume that the present day has reached a state of medical knowledge where science has developed reliable cures for all that plagues mankind. Indeed, the current state of medical knowledge and practice reveals many areas of doubt and confusion. Even more alarming, modern medical practices, such as the widespread and indiscriminate use of of antibiotics, has led to the development of Superbugs and other antibiotic-resistant strains of infection, which commonly proliferate in medical facilities. Many people, for a host of reasons, have decided not to subject themselves or their children to the conventional course of treatments, whether it involves vaccination or antibiotics. History may ultimately reveal that the modern treatments, like those

Oregon's Founders would not have, under any circumstances, sought to punish or restrain religious practice, particularly within such an important a place as the family unit. The assertion that men and women could be persecuted and imprisoned for placing their faith in God above "modern medicine" would have been an absurdity. The statutes in this instance must give way to the Constitution and the protections granted to Mr. and Mrs. Worthington, as well as all Oregonians, as it has stood since the inception of Oregon.[25]

C. THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE PROSECUTION OF MR. AND MRS. WORTHINGTON CONTRAVENES THEIR RIGHTS, PURSUANT TO THE FIRST, FOURTH, FIFTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, TO FREEDOM OF RELIGIOUS EXPRESSION AND AUTONOMY AND PRIVACY IN RELATION TO INTIMATE FAMILY MATTERS

It would be tempting, but incorrect, to view the values of diversity and religious freedom which are declared in the First Amendment to the United States Constitution as representing values that were always prevalent on this continent. The truth is that the religious freedom which was established in the First Amendment prevailed against a historical background of religious intolerance and religious oppression.

---

of the mid-19th Century, have lead to an ineffecutal treatment of disease which may have caused more harm than good. For all we know, it may turn out that those who abstain from the use of medical treatment, such as Mr. and Mrs. Worthington, were right all along. Considering the uncertain benefits, and possible harms, of conventional medical treatment, and taking into consideration the strong protection of religious worship which is guaranteed by the Oregon Constitution, we would urge that this prosecution be dismissed.

[25] The profound protections of religious freedom as guaranteed by Article I, Sections 2 and 3 of the Oregon Constitution express a widely (though not universally) held desire to safeguard the rights of conscience. Indeed, decades earlier, the Founders of our Nation realized similar needs and therefore enacted a less sweeping, albeit equally profound, declaration of religious freedom in the First Amendment to the United States Constitution. See, Section C, herein. Moreover, the declaration of the need to preserve the freedom of conscience that is safeguarded by Oregon's Constitution has been echoed by such a strong exponent of liberty as Pope John Paul II, wherein the Pope declared that to violate a man's conscience is worse than Murder:

> "I raise my voice to God, together with all men of good will, so that the consciences of my fellow citizens are not suffocated," the Pope said. "Societies all over the world, particularly the nations of Europe and America, continue to demonstrate concern because of the situation in Poland in relation to the proclamation of martial law," he said. "Under the threat of losing their jobs, citizens are forced to sign declarations that don't agree with their conscience and their convictions." This violation of conscience does "grave damage to man," the Pope said, adding: "It is the most painful blow inflicted to human dignity. In a certain sense, it is worse than inflicting physical death, of killing." "Pope Denounces Polish Crackdown," New York Times, January 11, 1982 (emphasis added).

The First Amendment guarantees that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” At this late stage of our Nation’s history, there can be no doubt that the freedom of religion is among the most cherished of rights that are enshrined in our Constitution.

Although it is common to think of religious freedom as being among the fundamental principles which led to the founding of our Nation, we must not overlook the fact that religious oppression, not freedom of religion, had characterized the earliest period of the settlement of this continent. Well into the 1700's, the colonies established oppression of minority faiths. With the exception of Rhode Island, all colonies had official or semi-official churches. The New England Colonies (Massachusetts, Connecticut and New Hampshire) were dominated by Puritans and disliked the Anglicans. Virginia, the Carolinas, and Georgia were dominated by the Church of England and disliked the Puritans. Pennsylvania was friendly toward the Quakers, but not other religious minorities. Maryland, which had been established with a vision toward the protection of religious freedom, ignored its heritage and soon resorted to the oppression of Catholics, which was commonplace throughout the colonies, as was the oppression of Jews. Waldman, Founding Faith: Providence, Politics and the Birth of Religious Freedom in America (2008), p. 14-17.

Without doubt, there was a disconnect between the values declared in the First Amendment and many of the practices of the day. Indeed, history reflects that, notwithstanding the strong protections of the freedom of religion that are established in our founding documents, religious oppression had been deeply established:

> As with other colonies, Virginians suffered from religious cruelty and intolerance among different sects. Madison deplored the “diabolical, hell-conceived principle of persecution” that raged about him in 1774. (Citation omitted) Baptists, Presbyterians, Catholics, Quakers, and other minority groups were whipped, fined, imprisoned and forced to support the established Anglican Church.

Fisher and Adler, American Constitutional Law, Volume 2: Constitutional Rights (7th Ed.

2007), p. 566. The protection of religious freedom in this country has been a struggle that is not over even today, more than two and a quarter centuries after the founding of our Nation.

It was because our Nation emerged from a backdrop of religious oppression that the Founders determined that it was necessary to enshrine the freedom of religion in our Constitution. Even before the establishment of our Nation, leading figures made brave pronouncements concerning the liberty that was inherent in our most basic principles. Thus, on November 20, 1772, Sam Adams presented a document entitled "The Rights of the Colonists" to the Boston Town Meeting, which included the declaration that: "As neither reason requires nor religion permits the contrary, every man living in or out of a state of civil society has a right peaceably and quietly to worship God according to the dictates of his conscience." Church, The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders (2004), p. 11-12. Prior to the issuance of the Declaration of Independence, each of the former colonies promulgated pronouncements of fundamental rights. Foremost among these was the Virginia Declaration of Rights, adopted on June 12, 1776, which established as follows:

> "Section XVI: That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."

Our Declaration of Independence begins with a striking pronouncement in favor of freedom. "We hold these truths to be self-evident, that all men are created equal and endowed by their creator with certain inalienable rights." Of course, even the most casual reader of American History would recall the immortal words of Patrick Henry: "Give me liberty or give me death", which was a rallying cry of the American Revolution. The fact that religious freedom was very much a preoccupation of the Founders is borne out by Thomas Jefferson's Statute for Establishing Religious Freedom, which was enacted in

Virginia in the year 1786. That enactment provided, in relevant part:

> "Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened [sic] in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities. * * * we are free to declare, and do declare that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

One illustration of the fact that the struggle to assure religious freedom in this country is an ongoing battle emerged from the Flag Salute cases of the 1940's. In Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), the Supreme Court held, for the first time, that the religion clauses of the First Amendment were applicable to the States. Nevertheless, the Court rejected a Jehovah's Witness's challenge to Pennsylvania's compulsory Flag Salute law. Writing for an 8-1 majority, in Minersville School District v. Gobitis, 310 U.S. 586 (1940), Justice Frankfurter upheld the law despite the complaints of the plaintiff that the law violated his freedom of worship as guaranteed by the First Amendment. Almost exactly three years later, the Supreme Court reversed itself, and struck down a similar Flag Salute law by a 6-3 margin. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). The Court made it clear that the paramount necessity of safeguarding Constitutional rights takes precedence over majoritarian democracy:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624, 638.

