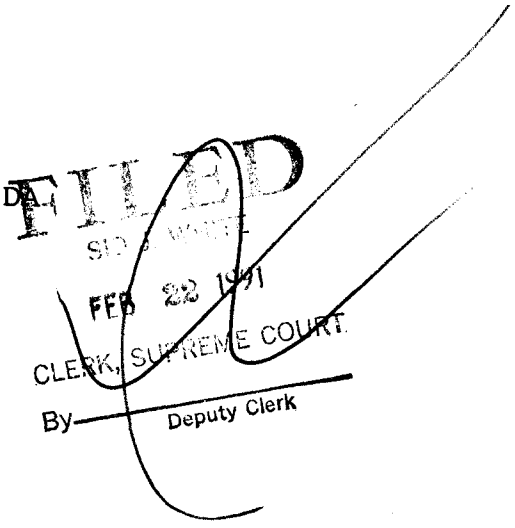
IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 77,067



WILLIAM HERMANSON and
CHRISTINE HERMANSON,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

PETITIONERS' INITIAL BRIEF ON CERTIFIED QUESTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS, CONT'D.

PREFACE

The parties will be referred to by their proper names. The following symbol will be used:

(R) - Record on Appeal.

CERTIFIED QUESTION

IS THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985)?

In addition to the certified question, petitioners raise the following points:

POINT I

THE FLORIDA STATUTES UNDER WHICH THE DEFENDANTS WERE CONVICTED DID NOT GIVE FAIR WARNING TO THE HERMANSONS AS TO THE CONSEQUENCES OF PRACTICING THEIR RELIGIOUS BELIEFS, AND THEIR CONVICTION IS THEREFORE A DENIAL OF DUE PROCESS.

POINT II

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE FAILED TO ESTABLISH DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT.

POINT III

PERMITTING A JURY TO DECIDE THE REASONABLENESS OF THE DEFENDANTS IN FOLLOWING THEIR RELIGIOUS BELIEFS IS A VIOLATION OF FREEDOM OF RELIGION.

POINT IV

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN THE PROSECUTOR STATED IN CLOSING ARGUMENT THAT CHRISTIAN SCIENCE RECOGNIZES CONVENTIONAL MEDICAL TREATMENT, WHICH WAS NOT SUPPORTED BY EVIDENCE OR TRUE.

STATEMENT OF THE CASE AND FACTS

The Hermansons are Christian Scientists who treated their daughter's illness in accord with Christian Science methods rather than conventional medical treatment. When their daughter died criminal child abuse charges were brought against the Hermansons.

The Hermansons relied on an exception in Florida's child abuse statutes which provides that a person:

> "legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone." Fla. Stat. §415.503(7)(f) (1986).

The trial judge ruled that the religious exception in the above statute was applicable to the facts and available as a defense in this case. Even though it was undisputed that the Hermansons were at all times legitimately practicing their religious beliefs the trial judge submitted the case to the jury, which convicted the Hermansons of felony child abuse in violation of Section 827.04(1), Florida Statutes (1986), which, since a death occurred, also constituted murder in the third degree.

The court ordered a four year prison sentence for the Hermansons, which was suspended, with probation of 15 years (R 1870, 1875). Special conditions of the probation require the Hermansons to have regular medical examinations and treatment of their children. The Hermansons appealed to the Second District

Court of Appeal, which affirmed in a 32-page opinion, and certified the following question as one of great public importance:

> IS THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985)?

The Second District set forth on pages 4 through 8 of its opinion the stipulation of facts filed by the Hermansons and the state for use at the hearing on the Hermansons' motion to dismiss the information. That stipulation provided:

> 1. The Defendant, William F. Hermanson, is 39 years of age. Mr. Hermanson is married to the Defendant, Christine Hermanson, who is 36 years of age. Since June of 1973, Mr. and Mrs. Hermanson have resided in Sarasota, Florida. At all times material to this case, they resided at . . . . Mr. Hermanson is a bank vice president, and Mrs. Hermanson is the director of the Sarasota Fine Arts Academy. Mr. and Mrs. Hermanson have graduate degrees from Grand Valley State College and the University of Michigan, respectively. Neither Mr. nor Mrs. Hermanson has ever been arrested for, or convicted of, a crime.
>
> 2. Mr. and Mrs. Hermanson were married on May 30, 1970. There have been two children born of this marriage: Eric Thomas Hermanson, date of birth 8/26/77 and Amy Kathleen Hermanson (deceased) date of birth 7/16/79. There are no facts indicating that Mr. or Mrs. Hermanson ever deprived their children of necessary food, clothing or shelter as those terms are used in Section 827.04, Florida Statutes.
>
> 3. According to the autopsy report of the Medical Examiner, James C. Wilson, M.D., on September 30, 1986, at approximately 1:55 p.m., Amy Hermanson died. Dr. Wilson found the cause of death to be diabetic ketoacidosis due to juvenile onset diabetes mellitus. Additional

autopsy findings of dehydration and weight loss were consistent with the disease process. Dr. Wilson believes that the disease could have been diagnosed by a physician prior to death and, within the bounds of medical probability, Amy's death could have been prevented even up to several hours before her death with proper medical treatment.

4. At the time of Amy's death, the Hermanson family, including William, Christine, Eric and Amy, were regular attenders of the First Church of Christ, Scientist in Sarasota. William Hermanson has been a member of the Christian Science Church since childhood, and Christine Hermanson has been a member of the Church of Christ, Scientist since 1969. The Church of Christ, Scientist is a well-recognized church or religious organization, as that term is used in Section 415.503, Florida Statutes.

5. Christian Scientists believe in healing by spiritual means in accordance with the tenets and practices of the Christian Science Church. William and Christine Hermanson, at all times material to the facts in this case, followed the religious teachings of their church and relied upon Christian Science healing in the care and treatment of Amy Hermanson.

6. On or about September 22, 1986, the Hermansons became aware that something was particularly wrong with Amy Hermanson which they believed to be of an emotional nature. They contacted Thomas Kellner, a duly-accredited practitioner of the First Church of Christ, Scientist for consultation and treatment in accordance with the religious tenets and beliefs of the Christian Science Religion. Thomas Keller treated Amy from September 22, 1986 until September 30, 1986.

7. On or about September 25, 1986, the Hermansons traveled to Indianapolis, Indiana to attend an annual Christian Science conference on healing and left the children in the care of one Marie Beth Ackerman, age 24, a Christian Scientist employed by the Christian Science Committee on Publications and who was residing with the Hermanson family in Sarasota County, Florida and assisting Mrs. Hermanson as an administrator at the Sarasota Fine ARts

Academy. The Hermansons returned to their home in Sarasota County, Florida at approximately 2 a.m. on September 29, 1986.

8. After their arrival, the Hermansons noticed a worsening of Amy's condition. They decided to seek the assistance of a local Christian Science practitioner and at approximately 9 a.m. on September 29, 1986, the Hermansons contacted one Frederick Hillier, a duly-accredited Christian Science practitioner of the First Church of Christ, Scientist whom they secured as a practitioner for Amy. Thereafter, until Amy's death, Hillier provided treatment for Amy relying solely on spiritual means for healing in accordance with the tenets and practices of the First Church of Christ, Scientist.

