IN THE SUPREME COURT OF THE STATE OF FLORIDA

JENNIFER C. JOHNSON,

Petitioner,

v. Case No. 77,831

STATE OF FLORIDA,

Respondent.

_____/

ON CERTIFIED QUESTION FROM THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent generally accepts petitioner's statement of the case and facts, with specific areas of dispute delineated below.

Jennifer Johnson was charged by information dated April 7, 1989, with two counts of delivery of cocaine to J.J. and C.J., "a person then under the age of eighteen years, contrary to Section 893.13(1)(c)(1)", on January 22, 1989, and October 3, 1987, respectively. Count two alleged that on January 22-23, 1989, the defendant knowingly or by culpable negligence inflicted physical or mental harm to J.J., an infant, "...by ingesting cocaine contemporaneous to the birth of J.J. and thereby causing J.J. to ingest cocaine, contrary to Section 827.04, Florida Statutes, (1987)." (R 446) [1]

On June 23, 1989, counsel for petitioner filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). This motion alleged: 1) that prosecution was precluded by section 415.503(9)(a)(2), Florida Statutes (1987)[2] 2) that a fetus was not a person; 3) that the term delivery does not encompass the exchange of bodily fluids; 4) that no harm was established as to Count II; and 5) that the prosecution was an unconstitutional infringement on the right to procreate. (R 470-472) A memorandum in support of the motion to dismiss was filed by the court during the motion to dismiss hearing, on June 26,

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[1] (R) refers to the record on appeal; (IB) refers to the initial brief of petitioner.

[2] This section was renumbered after amendment in 1988; the present statute number will be referred to in this brief, rather than the former subsection number, (8)(a)(2).

1989. (R 400, 479-490) This memorandum contains additional constitutional attacks, including due process (vagueness, notice), ex post facto (unforeseeable expansion of statute), equal protection and infringement on privacy. The state filed a traverse, disputing several facts. (R 473-474)

A hearing on the motion to dismiss was held on June 26, 1989, before the Honorable O.H. Eaton. (R 397-443) The state contended that the prosecutions for delivery were based upon the period of time after expulsion of the baby from the birth canal and before the umbilical cord was severed. (R 422-423, 433) Defense counsel conceded that cocaine stays in the body for seventy-two hours after ingestion. (R 421) The prosecutor argued that the definition of delivery included attempts. The activity which subjected the defendant to prosecution was not procreation, but rather the illegal activity of delivery of cocaine to a baby which is not constitutionally protected conduct. (R 423) In response to the defense thrust of section 415.503(9)(a)(2), the state parried with section 415.511, which states in pertinent part: "...nothing contained in this section shall be deemed to grant immunity, civil or criminal, to any person suspected of having abused or neglected a child, or committed any illegal act upon or against a child." The court denied the motion to dismiss. (R 439, 476)

The defense and the state entered into a stipulation which is dispositive of at least one of the issues raised on appeal. (R 5-6, 510) Included in this stipulation were the following undisputed facts: That C.J. and J.J. "...tested positive for the

presence of cocaine in their systems. Their urine was collected for testing after their respective births but the same day as their respective births. Jennifer Johnson also tested positive for cocaine after the birth of (J.J.)....The results of all testing of Jennifer, (J.) and (C.) Johnson indicate that **all had cocaine in their systems** (urine) up to 72 hours prior to the collection of the urine samples used for tests."(emphasis added) (R 510) The defense further stipulated that the defendant was over age 18, and that she was the natural mother of J.J. and C.J., and that the acts alleged occurred within Seminole County.

The defendant waived trial by jury. The trial was conducted before Judge Eaton on July 12 and 13, 1989. (R 1) The stipulation, toxicology reports and medical records were introduced without objection. (R 5-6)

The state specifically disputes the allegation that it presented "...no direct evidence to support its case." (IB 5) Petitioner claims that there was no direct evidence that the umbilical cords were functioning in the sixty to ninety seconds after the babies were born and before the cords were cut. Dr. Tompkins delivered Baby J., and testified that after the child was expelled from the birth canal, while the cord was still attached from the placenta to the baby, there was circulation through the umbilical cord between the placenta and the baby. (R 16-20) He explained that the umbilical cord delivered "maternally altered blood", containing nutrients and chemicals, until it was severed. (R 20) "It is well known that cocaine passes through the placenta to the baby." (R 21-22) The state

asked directly, "During your delivery of (J.), was blood flowing through the umbilical cord?" Dr. Tompkins answered, "Yes, it was." (R 23) On redirect, the prosecutor again established that the cord was functioning when he delivered Baby J. (R 42) During the time after expulsion from the birth canal and before the cord was clamped and cut, he testified that the baby would receive fluid from the umbilical cord. (R 23) In the doctor's opinion, J. was a person and not a fetus. (R 24)

As to Baby C., Dr. Mitchell Perlstein also testified that the umbilical cord was functioning, delivering maternally altered blood from the placenta to the baby, in the period of time after the expulsion from the birth canal and before the cord was clamped and cut. (R 58-60) Dr. Perlstein also opined that once a baby has been delivered from the birth canal it is no longer a fetus, but a person. (R 60) Dr. Matthew Seibel testified primarily concerning "harm" resulting from in utero cocaine use which is not relevant to this appeal.[3] However, he also testified that the standard medical definition recognized by the American Academy of Pediatrics of when a fetus becomes a person is "...at the time of a live birth, which is defined as the complete expulsion or extraction from the mother of the product of human conception irrespective of the duration of pregnancy which, after such expulsion or extraction, breathes or shows any other evidence of life, such as beating of the heart, pulsation

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[3] The trial court found that there was insufficient evidence of harm to withstand the motion for judgment of acquittal on count two, child abuse of J.J. The state cannot appeal this ruling.

of the umbilical cord or voluntary movement, whether or not the umbilical cord has been cut or the placenta is attached." (R 174)

The state's case established that on December 22, 1988, one month before the birth of Baby J., the defendant called an ambulance at two a.m. (R 141) The paramedic who responded to the 436 Bar in response to a possible crack cocaine overdose came in contact with the defendant. (R 142) The resulting report was introduced into evidence. (R 569) Johnson told the paramedic that she had smoked about two hundred dollars worth of crack cocaine earlier in the evening, and that she was now concerned about the effect on her unborn child. (R 144) Later, the defendant told Detective Prast that she called the ambulance not out of concern for her unborn child, but rather because she had no place to stay since her mother "was mad at me." (R 562) She thought they would send her "to a drug place or something" if she expressed false concern for her baby. (R 562-563)[4]

Baby J. was born at 1:01 p.m., January 23, 1989. (R 25-26) Johnson was first seen by Dr. Tompkins at about 10:30 that morning. (R 16) Johnson admitted that she had used cocaine earlier that morning. (R 15-16) Johnson made similar admissions after the birth of Baby C. (R 70)

Susan White, the supervisor of the chemistry lab at the hospital, testified that she reviewed the lab reports, and testified without objection as follows:

