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Case No. 77,831

In the

Supreme Court of Florida

JENNIFER JOHNSON,

Appellant

v.

STATE OF FLORIDA,

Appellee

On Appeal from the Court of Appeal
for the Fifth District of Florida

BRIEF OF THE AMERICAN SOCIETY OF LAW AND MEDICINE AS **AMICI CURIAE** IN SUPPORT OF APPELLANT

Wendy K. Mariner
80 East Concord Street
Boston, MA 02118
(617) 638-4626

Leonard H. Glantz
80 East Concord Street
Boston, MA 02118
(617) 638-4640

George J. Annas
80 East Concord Street
Boston, MA 02118
(617) 638-4626

Jary C. Nixon
25 Davis Boulevard
Tampa, Florida 33606
(813) 251-0515
Bar No. 58873

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MISCELLANEOUS

INTEREST OF THE AMICUS CURIAE

THE AMERICAN SOCIETY OF LAW & MEDICINE (ASLM) traces its beginnings to the Massachusetts Society of Examining Physicians (1911) and was formally incorporated as the ASLM in 1972. ASLM has more than 5,000 active members made up of physicians, lawyers, and health care professionals from all of the 50 states, including 202 members in Florida, and 30 countries. ASLM also publishes the two leading health law journals in the U.S., the American Journal of Law & Medicine (with Boston University School of Law), and Law, Medicine & Health Care. ASLM has actively encouraged cooperative efforts between the medical, legal, and public health communities for almost two decades, and is committed to the development and implementation of health policy that promotes the public welfare. ASLM is interested in this case because our organization seeks to ensure that health policy and law are rational and founded upon a clear understanding of scientific and medical facts. The ASLM also seeks to ensure that health policy and law are not needlessly discriminatory. Discrimination in health care policy is contrary to public health goals in that it will dissuade people from coming forward for treatment and is contrary to established bio-ethical values.

SUMMARY OF ARGUMENT

On July 13, 1989, Jennifer Johnson became the first woman in the United States to be convicted of delivering a controlled substance to a minor as a result of her drug use during pregnancy. While public health and medical authorities are in agreement that drug use by pregnant women presents a pressing public health problem, there is also virtually universal agreement among health care authorities that prosecuting pregnant women for their drug use is unjust and counterproductive.

In this case, the prosecution has attempted to criminalize an activity that has not been made unlawful by the legislature--the use (as opposed to possession) of drugs by pregnant women. But no Florida statute prohibits drug use by anyone, let alone pregnant women. Unable to properly charge Ms. Johnson with an existing crime, the prosecution has contorted the statute that makes it a felony to deliver drugs to a minor, Section 893.13(1)(c)(1), to try to make it "fit" Ms. Johnson. This is an untenable distortion of the words as well as the legislative intent of the statute.

Clearly, by passing the delivery to minors statute the legislature intended to make it an especially serious offense for drug pushers to give or sell drugs to children and adolescents. The prosecution's distortion of this statute makes drug pushers of addicted pregnant women not because of any act that might constitute a delivery of drugs but because of their personal use

of drugs. Additionally, the prosecution's theory of the case limits the statute's application solely to pregnant women who take drugs hours before they give birth. Thus, the prosecution would have this Court believe that the legislature made it a crime, punishable by thirty years imprisonment, for a pregnant woman to take drugs once just prior to delivery, but did not make it a crime for a women to take drugs daily throughout her pregnancy. This implausible interpretation of legislative intent is also contradicted by the legislature's explicit act of prohibiting criminal investigations solely as a result of an infant's drug dependency. In the instant case, no infant was born drug dependent; on the contrary, both infants were born healthy. Thus, the prosecution's position is that while the legislature prohibited even criminal investigations of women based solely on their infant's drug dependency, it has permitted making felons of women who deliver healthy children.

The prosecution's case rests on its argument that a controlled substance was delivered from the mother's blood to an infant's blood through the umbilical cord immediately following birth. However, under this Court's standard for establishing whether a person exists at law after birth, the prosecution's argument is legally impossible: If drugs are "delivered" from the mother's circulation to the infant's circulation, then the infants cannot be persons because they did not have "independent circulation at the time of delivery," and therefore delivery was not made to a "person under the age of 18 years." If, instead,

the infants were "persons" and had independent circulation, then, by definition, "delivery" from the mother's circulation to the infant's circulation is impossible.

One of the most disturbing aspects of this prosecution is the attempt to outlaw childbirth by women who use drugs. The prosecution has made it clear that delivery of a baby is an element of the crime they wish to prosecute. The trial court made it clear that the decisions to become pregnant and to stay pregnant are volitional elements of the crime to be deterred. Indeed, it is Ms. Johnson's failure to have an abortion that makes her a criminal in the eyes of the trial judge and the prosecution. Had she terminated her pregnancy, no crime could have been charged or proven. It is a clear violation of the United States and Florida Constitutions and the standards of human decency to punish a woman for choosing not to abort. This is especially true in this case in which a woman, because of her addiction to drugs, cannot freely choose to stop using the drugs, and where, as in this case, treatment facilities for addicted pregnant women are essentially nonexistent. Indeed, if the state has a compelling interest in reducing drug use by pregnant women, it would better and more effectively express this interest by funding drug treatment and prenatal care for pregnant women than by prosecuting and convicting them of a felony.

Not only is the prosecution and lower courts' construction of section 893.13(1)(c)(1) absurd and unconstitutional, but it is all for nothing. Prosecuting women who used drugs during

pregnancy will make everyone worse off--the women themselves, their children, and society as a whole. The prosecution would like to believe that by imprisoning women who used drugs while pregnant, it will deter such behavior. There is no evidence that this is true, and much evidence to the contrary. Deterrence requires a person to be able to control the behavior sought to be deterred--unhappily this is not the case where a person is addicted to drugs. Although criminal prosecution will not deter the undesirable drug using behavior, it <u>has</u> deterred and <u>will</u> deter women from entering treatment or receiving prenatal care. In this case, Ms. Johnson was prosecuted as a direct result of her seeking care and honestly disclosing her drug use to her doctors and other caregivers. Both good law and good health policy require that women <u>not</u> be punished as a result of seeking care. Indeed, the only realistic possibility of enabling women to control their drug use and improve their own health and the health of their children lies in attracting them to prenatal care and drug treatment. There are already enough barriers to care for pregnant women who use drugs--the criminal law should not create an additional barrier.

Both the trial court and the Court of Appeal accepted the prosecution's usurpation of legislative authority to define crimes, but gave no reasons for their decisions, other than their thinly veiled anger and frustration with Ms. Johnson. The majority opinion of the Court of Appeal is really no decision at all, but a request that this Court make the decision for them.

Because the courts below erroneously construed and applied the law of this State, and because such application will lead to disastrous results for pregnant women and their children, this Court should reverse Ms. Johnson's conviction.

