SUPREME COURT OF FLORIDA

CASE NO. 77,831

JENNIFER CLARISE JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Certified Question from the
District Court of Appeal 5th District

BRIEF OF THE AMICUS CURIAE, FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE COUNTY CHAPTER, INC.

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INTEREST OF THE AMICUS CURIAE

THE FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE COUNTY CHAPTER, INC. (hereinafter referred to as FAWL), was incorporated and organized to promote the encouragement, education and recognition of women in the legal profession and judiciary; to improve the administration of justice and the adherence to the rules regulating the Florida Bar; to promote understanding and improved relations among members of the Bar, the judiciary and the public; to disseminate to the public, particularly to women, information on legal rights and related sources of assistance; and, most importantly with respect to this case, to promote public awareness and elimination of abuses that diminish the integrity of the individual and the family unit.

ADOPTION OF THE STATEMENT OF THE CASE AND OF THE FACTS

The Amicus Curiae, FAWL, adopts and incorporates the statement of the case and of the facts contained in the Initial Brief of the Petitioner, Jennifer Johnson.

SUMMARY OF THE ARGUMENT

FAWL agrees with the position of the Petitioner, Jennifer Clarise Johnson, that she was wrongfully convicted of the crime of delivering cocaine, pursuant to Fla. Stat. § 893.13(1)(c).[1] The Legislature never intended for this statute to reach the conduct or circumstances of this case.

The district court's decision is contrary to the law and policy of the State of Florida. Chapter 893, the Florida Comprehensive Drug Abuse Prevention and Control Act[2] (hereinafter referred to as the "Act"), was enacted to control the manufacture and delivery of dangerous drugs, to prevent and control drug abuse, and to establish specific prohibited acts and penalties for violations. The legislature did not intend to impose penal sanctions upon pregnant drug addicts who use cocaine during their pregnancy, and who, during the brief moments from birth up to the severance of the umbilical cord, unintentionally transmit some minute amount of a metabolite of the cocaine to their children.

When the Act, specifically Section 893.13(1)(c)(1), is analyzed in accordance with the general rules of statutory

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[1] The case below is reported as Johnson v. State, 578 So. 2d 419 (Fla. 5th DCA 1991).

[2] Fla. Stat. § 893.01 (1973).

construction, it is clear that the Legislature never intended this criminal statute to apply to the present case or other similar cases.

The court below further begged the question of when a viable fetus becomes a "person," for purposes of applying Florida Statute Section 893.13(1)(c), and imposing criminal liability. Pursuant to Duncan v. Flynn, 342 So. 2d 123 (Fla. 2d DCA 1977), aff'd, 358 So. 2d 178 (Fla. 1978), the State did not show that Jennifer Johnson's children were "persons" at the time the involuntary act of "delivery" of the cocaine occurred. The State failed to prove that they had acquired a separate and independent existence from their mother.

The policies of the State of Florida favor privacy and the preservation of the family unit. The legislature has, in the past, consistently endeavored to uphold these fundamental principles. Affirming the decision of the court below will effectively undermine the policy of this State, and further cause irreparable harm to the individual and society.

We submit that the question certified to this Court:

> WHETHER THE INGESTION OF A CONTROLLED SUBSTANCE BY A MOTHER WHO KNOWS THAT SUBSTANCE WILL PASS TO HER CHILD AFTER BIRTH IS A VIOLATION OF FLORIDA LAW

should be answered in the negative, and further submit that the certified question should specify whether such an act by a pregnant drug addict is a violation of Florida criminal law.

I. THE CONVICTION OF JENNIFER JOHNSON SHOULD NOT BE AFFIRMED, SINCE TO DO SO WOULD ERADICATE THE INTENT OF THE LEGISLATURE, VIOLATE THE RULES OF STATUTORY CONSTRUCTION AND INTERPRETATION, EXACERBATE THE PRESENT SOCIETAL PROBLEMS OF DRUG ABUSE AND ADDICTION, AND WOULD PREVENT AFFIRMATIVE EFFORTS THAT WOULD BEST SERVE SOCIETY AND ITS INDIVIDUALS.

