IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SHANNON MAE HICKMAN, Defendant-Appellant Petitioner on Review.	Clackamas County Circuit Court Case No. CR1001094 CA A150127 SC 061896 (control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DALE RYAN HICKMAN, Defendant-Appellant Petitioner on Review.	Clackamas County Circuit Court Case No. CA A150126 SC 061902

PETITIONER'S REPLY BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from a Judgment
Of the Circuit Court for Clackamas County
Honorable Robert D. Herndon, Judge

Summarily Affirmed: August 20, 2013
Before: James W. Nass, Appellate Commissioner
Reconsideration Denied: December 18, 2013

BRONSON D. JAMES #033499
Attorney at Law
522 NW 23rd Ave., Suite A
Portland, OR 97210
bj@bronsonjames.com
Phone: (503) 943-6876
Attorney for Petitioner on Review

RYAN E. SCOTT #955267
Scott & Huggins Law Offices
1549 SE Ladd Ave
Portland, OR 97214
ryan@scotthugginslaw.com
Phone: (503) 546-0618
Attorney for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
CECIL A. RENICHE-SMITH
961479
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
cecil.a.reniche-smith@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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I. The state does not defend the rationale of the Court of Appeals

From the state's responsive brief, it is clear that there are certain aspects of this case that are uncontested. First, the state does not contest that faith healing is a bona fide historical tenet of the Hickmans' religion, nor that the Hickmans were engaged in that religious activity when the death of their son occurred. Second, the state does not assert that either Dale or Shannon Hickman wanted their child to die, nor critically, that either defendant *knew* their son would die as a result of faith healing. Third, the state does not dispute that a scienter requirement is central to this Court's holding in *Meltebeke*. As this Court held:

> "BOLI's objective standard imposes liability when an employer *should have known* that its conduct causes a specified forbidden effect, whether or not the employer actually did know * * * 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*."

Meltebeke v. BOLI, 322 Or 132, 151, 903 P2d 351 (1995). The state does not try to minimize that language by classifying it as dicta and therefore not

controlling. *See, e.g., Mastriano v. Board of Parole,* 342 Or 684, 692 n 8, 159 P3d 1151 (2007).

Finally, the legal rationale of the Court of Appeals concerning why *Meltebeke* was not controlling in this case – the holding that formed the basis of the petition and the questions to this Court – is now abandoned by the state. The Court of Appeals affirmed Defendants' convictions based on its decision in *State v. Beagley*. In *Beagley*, the Court of Appeals found *Meltebeke* inapplicable for two reasons:

> "We need not resolve this conundrum here, however, for two reasons. First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct "that may be motivated by one's religious beliefs." Second, *Meltebeke* involves civil sanctions; nothing in that opinion leads us to believe that the holding would apply to criminal law. Imposing a sanction for negligently engaging in that conduct does not interfere with protected religious expression."

State v. Beagley, 257 Or App 220, 226, 305 P3d 147 (2013).

In its response before this Court, the state distances itself from both of those reasons. First, the state disavows the distinction between religious practices and acts motivated by religious belief. *See* Respondent's Brief at 28 ("The state agrees with amicus American Civil Liberties Union that the distinction does not withstand close scrutiny.")

Second, the state appears to acknowledge that *Meltebeke*, on its face, offers no distinction between criminal and civil sanctions. *See* Respondent's Brief at 22 ("Read in isolation, that statement from *Meltebeke* would appear to foreclose the criminal conviction of a person for any act the person claimed had a religious basis, unless the state proved that the person knew that the act would result in an effect forbidden by law."). Nor does the state offer any principled argument why *Meltebeke* and the Oregon Constitution's religious expression clauses would apply to civil penalties, but not criminal.

II. This Court should reject the state's invitation to disavow precedent

The state sets out a historical analysis of the Oregon Constitution's religious expression clauses in an apparent attempt to persuade this Court that *Meltebeke's* scienter requirement is either incorrect and should be reversed, or should be confined to the facts of that case. This Court should decline the state's invitation.

To begin, this Court should reject the state's attempt to reframe the issue. The state seeks to make this a case about religious preference. It is not. With respect, this case is not *Hobby Lobby*. It is not one of religious preference, but of state sanctions imposed upon religious activity. And more specifically, can the state honor the protections of religious conduct embodied in the Oregon Constitution if sanctions can be imposed upon any

unknowing result of that religious conduct? *Meltebeke* answers that question, and this Court should not depart from that precedent.

This Court does not lightly reverse course and disavow precedent. And this Court has made clear that it will only entertain such requests upon a showing that:

> "[W]e were not presented with an important argument or failed to apply our usual framework for decision or adequately analyze the controlling issue, * * * [or] when the legal or factual context has changed in such a way as to seriously undermine the reasoning or result of earlier cases."