9. On Monday, September 29, 1986, William Hermanson had a discussion with Jack Morton, the father of Christine Hermanson, wherein Mr. Morton expressed his concern for the health of Amy and suggested the possibility that Amy had diabetes.

10. At approximately 9:30 a.m. on September 30, 1986, Hillier went to the Hermanson home to continue treatment and, due to the fact the Hermansons had been up all night with Amy, suggested that a Christian Science nurse be called to help care for Amy.

11. At approximately 10 a.m. on Tuesday, September 30, 1986, one Molly Jane Sellers was called to the Hermanson residence to assist in the care of Amy Hermanson. Molly Jane Sellers is recognized as a Christian Science nurse by the First Church of Christ, Scientist and has been so recognized for twenty years. In preparation for such accreditation by the Church, Sellers completed a three and one-half year training course. Her area of care primarily relates to the physical needs of the patients and, would be closely related to the duties performed by a licensed practical nurse.

12. On September 30, 1986 at approximately 11 a.m., William Hermanson was contacted by a counsel from the Department of Health and Rehabilitative Services (Willy Torres) who informed him that they had received a complaint

alleging child abuse of his daughter, Amy Hermanson and that a hearing pursuant to said allegation had been set before the Juvenile Court for 1:30 p.m. Torres further informed Mr. Hermanson that the purpose of the hearing was to determine if medical treatment would be court ordered or if treatment as prescribed by the Christian Science practitioner would be ordered at that time.

13. At approximately 12:30 p.m., Mr. Hermanson left his home and traveled to the Sarasota County Courthouse for the hearing pursuant to the notification from Willy Torres. While at the hearing, at approximately 1:27 p.m., Mr. Hermanson received a telephone call from an individual at the Hermanson home who reported that Amy had "taken a turn for the worse and an ambulance had been called." Such information was related to the Court and an order was entered which required that Amy Hermanson be examined by a licensed medical doctor. When paramedics arrived they found that Amy had died.

14. Prior to her death, Amy Hermanson continued under the care and treatment of Frederick Hillier with the assistance of Molly Jane Sellers until approximately 1:27 p.m. September 30, 1986 at which time Amy had died.

15. On or about October 7, 1986, the Department of Health and Rehabilitative Services notified Mr. and Mrs. William Hermanson that it had completed its investigation and had classified the report as unfounded (R 1345).

The facts which came out at trial were as follows. Amy Hermanson died as a result of diabetes according to Dr. Wilson, the pathologist who performed the autopsy. The pathologist called the Hermansons after the autopsy, and they were cooperative and had no reluctance to discuss what they knew with him (R 834). They indicated that in September Amy seemed lethargic and lost weight.

Reports from school indicated she was putting her head down on her desk during the day and falling asleep. During the last school week prior to her death, she did not feel well enough to attend school on Wednesday or Friday. She was vomiting on her last Sunday and Monday, and seemed incoherent Monday night. She had been rapidly consuming fluids and often going to the bathroom, as if the fluids were going right through her. All of this information was consistent with his diagnosis that diabetes was the cause of death (R 816-820, 834).

The Hermansons also advised the pathologist about the Christian Science treatment administered to Amy. He testified:

> Yes. My notes indicate that sort of a brief summary of what was going on. That they started Christian Science work to heal, or help her, on Monday, a week before her death. That it was prayerful work in recognition of Amy being tired and not herself. That it seemed there might have been some sort of an identity problem; that they were working on what was her true identity and whatever else was in there would come out on the basis of their work on this, what was her true identity. And that they wanted I think to reestablish that she was a child of God (R. 835).

Helen Falb, a teacher at the music academy operated by Christine Hermanson, would see Amy three or four times a week. She noticed Amy was losing weight, and became concerned about Amy's health about two weeks before she died (R 847-849). She did not express her concern to Christine Hermanson because she was aware of the Hermanson's religious beliefs (R 859). She felt that Amy's

problems were emotional, as opposed to physical, until two weeks before she died (R 868).

Nancy Strand, Amy's physical education teacher, noticed problems with Amy about three weeks before her death (R 899). She allowed Amy not to participate in class and instead put her head down on the picnic table. She was pale and would fall asleep (R 899). She told Christine about her concern for Amy, and Christine acknowledged the problem but said Amy seemed to feel a lot better when she was at home. When her teacher would ask her what was wrong, Amy never gave any specific complaint other than her stomach or her head hurt, or that she was tired (R 901). She felt Amy's condition was serious, because it was getting worse, but at no time did she think it was life-threatening (R 902-903).

Victoria Neuhaus saw Amy on September 24, 1986, when Christine came to her house to give her an organ lesson and brought Amy with her. Christine told her Amy was too tired to go to school. Ms. Neuhaus told Christine that Amy was obviously ill and suggested they go home. Christine responded that Amy would be alright. Amy appeared very tired and at one point crawled across the room and asked to go home (R 871-874).

Leslie Morton, Christine's sister-in-law, became concerned about Amy's health a few days before her death, and called HRS on Friday and Tuesday, as well as her pediatrician (R 889-894). She

knew that the Hermansons were very active practicing Christian Scientists who did not believe in any type of medical care, and that they would abide by their religious beliefs in treating an illness (R 895).

Amy's teacher, Laura Kingsley, testified Amy was falling asleep in class and she advised Christine about this. Christine responded that Amy did not want to go to school and that she felt Amy was having emotional problems (R 914, 922). She last saw Amy on the Thursday prior to her death, and thought something was seriously wrong, but not that her condition was life threatening (R 915-916). She testified that it would not be unusual for Amy to have had difficulty adjusting to school that year, because it was the first year she would have to change classes, and in addition she was one of the few children who were a year ahead of the other children, so that most of the children in her class were one year older. Several other children in her class were also having trouble adjusting, which she felt she probably had discussed with Christine (R 919).

Barbara Fleck saw Christine and Amy at a meeting of a women's organization on September 20, 1986. Christine had brought Amy with her and Amy was there three to four hours. She appeared lively, happy, talkative and healthy. She spoke with Amy and walked out of the meeting with Amy and Christine (R 955-956).

Gary Christman worked in a store next to Christine's music academy, and he saw Amy in his store quite often (R 932). Several weeks before her death he noticed that her skin had a bluish tint, her arms were thin like toothpicks, and she had lost weight (R 933). He had seen her lying on the floor at the music academy and sleeping in the car. He twice asked her if anything was wrong and she said that she was fine (R 935-937).

John Whitmire attended a meeting at the music academy which Christine directed, two days after Amy's death. The Hermansons called the meeting to explain to members of the academy what had transpired with Amy. The Hermansons told how they had contacted a Christian Science practitioner who had been called in, and that early Tuesday morning Amy had appeared to be doing better and they felt the type of "internal release," that a Christian Scientist feels when a healing has taken place (R 983). They were convinced at that point that Amy had been healed (R 984). William Hermanson discussed their deep faith and belief in Christian Science (R 989).

Mary Jane Sellers is a Christian Science nurse who came to the Hermansons at their request on September 30, 1986. When she arrived at the home the Christian Science practitioner, Frederick Hillier, who had been called in a week earlier, was praying and administering to Amy through spiritual healing (R 1064). She observed that the Hermansons believed they were practicing their

religion by relying on Mr. Hillier to provide the spiritual healing (R 1066). She asked about the situation and William Hermanson told her that someone suggested Amy had diabetes (R 1044). Amy was in very bad shape at that time, with slow pulse and breathing (R 1051). She told the Christian Science practitioner she was going to call an ambulance, and the practitioner said that he first had to call Boston (the home of the Christian Science church) (R 1053-1054). She waited what she described as "maybe two minutes" while the practitioner called Boston, and she then called the ambulance (R 1054-1055).