A. The Florida Legislature Never Intended to Criminalize the Passage of Harmful Substances from a Mother to her Child in the Brief Moments from Birth to the Severance of the Umbilical Cord.

It is well established that the legislative intent is the polestar by which we must be guided in interpreting the provisions of a law. See Parker v. State, 406 So.2d 1089 (Fla. 1981), citing to State v. Sullivan, 116 So. 255 (1928). See also, In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990). The first consideration in determining the intent of the legislature is to look at the plain meaning of the statute. See, e.g., St. Petersburg Bank & Trust Company v. Hamm, 414 So. 2d 1071 (Fla. 1982); S.R.G. Corp. v. Dept. of Revenue, 365 So. 2d 687 (Fla. 1978); Thayer v. State, 335 So. 2d 815 (Fla. 1976). Legislative intent may be expressed by the statute's plain language, or it may be gathered from the purpose of the Act, the administrative construction of it, other legislative acts bearing upon the subject, and all the surrounding circumstances attendant upon it. See Singleton v. Larson, 46 So. 2d 186 (Fla. 1950); City of St. Petersburg v. Carter, 39 So. 2d 804 (Fla. 1949); see also, Johnson v. State, 336 So. 2d 93 (Fla. 1976).

Formally enacted by the legislature in 1973[3], Fla. Stat. § 893.13 provides, in pertinent part:

> 893.13 PROHIBITED ACTS
>
> * * *
>
> (c) Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of the chapter. Any person who violates this provision with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) is guilty of a felony of the first degree; . . .[4]

Fla. Stat. § 893.13(1) (footnote added).

As Chapter 893 was enacted to combat the problems associated with drug abuse and prevention, Chapter 415 was enacted to protect children from abuse and neglect. In 1987, Chapter 415 was amended to include in the list of "harms" constituting child abuse and neglect, a newborn child's physical dependency upon a controlled

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[3] Chapter 893, Florida Statutes, enacted in 1973, is a consolidation of former Chapters 398 and 404, Florida Statutes. The effect of the consolidation is to provide a uniform control of drugs of abuse; to remove any prior conflicts between Chapters 398 and 404, and any federal drug abuse laws; and to assist persons concerned with drugs or abuse by providing defined procedures and guidelines. See Memorandum on CS for SB 1322 and CS for HB 1752, presented to the Governor for signature on June 20, 1973.

[4] Cocaine is listed as a Schedule II controlled substance under subsection (2)(a).

substance.[5] A review of the legislative history of Chapter 87-90 proves that the legislature never intended to impose criminal penalties upon mothers for delivering drug-affected children.

The staff analysis of Chapter 87-90 indicates that the effect of the bill was to broaden the definition of "harm" to include physical dependency of a newborn infant upon certain controlled substances. Because of the immediate concern among legislators that this language might authorize the criminal prosecution of mothers who give birth to drug-dependent children[6], the bill was amended to provide that no parent of a drug-dependent newborn would be subject to criminal investigation solely on the basis of the newborn's dependency.[7] Whereas Chapter 87-90 does discuss

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[5] The bill was passed by the legislature and the changes were codified in Section 415.503(9)(a)(2), ch. 87-90, § 1, Laws of Florida.

[6] Comment, A Response to "Cocaine Babies" -- Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent, 15 Fla. St. U.L. Rev. 865, 877 (1987).

[7] See, Comments to HB 155, expanding the definition of "harm" in Section 415.503(7), which provides:

> The legislation raises some concern regarding both equal protection and mother's privacy. As written, the legislation provides a likelihood that a parent could be criminally prosecuted under Chapter 893 by virtue of a child being born drug-dependent. This might lead to the potential, probably unintentional, criminal prosecution of the parent in cases where services could be provided for the protection of the child and stabilization and preservation of the family.

specifically the problem of pregnant drug addicts who give birth to drug-dependent children, Chapter 73-331 does not.[8]

For Chapters 893 and 415 to operate consistently with each other, and not circumvent the intent of the legislators in enacting each, it is imperative that this Court recognize that any criminal prosecution under Chapter 893 cannot include prosecution of mothers who give birth to drug-dependent children.