In its further efforts to protect religious liberty, the Supreme Court soon invalidated laws which prohibited Jehovah's Witnesses and other evangelicals from

selling religious books and other merchandise. Largent v. Texas, 318 U.S. 418 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Douglas v. Jeannette, 319 U.S. 157 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Tucker v. Texas, 326 U.S. 517 (1946).

The ability of families to rear their children within their religious faith, and free of governmental interference, has found special favor with the Supreme Court in its attention to the need to protect the freedom of religion. Accordingly, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court invalidated an Oregon law that required all children between the ages of 8 and 16 to attend public school. The Court decided that parents enjoyed the Constitutional right to send their children to private school, if they chose. Similarly, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court struck down Wisconsin's requirement that children attend public school until the age of 16. The Court upheld the contention of the Amish plaintiffs that compulsory school attendance interfered with the Amish community's desire to inculcate its values to the youth.[26]

The Supreme Court has laid out two sets of tests that will be used in cases regarding religious practice, starting with the Sherbert test. See, Sherbert v. Verner, 374 U.S. 398 (1963). A Seventh Day Adventist was denied unemployment benefits because she refused employment on her Sabbath. The Court announced that a law with a "rational basis" was not sufficient to withstand a challenge on the basis of the "free exercise" clause. The statute must be (i) neutral on its face meaning that it must have general applicability without the intent of singling out a particular religion, 374 U.S. at 403; (ii) the State must have "compelling interest" if a neutrally applied law burdens a particular religious practice, 374 U.S. at 406; (iii) if the State has a compelling interest, it must show that its interest can be served by no "less burdensome" measure, 374 U.S. at 408-

[26] On the other hand, in Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld a Jehovah's Witness's conviction for violating child labor laws, which arose from employing a 9 year old child in the distribution of religious literature.

409.

The United States Supreme Court re-adopted the Sherbert standard in Wisconsin v. Yoder, 406 U.S. 205 (1972), in which Yoder of the Amish Mennonite Church had been convicted of violating a compulsory school attendance law by failing to send his children to school after they turned thirteen. The Court has since then espoused a second test, the Smith Test that incorporates the Sherbert test, but only if the religious conduct is the product of religious conduct in concert with another protected right. The Hybrid Rights Test espoused in Smith is essentially the Sherbet Test. Otherwise, for religious claims upon neutral laws of general applicability the lower standard of "rational basis" will apply. Employment Division v. Smith, 494 U.S. 872 (1990) indicates that the "free exercise" clause (i) does not justify violation of neutral laws of general applicability that do not target religion or religious practices. Laws that target specific religions were subject to strict scrutiny and compelling interest analysis. 494 U.S. at 879-881; (ii) government does not need to justify burdening religious practices by such laws if they are a rational means of carrying out legitimate government ends. 494 U.S. at 888-890; (iii) the religious conduct was otherwise a violation of statute. 494 U.S. at 890; but the court indicates that this will not be the test when other constitutionally protected rights are implicated, as was the case in Yoder.

The Supreme Court of the United States has also recognized that the First, Fourth, Fifth and Ninth Amendments of the Constitution read in conjunction create a penumbra "right to privacy" within the Constitution. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court invalidated statutes prohibiting the use of contraceptive devices under a "zone of privacy" theory. Later in Roe v. Wade, 410 U.S. 113 (1973), the Court prohibited States from stopping early abortions as they are within the "right of privacy … found in the 14th Amendment's conception of personal liberty and restrictions upon state action …" 410 U.S. at 153. The United States Supreme Court has created a distinct

"zone of privacy" regarding marital relationships and child rearing. Although the State has a rational interest in regulating the activities of children, Prince v. Massachusetts, 321 U.S. 158, nevertheless, the State's rational basis for its statutes cannot survive strict scrutiny under the hybrid rights analysis compelling interest test espoused in Smith that must be applied to the instant case, where a claim of religious freedom is coupled with a privacy right, as was the case in Yoder.

Even independent of their right to freedom of religious worship, as guaranteed by Article I, Sections 2 and 3 of the Oregon Constitution, and the First Amendment, Mr. and Mrs. Worthington enjoy the right to be the ones who make crucial decisions concerning the raising of their children, which is also implicated in the instant prosecution. Indeed, the United States Supreme Court recently handed down a decision which strongly endorsed the right of all parents to raise their children free of governmental interference.

Thus, in Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court struck down a law in the State of Washington which had been applied to grant to a grandparent the right of visitation with a child, against the wishes of the child's parents. In very sweeping and broad language, the Court recognized the fundamental right of a parent to provide for the upbringing of the parent's child, which was transgressed by Washington's statute:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Fourteenth Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." Washington v. Glucksberg, 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Id., at 720; see also Reno v. Flores, 507 U. S. 292, 301-302 (1993).
>
> The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and

education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535. We returned to the subject in Prince v. Massachusetts, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children `come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, supra, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the `liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children" (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Troxel v. Granville, 530 U.S. at 65-66.[27]

---

[27] Although various Justices wrote separately, either concurring with the result or in dissent, there was no disagreement expressed concerning the fundamental nature of the right of a parent to control the upbringing of his or her child. Thus, Justice Souter wrote: "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." Troxel, supra, 530 U.S. at 77 (Souter, J., concurring). Justice Thomas wrote: "Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." Troxel, supra, 530 U.S. at 80 (Thomas, J., concurring). Justice Stevens wrote: "Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest – absent exceptional circumstances – in doing so without the undue interferences of strangers to them and to their child." Troxel, supra, 530 U.S. at 87 (Stevens, J., dissenting). Justice Scalia wrote: "In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their Creator.'" Troxel, supra, 530 U.S. at 91 (Scalia, J., dissenting). Justice Kennedy wrote: "As our case law has developed, the custodial parent has a

Considering that the instant prosecution not only interferes with the right of Mr. and Mrs. Worthington to freedom of religion, and freedom of worship, but taking into account that this prosecution also transgresses the fundamental right of Mr. and Mrs. Worthington to be the ones who make the day-to-day decisions concerning the raising of their children, we maintain that the Indictment should be dismissed. It is the burden of the State to establish that a parent is unfit to raise his or her child. Prior to the death of their daughter, the State of Oregon had made no determination that Mr. and Mrs. Worthington were unfit to raise their children. Nor has any such determination been made subsequent to the filing of the Indictment. Accordingly, it is up to Mr. and Mrs. Worthington to make the necessary decisions concerning the upbringing of their children, including the making of choices concerning the religious values that will be taught in their household. The Indictment should be dismissed because it interferes with the right of Mr. and Mrs. Worthington to raise their children within the framework of their religious faith.