ARGUMENT

I

THE COURT OF APPEAL ERRED IN AFFIRMING JENNIFER JOHNSON'S CONVICTION BECAUSE GIVING BIRTH TO A HEALTHY CHILD IS PROTECTED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS, AND SHOULD NEVER BE TREATED AS CRIMINAL ACTIVITY

Both the trial court's rulings and the prosecution's arguments make it apparent that becoming pregnant, staying pregnant, and delivering a child are elements of the "crime" Ms. Johnson allegedly committed. In its enumeration of the volitional acts that Ms. Johnson committed that make her guilty of a crime, the trial judge said "The defendant also made a choice to become pregnant and to allow those pregnancies to come to term." (Transcript at 367). As the prosecution explained, "When Jennifer Johnson smoked cocaine and she wasn't pregnant, she was just breaking the law in Mexico...and that was just bad. When she got pregnant, it got worse, because that's worse. <u>When she delivered the baby, she broke the law in the State.</u> She broke it." (Record on Appeal, hereinafter "RA," at 364-65) (emphasis added).

The clear meaning of these statements is that Ms. Johnson

was prosecuted not for delivering cocaine, but for delivering a baby. The prosecution of Ms. Johnson has transformed delivering a healthy baby into the crime of delivering dangerous drugs to children. Upon giving birth, new mothers instantly become drug pushers.

These remarkable statements demonstrate the belief of the trial court and the prosecution that they can and should outlaw procreation by women who are either using drugs or are addicted to them. Both the trial court and prosecution know that absent pregnancy and delivery Ms. Johnson could not be prosecuted for drug use alone.[1] Instead, the trial court faulted Ms. Johnson for "allow[ing] those pregnancies to come to term." The threat of criminal prosecution and imprisonment for up to thirty years for delivering a child could operate to coerce pregnant women into having abortions. In light of the lack of treatment for pregnant women addicted to drugs,[2] an abortion may be the only option available to a woman who wishes to avoid criminal prosecution and incarceration.

It is hard to imagine a more direct infringement of the Constitutional right to decide "whether to bear or beget a child," Eisenstadt v. Baird, 405 U.S. 438,453 (1972), than this criminal prosecution. Likewise, it is hard to imagine a more direct infringement of "a woman's decision whether or not to terminate her pregnancy," Roe v. Wade, 410 U.S. 113, 153

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[1] See Part III.D. infra.

[2] See Part II.B. infra.

(1973)(emphasis added), than the trial court's finding that Ms. Johnson's voluntary decision to continue her pregnancy was an element of the "crime" she committed. Obviously, had Ms. Johnson decided to abort her pregnancy, even after she had used drugs, neither the prosecution nor trial court judge could argue that she was guilty of any crime.

Punishing a woman for carrying a pregnancy to term is a state-created penalty for exercising her right to bear a child. Such a penalty is unconstitutional. Annas, Predicting the Future of Privacy in Pregnancy: How Medical Technology Affects the Legal Rights of Pregnant Women, 13 Nova L. Rev. 329, 348 (1989); and Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1445 (1991)(hereinafter Roberts, Punishing Drug Addicts) ("Thus, it is the choice of carrying a pregnancy to term that is being penalized"). See also, Note, Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of Fetal Abuse, 101 Harv. L. Rev. 994, 1007 n.79 (1988). This Court has recognized a similiar right under the Florida Constitution,[3] In re T.W., 551 So.2d 1186, 1192 (Fla. 1989), and found that the Florida Constitution provides broader protection than that offered by the Federal Constitution, Winfield v. Div. of Pari-Mutuel Wagering,

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[3] "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 section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Art. I, § 23, Fla. Const.

477 So.2d 544 (Fla. 1985). See also Rasmussen v. South Florida Blood Serv., 500 So.2d 533, 536 (Fla. 1987).

Other state courts in Massachusetts and Michigan that have considered whether a woman's constitutional rights are violated by criminal prosecutions such as this one have found that prosecuting a woman because she was pregnant at the time she used cocaine implicated her constitutional right of privacy. Commonwealth v. Pellegrini, No. 87970 (Mass. Super. Ct. Oct. 15, 1990); People v. Bremer, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991). The Massachusetts court noted that "the level of state intervention and control over a woman's body required by this prosecution" would set a dangerous precedent for numerous other pregnancy-related restrictions on women. Pellegrini, slip. op. at 9. See Johnsen, From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster, 138 U. Pa. L. Rev. 179, 191-194 (1989).

Because it is clear that the use of drugs by itself is not a crime in Florida, Ms. Johnson was prosecuted, not because she used drugs, but because she stayed pregnant and gave birth. It is the prosecution and punishment of a woman for making procreative choices that violates the constitutional right of privacy and liberty.

Moreover, as discussed in Part II below, the criminal prosecution of new mothers for "delivering" drugs to minors does not effectively serve any legitimate state interest, but, rather, undermines the State's interest in promoting healthy births by

deterring women from seeking prenatal care and drug treatment.

II

PROSECUTING WOMEN WHO USED DRUGS DURING PREGNANCY IS IRRATIONAL AND CONTRARY TO SOUND PUBLIC HEALTH POLICY AND WILL CAUSE HARM TO WOMEN AND THEIR CHILDREN

A. The Court of Appeal's Decision Threatens to Drive Women at High Risk Out of the Health Care System and Place Their Children at Greater Risk

The prosecution's interpretation of Section 893.13(1)(c)(1) is not only patently absurd and contrary to the statute's plain meaning and the legislature's intent, but it will exacerbate the problems of drug use in Florida and increase the potential harm to both mothers and children.

Major organizations and practitioners in the field of public health see drug use during pregnancy for what it is--behavior that needs to be changed. The public health goal is to improve the health of pregnant women and newborn children. American Public Health Association, Analysis of the Administration's National Drug Strategy 1, 4 (Feb. 6, 1991) ("APHA espouses a public health model as opposed to a criminal deviancy model to tackle the drug problem"); American Public Health Association, Illicit Drug Use by Pregnant Women, Policy Statement No. 9020 (1990); American Public Health Association, Drug Treatment on Demand, Policy Statement No. 8923 (1989). Prosecutors apparently

aspire to the same goal. State Attorney Curtis Golden of Pensacola was reported to say that the goal of prosecuting women such as Ms. Johnson "is to get mothers off drugs and to protect children." "Prosecuting Cocaine Mothers Frustrates State," Pensacola News Journal, April 28, 1991, at 1A, 10A ("'We are not really trying to put the mothers in jail,' he said. 'We're trying to bring pressure on the mother to seek prenatal counseling or to force her into some kind of rehabilitation program after the child is born.'").