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[4] At page 5 of the initial brief, petitioner quotes an exchange between Prast and herself. Immediately after this warning from Johnson that cocaine causes "pain", she admitted that she had last smoked cocaine immediately before Prast came to visit her, and that she immediately resumed smoking cocaine against doctor's orders after being released from the hospital. (R 565-566)

> We did our basic toxicology screen, and also we did a thin layer chromatography screen.
>
> The screen that we do for **cocaine was positive**, so therefore we carried on to a second step, which is **another assay on a different machine that was also positive.** We did the thin layer, the thin layer did not show cocaine. However, the other two tests we did before that were positive for benzoylecgonine, which is a metabolite of cocaine. (emphasis added)(R 75)

Without objection, White testified that benzoylecgonine was a cocaine metabolite. (R 75-76) When asked directly whether it was a derivative of cocaine, she responded, "Cocaine is broken down by the liver into benzoylecgonine." (R 76) The other witness who testified on this issue was the county medical examiner, Dr. Shashi Gore. (R 152-153) He explained that after cocaine is ingested, it is absorbed into the blood system, and eventually is inactivated by enzymes in the liver. (R 153) Cocaine has a half-life of one hour, meaning that within one hour, half of the cocaine remains in the system, and gradually decreases over the next 48 to 72 hours. (R 153-155) He testified that, "cocaine is metabolized in different derivatives or metabolites. The primary metabolite is benzoylecgonine, and that is formed by means of hydrolysis of cocaine." (R 154) When the prosecutor asked directly, without objection, whether benzoylecgonine is a derivative of cocaine, he answered affirmatively. (R 155) On cross, the defense specifically referred to benzoylecgonine as a "derivative". (R 158)

Sandra Gomez, a child protection investigator with the Department of Health and Rehabilitative Services, testified that on January 24, 1989, she received a report of child abuse on an infant, J.J. (R 83) Gomez went to the hospital and interviewed the defendant. (R 84) Johnson told Gomez that during her pregnancy with Baby J., she smoked cocaine three to four times a day, every other day. (R 85) Johnson also admitted smoking marijuana. Based upon this information, Gomez immediately filed a petition for the detention of Baby J, and an order to that effect was signed by Judge Wood on February 6, 1989. (R 87-88) Gomez testified that after the order was issued, as required by statute, she gave her file and records to Detective Dan Prast.

Prast, an investigator with the Seminole County Sheriff's Office, was notified on February 9, 1989, by Sandra Gomez, that a cocaine baby was born at Florida Hospital Altamonte on the 23rd of January. (R 127-128) Prast interviewed Johnson's mother, the physicians who attended the births of J. and C., and reviewed the medical records. (R 129) He received information of the defendant's present whereabouts, and went to that location. (R 130) Johnson voluntarily gave a sworn statement which was introduced without objection. (R 546-568) In this statement, Johnson freely discussed her drug use during both pregnancies and since Baby J. was born, not to obtain treatment as suggested on appeal, but rather because she was confident that "you don't got no probable cause....If I thought that you were gonna arrest me, I would've never got in your car." (R 567-568)

The state rested, and the defense made a motion for judgment of acquittal. (R 188-190) The defense argued that there was insufficient evidence that the umbilical cord was working, delivering blood to the babies after their expulsion. He argued that the transfer of fluids via the umbilical cord was not delivery within the meaning of the statute, and that the legislature did not intend prosecution under section 893 pursuant to this theory of delivery. The argument that a fetus was not a person until the umbilical cord was cut was reiterated. Finally, he argued that Johnson was not on notice that her conduct was proscribed by this statute. (R 190-197) After the state argued and the defense offered rebuttal argument, the court reserved ruling on the motion for judgment of acquittal. (R 225)

After calling two witnesses, the defense rested. (R 312) The state offered no rebuttal. (R 312) The motion for judgment of acquittal was not renewed. After hearing closing arguments, the court recessed for three hours, then returned to render the verdict, which is as follows:

> I find the defendant, Jennifer Clarice Johnson, guilty of delivery of a controlled substance to (J.) Johnson and (C.) Johnson, both of whom were persons under the age of eighteen years, as charged in Counts One and Three of the Information.
>
> I find the Defendant not guilty of child abuse as charged in Count Two due to lack of evidence.
>
> The evidence in this case convinces me beyond a reasonable doubt that after (J.) and (C.) were delivered at birth, but before their umbilical cords were severed, a derivative of cocaine, which the Defendant had introduced into her body, passed into theirs.

I am convinced and find that a child who is born but whose umbilical cord has not been severed is a person within the intent and meaning of Florida Statutes.

I am convinced and find that the term delivery includes the passage of cocaine or derivative of it from the body of a mother into the body of her child through the umbilical cord after birth occurs.

The fact that the Defendant was addicted to cocaine at the time of these offenses is not a defense. The choice to use cocaine or not to use it is just that--a choice. Once the Defendant made that choice, she assumed the responsibility for the natural consequences of it.

The defendant also made a choice to become pregnant and to allow those pregnancies to come to term. Upon making those choices, the Defendant assumed the responsibility to deliver children who are not ...who were not being delivered cocaine or a derivative of it into their bodies. Children, like all persons, have the right to be free from having cocaine introduced into their systems by others.

The defense has presented arguments in this case which I have rejected. I wish to comment upon some of them briefly.

I view (J.) and (C.) Johnson to be the victims in this case and not their mother. These children had no ability to control what was being introduced into their bodies. The defendant had that ability.

I do not view this case to be a case of prosecution gone amuck. Nor do I view the case as calling for judicial restraint. The law pertaining to delivery of a controlled substances has been applied to a broad variety of situations. Failure to previously prosecute these cases shows nothing more than the lack of awareness that the facts might constitute a crime and a resulting failure to investigate.

Finally, I wish to offer my perception of what this verdict means and what it does not mean. It is not a signal to pregnant addicts

> to avoid prenatal care and to give birth to their babies outside a hospital environment. In fact, the opposite is true. Pregnant addicts have been on notice for years that taking cocaine may be harmful to their children. This verdict gives further notice that pregnant addicts have a responsibility to seek treatment for their addictions prior to giving birth. Otherwise, the State may very well use criminal prosecution to force future compliance with the law or, in appropriate cases, to punish those who violate it.
>
> I am sure there will be those who disagree with this perception. I invite review of it by the appellate courts of the state and by the legislature.
>
> In the meanwhile, I will order a presentence investigation...and set sentencing for August 22nd, 1989, at 9:30 a.m. (R 365-368, 513-514)

On July 24, 1989, the defendant filed a "Motion for Re-Hearing", pursuant to rule 3.580, alleging that the trial court erred in denying the Motion to Dismiss due to the alleged failure to correctly interpret legislative intent. In support of this motion, for the first time, the defense tendered the subcommittee debate from the amendment to chapter 415. (R 638-639, 658-678) The court denied the motion. (R 656) Petitioner was sentenced to probation; none of the terms of probation are assailed on appeal.