Even if the Court concludes that the State has a compelling interest at stake, the Court is still left with the requirements of the Sherbert test: Is there a less burdensome method of enforcing the State's compelling interest? Yes, one possible less burdensome remedy available to the State is to take affirmative action prior to the death of a child, which the State has the authority to do and does daily throughout the State of Oregon through the Department of Human Services Division in a variety of other situations and cases. The State has mandatory reporting acts [see, for example, ORS 419B.005, et seq], that require intervention and the possible supply of alternative medical attention by the government with a minimum infringement upon the First Amendment and Article I,

---

constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." Troxel, supra, 530 U.S. at 95 (Kennedy, J., dissenting).

Sections 2 and 3, of the Constitution of the State of Oregon, which can certainly be expanded to include parents of children with serious illness. The State can certainly require that parents report serious illness to the State and to do so would present no greater burden than the lifting of a telephone or a visit to a local office. The State has the means of vindicating its interest in children without the destruction of the religious practices of Oregonians and without the prosecution of those who have suffered a loss greater than any prosecution can ultimately force upon them.

D. THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE PROSECUTION OF MR. AND MRS. WORTHINGTON, BASED ON A THEORY OF "CRIMINAL NEGLIGENCE", CONTRAVENES THEIR RIGHT TO FREEDOM OF WORSHIP AS GUARANTEED BY THE CONSTITUTION OF THE STATE OF OREGON AND THE UNITED STATES CONSTITUTION.

Mr. and Mrs. Worthington move that the Indictment be dismissed because the State seeks to prosecute them based on a theory of criminal negligence, rather than knowledge. In order to meet Constitutional muster, it is necessary that the State prove, beyond a reasonable doubt, that Mr. and Mrs. Worthington knowingly caused the death of their daughter. The failure of the State to satisfy the Grand Jury that Mr. and Mrs. Worthington had the requisite knowledge to satisfy the Constitutional standards applicable to this prosecution renders the Indictment insufficient.

The prosecution of Mr. and Mrs. Worthington implicates their right to the free exercise of religion, and freedom of conscience and freedom of worship, and free exercise in combination with their right to privacy and freedom with regard to parenting, child rearing and family choices as guaranteed by Article 1, Sections 2 and 3, of the Oregon Constitution, and the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.[28]

---

[28] We incorporate by reference the points and authorities separately presented in Parts B and C herein, and repeat those citations only as necessary to make our argument.

In order to sustain a conviction herein, the State must establish that the defendant's conduct was knowing, and not merely the result of criminal negligence. See, Smith v. Employment Div., 301 Or. 209 (1986), vacated and remanded on other, unrelated grounds, 485 U.S. 660 (1988) and Meltebeke v. Bureau of Labor And Industries, 322 Or. 132 (1995).

Mr. and Mrs. Worthington are lifelong members of the Followers of Christ (See attached Declarations), a federally and State recognized Church (see attached copy of 501(c)(3) status), situated in Oregon City, Clackamas County, Oregon, who are of the sincere belief that their religious conscience forbids the use of secular medical doctors and secular medicine, instead using the application of religious medical prayer, anointing with oil, and the laying on of hands. Mr. and Mrs. Worthington and their church adhere to the tenets of their faith which teach healing through their faith in God by prayer, laying on of hands, and anointing with oil, as described in the King James Bible, and as specifically provided in the New Testament at James 5:14-15:

> "Is any sick among you? Let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord: And the prayer of faith shall save the sick, and the Lord shall raise him up; and if he have committed sins, they shall be forgiven him."

Ava Worthington became ill on March 1st, 2008 and passed away on March 2nd, 2008. Mr. and Mrs. Worthington, following the tenets of their church and exercising their freedom of religious worship, administered religious medical care to Ava Worthington consistent with their religious beliefs. The Grand Jury thereafter indicted Mr. and Mrs. Worthington for the crimes of Manslaughter in the Second Degree and Criminal Mistreatment in the Second Degree, on the theory that they acted with criminal negligence and caused the death of their daughter by failing to provide adequate medical care to their daughter.

The Oregon Supreme Court has made explicit the requirement from Smith that "A person against whom a sanction is to be imposed for conduct that constitutes a religious practice must *know* that the conduct causes an effect forbidden by law." Meltebeke v. Bureau of Labor and Industries, 322 Or. 132 at 151 (1995) (italics from original) and that "Under the reasoning of Smith, more is required. When a person engages in a religious practice, the State may not restrict that person's activity unless it first demonstrates that the person is consciously aware that the conduct has an effect forbidden by the law that is being enforced." Id. at 152. In the case at bar, the standard espoused in Counts 1 and 2 of the Indictment is "criminal negligence", a lower standard than that of "knowingly" or knowledge and as such the Indictment should be dismissed.

E. THE INDICTMENT SHOULD BE DISMISSED BECAUSE IT IS PREMISED ON A LAW WHICH WAS ENACTED BY THE OREGON LEGISLATURE WHICH WAS MOTIVATED BY HOSTILITY TOWARD THE CHURCH OF WHICH MR. AND MRS. WORTHINGTON ARE MEMBERS.

As a separate and distinct ground for dismissal of the Indictment, Mr. and Mrs. Worthington urge that Count 1 of the Indictment should be dismissed on the ground that HB 2494, the 1999 legislation that repealed the affirmative defense of faith based healing from Oregon's Second Degree Manslaughter Statute, was enacted as a result of hostility toward the Church of which Mr. and Mrs. Worthington are lifelong members.[29]

Mr. and Mrs. Worthington maintain that their prosecution herein contravenes their rights to freedom of worship, freedom of religion, freedom of conscience, freedom of association, and the equal protection of the laws, as guaranteed by Article I, Sections 2, 3, and 20, of the Oregon Constitution, as well as the First and Fourteenth Amendments to the United States Constitution. As further authority, Mr. and Mrs. Worthington rely on the authority of the following decisions of the Oregon Supreme Court and the Supreme

[29] We incorporate by reference the points and authorities separately presented in Parts B, C, and D, herein, and repeat those citations only as necessary to make our argument.