Everyone thus agrees on the goal to be achieved. The real issue is how to achieve it. The prosecution's actions are counterproductive because punishment does not work, but prevention and treatment can. Mariner, Glantz & Annas, Pregnancy, Drugs, and the Perils of Prosecution, 9 Criminal Justice Ethics 30, 36-37 (1990).

The health care system offers the best and only means available to pregnant women to stop their drug use and improve their own health and the health of their children. Given the woefully inadequate drug treatment and prenatal care facilities that exist and the obstacles women must surmount to enter them, it is already far too difficult for them to find their way into the health care system when they need it. It makes no sense to make it harder. Yet prosecuting women who used drugs during pregnancy can only drive them away from health care.

The prosecution of Ms. Johnson and the Court of Appeal's decision has sent a message to drug dependent women who are

pregnant: stay away from the doctor and the hospital because your drug use will be discovered and prosecuted whether your child is healthy or not. Women who do come forward and admit their drug dependence will be treated like drug pushers.

As Judge Sharp correctly noted, "prosecuting women for using drugs and 'delivering' them to their newborns appears to be the least effective response to this crisis. Rather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected." Johnson v. State, No. 89-1765 slip op. at 11-12 (Ct. App. 5th Dist. 1991) (Sharp, dissenting).

No knowledgeable organization disagrees. The National Association of Public Child Welfare Administrators, for example, has determined that "[l]aws, regulations, or policies that respond to addiction in a primarily punitive nature...are inappropriate." National Association of Public Child Welfare Administrators, Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response 3 (Jan. 1991). The American Medical Association Board of Trustees has found: "Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate." American Medical Association, Board of Trustees, Legal Interventions During Pregnancy, 264 J. Am. Med. Assn. 1663, 2670 (1990)(hereinafter "Legal Interventions During Pregnancy"). See also American Medical Association House of Delegates, Resolution 131 (A-90)(1990). They note that:

> [I]ncarcerating pregnant women in order to preserve fetal health may prove counterproductive.
>
> Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment. This fear is not unfounded....[4]

Id. at 2667. See also, American College of Obstetricians and Gynecologists, Committee on Ethics, Opinion No. 55, Patient Choice: Maternal Fetal Conflict (Oct. 1987).

The United States General Accounting Office reported that "drug-addicted pregnant women refrain from seeking prenatal care because they fear that punitive actions will be taken if they are found to have used or abused drugs during pregnancy." United States General Accounting Office, Report to the Chairman, Committee on Finance, U.S. Senate, Drug Exposed Infants: A Generation at Risk 38 (June 1990) (hereinafter "GAO Report"). See also, Missing Links: Coordinated Federal Policy for Women, Infants and Children: Hearing Before Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. (July 31, 1989) (opening statement of Sen. Herb Kohl) at 5 ("Mothers-afraid of criminal prosecution--fail to seek the very prenatal care that could help their babies and them.") Hospital officials told the General Accounting Office "that in addition to not seeking

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[4] As the AMA states, "while the incarceration of pregnant women would be intended to benefit the fetus, the reality of the environment in which pregnant women would be placed would do little to ensure fetal health." American Medical Association, Legal Interventions During Pregnancy. See also, Barry, Pregnant Prisoners, 12 Harv. Women's L. J. 189 (1989).

prenatal care, some drug-using women are now delivering their infants at home in order to prevent being reported to child welfare authorities." GAO Report at 9-10. Ms. Johnson would almost certainly have avoided detection and prosecution had she delivered her children at home.

Indeed, prosecution itself depends upon the very thing it deters--birth under medical care. It is essential to the prosecution that women be under the care of a physician. Prosecutors depend on physicians and hospitals to identify women who used drugs during pregnancy. Therefore it should come as no surprise that women will avoid physicians and hospitals to avoid prosecution.

In short, prosecution tends to deter not the use of drugs but the use of health care. Since lack of obstetrical or prenatal care is one of the most certain predictors of unhealthy birth outcomes, prosecution will likely deter healthy births. Annas, Protecting The Liberty of Pregnant Patients, 316 New Eng. J. Med. 1213 (1987); Leveno, Cunningham, Roarke, Nelson & Williams, Prenatal Care and the Low Birthweight Infant, 66 Obstetrics & Gynecology 599 (1985)(hereinafter "Prenatal Care and Low Birthweight"); Miller, Infant Mortality in the U.S., 253 Scientific American 31 (1985). As the American Academy of Pediatrics has found, "[p]unitive measures taken towards pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health..." American Academy of Pediatrics, Committee on Substance Abuse, Drug-Exposed Infants,

86 Pediatrics 639 (1990). The Southern Legislative Summit on Healthy Infants and Families, an initiative of the Southern Governors' Association and the Southern Legislative Conference, has urged states to bar "pregnancy-related tests and care that reveal substance abuse from being used as evidence in criminal prosecutions." Southern Legislative Summit on Healthy Infants and Families, Policy Statement 9 (Oct. 4-7, 1990)(hereinafter "Policy Statement"). Instead, it recommended that "states should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol." Id. at 8.

The public health community is in agreement that a punitive approach to drug use during pregnancy will exacerbate, not solve, the problem. The legislature acted consistently with the public health model of treating drug use during pregnancy when it enacted Section 415.503(9)(a)(2) prohibiting the use of evidence of drug dependency in newborns as a basis for criminal investigation of the mother.[5] Section 415.503(9)(a)(2) specifically addresses the issue of pregnancy and drug use; Section 893.13(1)(c)(1) does not. Indeed, nothing in the entire Florida Comprehensive Drug Abuse Prevention and Control Act of 1970, of which Section 893.13(1)(c)(1) is a part, touches on pregnancy or birth. It simply cannot be inferred that the same

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[5] See Part II.D. infra. See also, Fla. Stat. 415.505(1)(b)(4) (providing early intervention offering "protective treatment, and ameliorative services" rather than punishment).

legislature that expressly forbade a criminal investigation of a mother in the circumstances of this case sought to permit the conviction of that same mother for a crime. The only specific policy the legislature has adopted addressing drug use during pregnancy is not a punitive policy. It is not up to the prosecution to change that policy.

One reason why a punitive approach is ineffective is because the initial and continuing use of drugs is not simply a matter of "choice" as the lower courts seem to believe. Rather, a complicated mix of personal and social factors powerfully influence drug use. These have nothing to do with making rational choices--no one makes a reasoned decision to be a drug addict. Up to three-quarters of drug dependent pregnant women have suffered incest, sexual abuse, rape, and/or battering, and may resort to using drugs to alleviate the threat and pain of violence. See Amaro, Fried, Cabral & Zuckerman, Violence During Pregnancy and Substance Abuse, 80 Am. J. Pub. Health 575, 578 (1990); Randall, Domestic Violence Begets Other Problems of Which Physicians Must Be Aware to Be Effective, 264 Medical News & Perspective 940, 943 (1990); N. Finkelstein, S. Duncan, L. Derman & J. Smeltz, Getting Sober, Getting Well: A Treatment Guide for Caregivers Who Work With Women 244 (1990). Poverty and homelessness also put women at risk for drug abuse. The "poverty, rootlessness, and personal inadequacy, which are at the bottom of [drug dependency], are scarcely deterrable by the threat of criminal conviction." S. Kadish, Blame and Punishment

29 (1987).