The paramedic testified that the call came in for the ambulance at 1:48 p.m. and that he arrived at the residence at 1:53 p.m., a period of five minutes (R 759-760). When he arrived Amy was dead, and based on his observation of her and what he was told, Amy had been dead for 20 minutes (R 761-764). Since it had only taken the ambulance five minutes to arrive at the Hermanson's after receiving the call, it was thus evident that Amy had already died before the ambulance was called.

Dr. John Malone, a professor of pediatrics at the University of South Florida College of Medicine, was called as an expert by the state. He testified that Amy's symptoms were consistent with juvenile diabetes, and that she could have been treated for diabetes right up until the time of death. In his opinion the actual cause of death was her vomiting and aspirating the fluid

into her lungs. In his opinion this is what caused her heart to stop beating. She might have lived another day or two, if she had not vomited and aspirated. The vomiting was brought on by the diabetes. The only cure for diabetes is insulin, and without insulin the patient will die (R 1082).

The jury convicted the Hermansons of felony child abuse which also constituted murder in the third degree. The Second District Court of Appeal affirmed the convictions.

SUMMARY OF ARGUMENT

In 1975, the Florida legislature, in Section 827.07(2), Florida Statutes (1975), defined an "abused or neglected child" as one whose physical or mental health or welfare is harmed, and "harm" was defined to include when a parent or other person responsible for a child's welfare:

> Fails to supply the child with adequate food, clothing, shelter, or health care, although [the parent is] financially able to do so or although offered financial means to do so; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone... .

At the time of its passage the legislative staff analysis and explanation of this bill stated that this constituted a "defense for parents who decline medical treatment for legitimate religious reasons" (R 1354, 1358). In 1983, the legislative revision

service moved this exception from Chapter 827 (criminal) to Chapter 415 (non-criminal), without official action by the legislature.

The trial judge determined that this exception was available to the Hermansons as a defense, and the case was tried and the jury instructed consistent with that ruling. The Hermansons appealed their conviction, arguing that since there was no evidence they were not legitimately practicing their religious beliefs (which the Second District acknowledged on page two of its opinion) the trial court erred in submitting the case to the jury. The Second District affirmed the conviction, apparently on the right for the wrong reason principle, concluding that the exception for spiritual treatment was not in the criminal child abuse statute, notwithstanding that was where the legislature had placed it. The Second District erred in concluding that the exception was not a defense, and the certified question should be answered affirmatively.

The conviction of the Hermansons under these circumstances violates due process. In Mourning v. Family Publications Service, Inc., 411 U.S. 356, 375, 93 S.Ct. 1652 (1973), the Court stated that the purpose of due process was:

> to insure that no individual is convicted unless a fair warning has been first given to the world in language that the common world will understand of what the law intends to do if a certain line is passed.

In the present case a respected trial judge concluded that the exception for religious treatment was a defense to criminal child abuse, and it took the Second District Court of Appeal nine pages to explain why it concluded to the contrary. Can it be said, under these circumstances, that the Hermansons were given "fair warning"? If this court agrees with the conclusion of the Second District that the exception is not a defense to criminal child abuse, then clearly the Hermansons were denied due process.

Section 827.04(1), Florida Statutes (1986), under which the Hermansons were convicted, requires willful misconduct or culpable negligence. The Second District stated on page two of its opinion:

> There is no dispute that they were sincerely practicing the tenets of Christian Science which eschews conventional medical treatment in favor of spiritual healing through prayer.

Since it was undisputed that the Hermansons were sincerely following their legitimate religious beliefs, the state failed to prove beyond a reasonable doubt that they were guilty of culpable negligence.

The Hermansons' conviction violated the First Amendment to the United States Constitution because the issue of the reasonableness of the defendants in following their religious beliefs was submitted to the jury. Courts cannot decide whether a person's religious beliefs are "acceptable, logical, consistent or

comprehensible." Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714, 101 S.Ct. 1425 (1981).

The prosecutor's remarks in closing argument that Christian Science does recognize conventional medical care were unsupported by the evidence, highly prejudicial, and require a new trial.

There has never been any question in this case as to the sincerity of the Hermansons' religious beliefs or that they were following Christian Science principles at all times. It is enough that they must carry this loss with them for the rest of their lives. Their convictions of felony child abuse and third degree murder constituted a miscarriage of justice, and the Hermansons' convictions should be reversed.

ARGUMENT

CERTIFIED QUESTION

IS THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985)?

The Hermansons argued on their appeal to the Second District that since it was undisputed that they were exercising legitimate religious beliefs as authorized by the child abuse statute, the trial court's submission of this case to the jury was inconsistent with his ruling that the exception for spiritual treatment was

available as a defense. The Second District did not address this issue because it concluded the defense was not available. The Second District's certification of the issue as to whether the defense was available would at least give rise to an inference that the Second District found merit to the Hermansons' argument that there was no issue to submit to the jury under the trial court's interpretation of the statutes. If this court agrees that the trial court was correct, and the Second District incorrect, this court must then decide whether the Hermansons' motion to dismiss based on the stipulated facts and an affidavit briefly describing Christian Science religious beliefs (R 1345, 1350), should have been granted. The affidavit reflected the following facts.

Christian Science Faith

Christian Science believes in spiritual healing rather than traditional medical care, and Christian Scientists believe this is a reasonable and effective way to accomplish and maintain normal health which others seek through medical care. The founding purpose of the church was to reinstate Christianity's "lost element of healing."

Christian Scientists are not faith healers and reject that term as a description of their healing practices. Christian Scientists believe in the theological view that sickness and pain are not part of God's will. Spiritual healing, to Christian

Scientists, is part of a whole way of life involving prayer, study, moral regeneration, and emphasis on healthy living in accordance with the teachings and spirit of the Bible. Christian Scientists rely on a well established support system in their healing, primarily involving individuals who devote all of their time to healing through prayer or spiritual treatment. These practitioners are listed by the church in a publication after they have given the church evidence of their moral character and healing ability. They charge for their services and are paid by their patients. Most group health insurance plans offered by major insurance carriers in the United States cover the charges of Christian Scientist practitioners, nurses, and Christian Science sanitoriums (R 1351).

In Baumgartner v. First Church of Christ, Scientist, 141 Ill.App.3d 898, 490 N.E.2d 1319, cert. denied, 479 U.S. 915 (1986), a wrongful death action was brought against the Christian Science church, a Christian Science practitioner, and a Christian Science nurse for medical malpractice and Christian Science malpractice. The court's statements regarding Christian Science are helpful to an understanding of the religion.