Court of the United States, which uphold the rights of the defendants to free exercise of their religion, as well as their right to freedom of conscience and worship, and their Constitutionally protected right to privacy and freedom with regard to parenting, child rearing, and family choices: Smith v. Employment Division, 301 Or 209 (1986), rev'd 494 U.S. 872 (1990), on remand, 310 Or 376 (1990); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1973).

As to the claim which Mr. and Mrs. Worthington raise pursuant to the Oregon Constitution, there can be no doubt that Article I, Sections 2 and 3, mandate neutrality on the part of the State. A complete exposition of the requirements of the provisions of the Oregon Constitution insofar as freedom of worship is concerned is found in Part B of this Memorandum, and we will not reproduce that analysis here. Suffice it to say that any enactment which favors one religious group over another, or which punishes religious practice, implicates the core values of Article I, Sections 2 and 3. The repeal of the faith healing affirmative defense, from the law pertaining to the crime of Manslaughter in the Second Degree, was such an enactment.

In Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993), the Supreme Court held as follows:

> "Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: it must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied."

A review of the legislative history of HB 2494, which amended Oregon's statute which defines the crime of Manslaughter in the Second Degree, reveals that the

legislation was motivated by hostility toward the Followers of Christ Church, of which Mr. and Mrs. Worthington are lifelong members. It is clear that HB 2494 was targeted to disallow the use of spiritual healing practiced by this particular church, and was intended to target for criminal prosecution the members of the Followers of Christ Church and other Christian religious organizations that practice spiritual healing.

Prior to the 1999 enactment of HB 2494, Oregon's Manslaughter in the Second Degree statute [ORS 163.125] previously included the clause still found today in ORS 163.118, "It is an affirmative defense to a charge of violating … this section that the child or dependent person was under care or treatment solely by spiritual means pursuant to the religious beliefs or practices of the child or person or the parent or guardian of the child or person." These provisions were enacted fairly and neutrally, and in compliance with Federal Law in Oregon in the 1970's, pursuant to a Congressional mandate for Federal funding of State programs through The Child Abuse Prevention and Treatment Act of 1974, ("CAPTA") Pub. L. No. 93-247, 88 Stat 4. This clause was removed from ORS 163.125 in 1999 through HB 2494, in a manner that can only be seen as a direct and unabated attack on the Followers of Christ Church and the religious practices of their membership. Some excerpts from the record, reproduced below, reveal that HB 2494 was motivated by hostility toward the Followers of Christ Church, as well as the intent to subjugate and restrain their faith through the enactment of this law (Transcribed from audio recordings of hearings conducted in relation to the enactment of HB 2494, furnished by the Oregon Legislature):

> Representative Sunsari: It's just, I'm, this is a very difficult subject for me, so I'm, really have spent a lot of time thinking about this. **The 1991 legislative session in the name of religion and the First Amendment, we allowed for people to use peyote, they used drugs in their religious ceremony**, even though that religious ceremony wasn't part of the Northwest tradition. Pregnant women were allowed to use it in unmeasured doses. **Young children were given peyote** NR, unmeasured, and their lives were put at risk. And, yet, I don't see a consistency in us allowing to do that and being concerned for the well-being of those children when we have people who are expressing the same kind of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

conviction here, and I'm trying to balance that in my mind; I'm not being critical; I'm just, I'm asking**, help me resolve some consistency there.** (March 4, 1999, tape #21/65/B).

Unknown Speaker: Well, I'm not sure I can help you resolve that. You asked the question earlier, **What, How do you change someone's beliefs? I don't think you can change someone's belief. But the same Bible that tells this group of people that they can rely upon faith-healing also tells them to respect the laws of the land and, in fact, it says that, that you, on this Committee you're agents of God, set these laws**. And, they're going to have to make that choice and decision themselves. I'm asking you to state the expectation that they will protect their children and obtain medical attention. (March 4, 1999, tape #17/64/B).

* * *

Chair Mannix: And isn't the broader problem right now that the existence of these statutes constitute a sort of State validation of the refusal of medical care before the fact and they're seen as such, and if we remove that State validation and say, "No, what we validate is that you need to provide reasonable medical care under the circumstances," **then some folks who may feel overborne by the precepts of their faith** that are looking for permission to be in a situation they could say, "Well, the State has told me that I cannot refuse medical care. I will be given that implicit permission by the removal of the statutory boundaries. (March 5, 1999, tape #5/69/A).

* * *

The current situation in Oregon parallels out of the natural experience -- I'm sure most of you are aware of the media coverage that began in 1998 with KATU TV in Portland followed by an extensive Oregonian newspaper investigation, finally culminating in an ABC 20/20 national program in January. **The precipitating event was the deaths of three children -- The Followers of Christ religious group in Oregon City during a seven month period. The Followers of Christ is a religious group of approximately 1,200 members that rejects medical care and believes instead in the power of prayer. I will confine my comments to cases during the last 10 years since investigation prior to that time was somewhat spotty and inconsistent although many preventable deaths of adults have occurred in this group, I'm going to confine my comments to children since that is the issue before us today.**

The Followers of Christ cemetery in Oregon City contains approximately 75 tombstones of children. During the last 10 years, there have been 18 deaths of children in The Followers of Christ Group. Most or all of these were preventable with medical intervention. And the death rate in these children is estimated by our Clackamas County Deputy Medical Examiner, who basically did some incident studies -- they were about 26 times more likely to die as a child in this group than you are in the population at large. (June 7, 1999, tape #4/216/A).

* * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Chair Bryant**: I think the Bills are before us today, in part, because one district attorney in the State refused to prosecute for criminal negligent homicide, and that would be the D.A. in Clackamas County, and in the particular case -- I don't know if it was a good or bad decision on her part -- but other district attorneys I talked to felt that she could have prosecuted if she chose to -- at least for the criminal negligent homicide.** And, what our State apparently decided to do in the past, and Peter you might have been there this was determined, but they allow for the defense, affirmative defense of spiritual treatment in the case of murder, murder by abuse, or the manslaughters, but clearly elected not to that for criminal negligent homicide, which to me -- reading between the lines -- is the statement was that they didn't want a parent charged, necessarily, with murder, or manslaughter for using spiritual treatment, but would allow that if for criminal negligent homicide if they believed, in fact, it was reckless or without regard to what a prudent person would deem to be reasonable treatment. And, but I'm not sure when that was adopted, but that's what I read between the lines of what, why – (June 7, 1999, tape #14/217/A).