The deterrence model advocated by the prosecution assumes that drug addicts are able to control their behavior as a matter of simple willpower alone. However, drug addiction is characterized by, and indeed defined as, the inability to control one's drug using behavior. The prosecution's assumptions about the value of criminal penalties to deter drug use during pregnancy are contrary to virtually all the accumulated knowledge on the causes and treatment of drug addiction. Prosecution can only deter pregnant women from getting the health care they need to overcome addiction and to improve their health and that of their children.

B. The Health Care Services That Can Reduce Drug Use During Pregnancy Remain Inadequate

If the State wants to reduce drug use by pregnant women and further the health of newborn children, it really has only one choice: to use its resources to develop easily accessible prenatal care and drug treatment programs for pregnant women, not prosecute them for delivering drugs to minors. Prosecuting women who used drugs during pregnancy does not create new health care or treatment services.

Pregnancy is often the catalyst that spurs women addicts to seek treatment. Beyond the Sterotypes: Women, Addiction, and Perinatal Substance Abuse, Hearing Before U.S. House Select Comm. on Children, Youth and Families. Testimony of I.E. Smith,

Director, Georgia Addiction, Pregnancy and Parenting Program (April 19, 1990); Adams, Gfroerer & Rouse, Epidemiology of Substance Abuse Including Alcohol and Cigarette Smoke, 52 Annals of New York Academy of Science 14 (1989). It is possible--in the absence of the threat of criminal prosecution--to attract pregnant women to prenatal care and treatment at a time when they and their offspring will benefit most.[6] American Medical Association, Drug Abuse in the United States: The Next Generation, Report of the Board of Trustees (I-89) at 12 (1989).

The tragic reality is that when a pregnant woman seeks help, it is rarely available. Despite recent efforts, Florida, like the rest of the nation, does not yet have enough prenatal programs equipped to deal with the special requirements of pregnant women who are dependent on drugs. Neither does it have enough drug treatment programs equipped to deal with the special requirements of drug addicts who are also pregnant.[7] Although

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[6] Maternal drug use may have its most damaging effects on the fetus during early pregnancy when the fetus is most susceptible to teratogenesis. Abrams, Cytogenic Risks to Offspring of Pregnant Addicts, 2 Addiction Dis. 63 (1982).

[7] Florida has begun to develop a comprehensive service program of prevention and treatment for pregnant women who use drugs. Florida Dept. of Health & Rehabilitative Services, Alcohol, Drug Abuse and Mental Health Program Office. Alcohol and Drug Abuse Program (Jan. 1991) (attached as Appendix A to this memorandum)(hereinafter "Fla. HRS, Alcohol and Drug Abuse Program"). Ideally, this should include prenatal, obstetrical, and other medical services, mental health, social and drug treatment services. D. Hughes, K. Johnson, S. Rosenbaum & J. Liu, The Health of American's Children: Maternal and Child Health Data Book (1989) (hereafter Health Data Book 1989). Today, prevention and treatment of sexually transmitted diseases, including HIV infection, should be available.

there were nearly 4,500 reported pregnant drug users in Florida in fiscal year 1989-1990, only a handful of the state's more than 200 drug treatment programs accept pregnant women.[8] Fla. HRS, Alcohol and Drugs Abuse Program at 9. According to recent estimates, there are only 135 residential beds and 400 day treatment slots available for pregnant addicts in all of Florida. "Services for at least an additional 3,000 women are needed." Id. Women are often unable to enter treatment programs for lack of child care for their children.[9] The lack of treatment facilities means that pregnant women have few places to turn for help.[10] The number of facilities actually available is further

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[8] See also, Florida Department of Health and Rehabilitative Services, Substance Abused Newborns Fact Sheet (Oct. 4, 1989); Miami Herald, Sept. 20, 1989, at 3B.

[9] The lack of child care "effectively precludes the participation of women in drug treatment." N.Y. Times, July 18, 1989, Section 1, at 21 (Op/Ed by W. Chavkin, M.D.).

[10] Many obstacles to women's participation in drug treatment programs are the legacy of discrimination against women addicts: "[T]he particular treatment needs of addicted women, including pregnant addicts, have been largely ignored." R. Brotman, D. Hutson & F. Suffet, eds., Treatment of the Pregnant Addict: An Historical Overview, in Pregnant Addicts and Their Children: A Comprehensive Care Approach 21 (1984). Drug dependency has traditionally been characterized as a male condition and, until recently, treatment regimens and facilities have been designed to treat men, not women. National Academy of Science, Institute of Medicine, Treating Drug Problems, Vol. 1, A Study of the Evolution, Effectiveness, and Financing of Public and Private Drug Treatment Systems 198 (1990)(hereinafter "IOM Report"); Reed, Developing Women-Sensitive Drug Dependence Treatment Services: Why So Difficult?, 19 J. of Psychoactive Drugs 151 (1987). In addition, medical uncertainty over the optimal management of addiction during pregnancy has made treatment programs reluctant to accept pregnant women. Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 Am. J. Pub. Health 483 (1990)(hereinafter "Drug Addiction and Pregnancy"). Treatment centers are also fearful of liability for mismanaging the problem. GAO Report at 9, 36. See also, McNulty,

limited by the expense of treatment, which can be as high as $10,000 to $20,000 a month for residential treatment. Few drug treatment programs accept Medicaid. For women like Ms. Johnson, who are not only addicted to cocaine but also poor, help is almost non-existent.[11]

Access to the few treatment programs that accept pregnant women is hampered by long waiting lists. GAO Report at 8. The length of waiting lists for access to treatment programs frequently extends beyond a pregnant woman's expected delivery date, rendering the benefits of treatment meaningless to fetal health. Thus, at precisely the time that the prosecution insists

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Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses, 16 N.Y.U. Rev. Law & Social Change 277, 301, n.167 (hereinafter "Pregnancy Police").

[11] The unavailability of drug treatment programs for women during pregnancy in Florida is replicated throughout the nation. See GAO Report 8-9, 36-38. A recent survey of 78 drug treatment programs in New York City (95 percent of total) revealed that 54 percent refused to treat pregnant women; 67 percent refused to treat pregnant women on medicaid; and 87% denied treatment to pregnant women on medicaid who were addicted to crack. Chavkin, Drug Addiction and Pregnancy. See also, McNulty, Pregnancy Police at 302. As Representative George Miller, Chairperson of the House Select Committee on Children, Youth and Families, stated: "Women who seek help during pregnancy cannot get it. Two thirds of the hospitals reported that they had no place to refer substance abusing pregnant women for treatment." Opening Statement of Congressman George Miller, Chairman, Hearing Before House Select Committee on Children, Youth and Families, 101st Cong., 1st Sess. 2 (July 31, 1989). "A 1990 survey conducted by the National Association of State Alcohol and Drug Abuse Directors, Inc. (NASADAD), estimates that 280,000 pregnant women nationwide were in need of drug treatment, yet less than 11 percent of them received care." GAO Report at 9.

that pregnant women get treatment to stop taking drugs, they are least likely to be able to do so.