The District Court of Appeal, Fifth District, entered its decision in this case on or about April 18, 1991, affirming the convictions and sentences and certifying a question to this court as one of great public importance. Johnson v. State, 578 So.2d 419 (Fla. 5th DCA 1991). The majority opinion finds as follows:

> It was established by the evidence that appellant consumed cocaine knowing that the

cocaine would pass to her soon-to-be born fetus. Upon the birth of her children it was medically determined that each of them had received some of the cocaine into their bodies. A qualified withess testified that some of the cocaine left the mother and was received by the child after birth but before the umbilical cord was cut. Under Florida law a person comes into being upon birth. Duncan v. Flynn, 342 So.2d 123 (Fla. 2d DCA 1977), adopted, 358 So.2d 178 (Fla. 1978). Appellant was over age eighteen and each of appellant's children obviously were persons under the age of eighteen.

Section 893.13(1)(c) Florida Statutes (1989) says:

> 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 this chapter.

The question is whether the acts of appellant violate the statute. Logic leads us to say that appellant violated the statute.

Appellant voluntarily took cocaine into her body, knowing that it would pass to her fetus and knowing (or should have known) that birth was imminent. She is deemed to know that an infant at birth is a person, and a minor, and that delivery of cocaine to the infant is illegal. We can reach no other conclusion logically.

We have spent the necessary time and effort considering the many arguments of appellant and her supporters who argue the mother's rights to her body and the analogies to the abortion cases. We have also considered appellant's assertion that the Florida legislature declined to pass a child abuse statute which forbade similar conduct. We have considered other arguments, such as what pregnant mothers might resort to if they know they may be charged with this crime; we are

> singularly unimpressed with those latter arguments.
>
> This appellant on two occasions took cocaine into her pregnant body and caused the passage of that cocaine to each of her children through the umbilical cord after the birth of the child, then an infant person. The statute was twice violated.
>
> We certify to the Supreme Court of Florida that the question resolved by this opinion is of great public importance and suggest that the court answer:
>
> > WHETHER THE INGESTION OF A CONTROLLED SUBSTANCE BY A MOTHER WHO KNOWS THE SUBSTANCE WILL PASS TO HER CHILD AFTER BIRTH IS A VIOLATION OF FLORIDA LAW?

Johnson did not move for rehearing of this decision, an apparent admission that the facts recited in the decision have support in the record.

SUMMARY OF ARGUMENTS

POINT ONE: Jennifer Johnson's conduct is clearly and explicitly within the definition of section 893.13(1)(c)(1). She is not being punished for carrying her pregnancy to term, but rather, for delivery of cocaine to a minor. The courts below correctly determined that the statutory definition of "delivery" and "person" were satisfied by the proof adduced at trial. Pursuant to Florida law, a fetus becomes a person at the time of live birth, which is defined as that moment in time that the child attains a separate and independent existence, after the complete expulsion or extraction of a baby from its mother. Under this definition, severence of the umbilical cord is not the dispositive factor. It is legally possible for a child to attain a separate and independent existence prior to the time that the

umbilical cord is severed. Delivery is defined as any transfer or attempted transfer. By any common understanding of this term, Jennifer Johnson transferred cocaine to her newborn children.

POINT TWO: The language of chapter 893 is clear and unambiguous and this court must accord the statute its plain meaning. There is no need to resort to other statutory provisions to interpret chapter 893 because its meaning is clear. Rules of statutory construction should never be used to create doubt. Chapter 415 and its legislative history does not grant petitioner immunity. Section 415.511, Florida Statutes (1987) clearly states that nothing in the chapter shall be deemed to grant criminal or civil immunity to any person who commits an illegal act upon or against a child. If the legislature intended to grant immunity to persons in petitioner's position, it would have added them to the list of persons granted immunity. §893.09, Fla.Stat.(1987).

POINT THREE: Petitioner has failed to establish a violation of due process of law on the theory that she lacked notice that her conduct was illegal. The requirement that statutes give fair notice cannot be used as a shield by one already bent on serious wrongdoing. Johnson knew her conduct was illegal and knew that her illegal conduct was affecting her children. At all times relevant to this prosecution, the definition of "harm" for purposes of the child abuse statute included the physical dependence of a newborn infant on cocaine or its derivatives. This constitutes sufficient notice to satisfy due process of law.

The act of taking cocaine is not a fundamental right. The right to privacy is not implicated in this case. This

prosecution is not directed to the defendant's mistreatment of her children in utero, but rather, predicated upon conduct which occurred after they were born.

Even if privacy rights are implicated, the state has demonstrated a compelling interest sufficient to overcome any personal interest involved. The right to abuse your own body stops at the border of your womb. The state has a legitimate interest in protecting the health of a future child from the effect of conduct which is clearly illegal.

POINT FOUR: The state sustained its burden of proof on each element of this offense. The defense stipulated below that cocaine or a derivative was present in the systems of the petitioner and her children before and after the children were born. Therefore, the claim that the state failed to prove that benzoylecgonine is a derivative of cocaine has been waived for review. Even if preserved, there was direct evidence on this issue which the trier of fact found credible. Delivery of cocaine to a minor is a general intent crime such that intent is presumed from doing the act. Taking cocaine is a volitional act. It is well known generally and known to the defendant specifically that cocaine passes from her body to her children. The district court found as fact that Johnson knew that cocaine passed from her body to her children, a fact which she did not dispute. The trial court correctly determined that the state established each element beyond every reasonable doubt.

POINT ONE

THE TRIAL COURT CORRECTLY DETERMINED THAT PETITIONER "DELIVERED" A CONTROLLED SUBSTANCE TO A "PERSON" WITHIN THE PLAIN MEANING OF SECTION 893.13, FLORIDA STATUTES (1987).

A. SCOPE

Johnson contends that in passing chapter 893, the legislature intended to punish drug dealers, not women who use drugs so close in time to the delivery of their child that both the mother and the child test positive for controlled substances. The argument in subsection B that this prosecution is precluded by chapter 415 is discussed in point two, infra.

At the outset, petitioner is incorrect that "criminal statutes must be strictly construed in favor of the accused." (IB 13) This rule applies only when the statute at issue is unclear or subject to differing constructions. §775.021 Fla. Stat. (1989). The state contends that chapter 893 is clear and unambiguous such that this rule of construction is inapplicable.

The trial court addressed this argument by observing, "The law pertaining to delivery of a controlled substance has been applied to a broad variety of situations. Failure to previously prosecute these cases shows nothing more than the lack of awareness that the facts might constitute a crime and a resulting failure to investigate." (R 513)

The district court's majority opinion finds:

> Appellant voluntarily took cocaine into her body, knowing it would pass to her fetus and knowing (or should have known) that birth was imminent. She is deemed to know that an infant at birth is a person, and a minor, and

> that delivery of cocaine to the infant is illegal. We can reach no other conclusion logically....
>
> This appellant on two occasions took cocaine into her pregnant body and caused the passage of that cocaine to each of her children through the umbilical cord after the birth of the child, then an infant person. The statute was twice violated. Johnson v. State, 578 So.2d 419, 420 (Fla. 5th DCA 1991).