> Initially, we observe that Christian Science is a widely known religion and courts will take judicial notice of its general teachings. (Northern Trust Co. v. Commissioner of Internal Revenue (7th Cir. 1940), 116 F.2d 96, 98.) Its basic premise, as plaintiff acknowledges in her pleading, is that physical disease can be healed by spiritual means alone. As stated in an article on Christian Science from the Encyclopedia Britannica (15th ed., 1984, Macropaedia, vol. 4, pp. 562-64):

> "Christian Science is a religious denomination founded in the United States in 1879 by Mary Baker Eddy (1821-1910), author of the book that contains the definitive statement of its teaching, Science and Health with Key to the Scriptures. About one-third of its nearly 3,000 congregations are located in 56 countries outside the United States, with membership concentrated in areas with strong Protestant traditions. It is widely known for its practice of spiritual healing, an emphasis best understood in relation to its historical background and teaching.
>
> * * *
>
> The cure of disease through prayer is seen as a necessary element in a full redemption from the flesh. Church historian Karl Holl summarizes the concept of treatment, or prayer, in Christian Science as 'a silent yielding of self to God, an ever closer relationship to God, until His omnipresence and love are felt effectively by man,' and he distinguishes this decisively from will power or mental suggestion." Id., at page 1321.

The exception for religious healing in the child abuse statutes is only one of many instances in which our legislature has recognized religious healing and specifically Christian Science.[1]

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[1] See, e.g., Fla. Stat. §39.08 (1985) (authorizing the Juvenile Court, in dealing with dependent or delinquent children, to order "treatment to be provided to the child by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a Church or religious organization when required by his health and when requested by the child"); Fla. Stat. §906.03(8) (1985) (crime victims may receive cost of "treatment rendered in accordance with a religious method of healing"); Fla. Stat. §458.347(g), 459.002(h), 460.402(4) & 462.01, (1985) (exempting from regulation those healing by practicing the religious tenets of any church); Fla. Stat. §90.505 (1985) (recognizing that communications to Christian Science practitioners are privileged communications); Fla. Stat. §400.051(2), (1985) (exempting Christian Science nursing homes and sanitariums from any rule or regulation requiring secular medical treatment of any patients therein); Fla. Stat. §410.101

Besides Florida, at least 42 other states have adopted similar exceptions to child abuse statutes, permitting remedial treatment by spiritual means alone.[2]

(1985) (providing that elderly citizens may be treated by religious healing and such treatment is not considered depriving the elderly of proper care); Fla. Stat. §627.736(1)(a) (providing that the services of Christian Science practitioners are covered by no-fault insurance protection); Fla. Stat. §383.04 (1985) (exempting babies of Christian Scientists from having mandatory eye drops at birth); and various Workmens Compensation laws exempting Christian Scientists from some of their provisions, including Fla. Stat. §440.15(6)(f) (1985).

[2] Ala. Code § 13A-13-6(b) (1975); Alaska Stat. § 47.17.020 (Supp. 1985); Ark. Stat. Ann. § 42-807(c) (Michie Supp. 1985); Cal. Welf. & Inst. Code § 18950.5 (West 1980); Colo. Rev. Stat. § 19-1-114 (1978); Conn. Gen. Stat. Ann. § 17-38d (1975); Del. Code Ann., tit. 16, § 907 (1983); D.C. Code Ann. § 2-1356 (1981); Hawaii Rev. Stat. § 350-4 (1976); Idaho Code § 18-401 2 (1979); Ill. Rev. Stat., ch. 23, § 2053(e) (Smith-Hurd Supp. 1986); Ind. Code § 35-46-1-4(a)(4) (Burns 1985); Iowa Code § 232.68(2)(c) (1985); Kan. Stat. Ann. § 21-3608(c) (1981); Ky. Rev. Stat. § 199.011(6) (1982); La. Rev. Stat. Ann. § 14:933 (West 1985); Me. Rev. Stat. Ann. tit. 22, § 4010 (1985); Md. Fam. Law Code Ann., § 5-702(g)(2) (1984); Mass. Gen. Laws Ann. ch. 273, § 1 (West Supp. 1986); Mich. Comp. Laws § 722.634 (West Supp. 1985); Minn. Stat. Ann. § 626.556, subd. 2(c) (West Supp. 1986); Miss. Code Ann § 43-45-31 (1985); Mo. Ann. Stat. § 210.115 (Vernon 1983); Nev. Rev. Stat. § 432B.020(2) (1986); N.H. Rev. Stat. Ann. § 169-C:3 (Equity Supp. 1985); N.J. Stat. Ann. §9:6-1.1 (1976); N.Y. Penal Law § 260.15 (McKinney 1980); N.D. Cent. Code § 50-25.1-05.1(2) (1982); Ohio Rev. Code Ann. § 2919.22(A) (Page Supp. 1985); Okla. Stat. tit. 21, § 852 (West Supp. 1985); Or. Rev. Stat. § 163.555(2)(b) (1985); Pa. Stat. Ann. tit. 11, § 2203 (Purdon's Supp. 1985); R.I. Gen. Laws § 40-11-15 (1984); S.D. Cod. Laws Ann. § 25-7-16 (1984); Tenn. Code Ann. § 37-1-157(c) (1984); Utah Code Ann. § 78-3a-19.5 (Allen Smith Supp. 1985); Vt. Stat. Ann. tit. 33, § 682(c) (Equity Supp. 1985); Va. Code § 18.2-371.1 (1982); Wash. Rev. Code § 26.44.020(3) (West Supp. 1986); W.V. Code § 49-1-3 (g)(2) (Michie Supp. 1985); Wis. Stat. Ann. § 48.981(3)(c) 4 (West Supp. 1985); Wyo. Stat. § 14-3-202(vii) (Supp. 1985).

Legislative History

The first provision of our child abuse statutes referred to in the certified question is in Section 415.503(7)(f), Florida Statutes (1986). It states that an "abused or neglected child" is one whose physical or mental health or welfare is harmed, and "harm" is defined to include when a parent or other person responsible for a child's welfare:

> Fails to supply the child with adequate food, clothing, shelter, or health care, although [the parent is] financially able to do so or although offered financial means to do so; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone...

The Hermansons were prosecuted and convicted of felony child abuse under Section 827.04(1), Florida Statutes (1985). The above quoted exemption for parents legitimately practicing religious beliefs, now in Section 415.503(7)(f), Florida Statutes (1986), was first passed by the legislature in 1975 as Section 827.07(2), Florida Statutes (1975). At that time the legislative staff analysis and the explanation of the bill to the members of the Judiciary-Criminal Committee stated that this constituted a "defense for parents who decline medical treatment for legitimate religious reasons" (R 1354, 1358). This analysis was also provided for by explanation of Senator Deeb in his presentation of the bill to the Senate Judicial-Criminal Committee (R 1358).

In 1983 the Legislative Revision Service moved the exemption from the criminal Chapter 827 to Chapter 415 (which covers non-criminal child abuse), without official action by the legislature. (See, 14b (Part 2), Fla.Stat.Ann., Historical Note Foll. sections 415.502 and 415.503 (West 1986).

The Trial Court's Interpretation of Statutes

Based on the legislative history the trial judge held that the spiritual treatment exception, although presently in Chapter 415, did provide a defense, and that is how this case was tried and the jury instructed. The Hermansons believed, since the state had stipulated that they were sincerely practicing their Christian Science religious beliefs, that the exception in the statute would, as a matter of law, provide them with a defense, and that there would be no issues for the jury to decide. In reliance on that available defense they did not testify at their trial. In spite of ruling that the exception was available as a defense, the trial court nevertheless allowed the jury to decide the guilt of the Hermansons and they were convicted.