Amicus does not believe that the legislature, in enacting Chapter 893, intended for it to be construed in a manner that would

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[8] The title to Chapter 73-331, Laws of Florida, which combined Chapters 398 and 404, reads as follows:

> AN ACT relating to drug abuse prevention and control; creating sections 893.01 through 893.15, Florida Statutes; creating the "Florida Comprehensive Drug Abuse Prevention and Control Act"; providing definition; providing standards and schedules under which controlled substances are controlled; regulating the practice of pharmacist(s) and practitioners dealing in controlled substances; prescribing requirements for distribution of controlled substances; providing for record keeping; providing exceptions for dispensing certain controlled substances at retail; providing for enforcement of this act; establishing burden of proof in certain proceedings; providing for suspension, revocation, and reinstatement of business and professional licenses; providing procedure and forfeiture, and sale of contraband in vessels, vehicles, or aircraft illegally used; establishing prohibited acts and penalties and arrest authorities; providing for conditional discharge and expungement of records for first-offense possession of controlled substance; providing for participation in drug rehabilitation program for certain offenders; . . .

cause a direct conflict with Chapter 415 and be completely at odds with public health interests and sound public policy.

Legislative intent may be expressed or it may be gathered from the purpose of the act, the administrative construction of it, other legislative acts bearing upon the subject, and all the circumstances surrounding and attendant upon it. City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949). The legislative history of Chapter 87-90, Laws of Florida, which was enacted to deal with the problem of child abuse and neglect, demonstrates that the legislature never intended to impose criminal penalties against mothers for delivering drug-affected children who receive an illegal drug derivative metabolized by the mother's body in utero. The staff analysis is particularly informative.

The staff analysis states that the effect of the bill was to broaden the definition of "harm" to include physical dependency of a newborn infant upon certain controlled drugs. However, when concern among legislators arose that this language might authorize criminal prosecution of mothers who give birth to drug-dependent children, the bill was amended to provide that no parent of a drug-dependent newborn shall be subject to criminal investigation solely on the basis of the infant's drug dependency.[9] A typical expression of legislative concern was:

> The legislation raises some concern regarding both equal protection and mother's privacy.

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[9] Comment, A response to "Cocaine Babies" - Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent, 15 Fla. S.U.L. Rev. 865, 877 (1987).

> As written, the legislation provides a likelihood that a parent could be criminally prosecuted under Chapter 893 by virtue of a child being born drug-dependent. This might lead to the potential, probably unintended, criminal prosecution of the parent in cases where services could be provided for the protection of the child and stabilization and preservation of the family.[10]

The bill was amended to preclude such a result. Clearly, by the passage of Chapter 87-90, the legislature never intended to prosecute mothers who give birth to drug-affected newborns.

Another indicator of the legislature's intent is the title of the law enacting the statute. As the Florida Supreme Court noted in Foley v. State, 50 So.2d 179, 184 (Fla. 1951):

> If the phraseology of the act is ambiguous or is susceptible of more than one interpretation, it is the Court's duty to glean the legislative intent from a consideration of the act as a whole, "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject," . . .

(emphasis added.)

Nowhere does the title to Chapter 73-331 mention criminal liability of pregnant women who used drugs during their pregnancy. Amicus does not believe that the legislature intended for the statute to be construed in a manner so patently at odds with public health interests and sound public policy.

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[10] The bill was passed by the legislature and the changes were codified in Section 415.503(9)(a)2, ch. 87-90, § 1, Laws of Fla.

B. To Prosecute Jennifer Johnson for Delivery of Cocaine Under Fla. Stat. § 893.13(1)(c)(1) is so Tenuous that it Cannot Reasonably be Inferred that the Legislature Intended this Application.