* * *

I'll try to cut through my testimony and note that I think that we're in agreement about how this thing came before us through Clackamas County. Our feeling is that there is a statute in Oregon -- the criminal negligent statute could have been imposed if the facts of the case would bear it. We take Hardy Myers' statements to be the altruist statement of those facts that Oregon law does provide available homicide sanctions to the youth in cases of parents who have not provided medical care to their children in circumstances where a reasonable person would have known that there was substantial risk of death. We feel that we live within that law, and our members are expected to be obedient to that law. If there is ambiguity about that State law, we would like to have it cleared up. We have introduced the -11 Amendment, A11 Amendment, which is an attempt to do, I think, what you are considering doing here -- clarifying that this is a crime -- making it clear both to the parents and to the prosecutors. But, our primary concern has been that the crime not be treated under Measure 11. We feel this would provide a mandatory minimum of 75 months and essentially kill the family, and we feel that at this point, there is no need for it to rise to that occasion. When professors of law say or agree it's, it won't happen, that's where I just have to be unknowing about this. My sense is that a jury, perhaps, could stumble in. I see other States people get convicted [unintelligible] third degree manslaughter, however, when those penalties are assessed, they are in accord with what we find for the first degree, excuse me, in accord with criminally negligent homicide. (June 7, 1999, tape #25/217/B).

* * *

Chair Bryant: **I think something needs to be done to deal with the situation in Oregon City.** (June 7, 1999; tape #48/218/B).

* * *

6th Unidentified Male Voice: Are any of these representative of Followers of Christ? (June 7, 1999, tape #49/218/B).

* * *

1 **Chair Bryant: No. None of them so far. I don't think any of the Followers of Christ are here. Is that correct? Is anyone here from the Followers of**
2 **Christ? I don't think anyone is."** (June 7, 1999, tape #49/218/B).
3
4 The legislation that removed the faith-healing affirmative defense from the
5 Second Degree Manslaughter law, HB 2494, cannot withstand the scrutiny required under
6 the standard espoused by the Supreme Court in Church of Lukumi Babalu Aye, Inc. v.
7 City of Hialeah, 508 U.S. 520 (1993):
8
9 Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872. However, **where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: it must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied**." 508 U.S. at 521.
10
11
12

* * *

13 Although a law targeting religious beliefs as such is never permissible, McDaniel v. Paty, supra, 435 U.S. at 626 (plurality opinion); Cantwell v. Connecticut, supra, 310 U.S. at 303-304, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see Employment Div., Dept. of Human Resources of Oregon v. Smith, supra, 494 U.S. at 878-879, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. **To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.** A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. 508 U.S. at 533.
14
15
16
17
18
19

* * *

20 **We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative.** The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," Gillette v. United States, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," Bowen v. Roy, supra, 476 U.S. at 703 (opinion of Burger, C.J.). **Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.** The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)." **(**Emphasis Added**)** 508 U.S. at 534.
21
22
23
24
25
26

1 Accordingly, insomuch as HB 2494 is not a law of general and neutral
2 applicability, but rather is a law specifically targeted at the Followers of Christ Church,
3 the enactment must be invalidated. This enactment cannot withstand the strict scrutiny
4 and narrow tailoring requirements of the Constitution. One of several possible
5 alternatives, which would withstand Constitutional scrutiny, would be for the State to
6 require that parents of a seriously ill child inform the State of the child's condition. Such
7 a procedure would enable the legitimate objectives of the State to be satisfied without
8 infringement on the rights of the individual to worship as he or she chooses.
9 This alternative proposed requirement is but one of the many possible facially
10 neutral, religiously neutral, narrowly tailored laws that would not infringe on the right of
11 any religious group or individual to freedom of worship, that would allow parents to treat
12 their children in the manner they see fit in accordance with their religious beliefs, and
13 would allow the State in cases of seriously ill children to send a representative to ensure
14 the interests of the State are vindicated with regard to the welfare of the children of
15 Oregon, without the need to target and attempt to destroy the religious practices of the
16 Followers of Christ.
17 Based on the foregoing, HB 2494 should be struck down as violative of the right
18 of Mr. and Mrs. Worthington to exercise their freedom of worship as guaranteed by
19 Article I, Sections 2 and 3 of the Constitution of Oregon and the First Amendment to the
20 United States Constitution, and the Indictment should be dismissed. Alternatively, HB
21 2494 should be struck down and the affirmative defense that was in the relevant statute
22 prior to the enactment of HB 2494 should be restored.
23
24
25
26

F. THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE PROSECUTION OF MR. AND MRS. WORTHINGTON IS THE TARGET OF RELIGIOUSLY MOTIVATED SELECTIVE PROSECUTION, IN VIOLATION OF THEIR RIGHT TO RELIGIOUS FREEDOM, THEIR RIGHT TO DUE PROCESS, AND IN VIOLATION OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS, AS GUARANTEED BY THE CONSTITUTION OF THE STATE OF OREGON AND THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Immediately after their daughter passed away, Mr. and Mrs. Worthington, through their church leaders, contacted the Medical Examiner's office to report Ava's passing, as they had been advised to do in accordance with an agreement between the Followers of Christ Church and Clackamas County District Attorney's Office dating back to the 1990's. In accordance with this agreement, the District Attorney's office had promised not to recklessly prosecute members of the Followers of Christ Church (See Exhibit containing a copy of the letters from the Clackamas County District Attorney). Mr. and Mrs. Worthington fully cooperated with law enforcement in the investigation of the death of their daughter, and were thereafter indicted for the crimes of Manslaughter in the Second Degree and Criminal Mistreatment in the Second Degree.

The instant prosecution arises from the sincerely held religious beliefs and practices of Mr. and Mrs. Worthington, as members of the Followers of Christ Church, and that the Defendants are the target of unlawful selective prosecution and/or vindictive prosecution on the part of the Clackamas County Sheriff's Office and the Clackamas County District Attorney.

Clackamas County alone has seen the deaths of more than 14 children since 1979 caused by Pneumonia or Influenza. The listed cause of death of Ava Worthington was Pneumonia, as was the case with Bryan Tennant, a six year old boy who died of Pneumonia in Milwaukie, Clackamas County, Oregon, the same week as Ava Worthington. Clackamas County, since 1979, has also seen the death of more than 900 children due to natural causes, not including accidental deaths or external causes of death

such as personal violence. Nevertheless, on information and belief, the only deaths of children from natural causes that have been prosecuted in Clackamas County as homicides have been the deaths of children of the Followers of Christ Church, including the pending Clackamas County prosecution of Jeffrey and Marci Beagley (Case Nos. CR0801358 and CR0801359), for the death of their 16 year old son under a charge of Criminally Negligent Homicide.[30]