The concurring opinion specifically addressed whether the legislature intended chapter 893 to encompass this conduct.

> The provisions of section 893.13(1)(c) clearly prohibit delivery of a controlled substance from a person eighteen years of age or older to a person under the age of eighteen. At the time some quantity of cocaine passed through the umbilical cord of Jennifer Clarise Johnson into the bodies of her newborn infants, Johnson was a person eighteen years of age or older and the infants were "persons". The statute provides no exceptions for delivery of a controlled substance during the birth process.1....
>
> (T)he clear and unequivocal language of the statute (i.e. §893.13) is unambiguous and leaves no room for interpretation of the word "delivery". Under the instant factual evidence, there can be no doubt that cocaine was delivered from one person to another person, both in 1987 and 1989. The fact that the legislature has elected not to criminalize the transmission of cocaine to a fetus cannot alter the fact that is has criminalized transmission to a person, and the recipients of the cocaine in the instant case, beyond any legal disputation, were persons as defined by the law of Florida....
>
> If the Florida Legislature wishes to exempt the transmission of cocaine through the umbilical cord from the operation of section 893.13 for the public policy reasons set forth in the dissent, that is its prerogative. But it has not done so, and the setting of public policy, however tempting, is not a court function.

> 1. Although the dissent refers to blood flow as an involuntary act, the placing of cocaine into that blood flow is a voluntary act, and the cocaine destination is far more certain than if it were placed into the United States Mail.
>
> Johnson v. State, 578 So.2d at 419, 420-421 (Fla. 5th DCA 1991).

Jennifer Johnson's conduct is clearly within the definition of the delivery statute. She unquestionably committed the voluntary act of placing cocaine into her bloodstream, knowing that it would pass to her children. The legislature has made it a crime to deliver cocaine to persons, and her children were undisputably minor persons when the crimes took place. Children in a schoolyard have the opportunity to rebuff peddlers; Johnson did not give her children that chance. The prosecution in this case advances the state and federal legislative purpose of deterring drug distribution to children, as petitioner recognizes. (IB p. 20, n. 14) It is not just children who can walk and talk that deserve protection from drugs; indeed, newborn infants are the most vulnerable human beings.

The legislature has not exempted delivery of a controlled substance immediately after birth, and this court cannot create such an exception.[5] The district court's decision was rendered several weeks before the 1991 legislature recessed sine die, and yet no action was taken, further indication that this decision

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[5] As petitioner observes in footnote 16, drug use during pregnancy was not a new or unknown phenomenon in 1970. Had the legislature intended to exclude newborns from the delivery statute, it could easily have done so.

comports with the legislature's intent. The amicus brief on behalf of a handful of legislators cannot change the nonaction of the entire legislature on this issue. That other states have reached different conclusions concerning their state's statutes is merely persuasive and not relevant to Florida's statute.

B. PERSON

Petitioner contends that the statute is ambiguous because the term "person" is not defined. The state concedes on appeal as it did below that a fetus is not a person within the meaning of this statute. However, pursuant to established Florida law, both of these children attained a separate and independent existence during the critical period of time which is the basis of this prosecution.

The definition of person is contained in the case of Duncan v. Flynn, 358 So.2d 178 (Fla. 1978). This definition, in full, is as follows:

> 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 reasonable 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. Id. at 126.

The last sentence of this passage demonstrates that it is legally possible to attain a separate and independent existence even if the umbilical cord has not been severed. That is exactly the proof in this case: that both babies had attained a separate and independent existence after they were born but before the umbilical cord was cut. Once the fetus becomes a person, it is immaterial whether the person is age one minute, one month, one year or one decade; a person is a person.

Various jurisdictions have developed three concepts of what constitutes a live birth. The first theory is that "life" is present when a child has reached that state of development where it is capable of living an independent life as a viable being. Under this theory, a child in the process of being born may be considered a live human being. Singleton v. State, 35 So.2d 375 (Ala. 1948); People v. Chavez, 77 Cal.App.2d 621, 176 P.2d 92 (1947); Keeler v. Superior Court, 470 P.2d 617 (1970); Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984). The second theory, adopted as the law in Florida, is that "life" is not present until the child has been completely expelled from the mother's body and has attained a separate and independent existence. Duncan v. Flynn, supra; Logue v. State, 198 Ga. 672, 32 S.E.2d 397 (1944); Harris v. State, 28 Tex.App. 308, 12 S.W. 1102 (1900). The third theory, which petitioner urges upon this court, encompasses the second theory and adds the additional requirement of showing independent circulation and/or respiration. Jackson v. Commonwealth, 265 Ky. 295, 96 S.W.2d 1014 (1936); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923);

Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978); People v. Wang, 490 N.Y.S.2d 423 (1985); See generally, LaFave and Scott, Criminal Law, §7.1(c). Inflicting injury upon a fetus before birth can be homicide if the baby dies after being born alive. People v. Bolar, 109 Ill.App.3d 384, 440 N.E.2d 639 (1982); Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); Ranger v. State, 249 Ga. 315, 290 S.E.2d 63 (1982).

All of the experts who testified in this case agreed that a fetus becomes a person at the time of live birth, which is the complete extraction or expulsion of product of human conception, that, after such expulsion, shows any evidence of life, such as beating of the heart, pulsation of the umbilical cord, or voluntary movement, whether or not the umbilical cord has been detached. (R 60, 174, 288) This medical definition is entitled whatever weight the trier of fact chooses to give it. §§90.702, 90.703, Fla. Stats. (1987).

The standard of separate existence is in accordance with the medical definition of live birth, and also a logical solution to this question. The status of being a person is not dependent upon the umbilical cord. The cord has little to do with sustaining life after the baby is expelled from the mother's body. Within minutes after birth, the placenta separates and the cord no longer functions. After expulsion but before the cord is cut, the child is not dependent upon the cord to sustain life; the child has already attained a separate and independent existence. While the umbilical cord continues to deliver maternally altered blood to the child, the cord is no different

from a hypodermic needle, straw or any other device that functions to introduce a substance into the body. The undisputed evidence in this case establishes that both Baby J. and Baby C. exhibited signs of life and demonstrated their separate existence after delivery and before the umbilical cord was cut. Whether the cord is cut is not the sole test to determine if a fetus is a person. The trial court correctly concluded that "...a child who is born but whose umbilical cord has not been severed is a person within the intent and meaning of Florida Statutes." (R 366, 514)

C. DELIVERY

Section 893.02 (5), Florida Statutes, (1987), defines the term "delivery" as "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." The trial court stated, "I am convinced and find that the term delivery includes the passage of cocaine or derivative of it from the body of a mother into the body of her child through the umbilical cord after birth occurs." (R 366-367) Under any common understanding of this term, Jennifer Johnson transferred cocaine to her newborn children. "Transfer" is not a term which requires a statutory definition as petitioner suggests; any competent person knows what this word means. The state respectfully suggests that this finding was correct, and petitioner has failed to sustain her burden of establishing otherwise. Contrary to the petitioner and her amici, the terms "person" and "delivery" are unambiguous. The proof in this case established beyond question that Johnson delivered cocaine to two persons.