Even if this Court were to conclude that the language of Florida Statute Section 893.13(1)(c) technically includes "delivery" of a controlled substance via the umbilical cord, legislative intent must control. A literal interpretation of a statute need not be given when to do so would lead to unreasonable conclusions or defeat legislative intent. See, e.g., In re Order on Prosecution of Cr. App., supra at 1137; Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986) (literal interpretation of statute need not be given when to do so would lead to unreasonable conclusions or defeat legislative intent); Johnson v. Presbyterian Homes of the Synod of Florida, Inc., 239 So. 2d 256 (Fla. 1970); Winemiller v. Feddish, 568 So. 2d 483 at 484 (Fla. 4th DCA 1990).

The obligation of the Florida Supreme Court is "to honor the obvious legislative intent and policy behind an enactment, even when that intent requires an interpretation that exceeds the literal language of the statute." Byrd v. Richardson-Greenshields Securities, 552 So. 2d 1099, 1102 (Fla. 1989).

1. Avoiding Unreasonable Results.

When construing a statute, courts must avoid any construction that would lead to unreasonable, harsh, or absurd results. Tampa-Hillsborough County Expressway Authority v. R.E. Morris Allignment Service, Inc., 444 So. 2d 926, 929 (Fla. 1983); City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950); State v.

Miller, 468 So. 2d 1051 (Fla. 4th DCA 1985), rev. denied, 479 So. 2d 111 (1985); Garcia v. Allstate Insurance Company, 327 So. 2d 784, 786 (Fla. 3d DCA 1976), cert. denied, 345 So. 2d 422 (Fla. 1977). Second, absent a contrary showing, laws that apply to the same general field are presumed to be harmonious. City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983).

It is absurd to attribute to the legislature an intent, via Florida Statute Section 893.13(1)(c), to subject a pregnant woman to criminal penalties for whatever controlled substance might be "delivered" during a 60- to 90-second interval between the time the fetus leaves the birth canal to the time the umbilical cord is cut, yet, via Chapter 415, to specifically protect a pregnant woman against criminal penalties for the "delivery" of a controlled substance during her 9-month term of pregnancy. If and when the legislature does decide to regulate the exchange of a controlled substance via blood circulation between a mother and her fetus, it will do so in clear and unambiguous terms, with a rational approach to the entire term of pregnancy, rather than during the brief 60- to 90-second interval of the term of pregnancy.

If this Court were to affirm the lower court's interpretation and application of Section 893.13(1)(c)(1), future absurd and unfair results will surely follow. An example of such absurd results is the following: Assume you have two drug-using, pregnant women, in their eighth month of pregnancy. If one of these women should go into labor prematurely, this interpretation of the statute would apply to subject her to criminal liability. A woman

should not be held criminally responsible for engaging in activity which may or may not meet the criteria for committing that offense, depending upon contingencies beyond her control. This would be an irrational distinction upon which to justify such differential treatment. Indeed, even if the women were in their ninth month of pregnancy, a few days' difference in the date of birth would mean the difference in criminal liability or not.

2. Harmony in Construction of Statutes.

The second principle of statutory construction, as articulated in City of Boca Raton, supra, is that a law should be construed together with any other law relating to the same purpose, so that they are in harmony. For example, in Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981), this Court was called upon to determine legislative intent and to promote harmony between two statutes related to the same purpose. The statute at issue placed a limit on the compensation of court-appointed counsel. Because of an inherent ambiguity in the statute, this Court looked to the rules of statutory construction:

> In determining our polestar legislative intent, we are not to analyze the statute in question by itself, as if in a vacuum; we must also account for other variables. Thus, it is an accepted maxim of statutory construction that a law should be construed together and at harmony with any other statute relating to the same purpose, . . .

Id. at 542.

This Court then compared the statute in question to another statute that provided for "reasonable compensation." Concluding that one construction of the limitation could lead to "unreasonable

compensation," and therefore, conflicts between the two provisions, this Court chose to construe the limiting statute in a manner that would ensure reasonable compensation. Id. at 543.

In the case sub judice, Florida Statute Section 893.13(1)(c)(1) and 415.503(9)(a)(2) address similar areas of concern. Chapter 415, which was enacted to deal with the problem of child abuse and neglect, makes clear that the legislature expressly chose to treat the problem of drug-dependent mothers and newborns as a public health problem, and had considered, but rejected, imposing criminal sanctions, upon pregnant drug addicts via Section 893.13(1)(c)(1).