Farmers Ins. Co. of Oregon v. Mowry, 350 Or 686, 698, 261 P3d 1 (2011).

In this case, the state makes no showing that any of the *Mowry* factors are present. A review of the briefs in *Meltebeke* shows that the scienter argument was central to the litigation. *See Meltebeke v. BOLI* Pet Br at 26. The state briefed the issue, and this Court ruled. The state offers no claim that a critical argument regarding scienter was not presented to the *Meltebeke* court. If the state is claiming that *Meltebeke* lacked some of the historical citations now offered in this case, that is insufficient. *See e.g.*, *Engweiler v. Persson*, 354 Or 549, 560, 316 P3d 264 (2013) ("Although defendants are correct in observing that the statutory construction analysis in which this court engaged in *Engweiler IV* was not extensive, it is inaccurate to say that the court did not follow its accepted statutory construction

methodology. The parties briefed and argued the case, including the issue at hand, based on their respective analyses of the text and context * * * and the court did the same.")

Further, *Meltebeke* was decided post-*Priest v. Pearce*, and employed this Court's now established methodology for constitutional interpretation "require[ing] an examination of the text of the provision, the history of the provision, and the case law concerning the provision." *Clarke v. Oregon Health Sciences Univ.*, 343 Or 581, 590, 175 P3d 418 (2007). *Meltebeke* begins with the text, then appropriately turns to the historical background and caselaw interpretations of Article I, sections 2 & 3.

Finally, the state makes no claim that the legal or factual context has changed from *Meltebeke* sufficient to render that holding a historical aberration.

As this Court has noted, repeatedly,

> "Stability and predictability are important values in the law; individuals and institutions act in reliance on this court's decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness. Moreover, lower courts depend on consistency in this court's decisions in deciding the myriad cases that come before them. Few legal principles are so central to our tradition as the concept that courts should "[t]reat like cases alike," * * * and *stare decisis* is one means of advancing that goal. For those reasons, we begin with the assumption that issues considered in our prior cases are correctly decided, and 'the party seeking to change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent.'"

Mowry, 350 Or at 697-98.

This Court may share the state's distaste for the result in this case. But this Court must not allow the state to lead it down a path towards results-oriented jurisprudence. This Court has refused, time and again, to allow the personal policy preferences of justices to dictate constitutional interpretation, or adherence to precedent. *G.L. v. Kaiser Found. Hospitals, Inc.*, 306 Or 54, 757 P2d 1347 (1988) ("Without some such premise, the court has no grounds to reverse a well-established rule besides judicial fashion or personal policy preference, which are not sufficient grounds for such a change."); *Mowry*, 350 Or at 698 (" We will not depart from established precedent simply because the 'personal policy preference[s]' of the members of the court may differ from those of our predecessors who decided the earlier case."); *Engweiler*, 354 Or at 559 ("Because of the importance of those values, we will not overrule prior decisions 'simply because the personal policy preferences of the members of the court may differ from those of our predecessors who decided the earlier case.'")

Meltebeke holds that the state cannot sanction religious conduct unless the person is "consciously aware that the conduct has an effect forbidden by the law that is being enforced." *Meltebeke*, 322 Or at 151. *Meltebeke* arrived at that holding through legitimate methodology, and based upon the parties'

arguments. Whether the state, or members of this Court would have reached the same result is not the criteria upon which *Meltebeke* is judged.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to reverse the decision of the Court of Appeals and trial court, and remand for further proceedings.

Respectfully submitted this 21st day of August, 2014,

/s/ Bronson James

BRONSON D. JAMES #033499
bj@bronsonjames.com
Attorneys for Defendant-Appellant
Shannon Mae Hickman

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1,519 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 21, 2014.

I further certify that I directed the Petitioner's Reply Brief on the Merits to be served upon Cecil A. Reniche-Smith, attorney for Plaintiff-Respondent, on August 21, 2014, by having the document electronically delivered to:

Cecil A. Reniche-Smith # 961479
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301
Phone: (503) 378-4402
Attorney for Plaintiff-Respondent

Ryan E. Scott
Scott & Huggins Law Offices
1549 SE Ladd Ave.
Portland OR 97214
Phone: (503) 546-0618
Attorney for Defendant-Appellant

Tim Volpert
Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2400
Portland OR 97201
Attorney for amicus ACLU

Respectfully submitted this 21st day of August, 2014,

/s/ Bronson James

BRONSON D. JAMES #033499
bj@bronsonjames.com
Attorneys for Defendant-Appellant
Shannon Mae Hickman