POINT TWO

CHAPTER 893 IS CLEAR SUCH THAT RESORT TO OTHER STATUTES IS UNNECESSARY. CHAPTER 415 DOES NOT PRECLUDE CRIMINAL PROSECUTION IN THIS CASE. THE LEGISLATIVE INTENT AS INTERPRETED BY THE EXECUTIVE AGENCY CHARGED WITH ENFORCING THIS STATUTE REQUIRES THE MANDATORY REPORTING OF SUSPECTED CRIMES TO LAW ENFORCEMENT AUTHORITIES, WHO BY STATUTE MUST ACT ON THAT INFORMATION.

Johnson contends that the statute which she was prosecuted under, section 893.13, must be construed with chapter 415, the statute concerning protection of Florida citizens from abuse, neglect and exploitation. Respondent disagrees that chapter 415 is relevant to this case. As noted by the concurring opinion, "...the clear and unequivocal langauge of the statute (i.e. §893.13) is unambiguous and leaves no room for interpretation of the word 'delivery.'" Johnson v. State, 578 So.2d at 420. This Court has repeatedly held that unambiguous statutory language must be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1977). When the language of a penal statute is clear, plain and without ambiguity, courts are without power to construe it otherwise. Graham v. State, 472 So.2d 464 (Fla. 1985); Jenny v. State, 447 So.2d 1351 (Fla. 1984). Rules of statutory construction are useful only in a case of doubt and should not be used to create doubt. State v. Egan, 287 So.2d 1 (Fla. 1973). As argued in point one, supra, under any common understanding of the term "delivery", Johnson transferred cocaine to her newborn children. There is no need to resort to other statutes to define this unambiguous word.

Even if chapter 415 is applicable to this case, it offers Johnson no solace. In June, 1987, the legislature amended the statutory definition of "harm" which is used in child dependency cases to include physical dependency of a newborn infant upon controlled substances including cocaine. §415.503(9)(a)(2), Fla. Stat. (1989). Petitioner correctly states that as originally proposed, the amendment authorized criminal prosecution of a mother who gave birth to a drug dependent newborn. House Bill 155 was initially referred to the House Committee on Health and Rehabilitative Services, who in turn sent the bill to the Subcommittee on Social, Economic and Developmental Services. Representative Lippman prepared two amendments to the bill, which were introduced in the Subcommittee by Representative Jennings. The amendments were incorporated and the bill was passed on to the full committee, which passed the Committee Substitute for House Bill 155 to the entire house. After unanimously passing both the House and the Senate, the bill was signed into law and became effective on October 1, 1987. The amendment which is alleged to be material on appeal is the provision that, "no parent of (a drug dependent) newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency."

Respondent maintains the position that this provision concerning criminal **investigation** is overridden by another subsection of this statute. Section 415.511 (1)(b), Florida Statutes (1989) states:

> Except as provided in s. 415.503(9)(f), nothing contained in

> this section shall be deemed to grant immunity, civil or criminal, to any person suspected of having abused or neglected a child, or committed any illegal act upon or against a child.

Subsection (9)(f) concerns parents who fail to supply the child with medical treatment for legitimate religious reasons. Had the legislature intended to grant criminal immunity from **prosecution** as opposed to **investigation** for those persons who give birth to drug dependent newborns, reference could have been made to that particular subsection. It is axiomatic that the expression of one thing excludes all others. Moreover, the legislative intent expressed in section 415.101 is "...to provide for the detection and correction of abuse, neglect and exploitation through social services and criminal investigations..." Petitioner's argument that these convictions must be reversed because the legislature intended to grant her immunity must fail in light of section 415.511 (1)(b).

This interpretation is consistent with the intent divined by the executive agency authorized to implement this legislative policy, the Department of Health and Rehabilitative Services (HRS). The legislature has delegated to HRS the responsibility for enforcing this act. Pursuant to section 415.505(1)(g), HRS must notify the state attorney and the appropriate law enforcement agency of child abuse or neglect. After receiving knowledge of the commission of a criminal offense, if the state attorney ignores this information, he may be criminally liable for his failure to prosecute. §843.14, Fla. Stat. (1989). Indeed, this case originated when the HRS child protection team

investigator, Sandra Gomez, notified Detective Dan Prast of the Seminole County Sheriff's Department, who in turn reported the child abuse to the Office of the State Attorney. (R 82, 128) The executive agency charged with the responsibility of implementing the intent of the legislature as expressed in chapter 415 has interpreted that intent to be to institute investigations, and where appropriate, report the results of those investigations to the criminal authorities.

This legislative intent is further bolstered by an amendment to Chapter 415 in the 1990 legislative session. Laws of Fla. 90-50. The definition of "harm" in section 415.503(9)(g), Florida Statutes, (1990) now includes:

> Exposes a child **from birth** to five years of age to drugs. Exposure to drugs is established by a preponderance of the evidence that the **mother used a controlled substance during pregnancy** or that the parent or parents demonstrate continued chronic and severe use of a controlled substance...(emphasis added)

This amendment indicates that the legislature intended that drug use while pregnant which exposes a child at birth to controlled substances constitutes a crime in Florida.

Finally, there are specific subsections of chapter 893 which grant immunity to certain persons. §893.09 Fla. Stat. (1989). If the legislature had intended to preclude prosecution for other persons in other situations, it could have added them to the section granting immunity. Petitioner has failed to sustain her burden on this issue.

POINT THREE

APPLICATION OF SECTION 893.13, FLORIDA STATUTES (1987) TO THE FACTS OF THIS CASE DOES NOT VIOLATE JOHNSON'S CONSTITUTIONAL RIGHTS.

Johnson assails this prosecution as violative of her state and federal constitutional rights. The constitutional attack is not to the statute on its face, but rather, application of the statute to the facts of her particular case. See, Trushin v. State, 425 So.2d 1126 (Fla. 1983). These claims were presented below and are therefore preserved for appellate review. There is absolutely no evidence to support amicus NAPARE's claim of selective enforcement, improperly raised for the first time in this Court and therefore not preserved for review.

A. DUE PROCESS

Petitioner contends that she was not on notice that her conduct was proscribed by statute due to the "unforeseeable application" of this statute to the facts of this case. Statutory language must convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Jordan v. DeGeorge, 341 U.S. 223, 231-232, 71 S.Ct. 703, 708, 95 L.Ed. 886 (1951). '(T)o ensure that a legislature speaks with special clarity when marking boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably proscribed." Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979).