The Second District's Interpretation of Statutes

In response to the Hermansons' argument on appeal that, since it was undisputed they were sincerely following their Christian Science beliefs, they were exempt, under the statute, from

prosecution, the Second District decided that the statutory exemption was not available in a criminal prosecution for child abuse. The Second District stated on page three of its opinion:

> ...an error occurred at the outset of this case which caused an unnecessary legal tangle throughout the entire proceedings.

The Second District acknowledged, on page 14 of its opinion, that the exemption which is presently in Chapter 415 was originally enacted by the legislature in Chapter 827, which provided criminal sanctions for child abuse. The exemption was first passed by the legislature in 1975 as Section 827.07(2), Florida Statutes (1975). The Second District did not discuss the fact that it was not through any act of the legislature that the exception was removed from Section 827 (felony child abuse) to Section 415 (non-criminal child abuse), but on the contrary was simply moved by the Legislative Revision Service. Nor did the Second District discuss the fact that the legislative staff analysis, in the explanation of the bill, stated that this constituted "a defense for parents who declined medical treatment for legitimate religious reasons" (R 1354).

In addition to the exemption in Chapter 415 referred to above, section 415.511 (1985) provided:

> Any person, official, or institution participating in good faith in any act authorized or required by ss 415.502 - 415.514 shall be immune from <u>any civil or criminal liability which might otherwise result by</u>

> reason of such action. (Emphasis added) (section 415.511 (1985)).

Although the Second District opined that this immunity provision "attaches only to those acts which we find are specifically authorized in this chapter" (opinion at page 11), the statute by its terms has broader application. In fact, the legislature has specifically provided that the courts may accommodate the use of spiritual healing as an alternative to traditional medical care by noting that the exception in 415.507(f) does not:

> preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined herein, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization (Fla. Stat. § 415.503(7)(f) (Emphasis added)).[3]

Since these charges were brought against the Hermansons, the legislature has re-addressed the immunity provisions in Chapter 415. In 1988, the broad application of the immunity provisions as applied to the exemption was clarified by adding:

> (b) except as provided section 415.508(f) (formerly 415.503(7)), nothing contained in this section shall be deemed to grant immunity, civil or criminal, to any person suspected of having abused or neglected a child, or committed any illegal act upon or against a child.

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[3] See similar authority in Fla.Stat. § 39.407(8) and 39.439(8) (1989).

We respectfully submit that the Second District erred, when it concluded under these facts, that the exemption for spiritual healing was not part of the criminal child abuse statute.

If The Exemption For Spiritual Healing Was Available Then The Hermansons' Motion To Dismiss The Information Should Have Been Granted

As the Second District acknowledged on page two of its opinion:

> There is no dispute that they were sincerely practicing the tenets of Christian Science which eschews conventional medical treatment in favor of spiritual healing through prayer.

It is well established that where a proper defense is undisputed a criminal case should not proceed to trial.

A similar situation was presented in State v. News-Press Pub. Co., 338 So.2d 1313 (Fla. 2d DCA 1976), in which a newspaper was indicted because it destroyed tape recordings in violation of a statute prohibiting tampering with evidence which would be involved in a criminal proceeding. The newspaper filed a sworn motion to dismiss stating that the reporter involved had recorded a telephone conversation and then erased it "according to the newspaper's policy to erase and reuse tapes." The trial court dismissed the indictment based on the undisputed statement that it was the newspaper's policy to erase such tapes. In affirming the dismissal, the court stated on page 1319:

> Given the record before us that the state has no evidence which points to an improper purpose in erasing the tapes, we are compelled to find that the uncontroverted facts would be insufficient to support a conviction, and that the indictment was properly dismissed.

In the present case the state stipulated that the Christian Science church falls within the meaning of Section 415.503, Florida Statutes, that Christian Scientists believe in healing by spiritual means, and that the Hermansons were following their religious teachings at all material times in treating their daughter.

In Gonzales v. Florida Parole and Probation Com'n, 421 So.2d 675 (Fla. 1st DCA 1982), an information charged the defendant with drug trafficking, and he filed a sworn motion to dismiss stating he was a confidential informant to the Federal Drug Enforcement Administration. The First District held that these undisputed facts constituted a valid defense and that the trial court properly dismissed the information.

The Florida legislature enacted the exemption for spiritual treatment in Chapter 827, which contained criminal sanctions for child abuse. The legislative staff analysis and the explanation of the bill to the members of the Judiciary-Criminal Committee stated that this constituted a "defense for parents who decline medical treatment for legitimate religious reasons" (R 1354, 1358). But for the Legislative Revision Service moving the section

from criminal Chapter 827 to civil Chapter 415, without official action by the legislature, this exemption would still be contained in Chapter 827. The trial court correctly ruled that the exemption for spiritual treatment was applicable, and the certified question should therefore be answered in the affirmative. The motion to dismiss the information should have been granted.

POINT I

THE FLORIDA STATUTES UNDER WHICH THE DEFENDANTS WERE CONVICTED DID NOT GIVE FAIR WARNING TO THE HERMANSONS AS TO THE CONSEQUENCES OF PRACTICING THEIR RELIGIOUS BELIEFS, AND THEIR CONVICTION IS THEREFORE A DENIAL OF DUE PROCESS.

The Hermansons believed, and the trial court agreed with their belief, that the exemption for spiritual treatment did constitute a defense to criminal child abuse. The Second District held that the trial court erred in so concluding, stating on page three:

> We agree with the state that an error occurred at the outset of this case which caused an unnecessary legal tangle throughout the entire proceedings.

The Second District took nine pages (8-17) to explain how it arrived at its conclusion that the exemption for spiritual treatment was only part of the civil child abuse statute and not the criminal child abuse statute. If this court agrees with the analysis of the Second District, then at the very least the Hermansons were denied due process of law in violation of the

United States Constitution, 14th Amendment, and the Florida Constitution, Article I, Section 9. If the respected trial judge could not understand the fine distinctions which it took the Second District 9 pages to explain, how could the Hermansons have been expected to understand what would happen to them as a result of following their religious beliefs.

In Mourning v. Family Publications Service, Inc., 411 U.S. 356, 375, 93 S.Ct. 1652 (1973), the Court stated the purpose of due process:

> to insure that no individual is convicted unless a fair warning has been first given to the world in language that the common world will understand of what the law intends to do if a certain line is passed.

The requirement of fair warning is of greater importance where laws impose "criminal penalties" or "threaten to inhibit the exercise of constitutionally protected rights." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186 (1982). Furthermore, inexplicably conflicting statutory commands involving criminal penalties cannot be given legal effect. United States v. Cardiff, 344 U.S. 174, 176-77, 73 S.Ct. 189 (1952). The United States Supreme Court has pointed to confusion in lower courts as evidence of vagueness which violates due process. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89-90, 41 S.Ct. 298, 300 (1921). In Linville v. State, 359 So.2d 450 (Fla. 1978), this court stated that due process is lacking

where "a man of common intelligence cannot be expected to discern what activity the statute is seeking to proscribe." Id. at 453-454.

The Hermansons do not contend that the statutes are so vague as to deny due process. Neither side raised the constitutionality of the statutes in the Second District. The Hermansons' due process arguments are solely that their convictions were violative of due process regardless of which way this court answers the certified question.