It is clear that the prosecution of Mr. and Mrs. Worthington is not based solely on any alleged criminal conduct of the Defendants. Instead, considering the multitude of children who have died under the same or similar circumstances within Clackamas County whose parents have not been prosecuted, the conclusion is inescapable that the prosecution of Mr. and Mrs. Worthington is precipitated by their protected religious belief and practice in the use of religious medical care, rather than secular Western medicine. Thus, the prosecution of Mr. and Mrs. Worthington arises from their belief in the word of God as laid down in the Christian Scriptures, and Clackamas County's intent to persecute and prosecute the members of the Followers of Christ Church for their faith. If it were otherwise, Clackamas County would not abstain from prosecuting any other case regarding the death of children from natural causes.[31]

A Selective Prosecution claim flows from a prosecutor's decision to treat a particular class or individual in a legally impermissible manner compared to other similarly situated individuals based on either a particular animosity towards the individual or a protected group to which the individual belongs, including race or religion under Article I, Section 20, of the Oregon Constitution ("No law shall be passed granting to any

---

[30] Contemporaneous to the filing of this motion, Mr. and Mrs. Worthington are serving upon the Clackamas County District Attorney a request for discovery which seeks documentation relating to other prosecutions (if any) in similar such matters.

[31] We incorporate by reference the points and authorities separately presented in Parts B, C, D and E herein, and repeat those citations only as necessary to make our argument.

citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."), U.S. Const., Amendment XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."), State v. Kadderly, 176 Or. App. 396 (2001) (Drawing from Equal Protection Clause standards, selective prosecution arises where a defendant demonstrates that others "similarly situated" were treated more favorably and "that the decision whether to prosecute [was] based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). One such "unjustifiable standard" is the prosecution of a particular defendant for having exercised a constitutional right. United States v. Oaks, 527 F.2d 937, 940 (9th Cir 1975), cert den, 426 U.S. 952 (1976); City of Portland v. Bitans, 100 Or. App. 297, 302 (1990). Thus, in general, "little substantive difference can be detected between selective prosecution and vindictive prosecution." United States v. Wilson, 639 F.2d 500, 502 (9th Cir 1981) and City of Portland v. Bitans, 100 Or. App. 297 (1990) ("To make out a claim of discrimination on the basis of selective prosecution, a defendant must establish that (1) the prosecutor has not prosecuted others similarly situated for similar conduct and (2) the decision to prosecute was based on impermissible grounds, as, for example, race, religion or the exercise of constitutional rights. See Jarrett v. U.S., 822 F.2d 1438, 1443 (7th Cir 1987); State v. Freeland, 295 Or. 367, 375 (1983); City of Eugene v. Crooks, 55 Or. App. 351, 354 (1981), rev den, 292 Or. 722 (1982).")

A Vindictive Prosecution arises when a prosecution is enhanced or increased in seriousness due to the exercise of a protected right of the individual being investigated or prosecuted that results in impermissible addition of charges, or even the initial imposition

of charges if such imposition is based upon the individual's exercise of a protected right. State v. Kadderly, 176 Or. App. 396 (2001). ("Vindictive prosecution," which is rooted in the Due Process Clause, is premised on the notion that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]" Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). Thus, a criminal charge is subject to dismissal if the State brought the charge in retaliation against a person "for exercising a protected statutory or constitutional right." United States v. Goodwin, 457 U.S. 368, 372 (1982)).

Based on the foregoing, we maintain that Mr. and Mrs. Worthington are being subjected to unlawful selective and/or vindictive prosecution, and accordingly the Indictment should be dismissed.

G. THE INDICTMENT SHOULD BE DISMISSED BECAUSE IT IS VOID FOR VAGUENESS AND VIOLATES THE RIGHT OF MR. AND MRS. WORTHINGTON TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW, AND EQUAL PRIVILEGES AND IMMUNITIES, AND CONSTITUTES AN EX POST FACTO APPLICATION OF STATUTE, IN VIOLATION OF ARTICLE I, SECTIONS 20 AND 21 OF THE OREGON CONSTITUTION, AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. and Mrs. Worthington submit that their prosecution herein is estopped by the lack of notice afforded Mr. and Mrs. Worthington by vagueness within the Oregon Revised Statutes charged concerning the use of the term "adequate medical care", both on its face and as applied to the Defendants, contrary to the requirements of Equal Privileges and Immunities as well as Due Process as applied through the Federal Constitution Amendment XVI and Amendment V to Oregon, that the vague nature of "adequate medical care" is violative of Article 1, Section 20 and 21 both as an ex post facto law and a violation of equal privileges and immunities under the Oregon Constitution.

The prosecution is also estopped on the grounds that Mr. and Mrs. Worthington had previously received, through their church, verbal and written statements, opinions,

and assurances from the Clackamas County District Attorney's office that they would not be recklessly prosecuted for the practice of their religion.

Additionally, Mr. and Mrs. Worthington move to dismiss the Indictment on the grounds that even if the term "adequate medical care" could be found to be defined in some manner, albeit not statutorily, both facially and as applied, Mr. and Mrs. Worthington did provide consistent religious "medical care" to Ava Worthington. This dismissal must occur particularly in light of the rule of lenity, such that when a term lacks proper definition within the statutes no criminal prosecution can proceed in this case on the grounds of failure to provide "adequate medical care" under ORS 163.125 and ORS 163.205 consistent with the rule of lenity.[32]

1. The Indictment should be dismissed because the prosecution of Mr. and Mrs. Worthington violates their rights to Due Process, Equal Protection and Equal Privileges Under Law.

The Fourteenth Amendment to the Federal Constitution provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." and Amendment V provides that "No person … shall be deprived of life, liberty, or property, without due process of law". Due process dictates that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." Goddard v. Farmers Ins. Co. of Oregon, 344 Or. 232 (2008) (Quoting BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996)).

State v. Iillig-Renn, 341 Or. 228, 240 (2006) provides us with the standard that

[32] We incorporate by reference the points and authorities separately presented in Parts B, C, D, E and F, herein, and repeat those citations only as necessary to make our argument.

will be used in Oregon for Due Process Analysis "For due process purposes, a statute is vague in that sense if it either contains no identifiable standard, Kolender v. Lawson, 461 U.S. 352, 358 (1983), or employs a standard that relies on the shifting and subjective judgments of the persons who are charged with enforcing it, City of Chicago v. Morales, 527 U.S. 41, 62 (1999)" Illig-Renn goes on to indicate that a statute also must be examined to determine whether the statute "is vague in the sense that it fails to provide fair warning, in violation of the Due Process Clause of the Fourteenth Amendment. In the past, we have described that 'fair warning' requirement in the following terms: 'The terms of a criminal statute must be sufficiently explicit to inform those subject to it of what conduct on their part will render them liable to its penalties.' (State v. Graves, 299 Or 189, 195 (1985)). In assessing a claim that a criminal statute fails to give fair warning, we employ the standard that federal courts have applied to criminal and quasi-criminal statutes - whether the statute would '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).'" State v. Illig-Renn, 341 Or at 241. The decision of the Supreme Court in State v. Graves, 299 Or. 189 (1985) also clearly lays out that

> "The terms of a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties. State v. Hodges, 254 Or. 21, 27 (1969). In addition to its function of giving fair notice of the forbidden conduct, [a] criminal statute must not be so vague as to permit a judge or jury to exercise uncontrolled discretion in punishing defendants, because this offends the principle against ex post facto laws embodied in Article I, section 21, of the Oregon Constitution. Id. The equal privileges and immunities clause is also implicated when vague laws give unbridled discretion to judges and jurors to decide what is prohibited in a given case, for this results in the unequal application of criminal laws. See State v. Robertson, 293 Or. 402, 408 (1982). A criminal statute need not define an offense with such precision that a person in every case can determine in advance that a specific conduct will be within the statute's reach. However, a reasonable degree of certainty is required by Article I, sections 20 and 21."