Even where comprehensive drug treatment is not available, adequate prenatal care (which would include balanced nutrition and other lifestyle changes) can help to counteract the potential negative effects of drug use.[12] GAO Report at 38. It is well known that adequate medical care during pregnancy is "essential for healthy pregnancies and healthy babies..." D. Hughes, K. Johnson, J. Simons & S. Rosenbaum, Maternal and Child Health Data Book 36 (1986). "To promote the birth of healthy babies, states must ensure that all pregnant women access pre- and postnatal care.... If detected and treated early in the pregnancy, many medical and social risk factors can be controlled so that no harm comes to either the mother or the infant." Southern Legislative Summit on Healthy Infants and Families, Policy Statement at 3, 7-8. As a 1985 Orlando report concluded: "In the end, it is safer for the baby to be born to a drug abusing, anemic or diabetic mother who visits the doctor throughout her pregnancy than to be born to a normal woman who does not." Gentry, Taxpayers Pay for Lack of Prenatal Treatment, St. Petersburg Times, Nov. 3, 1986, at 7B.

At least some of the problems attributable to drug use during recent years might have been alleviated with adequate

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[12] Of course, in Johnson's case, there were no such negative effects.

prenatal care for poor women.[13] Florida ranks extremely low in the availability of even basic prenatal care nationwide. As of 1987, in only four states did fewer women receive early prenatal care and more women receive late or no prenatal care. Children's Defense Fund, Children 1990 84 (1990) (hereinafter Children 1990); see also, Health Data Book 1989 at 55.

Women of color are at an even greater disadvantage. While approximately one in every twenty pregnant women in the general population receives little or no prenatal care, one in every eleven women of color lack such care. In Florida, only half of all black women who become pregnant receive early prenatal care, 14.1 percent receive late or no care; of those who do receive care, more than 50 percent receive inadequate care. Health Data Book 1989 56, 57 (1989).

The scarcity of prenatal and drug treatment services summarized above means that pregnant women who use drugs face enormous barriers to needed care. The barriers are even higher for poor women of color. The threat of prosecution for delivering drugs to a minor at birth makes entering the health

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[13] Each year in the United States, 300,000 women give birth having had little or no prenatal care, and two-thirds of the infants who die each year are born to these mothers. N.Y. Times, June 26, 1987, at A1. Most infant morbidity and mortality in the United States occurs because babies are born premature or too small for their gestational age. Binsacca, Ellis, Martin & Petitti, Factors Associated With Low Birthweight In An Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). This happens, in large part, because the mothers get no prenatal care of any kind. Id. Prenatal care greatly reduces the incidence of low birth weight babies and accompanying infant morbidity and mortality. Leveno et al., Prenatal Care and Low Birthweight.

care system almost impossible. It makes no sense to insist that the purpose of prosecution is to encourage drug dependent women to seek help when that help is not available. If there is no voluntary treatment realistically available, then there can be no deterrence. Ms. Johnson is being punished for not obtaining treatment that was not in fact available to her.[14]

In Florida, the effort to expand prenatal care services and to develop drug treatment programs for pregnant women is just beginning. Such programs offer the only real hope for improving the health of pregnant women and their children and controlling the problems of drug dependency. But in order for them to be at all effective, women must feel free to enter them as patients, not potential prisoners.

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[14] Although one study found that about the same proportion of white women used drugs as did minority women, poor women of color like Ms. Johnson are disproportionately singled out for coercive measures and prosecution. Chasnoff, Landress & Barret, The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida, 322 New Eng. J. Med. 1202 (1990). See also, Roberts, Punishing Drug Addicts at 1481; and Kolder, Gallagher & Parsons, Court-Ordered Obstetrical Interventions, 316 New Eng. J. Med. 1192 (1987)(of 21 cases in which civil court orders were sought to compel a pregnant woman to submit to a cesarean section delivery or other involuntary treatment for the benefit of the fetus, 17 (81 percent) were directed against African-American, Asian or Hispanic women, and all cases involved low income women).

III

THE COURT OF APPEAL ERRED IN AFFIRMING JENNIFER JOHNSON'S CONVICTION BECAUSE:

A. Under Florida Law, It Is Legally Impossible For The Prosecution to Prove Beyond A Reasonable Doubt That There Was In Existence, Simultaneously, Both An Independent Person And The Delivery Of Controlled Substances Through An Umbilical Cord To That Person.

Both the Court of Appeal and the trial judge accepted the prosecution's argument that the children to whom the alleged drug delivery was made were "persons" for the purposes of Section 893.13(1)(c)(1). Neither court provides--nor could provide--any reasons for their decision that would support this finding, because their decision is insupportable by either law or logic.

The prosecution admits that the term "person" does not apply to a fetus in utero. Rather, the prosecution argues that a "person" existed immediately after birth but while the functioning umbilical cord still connected the newborn to the mother. Indeed, the prosecution's entire case regarding "delivery" of drugs rests on this point.

The legal standard in Florida for "live birth" was established in Duncan v. Flynn, 358 So.2d 176 (Fla. 1978), in which this Court adopted the Second District Court of Appeal's ruling in this matter, Duncan v. Flynn, 342 So.2d 123, 126 (Fla. Ct. App. 2d Dist. 1977):

> We adopt the view that to constitute "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. This view, we think provides a reasonably definitive test, is logical, and is supported by the authorities. Generally, the requirements of separate and independent existence will be met by a showing of expulsion (or in a Caesarean section by complete removal) of the child's body from its mother with evidence that the 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 had been attained by the infant prior to that time. (emphasis added)

It is thus unequivocal that a child must have a "separate and independent existence" from its mother, with a showing that the umbilical cord has been cut, and the infant has "an independent circulation of blood." (emphasis added) Of course, it is essential to the prosecution's case that the infants in this case not have an "independent circulation of blood." If such an "independent circulation" existed at the time of delivery, then it would be physically and legally impossible for the drugs to be delivered from the mother's circulation to the infant's circulation.

Thus, if the prosecution establishes that drugs were "delivered" from the mother's circulation to the infants' circulation, then the infants cannot be "persons" because they did not have "independent circulation" at the time of delivery, and therefore, delivery was not made to a "person under the age of 18 years" as forbidden by section 893.13(1)(c)(1). On the other hand, if the prosecution establishes that these infants

were "persons" and therefore had "independent circulation," then, by definition, "delivery" from the mother's circulation to the infants' circulation becomes impossible.