If the trial court was correct in determining that the exemption for spiritual treatment is part of the criminal child abuse statute, the Hermansons' conviction was a denial of due process because the Hermansons were not given fair warning as to the consequences which would follow if they practiced their religious beliefs. How were the Hermansons to know at what point their reliance on prayer alone lost the express statutory approval, and became culpable negligence evincing a reckless disregard for human life equivalent to an intentional act? The wording of the statute gives no guidance as to when, or even if, a parent must stop relying on prayer and call a doctor. To leave these decisions to a jury, when it is undisputed that the parents were legitimately practicing the beliefs of a religion as well established as Christian Science, is fundamentally unfair.

In the alternative, if this court agrees that the Second District correctly concluded that the exemption for spiritual healing is not part of the criminal statute and does not constitute a defense (contrary to the legislative history), the conviction of the Hermansons still constituted a denial of due process for the very same reason. The statute did not give fair warning to the Hermansons as to the consequences of practicing their religious beliefs.[4]

A similar situation was recently presented in State v. McKown, 461 N.W.2d 720 (Minn. App. 1990), in which the daughter of Christian Scientists died of the same disease, diabetes, with the same factual scenario, intermittent illness over several weeks becoming progressively worse a few days prior to death. As in the present case, the McKowns utilized a Christian Science practitioner and a Christian Science nurse, but did not seek conventional medical treatment. They were indicted for second degree manslaughter, and the issue was whether the child abuse statute, which contained an exception for spiritual treatment similar to

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[4] The due process argument argued in the briefs in the Second District was based on the assumption that the trial court had correctly ruled that the defense was applicable. After the Second District issued its opinion determining that the trial court had erred in its interpretation of the statutes, the Hermansons then argued extensively in their motion for rehearing that their conviction still constituted a denial of due process because, under the interpretation of the Second District, the Hermansons were not given fair warning of the consequences of their conduct. The motion for rehearing was denied except for the certification of the question of great public importance.

Florida's statute, was to be construed in conjunction with the manslaughter statute which involved culpable negligence resulting in death. Although the Minnesota court concluded that the two statutes were not in pari materia, it held that a prosecution of the defendants for manslaughter would constitute a denial of due process. That court concluded, based on an "ambiguous legislative history," and a "lack of clarity in the relationship between the two statutes," that the defendant's due process rights were violated.

Although the Minnesota exception for spiritual treatment was unquestionably in the criminal child abuse statute, the reasoning of the Minnesota court is applicable in the present case, regardless of which court, the trial court or the Second District, was correct in interpreting the statutes in this case. As in Minnesota, there was at the very least an "ambiguous legislative history" and a "lack of clarity in the relationship between the two statutes." Id. at 723. The Minnesota court stated on page 724:

> ...the state would have us conclude that the choice of spiritual treatment, which has been put on legal footing equal to that of orthodox medical care by the child neglect statute, can result in a manslaughter indictment, simply because of its outcome. That is unacceptably arbitrary, and a violation of due process.

In the present case the Second District, on page 21, quoted Justice Holmes' statement that:

> [t]he law is full of instances where a man's fate depends on his estimating rightly, that

> is, as the jury subsequently estimates it, some matter of degree. Nash v. United States, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232 (1913).

It is ironic that the Minnesota court, in McKown, supra at 725, relied on that very same statement for resolving the confusion in favor of the Christian Scientists.

In State v. Winters, 346 So.2d 991 (Fla. 1977), in which this court struck down a prior child abuse statute which criminalized "negligent treatment for children" as being too vague and indefinite, this court stated on page 993:

> A palatial mansion that is clean and spacious could fail to qualify as "necessary shelter" if it had no heat. A small, overcrowded log cabin may, on the other hand, meet the test. Depending upon the standard adopted, any given shelter, whether in the suburbs or the ghetto, could be found to fall short of "necessary shelter." Similarly, each person must ask just how much and what quality of food, clothing, shelter and medical treatment he must provide to avoid jeopardy. Nothing in the statute gives us the answer. There are no guidelines.

In State v. Joyce, 361 So.2d 406 (Fla. 1978), this court held that the subsequent child abuse statute was not too vague, stating on page 406:

> The particular words complained of, "unnecessarily or excessively," are not vague when considered in the context of the entire statute and with the view to effectuating the purpose of the act. The fact that specific acts of chastisement are not enumerated, an impossible task at best, does not render the statutory standard void for vagueness. Criminal laws are not "vague" simply because the conduct prohibited is described in general language.

* * *

> Men of common understanding can comprehend the meaning of the words "unnecessarily or excessively chastise" when read in conjunction with the entire act. The conduct described by the statute can be determined with reasonable certainty notwithstanding the various methods of disciplining the children. (Emphasis added).

In the instant case, it is both reasonable and foreseeable that the exemption in Section 415.503(7)(f), Florida Statutes (1985) would be read in pari materia with Section 827.04(1), Florida Statutes (1985), in determining what is "necessary" medical care.

In the present case the learned trial judge, after reviewing memorandums of law, concluded that the defense was available. The Second District disagreed; however, it required a complex analysis for that court to explain why the defense was not available. The Hermansons' conviction under those circumstances clearly violates due process and must be reversed.

In the event this court decides that the opinion of the Second District is correct on all issues, it is respectfully submitted that the Second District's interpretation of the law should be applied prospectively only.

In this regard the court in State v. McKown, supra, stated on pages 724 and 725:

> Evidence before the trial court suggests that, due to the sensitive nature of this issue, many Christian Scientists, including the McKowns, were specifically aware of the statutory provisions relating to use of spiritual means and prayer. They may have indeed "mapped out" their behavior based upon the statute. While the cases in this area are more likely to involve reliance by the defendant on administrative pronouncements, there is nothing inherent in the concept which would make it inapplicable to an argument of reliance on a specific statutory enactment. The state in this instance has attempted to take away with the one hand--by way of criminal prosecution--that which it apparently granted with the other hand, and upon which defendants relied. This it cannot do, and meet constitutional requirements.

An analogous situation was presented in State v. White, 194 So.2d 601 (Fla. 1967), in which the defendant was charged with a violation of a criminal statute before a circuit judge who had previously held the same statute unconstitutional. The trial court again held the statute unconstitutional, the state appealed, and this court reversed, holding the statute constitutional. This court went on to hold, however, that the defendant should not be prosecuted under the statute, because he had the right to rely on it having been previously declared unconstitutional by the trial judge in another case.

The trial court's interpretation of the statute in the present case permeated these proceedings to such an extent that the affirmance by the Second District, based on an entirely different statutory interpretation, is violative of due process and

fundamentally unfair. The Hermansons properly relied on the trial court's interpretation of the statutes when they decided not to testify. Had they known the statutory defense was not available, they may well have decided to take the stand, to present more evidence regarding the physical condition of their daughter, to present a more detailed explanation of the events transpiring prior to her death, and to explain their religious beliefs.

The Hermansons' conviction under these circumstances should be reversed as being violative of due process. In the alternative, since the Hermansons relied on the trial court's interpretation of the statutes, which interpretation permeated this trial, at the very least the Hermansons are entitled to a new trial so that they can present the evidence that they would have presented, but for the trial court's interpretation of the statute.

POINT II

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE FAILED TO ESTABLISH DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT.

Section 827.04(1), Florida Statutes (1986), under which the Hermansons were convicted, provides:

> Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability,

> or permanent disfigurement to such child, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (Emphasis added).