The state contends that the conduct at issue is plainly and unmistakably proscribed by section 893.13, such that Johnson

received sufficiently definite warning that her conduct was illegal. The rule that criminal laws are to be strictly construed and statutes must not be vague does not require distortion or nullification of the evident meaning and purpose of the legislation. United States v. Gaskin, 320 U.S. 527, 64 S.Ct. 318, 88 L.Ed. 287 (1944). The requirement that statutes give fair notice "...cannot be used as a shield by one who is already bent on serious wrongdoing....There is little need of advance notice to a perjurer that his false testimony, which he well knows to be unlawful, is a violation of the law." United States v. Griffin, 589 F.2d 200 (5th Cir. 1979). Johnson cannot resort to this shield because she knew that her conduct was illegal, and she knew that her illegal conduct was affecting her children.[6] This is not a case where the court should invalidate application of a criminal statute, "...strong medicine to be employed sparingly and only as a last resort." United States v. Hutson, 843 F.2d 1232 (9th Cir. 1988).

Acts of the legislature are presumed valid, and courts have a duty to preserve the constitutionality of a statute wherever possible. Tal Mason v. State, 515 So.2d 738 (Fla. 1987) "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." Solem v. Helm, 463 U.S. 277,290; 103 S.Ct. 3001, 3009; 77 L.Ed.2d

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[6] This guilty knowledge distinguishes this case from Fiske v. State, 366 So.2d 423 (Fla. 1978) Moreover, unlike the controlled substance at issue in Fiske, cocaine is defined by statute to include derivatives. §893.03(2), Fla. Stat. (1987).

637 (1983). A statute will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. State v. Kinner, 398 So.2d 1360 (Fla. 1981) The question presented by a vagueness challenge is whether ordinary people will understand what the statute requires or forbids, measured by common understanding and practice. State v. Bussey, 463 So.2d 1141 (Fla. 1985).

The trial court found as fact that,

> The law pertaining to delivery of controlled substances has been applied to a broad variety of situations. Failure to previously prosecute these cases shows nothing more than the lack of awareness that the facts might constitute a crime and a resulting failure to investigate....Pregnant addicts have been on notice for years that taking cocaine may be harmful to their children.

These factual findings are supported by record evidence and are not assailed on appeal. The district court accepted these facts, a finding which Johnson did not dispute.

Effective October 1, 1987, the definition of "harm" for purposes of child abuse statutes included the physical dependence of a newborn infant upon controlled substances delineated in Schedule I and II, including cocaine and its derivatives. All persons are deemed to have notice of penal statutes passed in accordance with the law. In order to establish that cocaine derivatives were delivered to the child after birth but before the umbilical cord is severed, the mother must have ingested the cocaine within 48 to 72 hours prior to delivery. Therefore, the conduct which is the subject of this prosecution occurred in both

instances after October 1, 1987. This statute placed petitioner on notice that if she gave birth to an infant who was physically dependent on cocaine, she was harming her child within the meaning of the child abuse statute. The state suggests that Johnson was on notice that her conduct was criminal and would subject her to criminal prosecution such that no due process violation has been established.

Neither has petitioner established an ex post facto violation under Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, (1964). "An **ex post facto** law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was **innocent** when done, criminal; and punishes such action,' or 'that **aggravates** a **crime**, or makes it **greater** than it was, when committed." Id. at 353. Delivering cocaine to a minor was not innocent conduct on October 3, 1987 or January 23, 1989, nor has the punishment for this crime been aggravated. It cannot be maintained that the punishment has been increased beyond what was prescribed when the crime was consummated. Weaver v. Graham, 450 U.S. 24,30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981); Miller v. Florida, 482 U.S. 423 , 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

Nor does this prosecution violate substantive due process as alleged in subsection B. Smoking cocaine is not "inherently and generally innocent" conduct as petitioner suggests. (IB 29) Petitioner admits that it is a legitimate legislative concern to protect the health and well-being of Florida minors. (IB 29) Prosecuting Johnson for delivery of controlled substances to a

minor bears a rational relationship to this admittedly legitmate state interest. State v. Saiez, 489 So.2d 1125 (Fla. 1986). It is well-established that the effects of maternal use of cocaine and other drugs during pregnancy has an extremely adverse effect upon the health of the child. Johnson v. State, 578 So.2d at 425, (J. Sharp, dissenting). The cost in both the value of potential life and the staggering monetary costs associated with fetal abuse is undeniable.[7]

Johnson and amici argue that pregnant addicts will be deterred from obtaining health care for themselves and their infants due to the fear of prosecution. If this Court accepts this argument, then it follows that all existing child abuse statutes are equally invalid, because these laws may deter parents from obtaining medical care for their physically or sexually abused children. This argument is "singularly unimpress(ive)". Johnson v. State, 578 So.2d at 420. Children are not chattels of their parents but have separate and distinct legal rights, and are entitled to the protection of the law, even from their parents.[8] Under the state's power of parens patriae, the state has a paternalistic power to restrict the parent's control and to preserve and promote the welfare of the child.[9]

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[7] See, e.g., Maternal Substance Abuse: The Need to Provide Legal Protection to the Fetus, So.Cal.L.Rev. Vol. 60:1209, (1987).

[8] See, Robertson, Fetal Abuse: Should We Recognize It as a Crime? A.B.A. J. August, 1989, at. 38.; Fost, Maternal-Fetal Conflicts: Ethical and Legal Considerations, Annals N.Y. Acad.Sci. 248 (1989), as quoted by Logli, footnote 13, infra.

[9] Terres, Prenatal Cocaine Exposure: How Should the Government Intervene?, Am.J.Crim.Law, Volume 18:61 (1990), p. 70.

Prince v. Massachusetts, 321 U.S. 158 (1944). This ancient doctrine is the authority upon which states enact child abuse laws. "The evolution and strength of child abuse laws lays the foundation for intrusion into private family matters for protecting the fetus from deliberate or conscious harmful acts."[10] In addition to the more general police power, the state's power of parens patriae provides a rational basis for this prosecution. This prosecution is reasonably related to these unquestionably legitimate interests such that substantive due process is satisfied.[11]

B. PRIVACY

Finally, petitioner contends that this prosecution is an unconstitutional infringement upon her state and federal right to privacy. Johnson contends that a compelling state interest must be advanced when a law "even incidentally" infringes on this constitutional right. (IB 34) Petitioner contends that application of section 893.13, Florida Statutes (1987) to women

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[10] Shaw, Conditional Prosepective Rights of the Fetus, 5 J. Legal Med. 63, p. 99 (1984).

[11] Contrary to the argument of amicus AMA, et al., (which is improperly raised), it is not only drug use in early pregnancy which harms a fetus. Dr. Ira Chasnoff wrote in May, 1987, that cocaine use during the last trimester tends to induce the sudden onset of uterine contractions, tachycardia and other abnormalities. The incidence of abruptio placentae is several times higher for cocaine abusers in the last trimester. Additional complications of labor include increased incidence of precipitous delivery and of fetal meconium passage, which Johnson's baby experienced. Chasnoff, Ira J. "Perinatal Effects of Cocaine", Contemporary OB/GYN, PP. 163, 175-176 (May, 1987). Moreover, the state need not attack every aspect of a problem to satisfy constitutional requirements. In re Estate of Greenberg, 390 So.2d 40, 46 (Fla. 1980), dism. 450 U.S. 961 (1981).

who deliver cocaine via the umbilical cord to her newborn infant implicates fundamental privacy rights.