Furthermore, in cases involving religious conduct, "because First Amendment

freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity". NAACP v. Button, 371 U.S. 415, 433 (1963). The danger of a possibly chilling effect upon the exercise of First Amendment rights must be guarded against by laws which clearly inform individuals of precisely what is being prohibited. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

Finally, the rule of lenity, as recently reinvigorated and affirmed by the Supreme Court of the United States, also provides that "under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. See United States v. Gradwell, 243 U.S. 476, 485 (1917) ; McBoyle v. United States, 283 U.S. 25, 27 (1931) ; United States v. Bass, 404 U.S. 336, 347–349 (1971) . This venerable rule . . . not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." U.S. v. Santos, ___ US ___, 128 S.Ct 2020 (2008).

For all the foregoing reasons, the Indictment should be dismissed.

2. The prosecution of Mr. and Mrs. Worthington is estopped by the policies declared by the Clackamas County District Attorney's Office upon which Mr. and Mrs. Worthington have relied to their detriment.

Mr. and Mrs. Worthington were led to believe through the conduct of officials and others within the Clackamas County District Attorney's office that their religious conduct would not be prosecuted if they would cooperate and work with the District Attorney, Medical Examiner and Sheriff's Office when a death occurs within the Followers of Christ Church Community. The members of the Followers have been the recipients of multiple verbal and written statements regarding the policy of the District Attorney's Office not to recklessly prosecute them, so long as they cooperated fully and were forthright with the Clackamas County District Attorney. Assurances were made on the

part of the District Attorney, following the passage of HB 2494, which unconstitutionally removed the affirmative defense of spiritual healing from the Oregon Revised Statutes:

> "I hope that each of you will continue to encourage your fellow members to cooperate with the police and medical examiner when a death occurs. In return for your cooperation, you have my written word that no case will be recklessly charged without every consideration given to the tenets of your faith and religious practices." (See attached Exhibit, constituting correspondence from the Clackamas County District Attorney).

To our knowledge, the District Attorney's Office has never issued to the Followers of Christ Church any renunciation, disclaimer, or modification concerning this policy. In reliance upon the promises made by the District Attorney's Office, Mr. and Mrs. Worthington, and their church, have fully cooperated with law enforcement, reporting the death of Ava Worthington immediately to the Medical Examiner, and otherwise. Nevertheless, in violation of the promises which had been made on the part of law enforcement, the Clackamas County District Attorney's Office has proceeded with the prosecution of Mr. and Mrs. Worthington. For this reason, the Indictment should be dismissed.

3. The Indictment should be dismissed because it relies on a statute which is unconstitutionally vague, and the prosecution therfore violates the right of Mr. and Mrs. Worthington to Due Process of Law, and their right against ex post facto prosecution.

Mr. and Mrs. Worthington also submit that the term "adequate medical care" contained within ORS 163.115(6)(b) is unconstitutionally vague and did not afford them fair notice as required under Due Process to allow them to know what conduct is prohibited so that they may conform their conduct with the law. The term "adequate medical care" is nowhere defined within the statutes and as such contains no identifiable standard as to what constitutes "adequate medical care", but rather relies on the shifting and subjective judgment of the District Attorney to determine what is "adequate medical care." As such, Mr. and Mrs. Worthington are left to guess at what constitutes "adequate

medical care" and suffer prosecution for a standard which has never been established.[33]

In the alternative, even if the term "adequate medical care" is determined not to be unconstitutionally vague, facially or as applied, Mr. and Mrs. Worthington submit that they did provide "medical care" of a religious nature to Ava Worthington such that no prosecution may proceed on grounds of failure to provide "adequate medical care". The wide pantheon of available treatments and care available in the marketplace of medicine ranging the alphabetic gamut from Acupuncture to Zinc Therapy are quite broad in nature and come from a variety of sources and systems, some religious in nature, some spiritual in nature, some divorced from any sort of religious connection, but they all fall within the scope of what constitutes "adequate medical care" in Oregon where diversity of thought and opinion are constitutionally well protected, and "adequate medical care" is undefined by statute.

The practice of Christian religious medical care has been used for over 2000 years, including by Jesus himself, as reflected in the Christian sacred texts whereby Jesus healed the sick with touch, prayer, and anointing oil. Chiropractic care, which is of recent import, but widely used and accepted throughout Oregon and the United States, is based on a system of energy and bodily manipulation to align the presence of innate intelligence, which include the presence of God in man. D.D. Palmer, the founder of chiropractic, who himself lived and worked in Oregon during his lifetime at the turn of the 19th century, explained that chiropractic was a medical practice based upon received

---

[33] Of course, we are aware of the decision rendered by the Court of Appeals in the case of State v. Hays, 155 Or App 41 (1998), in which the court upheld a conviction for Criminally Negligent Homicide based on the defendant's failure to seek medical treatment for his son. However the Hays decision is not dispositive to the issues which are being raised herein. To begin, the Court of Appeals did not even address the Constitutional issues which arise from the Oregon Constitution's protection of freedom of worship, pursuant to Article I, Sections 2 and 3. Nor did the Court of Appeals address the issues of family autonomy which arise from the decision of the United States Supreme Court in Troxel v. Granville, 530 U.S. 57 (2000), for Troxel had not been decided as of the Hays decision. Likewise, the issues raised herein as to the unconstitutionality of HB 2494, the 1999 amendment to Oregon's law concerning the crime of Manslaughter in the Second Degree were not addressed in Hays, because Hays was decided prior to that legislation. Accordingly, while Hays may be a decision of historical interest, it does not control the litigation of the instant matter in any important respect.

religion wisdom. (See Exhibit, attached letter of DD Palmer). The use of Eastern Chinese acupuncture based on mystical energy channels of the body dates back over 4000 years and has been used quite successfully by many Oregonians and Americans to treat varied conditions. Acupuncture is of only recent import to the West, but it constitutes a healing practice that has been used for many millennia, and is widely used throughout Oregon, including at Oregon Health and Sciences University, a publicly funded and maintained institution of the State of Oregon. Naturopathic and Homeopathic medicine, based on traditional herbal pagan medicine dating back to the beginning of written history, has gained widespread acceptance throughout the world ranging from the United States to Europe to Asia and is available commercially throughout Oregon in various forms. Traditional Native American medicine indigenous to Oregon is still practiced amongst the remaining Native Americans who live in Oregon, and has been in use long before the first white men set foot upon the soil of Oregon or even dreamed of settling here.