If the lower court's construction of Section 893.13(1)(c)(1) is allowed to stand, there is nothing to prevent courts from applying to pregnant women other Florida statutes which prohibit delivery to minors, to criminalize behavior which is otherwise legal, albeit at times lacking in wisdom. For example, Section 562.11(1)(a), Florida Statutes[11], makes it a criminal act to give alcoholic beverages to a person under 21 years of age. If a pregnant woman consumes alcohol and delivers her child shortly thereafter, applying the lower court's method of statutory

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[11] Section 562.11:

> (1)(a) It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises. Anyone convicted of violation of the provisions hereof is guilty of a misdemeanor of the second degree . . . .

construction, she would arguably have "given" an alcoholic beverage to her newborn child in the moments between birth and severance of the umbilical cord.

Similarly, Section 859.06, Florida Statutes[12], criminalizes the delivery or furnishing, directly or indirectly, of tobacco products to a minor. If a pregnant woman smokes a cigarette and delivers her child shortly thereafter, nicotine and other derivatives of nicotine and tobacco products, would be delivered to the newborn child between the moments of birth and severance of the umbilical cord.

Thus, adoption of the lower court's interpretation of Section 893.13(1)(c)(1) would criminalize, behavior which is otherwise legal. This construction of the criminal laws of Florida reaches more broadly than is reasonably necessary to sustain legitimate government interests. It would ostensibly allow, by extension to the alcohol and tobacco statutes, criminalization of common lawful conduct. Such an interpretation of these statutes would violate an individual's right to substantive due process. See State v. Walker, 444 So. 2d 1137 (Fla. 2d DCA), aff'd, 461 So. 2d 108 (Fla.

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[12] Section 859.06:

> No person shall sell, deliver, barter, furnish, or give away, directly or indirectly, to any minor, any cigarette, cigarette wrapper, or other tobacco product. As used in this section, the word "cigarette" includes clove cigarettes and tobacco substitutes. Any person who violates the provisions of this section is guilty of a misdemeanor of the second degree . . . .

1984) (holding unconstitutional a statute criminalizing removal of lawfully dispensed controlled substances from container in which originally delivered). A footnote in State v. Walker states succinctly: "While we agree with the need for effective law enforcement, we respectfully submit that other, less drastic alternatives are available." 444 So. 2d 1137 at 1140 n.1.

C. Criminal Statutes are Construed Strictly and in Favor of the Accused in Accordance with the General and Well Established Rules of Statutory Construction.

The general rule is that criminal statutes must be strictly construed, and if there is any reasonable doubt as to the meaning of such a statute, it should be construed in favor of the accused. Whitehurst v. State, 141 So. 878 (Fla. 1932). These principles have been incorporated into the Florida criminal code, which provides specifically that provisions of the criminal code and offenses defined by other statutes are to be strictly construed, and, when the language is susceptible to different constructions, the statute should be construed most favorably to the accused. Fla. Stat. § 775.021 (1976); Perkins v. State, 576 So. 2d 1310 (Fla. 1991); Ferguson v. State, 377 So. 2d 709 (Fla. 1979); Arthur v. State, 391 So. 2d 338 (Fla. 4th DCA 1980); State v. Buchanan, 191 So. 2d 33 (Fla. 1966); State v. Carroll, 378 So. 2d 4 (Fla. 4th DCA 1979).

In Ferguson, this Court explained:

> This rule is founded on the principles of fairness and justice, that a person is entitled to clear notice of what acts are proscribed and is therefore given the benefit of the doubt when the criminal statute is

> ambiguous. Applying the rule that criminal statutes must be strictly construed, nothing not clearly and intelligently described in a statute's very words, as well as manifestly intended by the legislature, shall be considered included within its terms. Earnest v. State, 351 So. 2d 957 (Fla. 1977).

Id. at 711.