In reversing a conviction of manslaughter by culpable negligence, the First District stated in Blok v. State, 541 So.2d 713 (Fla. 1st DCA 1989):

> The evidence adduced in the instant case does not rise to the level of gross, flagrant conduct showing a reckless disregard for human life or the safety of persons exposed to its dangerous effects, or wantonness or recklessness, or a grossly careless disregard for the safety or rights of others that constitutes culpable negligence.

In Dominique v. State, 435 So.2d 974 (Fla. 3d DCA 1983), defendant was convicted of manslaughter based on culpable negligence. The evidence showed defendant had been threatened by another guest at a party, and the guest, upon leaving the party, threatened to come back and get the defendant. As defendant was retrieving a loaded gun from the glove compartment of his own car, someone grabbed his arm and the gun discharged, killing a friend of the defendant. The Third District reversed the conviction, holding that the evidence did not establish culpable negligence beyond a reasonable doubt and that the homicide was excusable.

In the present case, in order for this case to have presented a question for the jury to determine, the state was required to prove beyond a reasonable doubt that the Hermansons were guilty of culpable negligence which evidenced a reckless disregard for human

life equivalent to an intentional act. And of course if the spiritual exemption defense is available, the state also had the burden of proving beyond a reasonable doubt that the Hermansons were not following their religious beliefs. Wright v. State, 442 So.2d 1058 (Fla. 1st DCA 1983), rev. denied 450 So.2d 489 (Fla. 1984) (which holds that the state has the burden of overcoming affirmative defenses beyond a reasonable doubt).

In order to avoid repetition we will not reiterate the evidence at trial set forth in our statement of facts. While we recognize that the evidence was in conflict as to the seriousness of Amy's condition, that evidence did not constitute proof beyond a reasonable doubt that the Hermansons were guilty of culpable negligence which evidenced a reckless disregard for human life equivalent to an intentional act. The motion for acquittal made at the close of the state's case and renewed after jury verdict (R 1088, 1608) should have been granted.

The Second District recognized on page two of its opinion that there was no issue of fact as to whether the Hermansons were following legitimate religious beliefs:

> There is no dispute that they were sincerely practicing the tenets of Christian Science which eschews conventional medical treatment in favor of spiritual healing through prayer.

In Cheek v. United States, 4 FLW Fed. S1001 (January 8, 1991), the defendant was criminally convicted of "willfully" evading payment of income tax. Defendant had testified that he had not acted willfully because he sincerely believed, based on indoctrination by a group and his own study, that the federal income tax law was being unconstitutionally enforced and that his actions were lawful. The Supreme Court stated:

> In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.

In the present case the Hermansons did not take the stand to testify as to the sincerity of their religious beliefs, which were never in dispute, because of the trial court's erroneous (according to the Second District) ruling that the defense was available. Due process and fundamental fairness require that, if this court does not reverse the conviction and direct acquittal, at the very least a new trial should be granted.

POINT III

PERMITTING A JURY TO DECIDE THE REASONABLENESS OF THE DEFENDANTS IN FOLLOWING THEIR RELIGIOUS BELIEFS IS A VIOLATION OF FREEDOM OF RELIGION.

The Second District recognized on page two of its opinion that it was undisputed that the Hermansons were at all times sincerely following Christian Science principles, which utilized spiritual

healing through prayer rather than conventional medical treatment. The submission of this case to a jury required the jury to consider the reasonableness or legitimacy of the Hermansons' religious beliefs, and this violated their First Amendment rights.

The First Amendment to the United States Constitution provides in part:

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

In United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882 (1944), the Court stated:

> The miracles of the New Testament...[and] the power of prayer are deep in the religious convictions of many.... Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.... When the triers of fact undertake that task, they enter a forbidden domain. Id. at 86-87.

Courts cannot resolve disputes if that resolution requires the court to evaluate the importance or meaning of religious doctrines. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601 (1969). There is no way the jury could have convicted the Hermansons without evaluating Christian Science treatment, which is prohibited under Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707,

714, 101 S.Ct. 1425 (1981), wherein the Court held that courts have no power to decide whether a person's religious beliefs are "acceptable, logical, consistent or comprehensible."

The jury asked the following questions (paraphrased) during their deliberations. Does a Christian Scientist have a choice to go to a medical doctor? Can a Christian Scientist call a doctor at a certain point? Does a Christian Scientist need permission to call a doctor? (R 1257-1258). These questions make it clear that the jury in this case was attempting to reconcile what the Hermansons did with the formal doctrines of their church. In Thomas, supra, a Jehovah's Witness quit his job rather than work in the production of armaments. In denying him unemployment benefits, the Indiana court placed great weight on the fact that he was not clear about his religious beliefs and that another Jehovah's Witness was willing to work on tank turrets. The Supreme Court reversed, stating (450 U.S. at 716, 101 S.Ct. at 1431):

> ...it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The court instructed the jury, in material parts, as follows:

> It is a defense to child abuse and third degree murder if parents failed to provide medical treatment for their child because they were legitimately practicing their religious beliefs. An issue in this case is whether the Defendants, in declining to seek conventional

medical treatment for Amy Hermanson, were following their religious beliefs.

Section 415.503 of the Florida Statute provides in part as follows: A parent, or other person responsible for the child's welfare, legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone.

You should determine if the Defendants, in declining to provide conventional medical treatment for Amy Hermanson, were relying on their religious beliefs by providing spiritual care through Christian Science.

I instruct you that The Church of Christ, Scientist, is a well-recognized religion under the law of Florida.

In determining if the evidence shows that the Defendants were following their religious beliefs in caring for their daughter, you are not to decide if the Defendants correctly interpreted the teachings of their religion, only whether the Defendants held a sincere belief that the teachings of their religion authorized them to take a particular course of action.

Further, you may not question the wisdom or sincerity of the Defendants' belief in, nor the wisdom or effectiveness of, spiritual healing of the Christian Science Church, or the basic tenets of that religion.

As I have explained to you, the burden of proof in this case must be met by the State of Florida. Therefore, it is not incumbent upon the Defendants to prove to you by any particular standard of proof that they were following their religious beliefs. The burden concerning this defense is upon the State of Florida to prove beyond a reasonable doubt that the Defendants were not following their religious beliefs in the care of their daughter.

Therefore, if you find from the evidence that the Defendants relied upon the practices

> of their religious beliefs in not providing specified medical treatment for their child, you should find them not guilty.
>
> The State of Florida authorizes a parent's use of a duly accredited practitioner who relies solely on spiritual means for healing, in accordance with the tenets and practices of a well-recognized church or religious organization in caring for the health of the child. I further instruct you that Christian Science is a well-recognized church (R 1250-1252).

The jury instructions make it clear that in order to find the Hermansons guilty the jury had to find that they were not "legitimately practicing their religious beliefs," but on the contrary were guilty of culpable negligence. This jury thus decided the issue of whether or not the Hermansons "correctly perceived the commands" of Christian Science, which is expressly prohibited under Thomas, supra.

In Baumgartner v. First Church of Christ, Scientist, 141 Ill.App.3d 898, 490 N.E.2d 1319, cert. denied, 479 U.S. 915, 107 S.Ct. 317 (1986), a wrongful death action was brought against the Christian Science church and one of its practitioners and nurses, for both medical malpractice and Christian Science malpractice. In rejecting the possibility of bringing a claim for Christian Science malpractice, the court stated on page 1323:

> The United States Constitution dictates that the only entity with the authority and power to determine whether there has been a deviation from "true" Christian Science practice is the Christian Science Church itself. As the United States Supreme Court has

> held, the first amendment bars the judiciary from considering whether certain religious conduct conforms to the standards of a particular religious group. (Thomas v. Review Board of Indiana Employment Security Division (1981), 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624; Serbian Eastern Orthodox Diocese for the United States of America v. Milivojevich (1976), 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151.)