"Modern" Western Medicine, as most Oregonians know it, is of relatively recent vintage, in fact occurring almost entirely as it is practiced today after the founding of Oregon, so much so that "Modern" Western Medicine as practiced today in Western hospitals would have been a foreign and bizarre concept to the Founding Fathers of Oregon, infused with just as much mysticism and ritual as many of those in the secular public today view religious and "alternative" medical care. The members of the Followers of Christ Church, along with most of the population of Oregon at the founding of the State of Oregon, would have sought healing from God as opposed to that of a worldly physician, who may as likely have bled them, attached leeches, force fed them purgatives, applied blistering poultices and ultimately killed or infected them as he may possibly have healed them. Even today we are told of the horrors that transpire within the walls of American hospitals ranging from wrongly amputated limbs to individuals

coming in with a simple cold and leaving in a body bag thanks to Superbug infections and other rampant transmittable infections within "modern" hospitals.

Mr. and Mrs. Worthington's choice of prayer, anointing oil, and laying on of hands, all methods of healing employed by the Great Physician (Jesus), for their family all fall within the gamut of medical treatment options that are legitimately selected and practiced in Oregon. The simple fact that their medical care practices are not those selected by the majority or that they are religious in nature does not disqualify them as "adequate medical care", but rather in fact enhances their protection through the guarantees of religious freedom which are granted to all Oregonians in Article I, Sections 2 and 3 of the Oregon Constitution, whereby Oregonians are guaranteed that "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences," and "No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience."

The State may be anticipated to take the position that as Ava's illness progressed, there came a point, to be determined by a jury, at which a "reasonable" person would give up on God and would have gone to a "modern" medical hospital. Under this standard, Mr. and Mrs. Worthington are to be deemed guilty based upon the jury's assessment of when their decision to put their faith in prayer, anointing, and laying on of hands became unreasonable. However, a judicial tribunal has no power to decide whether an individual's religious belief are "acceptable, logical, consistent or comprehensible". Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 714 (1981). When a court undertakes that task, it enters a forbidden domain. U.S. v. Ballard, 322 U.S. 78, 86-87 (1994). The State cannot put to the jury the question of the reasonableness of Mr. and Mrs. Worthington's religious beliefs and practices, anymore than it can be put to the jury whether the Worthingtons' religion's God is the one true and

correct God. To do so places the trier of fact, here a jury of twelve, in the position of judging the worth and merit of a religion, a task which is explicitly forbidden to the court.

The Worthington family's decision to select religious "medical care" is protected in the same way Oregon must protect a Chinese-American family's right to use Eastern medical care, as that of a Canadian-American family to rely on homeopathic care, a Native American family's right to rely on traditional Indian medicine, and all the other diverse people who inhabit Oregon. Furthermore, Mr. and Mrs. Worthington's decision is based on their religious belief and conscience, such that their use of medical care that they deem appropriate for their family in Oregon is accorded the greatest protection under the Smith Hybrid Rights Test (strict scrutiny combined with the least burdensome test), to a family that engages in religious medical care within their family unit, no less than the privacy right to raise and rear one's children is implicated in concert with the right to raise one's children and family in the religious atmosphere and teachings of the parent's choosing, not the government's choosing.

Accordingly, for the foregoing reasons, the Indictment should be dismissed.

H. CONCLUSION

Dating back to time immemorial, mankind has invoked the Deity to provide healing. During the 18th and 19th Centuries, contemporaneous to the establishment of this Nation and the State of Oregon, religious faith healing was a commonplace form of worship. For many, prayer continues as a source of healing to this very day. In the tradition of their faith and their church, and as devoted parents committed to the well-being of their household, Mr. and Mrs. Worthington prayed for their daughter, along with their extended family and church members. In their worship, Mr. and Mrs. Worthington anointed their child with oil, and they laid on of hands. The instant prosecution seeks to treat Mr. and Mrs. Worthington as criminals, because they were true to their religious

faith. We submit that Indictment contravenes the right of Mr. and Mrs. Worthington to freedom of worship and interferes with the sanctity of their family unit.

One of the more frequently quoted declarations of President George W. Bush was the pronouncement: "I'm the decider", which President Bush declared in relation to the conduct of the War in Iraq. While the United States President may be the "decider" when it comes to the conduct of American foreign policy, it is clear that the government is not the "decider" when it comes to the raising of children. Within the family unit, the parents have the right and the obligation to make decisions concerning how their children shall be raised. The parent is the "decider", not the government. The Indictment attempts to usurp from Mr. and Mrs. Worthington the responsibility for raising their children in accordance with their own religious precepts and values, in violation of their most precious and fundamental Constitutional rights. This governmental intrusion into the sanctity of the family unit should not be allowed.

Based on the foregoing, and based on the evidence to be established at the hearing which shall be conducted herein, we submit that the Indictment should be dismissed. In the alternative, we request that the Court grant such other and further relief as may be just and appropriate.

Respectfully submitted this 21ST day of November, 2008

____

MARK C. COGAN
Attorney for Defendant Carl Brent Worthington

____

JOHN W. NEIDIG
Attorney for Defendant Raylene Marie Worthington

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

*** * * * * CERTIFICATE - TRUE COPY * * * * ***

I hereby certify that the forgoing copy of DEFENDANT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT, AND FOR OTHER RELIEF is a complete and exact copy of the original.

DATED: November 21, 2008

____

Mark C. Cogan, OSB# 92016
Attorney for Defendant

*** * * * * CERTIFICATE OF SERVICE * * * * ***

I hereby certify that I caused to be served the forgoing DEFENDANT'S PRETRIAL MOTION TO DISMISS THE INDICTMENT, AND FOR OTHER RELIEF on the following person, by personal delivery of same, on the date subscribed below:

Clackamas County District Attorney
Clackamas County Courthouse
807 Main Street
Oregon City, Oregon 97045

DATED: November 21, 2008

____

Mark C. Cogan, OSB# 92016
Attorney for Defendant