The prosecution, realizing that it cannot meet the clear and straightforward test this Court has adopted, tries to take solace in the last sentence of the quoted passage in Duncan v. Flynn. CA Answer Brief at 31. The prosecution argues that the sentence "demonstrates that it is legally possible to attain a separate and independent existence even if the umbilical cord has not been severed." The short answer to that argument is that the last sentence explicitly refers only to cases in which "death occurs prior to the cord being severed..." In the instant case, not only was there no death, but two healthy children were born. Second, the prosecution presented no evidence from which the fact-finder could fairly or reasonably "determine whether such separate and independent existence had been attained by the infant..." Rather, the prosecution obtained conclusory opinions from "experts" who opined that a fetus becomes a person at the time of live birth which they self-defined as the complete extraction or expulsion of the product of human conception, if after such expulsion there is "any evidence of life," whether or not the umbilical cord has been detached. CA Answer Brief at 33. All that this "expert opinion" establishes is the witness's profound ignorance of the legal standards adopted by this Court. An "expert's" personal opinion does not supersede and cannot replace the legal standard set by this Court.

Contrary to the "experts" opinion, Duncan makes it clear that expulsion from the mother's body, even with "evidence of life," is not sufficient to establish personhood. Rather, what is required is "expulsion (or in a Caesarean section by complete removal) of the child's body from its mother with evidence that the cord has been cut and the infant has an independent circulation of blood." 342 So.2d at 126. This constitutes a two part test: expulsion plus proof of independent circulation, as evidenced by the cutting of the umbilical cord. The prosecution, the "experts," and the courts below have ignored this Court's requirements. Furthermore, not only has the prosecution not made a showing of independent circulation, it has made every effort to show the opposite, i.e., that the children's circulations were dependent on the mother's, in order to establish the delivery of a drug.

The rulings of the trial and appeal courts should be reversed because the prosecution has not proved (and cannot prove) beyond a reasonable doubt that the children in question were "persons" under Florida law at the time the "delivery" was alleged.

B. There Was No "Delivery" of a "Controlled Substance" As Those Terms Are Used in Section 893.13(1)(c)(1).

The Court of Appeal, in upholding the trial court's conviction, asserts that the following facts were proven by the

prosecution: (1) "appellant consumed cocaine knowing that the cocaine would pass to her soon-to-be-born fetus," (2) "it was medically determined that each of them had received some of the cocaine into their bodies," (3) "a qualified witness testified that some of the cocaine left the mother and was received by the child after birth but before the umbilical cord was cut," (4) "appellant voluntarily took cocaine into her body knowing it would pass to her fetus and knowing (or should have known) that birth was imminent, and (5) "she is deemed to know that an infant at birth is a person." Johnson v. State, slip op. at 1-2.

All of these conclusions are either erroneous or legally irrelevant. Whether or not Ms. Johnson knew that cocaine would pass to her fetus is legally irrelevant. She was not convicted of knowingly passing cocaine to a fetus - even the prosecution admits there is no such crime.

There is no evidence that cocaine was delivered to or received by either the fetuses or the newborns. Rather, the evidence was that traces of benzoylecgonine were found in the urine of Ms. Johnson and her newborn children. Benzoylecgonine is not cocaine but is rather the result of cocaine being metabolized in the liver and probably elsewhere in the body. The essential question is: is benzoylecgonine a controlled substance as that term is used in Chapter 893? Remarkably, this question is ignored by the Court of Appeals.

The fact that benzoylecgonine is referred to by the prosecution's witnesses as a metabolite of cocaine shows that it

is not itself cocaine. Metabolism refers to a change in a substance from one thing to another - a metamorphosis.[15] Section 893.03(2)(a)(4) does include "cocaine" or a "derivative" of cocaine in its definition of controlled substances. The prosecution bases its case on the argument that benzoylecgonine

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[15] An Indiana Court of Appeals affirmed the acquittal of a defendant who was charged with possession of cocaine. The only evidence the state produced was a urine sample that contained metabolites of cocaine. The court held that this was not sufficient evidence to support a charge of possession of cocaine. State v. Vorm, Indiana Ct. of App, 4th Dist. No. 46A04-9009-CR-436 (April 25, 1991). In a concurring opinion, one judge notes,

> The substance found in Vorm's urine was described as "cocaine metabolites". A metabolite is "a product of one metabolic process that is essential to another such process in the same organism." Webster's Third New International Dictionary (1976 ed.). In United States v. Sixty 28-Capsule Bottles (1962 D. N.J.) 211 F. Supp. 207, 209, the court acknowledged that "metabolic" was descriptive of the "alterations in the biological or biochemical activity of various cells under various conditions." Furthermore, the basic term, metabolism is derived from a German word meaning "to turn about, change or alter". Sloane-Dorland Annotated Medical-Legal Dictionary (1987) p. 445. It is clear, therefore, that a substance which has undergone the metabolic process does not retain its original chemical nature or form. The substance within Vorm's system was not, therefore, either pure or adulterated cocaine as required for conviction under I.C. 35-48-4-6 (a)...
>
> In the case before us, the substance present in the urine may have been cocaine at one time but its chemical makeup had been altered by the metabolic process. It was no longer cocaine at the crucial time of the alleged possession.
>
> Id., slip op. at 2-3 (Sullivan, J., concurring).

is such a derivative. However, the fact that a chemical comes from a controlled substance does not mean that it is a "derivative" of that substance for purposes of section 893.03(2)(a)(4) ("Schedule II"). In using this language, the legislature surely was concerned that there may be psychoactive substances that are not technically cocaine, but are very similar and have the same potential for abuse. Thus, Schedule II is directed at controlling substances which themselves "have a high potential for abuse" and which themselves "may lead to severe psychological or physical dependence." Fla. Stat. Section 893.03(2).

If the prosecution were able to prove that a derivative (including a metabolite of cocaine such as benzoylecgonine), had such a high potential for abuse and dependence, then it is at least arguable that it would be a "controlled substance." However, the prosecution has made no such showing, let alone a showing beyond a reasonable doubt. The prosecution's own experts described benzoylecgonine as an "inactive metabolite" and testified that there is "no action involved at all" if the substance were to be introduced into either an adult or newborn (RA at 158, 162). Thus, even if one were to conclude that benzoylecgonine results from the breakdown of cocaine, it is not a derivative that qualifies as a "controlled substance." It is not one of those "dangerous drugs" which the legislature hoped to regulate. It is not susceptible of abuse, distribution, manufacture, trafficking, or indeed, delivery -- the very conduct

the legislature sought to proscribe.