The fourth amendment proscription against unreasonable search and seizure is embodied in the right to privacy. See, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 709, 35 L.Ed.2d 147 (1973); Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928). This is not a case where the police obtained a warrant and stormed into the hospital, compelling urine tests from petitioner and her children. Rather, any search that was conducted was made by private citizens within the scope of their employment. See, State v. Gans, 454 So.2d 655 (Fla. 5th DCA 1984), United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Moreover, any privacy interest involved was waived by petitioner when she called the ambulance to obtain medical treatment for herself and her unborn child.[12]

The state respectfully suggests that this prosecution does not infringe upon the right to privacy. This case does not involve fetal rights, nor does the state in this prosecution predicate criminal liability upon acts committed against a fetus. This case does not involve protecting autonomy in "...matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Whalen v. Roe, 429 U.S. 589, 600, 97 S.Ct. 869, 877, 51 L.Ed.2d 64 (1977). The state in no way infringed upon Johnson's "...decision whether to

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[12] Johnson's stipulation to the introduction of the medical records in this case waives any fifth amendment "concerns". See and compare, Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).

bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). Nor did the state penalize Johnson for deciding to bear her children. C.f. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974).

The right to privacy does not include the right to use drugs. Maisler v. State, 425 So.2d 107 (Fla. 1982). In Cheesbrough v. State, 255 So.2d 675 (Fla. 1971), the court held that the right of privacy does not include the privilege of engaging in sexual intercourse at such times and places as the parties may desire and in the presence of others. The court affirmed Cheesbrough's conviction for lewd and lascivious act within the presence of a minor for the private act of having sexual intercourse in the presence of his son. This prosecution did not infringe upon his right to privacy. In this case, Johnson's criminal conduct is not protected by her right to privacy any more than Mr. Cheesbrough. It cannot be maintained that this prosecution has "no other purpose...than to chill the assertion of constitutional rights..." Shapiro v. Thompson, 394 U.S. 618, 631, 89 S.Ct. 1322, 22 L.Ed. 600 (1969).

In the case of In re T.W., 551 So.2d 1186 (Fla. 1989), the court addressed a statute which required a minor to either obtain parental consent or judicial approval before obtaining an abortion during the first trimester. Citing Roe v. Wade, supra, the court determined that during the first trimester of pregnancy, a woman has an absolute right to obtain an abortion, however, the court also determined that after the fetus is

viable, pursuant to federal law, the state may forbid abortion altogether. Id. at 1190. Therefore, this decision is not dispositive of whether privacy rights are involved in this case. Indeed, the T.W. decision recognized that after the first trimester, the health of the mother may be a compelling state interest. Id. at 1193. "Under our Florida Constitution, the state's interest becomes compelling upon viability...Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb...Following viability, the state may protect its interest in the potentiality of life by regulating abortion..." Id. at 1194.

Even if this case involves privacy rights, the state has a compelling interest to ensure the health of a future citizen. In order to test positive for cocaine after the child is born, the mother must have ingested the substance within 72 hours of birth. A fetus is certainly viable three days before birth. Therefore, the state, pursuant to T.W., has a compelling interest in ensuring that a viable fetus is born drug-free. "Like all of our other fundamental rights, the fundamental right of privacy is not absolute." Shakman v. State, 553 So.2d 148,151 (Fla. 1989). Under either the Florida or Federal Constitution, Johnson's privacy rights are not unconstitutionally impaired by this prosecution.

In the case of Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 3057, 106 L.Ed.2d 410, (1989), the Court expanded the state's interest in protecting potential human life by setting aside viability as determined by a calendar as

the rigid line after which the state's interest becomes predominant. "The State's interest, if compelling after viability, is equally compelling before viability. The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'" Id., (citations omitted).

Johnson and amici argue that her right to abuse her own body supercedes the right of the state to regulate her behavior. However, long ago it was established that the right to personal autonomy to do certain acts is limited when those acts adversely affect someone else. Roe v. Wade, 410 U.S. at 154, citing Jacobson v. Massachusetts, 197 U.S. 11 (1905). It cannot be maintained that using controlled substances is a fundamental right which enables the user to cause disasterous consequences to another person, in this case, a person who is helpless to resist.

The state perceives no contradiction between a woman's right to an abortion during the first trimester and the right of the state to require a certain degree of prenatal care once she elects not to have an abortion and carry the child to full term. Alan M. Dershowitz, a professor of law at Harvard University, is quoted in the Congressional Record as explaining this distinction:

> Now, I am not a "fetal-rights" advocate. I favor Roe vs. Wade. I believe that a pregnant woman should have the right to choose between giving birth or having an abortion. But I am a human-rights advocate, and I believe that no woman who has chosen to give birth should have the right to neglect or injure that child by abusing their collective body during pregnancy.

> Once a woman has made the decision to bear a child, the rights of that child should be taken into consideration. What happens to the child in the womb may have significant impact on his or her entire life....
>
> There is a principled distinction between totalitarian intrusions into the way a woman treats her body, and civil-libertarian concerns for the way a woman treats the body of the child she has decided to bear. That principled distinction goes back to the philosophy of John Stuart Mill and is reflected in the creed that "your right to swing your fist ends at the tip of my nose." In the context of a pregnant woman's rights and responsibilities in relation to the child she has decided to bear, the expression might be: "Your right to abuse your own body stops at the border of your womb."
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> A principled person can fully support a woman's right to choose between abortion or birth, without supporting the very different view that the state should have no power to protect the health of a future child. Congressional Record, Senate, August 1, 1989, S 9323.

This distinction has been recognized by other authorities as well.[13] "(T)he state's compelling interest in potential human life would allow the criminalization of acts which if committed by a pregnant woman can damage not just a viable fetus but eventually a born-alive infant. It follows that, once a pregnant woman has abandoned her right to abort and has decided to carry the fetus to term, society can well impose a duty on the mother

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[13] Additionally, state intervention into maternal autonomy has been approved in other contexts, for instance, compelling a Jehovah's Witness to submit to blood transfusions in the last month of pregnancy, Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 985 (1964); or by requiring a woman to undergo a caesarian section delivery. Jefferson v. Spaulding County Hospital Authority, 247 Ga. 86, 274 S.E.2d 457 (1981).

to insure that the fetus is born as healthy as possible."[14] Once a woman has decided not to end her pregnancy, she assumes the obligation to refrain from causing harm to the future child.[15] "(T)he state's interest in protecting the quality of life of the born child can be seen as derived in part from the rights of the born child to retroactive protection, an interest that does not apply in the case of abortion."[16] Even if privacy interests are implicated in the prosecution of this case, the state has demonstrated a compelling interest that outweighs any privacy interest implicated when a pregnant woman smokes crack cocaine hours before the birth of her child. Johnson has failed to sustain her burden of establishing that this prosecution was unconstitutional.