The absence of any statutory definition of "person" in Section 893.13(1)(c)(1) requires that any doubt about when a fetus becomes a person should be resolved in favor of the accused, here, Jennifer Johnson. Under this construction, Johnson's child did not become a person until the umbilical cord was severed. After that point in time, there was not, nor could there have been any "delivery" of a controlled substance by an involuntary circulation of Johnson's blood to the baby.

II. THE COURT BELOW FAILED TO ADDRESS THE CRITICAL QUESTION OF WHEN JENNIFER JOHNSON'S CHILDREN BECAME "PERSONS" FOR PURPOSES OF APPLYING FLA. STAT. § 893.13(1)(c).

The certified question begs the question because it fails to address the critical definition of a "person" for the purposes of Section 893.13(A)(c).

Section 893.13(1)(c)(1), Florida Statutes, prohibits delivery of a controlled substance to a "person." Jennifer Johnson never delivered a controlled substance to a "person" as defined in Duncan v. Flynn, 342 So. 2d 123 (Fla. 2d DCA 1977), aff'd, 358 So. 2d 178 (Fla. 1978).

Duncan involved a suit for wrongful death against a physician, the hospital and the hospital's insurers by the father of a baby who died during childbirth. The infant's head emerged from the

birth canal, but its shoulders were too wide to allow further passage. Despite the physicians' attempts to save the baby, twenty minutes later, the baby died from strangulation. In the ensuing wrongful death action by the father, the Second District was faced with two legal issues: (1) Was there a live birth; and (2) if not, was the unborn but viable fetus a "person?"

The plaintiff argued that because the child had breathed apart from its mother while still lodged in the mother's pelvis, and its heart was beating, there was a live birth. The appellate court disagreed, and adopted the view that:

> to constitute a "live birth," so as to give rise to an action for wrongful death, a child must acquire a separate and independent existence of its mother. . . . Generally, the requirements of separate and independent existence will be met by a showing of expulsion (or in a Caesarian section by complete removal) of the child's body from its mother with evidence that the [umbilical] cord has been cut and the infant has an independent circulation of blood. Should the death occur prior to the cord being severed expert medical evidence may be required to determine whether such separate and independent existence has been attained. . . .

342 So. 2d at 126.

In the absence of such evidence, the fetus is not a "person. 342 So. 2d at 127. The State did not present such evidence here.

As a matter of law, Jennifer Johnson did not violate Section 893.13(1)(c) because the State did not prove that she delivered cocaine to a "person." She ingested cocaine before giving birth, apparently transmitting cocaine to her unborn children, both viable but unborn fetuses, not yet "persons." Subsequently, the children

were completely expelled from her body. They were not yet "persons" until they had separate and independent existences from their mother. They attained the status of being born "alive" and acquiring these separate and independent existences when the umbilical cord was severed and the children had their own circulation. The State did not show that, after that point, there was a "delivery" of a controlled substance, since the umbilical cord had by then been severed.

Jennifer Johnson's children were not "persons" within the meaning of Section 893.13(1)(c)(1) at the time when she ingested cocaine. No act of delivery was proved occurred after the umbilical cord was severed and the children acquired separate and independent existences from their mother.

III. STATE POLICY DOES NOT SUPPORT A CRIMINAL PROSECUTION OF WOMEN WHO GIVE BIRTH TO COCAINE-EXPOSED BABIES.

Few states have expressed as strong a commitment as Florida has to the right of privacy in family matters, to the support and preservation of the family unit, and to finding comprehensive solutions to the complex problems of abused and neglected children. The decision below contradicts these policies. It is a failed attempt at an overly simplified solution to a complex problem. Amicus strongly believes that the legislature would not have enacted a statute so directly contrary to the oft-stated public policies of this State without clear articulation of its reasons for doing so.

We wish to be quite clear. We are definitely not advocating recognition of a privacy right in the use of illegal substances. But the decision below must be reviewed in light of the established policies of the State of Florida favoring privacy and the family, and of multi-faceted, non-criminal solutions to complex family problems. Given these policies, we doubt the legislature would have chosen imposition of criminal penalties as the way to solve the problems of drug exposed babies. Further, if the State of Florida did choose to use the criminal law as one of its tools in the battle against this problem, it would have done so in clear, direct language, after open public debate, and not silently, through a statute that does not purport to address the issue.