The Court of Appeal was also wrong when it concluded that there was sufficient evidence that "some of the cocaine left the mother and was received by the child after birth but before the umbilical cord was cut." The prosecution has placed much emphasis on trying to prove that the umbilical cord was "working" immediately after the births but before the umbilical cords were cut. There is also evidence that benzoylecgonine, not cocaine, was transferred to the fetuses through the umbilical cord prior to birth, and that Ms. Johnson knew this might occur. But all of this is beside the point. The issue in this case is what happened in the 60 to 90 seconds after birth before the umbilical cord was cut, and what Ms. Johnson knew about it.

The fact, if such could be proven, that blood flowed in the umbilical cord after birth of the children is not evidence of delivery of anything from mother to children. This is because the blood in the umbilical cord is not the mother's, but the child's. It is true that the blood in the umbilical cord is "maternally altered," as the prosecution likes to put it, and that the nutrients and oxygen found in the umbilical cord are there as a result of the exchange that occurs in the placenta. But "maternally altered blood" is not maternal blood - it is solely fetal blood.[16] And, as dissenting Judge Sharp correctly

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[16] "The maternal and fetal circulations are brought into close contact within the placenta, but there is no actual intermixing of fetal and maternal blood." L. Crowley, An Introduction to Clinical Embryology 101 (1974). This is why mother and fetus can have different blood types.

asserts, there is no evidence that in the 60 to 90 seconds in question anything was transferred from the maternal blood supply to the placenta, and thereafter from the placenta to the umbilical cord. Johnson v. State, slip op. at 4 (Sharp, J. dissenting). In Judge Sharp's words:

> I submit there was no medical testimony adequate to support the trial court's finding that a "delivery" occurred here during the birthing process, even if the criminal statute is applicable. The expert witnesses all testified about blood flow from the umbilical cord to child. But that blood flow is the child's, and the placenta through which it flows, is not part of the mother's body. No witness testified in this case that any cocaine derivatives passed from the mother's womb to the placenta during the sixty-to-ninety seconds after the child was expelled from the birth canal. That is when any "delivery" would have to have taken place under this statute, from one "person" to another "person." Id.

Indeed, in any individual case it is probably impossible to produce any evidence at all on this issue. As the prosecution stated in its brief below, "within minutes after birth, the placenta separates and the cord no longer functions." CA Answer Brief at 33. What is not known in this particular case, or as a general matter, is exactly when the process of placental separation begins, and at what point in the birth process the placenta ceases to receive substances from the mother's circulation. This is particularly problematic in pregnant women who have used cocaine, since premature separation of the placenta from the uterine wall is one of the possible negative side

effects of cocaine use.

Moreover, even if the prosecution has demonstrated that the umbilical cord was functioning in the 60 to 90 seconds after Ms. Johnson delivered her children, it did not prove beyond a reasonable doubt that any substance was transferred from her body to the body of her children.

Finally, while it may be the case that Ms. Johnson knew in a general way that cocaine use during pregnancy might be deleterious to the health of her fetuses, there is no evidence that she knew that any substances would pass to her newborns after they were born, or that this might harm these newborns.

C. The Court of Appeal's Construction of Section 893.13(1)(c)(1) Leads to Absurd Results

The prosecution's construction of section 893.13(1)(c)(1) distorts its original, appropriate goal and would lead to other absurd results. Obviously, a law with a possible 30 year penalty for its violation, that prohibits adults from delivering drugs to minors, was designed to deter and punish the particularly heinous act of pushing drugs to children. Drug pushers who take advantage of children's special vulnerabilities, introduce children to drugs, and make a profit from these activities, well deserve special attention and the severest punishment.

However, the prosecution's goal of converting pregnant women into drug pushers cannot stop at just the use of illegal drugs. Every pregnant woman who takes legal drugs which are regulated under Chapter 893 pursuant to a legitimate prescription from her physician, and who gives birth at a time when metabolites of these drugs are present in her and her baby's bloodstream, would also be subject to prosecution. It is unlawful for a person who legitimately possesses a prescription drug to "transfer" that drug to another person, and a warning to this effect must be attached to prescription drug containers. Fla. Stat. 893.04(1)(e)7; 893.05(2)(e). If Ms. Johnson's behavior legally constitutes the delivery of cocaine, then similar use of a prescription drug would also constitute an unlawful "transfer." Clearly, the legislature did not intend to outlaw the use of prescription drugs by pregnant women. But that is the result the prosecution's interpretation must lead to.

Section 893.138 permits the abatement of any drug-related nuisance, which is defined as "[a]ny place or premise which has been used on more than two occasions as the site of the unlawful sale or <u>delivery</u> of controlled substances..." (emphasis added) Under the prosecution's understanding of the term "delivery" as used in Chapter 893, this section would make hospitals that have more than two births by drug-dependent women public nuisances, since they would be the "place or premise" at which such deliveries occur.

If, as the prosecution has argued, an umbilical cord "is no different from a hypodermic needle, straw or other device that functions to introduce a substance into the body," CA Answer Brief at 33, then a pregnant women becomes no more than a piece of drug paraphernalia. Section 893.147 defines drug paraphernalia to include materials of any kind that are used in "injecting, ingesting,...or otherwise introducing into the human body a controlled substance..." The statute specifically mentions hypodermic syringes, which the prosecution has argued below is no different from umbilical cords.[17]

Finally, if Chapter 893 permits prosecution based on the transfer of bodily fluids, then a drug user who produces a urine sample at the request of a physician is guilty of "delivery" under Section 893.13(1)(a)(1), since metabolites of the drug will be present in the urine. Testing such urine samples is, of course, the most common method of detecting prior drug use.

We do not suggest that any of these interpretations of the statute make any sense at all. But they make as much sense as the prosecution's interpretation of the term "delivery" as used in section 893.13(1)(c)(1), and are logically consistent with the prosecution's interpretation and argument.

Judge Sharp is correct in concluding that the term delivery in section 893.13(1)(c)(1) does not include the transfer of

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[17] But, of course, under the prosecution's theory of the case, the umbilical cord is only one part of a complicated drug delivery system, that consists of the placenta, circulatory system, and liver that produces the drug in question.

cocaine metabolites in the 60 to 90 second interval after birth of a newborn, but before its umbilical cord is severed. Johnson v. State, slip op. at 8 (Sharp, J., dissenting). Like Judge Sharp, a Michigan Court of Appeals found that a virtually identical law prohibiting delivering drugs to minors could not reasonably be construed to apply to women who used cocaine during pregnancy. In Michigan v. Hardy, No. 128458, slip op. at 2-3 (Mich. Ct. App. April 1, 1991), the Court said:

> "To prosecute defendant for delivery of cocaine is so tenuous that we cannot reasonably infer that the Legislature intended this application, absent unmistakable evidence of legislative intent. This Court is not at liberty to create a crime. We are not persuaded that a pregnant woman's use of cocaine which might result in the post-partum transfer of 'metabolites' through the umbilical cord to her infant is the type of conduct that the Legislature intended to be prosecuted under the delivery of cocaine statute..."