Amy's tragic death of course pervaded this case, however it is important to remember that this case does not involve the issue of whether the state can compel children to have medical care instead of Christian Science treatment. Section 415.503(8)(f)(3), Florida Statutes, provides that the exception for religious beliefs does not:

> preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined herein, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.

See also Section 39.08(8), Florida Statutes.

The issue here, therefore, is not medical care for children, but whether parents can be convicted for following their religious beliefs. The same distinction was made by the Supreme Court of the United States in Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972). In holding that Amish parents could not be compelled to send their children to high school in violation of the parents religious beliefs, the court stated:

> Contrary to the suggestion of the dissenting opinion of Mr. Justice Douglas, our holding today in no degree depends upon the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. 406 U.S. at 230-31.

Similarly, the Hermansons do not contend that their religious beliefs excuse them "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" nor that their First Amendment rights have been violated by the obligation to comply with a "valid and neutral law of general applicability on the ground that the law prescribes conduct that his religion proscribes." Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. ____, 108 L.Ed.2d 876, 110 S.Ct. 1595 (1990). Rather, this case involves not only the Free Exercise Clause, but also the rights of parents to responsibly direct the health care of their children. The legislature, by the enactment of the spiritual treatment exception, has recognized this as a responsible form of treatment, albeit religiously motivated. In enacting the provisions of section 415.503(7)(f), which also recognized that a court can require the provision of medical services by a physician, the legislature utilized the "least restrictive means" necessary to accomplish the State's purpose; to

wit: responsible healthcare for the children of the state. Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963).

Similarly, in Public Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989), this court held that a Jehovah's Witness had the right to decline a blood transfusion in accordance with her religious beliefs, even though she was the mother of two minor children and would die without it. The trial judge had ordered the transfusion on the grounds that the children's right to be reared by their mother overrode the mother's right to exercise her religious beliefs. This court held that:

> ...the state's interest in maintaining a home with two parents for the minor children does not override Mrs. Won's constitutional rights of privacy and religion. Id., at page 98.

The submission of this case to the jury for determination of the reasonableness of the Hermansons' religious beliefs and whether they were following those beliefs violated the First Amendment.

POINT IV

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN THE PROSECUTOR STATED IN CLOSING ARGUMENT THAT CHRISTIAN SCIENCE RECOGNIZES CONVENTIONAL MEDICAL TREATMENT, WHICH WAS NOT SUPPORTED BY EVIDENCE OR TRUE.

The Christian Science nurse caring for Amy called the ambulance which arrived after Amy had died, and the prosecutor took that and distorted it into an argument that seeking medical

attention would not have been in conflict with Christian Science beliefs. There was not one shred of evidence in this case to support the prosecutor's argument. Even worse, it isn't true. The court should have granted defendants' motion for mistrial (R 1210). The prosecutor's remarks were as follows:

> This expert in the Christian Science Church, as a nurse, recognizes that medical attention is needed. This expert goes to another expert, who is a practitioner, and says, We need to call an ambulance.
>
> And what does he do? He calls Boston, head of the church, and he comes back to her and says, Call an ambulance. And she says, I called an ambulance, I called the paramedics.
>
> What that shows, ladies and gentlemen, is that even Nurse Sellers recognized that prayer was not working; an expert, that she recognized that prayer was not working, that medical attention was needed (R 1205).
>
> And what that shows is that these experts in the church, Mrs. Sellers and Mr. Hillier, recognized the need for medical attention would be allowed and is also recognized in this church. Because these two people are the ones who recommended it.
>
> What it shows is that the church does recognize medical help. And that's what was happening in that time. These two experts in this church said, It's time to call a doctor. These two experts say, The Church says it's okay to call a doctor (R 1206).
>
> * * *
>
> The Christian Science Church believes in sanctity of the life of a child. Christian Science Church allows medical attention.
>
> * * *
>
> The Defendants are not relieved of their responsibilities to provide for their child, including medical care, because they are

> Christian Scientists. I contend to you their actions were not legitimate practice, were not.
>
> * * *
>
> If the Defendants were legitimately practicing their beliefs, religious beliefs, if the Defendants were legitimately practicing their religious beliefs, they would have called a doctor and they would have saved her life. (R 1207-1208).

There was no evidence in this case that the Christian Science church sanctioned medical attention. The Hermansons had been relying on the Christian Science practitioner for one week. The Christian Science nurse called the ambulance at 1:48 p.m., and the ambulance arrived at 1:53 p.m., five minutes after receiving the call (R 759-760). The paramedic responding to the call for the ambulance testified that based on his observation of Amy and the information he received from those with her, she had already been dead for 20 minutes at the time he arrived (R 760-764). It is thus clear that when the Christian Science nurse called the ambulance, Amy had already died.

In Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976), the prosecutor said, in closing argument:

> "I could have brought in a lot of police officers."

Defense counsel objected, which the court overruled. In reversing the conviction, the Fourth District stated on page 836:

> The state concedes that the prosecutor's remarks were improper, but asserts that they were of a general nature not likely to

> prejudice the accused and therefore harmless error. In a close case we must give particularly careful attention to any improper and prejudicial remarks. The jury verdict in this case hinged upon the defendant's credibility. We cannot say that the prosecutor's allegation that he "...could have brought in a lot of police officers", might not have had the effect of unfairly tipping the scales against the defendant.

In the present case the jury verdict hinged on whether the jury believed the Hermansons were legitimately practicing their religious beliefs. (See jury instructions, R 1251-1252). By telling the jury that the Christian Science religion allowed medical care for Amy, and that the Hermansons were not following Christian Science beliefs when they failed to get medical care, the prosecutor told the jury things about the Christian Science religion which were not supported by evidence and are not true.

Without any other basis in the evidence other than the fact that the Christian Science nurse called an ambulance, the prosecutor argued to the jury that "Christian Science church allows medical attention...the defendants are not relieved of their responsibilities to provide for their child, including medical care, because they are Christian Scientists...if the defendants were legitimately practicing their beliefs, religious beliefs...they would have called a doctor and they would have saved her life" (R 1207-1208).

Not only did the prosecutor's improper remarks involve the precise issue to be determined by this jury, but the jury, during deliberations, asked the following questions (paraphrased): Does a Christian Scientist have a choice to go to a medical doctor? Can a Christian Scientist call a doctor at a certain point? Does a Christian Scientist need permission to call a doctor? (R 1257-1258).

If there were any question about the prejudicial effect of the prosecutor's statements about the Christian Science religion which were not supported by evidence, the jurors' questions, as well as the instructions, make it clear that these remarks require a new trial, because they went to the very heart of the issue.

CONCLUSION

That the Hermansons have to bear the loss of their daughter for the rest of their lives is enough of a burden. Their conviction for relying on the Florida Statutes, which unquestionably authorize spiritual healing for many purposes, offends due process, is fundamentally unfair, and should also be reversed for the other reasons set forth above.

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished, by mail, this 20th day of February, 1991, to:

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