Article I, Section 23 of the Florida Constitution gives special protection to the right of privacy:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

This provision protects individual decision-making in areas of reproduction and family life. E.g., In re T.W., 551 So. 2d 1186, 1195 (Fla. 1989) (right to choose abortion); In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984) (parent's right to authorize removal of life support from infant in permanent coma); I.T. v. State, 532 So. 2d 1085 (Fla. 3d DCA 1988) (deprivation of custody not justified by generalized conclusion of lack of parenting skills). But the Constitution is far from the only official statement by the State of Florida in the areas of privacy and family relationships. For example, this Court has, in

case law, recognized the "preservation of the family unit" as a "significant" State interest. In re T.W., 551 So. 2d at 1194-5.

The State of Florida has also demonstrated its concern for children and the family by creating the Study Commission on Child Welfare to examine the State laws and policies which affect services to children and their families. The Commission was chaired by a Justice of this Court, and included other judges, lawyers, members of the legislature, and representatives of family service agencies. In March 1991, the Commission issued its report. Report of the Study Commission on Child Welfare, (March 1991) (hereinafter Study Commission Report) (see Appendix).

The Commission reviewed the legislative intent stated in a number of state laws concerning children and their families, and concluded that the legislature

> emphasizes prevention services and a belief that the family is the primary protector and nurturer of the child, that the quality and stability of the family should be preserved, and that programs and services should be provided to prevent family dysfunction and loss of independence.

Id. at 51.

Among other areas of concern, the Study Commission addressed the problem of substance abuse among pregnant women. Study Commission Report, Part One at 11-12, and Part Two at 20-21. The Commission found that "[i]n Florida, the number of infants born exposed to drugs, including alcohol, exceeds the treatment services available for them or their families." Id., Part One at 11. The Study Commission recommended that

> 16. Florida must develop inducements to encourage drug-abusing parents to obtain treatment without fear of prosecution or the permanent loss of custody of their children.
>
> * * *
>
> 21. Florida must develop a uniform approach for dealing with substance-exposed babies and their families in terms of how they are treated and court handled.

Id. at 11-12 (emphasis added).

Perhaps most important of all, the Commission recognized the complexity of the problems affecting children and their families:

> Resolving the problems confronting children requires a combination of financial, structural, and societal remedies, as well as a commitment from every Floridian. It will take the strong will and coordinated efforts of families, communities, schools, social service agencies, courts and the legislature.

Id. at 2 (emphasis in original).

In sum, the policy of this State, as expressed by a Commission whose members were drawn from all three branches of government, is consistent with the privacy and family-preservation policies expressed in the Constitution, statutes, and case law. The policy of this State favors preservation of the family unit and opposes the use of criminal prosecutions to solve the problems of substance-exposed babies.

Consistent with these fundamental values, the legislature has taken great pains to carefully draw statutes that may impact on family life. The legislative history of the statute under which the Petitioner was prosecuted shows that, when presented with an opportunity to do by statute what the court below has done by

decision, the legislature emphatically refused. Because of the profound importance of the privacy rights of reproduction and family, the legislature chose a different course when dealing with the problem of drug addicted babies.

Because of Florida's pro-family, pro-privacy public policy, the legislature would not and did not choose to solve the complex problem of cocaine-exposed infants by locking up the mother after the harm has already been done.

CONCLUSION

The Amicus Curiae, the Florida Association for Women Lawyers, Dade County Chapter, Inc., respectfully submits that the question certified to this Court of

> WHETHER THE INGESTION OF A CONTROLLED SUBSTANCE BY A MOTHER WHO KNOWS THAT SUBSTANCE WILL PASS TO HER CHILD AFTER BIRTH IS A VIOLATION OF FLORIDA LAW

should be answered in the negative, the conviction of Jennifer Johnson be overturned, and the criminal charges dismissed.

Respectfully submitted,

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