The prosecution's obviously strained construction of section 893.13(1)(c)(1) flies in the face of this Court's admonition that literal interpretations are eschewed if, as here, they lead "to an unreasonable or ridiculous result or to a purpose not dictated by the lawmakers." City of Boca Raton v. Gitman, 440 So.2d 1277, 1281 (Fla. 1983). This Court has insisted that "[c]ourts are obligated to avoid construing a particular statute so as to achieve an absurd or unreasonable result." Carawan v. State, 515 So.2d 161, 167 (Fla. 1987). See also Wakulla County v. Davis, 395 So.2d 540, 543 (Fla. 1981); State v. Webb, 398 So.2d 820, 824

(Fla. 1981). To avoid these "absurd and unreasonable results," we urge this Court to reject the prosecution's absurd and unreasonable interpretation of the term "delivery" as used in section 893.13(1)(c).

D. The Legislature Did Not Intend That Section 893.13(1)(c)(1) Apply to Women Who Give Birth Shortly After Using Drugs

The prosecution's construction of Section 893.13(1)(c)(1) in this case requires accepting the implausible proposition that the legislature was uniquely concerned with outlawing the rare and particular circumstance in which a live birth occurs within hours after a pregnant woman has used cocaine. The prosecution itself argues that 893.13(1)(c)(1) reaches only those cases in which a woman (1) has taken cocaine while pregnant, (2) gives birth to a live baby, (3) within hours after using cocaine and, (4) a derivative of cocaine passes from the mother to the baby through the placenta and umbilical cord after the baby is physically outside the woman's body.

This interpretation excludes each of the following cases: (1) a baby is stillborn; (2) a live birth occurs several days or more after the mother used cocaine; (3) no cocaine derivative was actually passing from the mother into the placenta after a live baby was removed from the mother; (4) the umbilical cord was cut before a live baby was removed from the mother. Judge Cobb's concurring opinion would also exclude any premature birth or an

instance where the mother could not foresee the passage of any cocaine derivative to her baby. Johnson v. State, slip op. at 2 (Cobbs, J., concurring specially).

The effect of the mother's use of cocaine on the baby in each of these cases is the same or similar to that which the prosecution claims must be prosecuted under Section 893.13(1)(c)(1). Yet both the prosecution and the courts below also make clear that none of these cases are covered by 893.13(1)(c)(1). Indeed, their construction of 893.13(1)(c)(1) would require the prosecution of a pregnant woman who used cocaine only once within one or two days before delivering a live baby, and would preclude prosecution of a pregnant woman who used cocaine daily during pregnancy but stopped two or three days before giving birth.

The prosecution would have this Court believe that the legislature chose to prohibit only one rare instance in which a newborn might possibly have been exposed to risk (and an indeterminate risk at that[18]), while deliberately excluding

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[18] There is considerable scientific uncertainty about the specific effects of maternal cocaine use on a fetus or newborn. A major reason for this uncertainty is that women who use cocaine typically use other substances like cigarettes, alcohol and marijuana, are poorly nourished, lack prenatal care and are otherwise in poor health. Since all these factors create risks to a developing fetus, it is difficult to isolate an independent effect of cocaine. Frank, Bauchner, Parker, Huber, Kyel-Aboagye, Cabral, & Zuckerman, Neonatal Body Proportionality and Body Composition After in Utero Exposure to Cocaine and Marijuana, 117 J. Pediatrics 622 (1990). Many of the presumed effects of cocaine (such as low birthweight and premature delivery) mimic the effects of lack of prenatal care and poor maternal health. Moreover, the long-term effects of prenatal cocaine exposure are still under study. Kronstadt, Complex Developmental Issues of Prenatal Drug

virtually all other circumstances that may give rise to the same or greater risk. This Court should not accept such an implausible theory.

It is apparent that the activity the prosecutor would like to deter by this prosecution is the use of drugs by pregnant women.[19] Indeed, the only act committed by Ms. Johnson that could conceivably be construed as the actus reus of her "crime" was using cocaine late in her pregnancy. However, the legislature has not made it a crime for anyone to use a controlled substance.[20] The prosecution's interpretation creates a new crime that was not enacted by the legislature. Worse yet, this new crime could only be committed by women who give birth. No matter how laudable its goals, the prosecution may not decree a new criminal law, use of drugs by a pregnant woman.

Not only has the legislature not chosen to take such action, it has done the contrary by enacting section 415.503(9)(a)(2),

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Exposure, 1 The Future of Children 36 (1991). See also, Bresnahan, Brooks & Zuckerman, Prenatal Cocaine Use: Impact on Infants and Mothers, 17 Pediatric Nursing 123 (1991).

[19] See Part II. A. infra.

[20] Section 893.13(1)(a) makes it "unlawful for any person to sell, purchase, manufacture, or deliver, or possess with intent to sell, purchase, manufacture, or deliver, a controlled substance." Subsection (d) prohibits bringing any controlled substance into the state unless the possession is authorized by the Act or the person is licensed to do so. Subsection (f) forbids "actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription..." The Act contains no independent offense of the use of a controlled substance.

which states: "No parent shall be subject to a criminal investigation solely on the basis of such [newborn] infant's drug dependency." Ch. 87-90 s. 1, Laws of Fla. See 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). Since the legislature has explicitly forbidden criminal investigations where newborn infants are so seriously affected by their mothers drug use that such infants are "drug dependent," it follows that the legislature intended no investigation (and therefore even the possibility of prosecution) in the instant case in which neither child was drug dependent, but on the contrary, was healthy and normal in every respect.[21]

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[21] Judge Sharp's dissenting opinion in the Court of Appeal makes clear that the legislature added the prohibition against criminal investigation in order to ensure that families were kept together and that mothers were not criminally prosecuted. Johnson v. State, slip op. at 6-8 (Sharp, dissenting). Justice Sharp quotes the bill's sponsor:

> This clearly states that the individual would not be subject to any investigation solely upon the basis of the infant's drug dependency.
>
> Again, there is a well-founded anxiety that we are looking to arrest Moms. We're not looking to do that. (emphasis added)

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the decision of the Court of Appeal and dismiss the drug delivery charge against Ms. Johnson.

Respectfully submitted,

Wendy K. Mariner
80 East Concord Street
Boston, MA 02118-2394
(617) 638-4626

Leonard H. Glantz
80 East Concord Street
Boston, MA 02118-2394
(617) 638-4640

George J. Annas
80 East Concord Street
Boston, MA 02118-2394
(617) 638-4626

Jary C. Nixon*
25 Davis Boulevard
Tampa, Florida 33606
(813) 251-0515
Bar No. 58873

*Counsel of Record