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[14] P. Logli, "Drugs in the Womb: The Newest Battlefield in the War on Drugs", Criminal Justice Ethics, Volume 9, Number 1, Winter/Spring 1990 p. 26.; Robertson, Procreative Liberty and The Control of Conception, Pregnancy and Childbirth, 69 Va. L.Rev. 405 (1983); Terres, Prenatal Cocaine Exposure: How Should the Government Intervene?, Am.J.Crim.L. Vol. 18:61 (1990).

[15] Terres, Prenatal Cocaine Exposure, etc., id. at 71; Parness and Prichard, To Be or Not To Be: Protecting the Unborn's Potentiality of Life, 51 U.Cinn.L.Rev. 257 (1982).

[16] Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of Fetal Abuse, 101 Harv. L.Rev. 994, 1003 n. 55 (1988).

POINT FOUR

THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS SUFFICIENT, COMPETENT EVIDENCE TO SUSTAIN THE STATE'S BURDEN OF PROOF ON THE ELEMENTS OF DELIVERY OF A CONTROLLED SUBSTANCE OR ITS DERIVATIVE TO A PERSON.

A. DELIVERY VIA UMBILICAL CORDS

Johnson contends in this subsection that the state failed to introduce sufficient evidence that the derivative of cocaine passed through the umbilical cords to her newborn infants during the period of time after their expulsion from the birth canal and before the cords were clamped and cut. (IB 38)

The defense counsel moved for judgment of acquittal at the close of the state's case, however, he failed to renew this motion at the close of all the evidence. Florida Rule of Criminal Procedure 3.380(b) provides that such a motion is not waived by subsequent introduction of evidence, but after the defense does introduce evidence, "...the motion for judgment of acquittal **must be renewed at the close of all the evidence.**"(emphasis added) The mandatory language suggests an absolute requirement. See, Williamson v. State, 510 So.2d 1052 (Fla. 3d DCA 1987) The state suggests that the failure to renew the motion waived review of the issue of the sufficiency of the evidence that the umbilical cords were properly functioning, delivering maternally altered blood containing a cocaine derivative to the babies until those cords were severed.

Even if preserved despite the failure to renew the motion, no error is presented. In moving for a judgment of acquittal, a

defendant admits all facts in evidence and every conclusion favorable to the state which the trier of fact may infer from that evidence. The motion must be denied unless the trier of fact may take no lawful view of the evidence favorable to the state. Herman v. State, 472 So.2d 770 (Fla. 5th DCA), rev. denied 482 So.2d 348 (Fla. 1986) The motion should be denied if there is room for a difference of opinion between reasonable persons as to the proof of the facts from which an ultimate fact is sought to be established. Lynch v. State, 293 So.2d 44 (Fla. 1974). In light of this standard, petitioner has failed to establish that the trial court abused its discretion in concluding that the evidence was sufficient to establish beyond a reasonable doubt that after Baby J. and Baby C. "...were delivered at birth, but before their umbilical cords were severed, a derivative of cocaine, which the Defendant had introduced into her body, passed into theirs." (R 366, 513) An appellate court will not substitute its judgment for that of the trial court on questions of fact where there is record evidence to support those findings. Demps v. State, 462 So.2d 1074 (Fla. 1984) Petitioner has the burden of overcoming the strong presumption of correctness afforded to factual findings inherent in a trial court's order. Wasko v. State, 505 So.2d 1314 (Fla. 1987).

Viewing the evidence in the light most favorable to the verdict, the state produced sufficient, competent evidence to sustain the trial court's factual findings. As to Baby J., the state established that the defendant consumed cocaine while in

labor, within hours of Baby J.'s birth. (R 547-568) Both the baby and the mother tested positive for cocaine or a cocaine derivative after the baby was born. (R 520-530) Similarly, the state established that Johnson consumed cocaine hours before Baby C. was born at 8:38 a.m. (R 54, 70, 520-530) The defense stipulated that all three persons had cocaine in their systems up to 72 hours before the specimens were collected, after the respective births of the children. (R 510) Even the defense expert testified that if the substance was in the defendant's blood, it passed to the children. (R 284) The initial brief concedes that the cocaine metabolite is in the blood for 48 to 72 hours after consumption.

The state's evidence also established that cocaine has a half-life of one hour in the bloodstream before it is broken down by the liver. (R 153-154) The deriviative of cocaine, benzoylecgonine, remains in the blood up to 72 hours after ingestion. (R 155) The kidneys continually filter blood and as long as the cocaine metabolite is in the blood, it will be in the urine. (R 159) There is "no question of absorbtion" as the metabolite passes through the placenta, through the umbilical cord, to the baby. (R 162) It is "well known" that cocaine passes through the placenta to the baby via the umbilical cord. (R 22). The trial court found as fact that "Pregnant addicts have been on notice for years that taking cocaine may be harmful to their children." (R 513) The district court agreed that the evidence established that Johnson "...consumed cocaine knowing that the cocaine would pass to her soon-to-be born children."

Johnson v. State, 578 So.2d at 419. Once the metabolite has passed from the mother's bloodstream through the umbilical cord, the cocaine will be in the baby's bloodstream as well. (R 162) As Dr. Gore stated, "What is in the cup is in the saucer." (R 161) The state proved that during a normal birth, a baby delivered from the birth canal would receive blood from the mother through the umbilical cord, regardless of the relative positions of the baby and the mother, until the cord is clamped and severed. (R 174, 257, 278-281, 283-284)

The state acknowledges that the cocaine metabolite was being transferred from the defendant to the two children before their births. The defense admits this fact. However, this prosecution is **not** predicated upon the conduct of the defendant before the children were born. Rather, after the fetuses became persons under Florida law, the process that the defendant admits occurred before birth continued until the umbilical cord was severed. The state understands the defense argument to be that this exchange of maternally altered blood, containing cocaine or its derivative, which they admit passed through the placenta before birth, somehow ceased at the time of delivery. It is immaterial that this period of time was of relatively brief duration. There is no time requirement for this offense; hand to hand deliveries are completed in much less time than sixty to ninety seconds. This argument is contrary to the unanimous testimony of all experts in this case, and indeed, contrary to common sense.

The petitioner places great emphasis on the fact that the two doctors who delivered Baby J. and Baby C. testified that the

umbilical cords were working because there was no indications in either birth of complications relating to the cord. This is characterized as an inference. The state respectfully disagrees. First of all, there was direct, positive testimony from Dr. Tompkins, who delivered Baby J., that after the child was expelled from the birth canal, while the cord was still attached from the placenta to the baby, there was circulation through the umbilical cord between the placenta and the baby. (R 16-20) He explained that the umbilical cord delivered "maternally altered blood", containing nutrients and chemicals, until it was severed. (R 20) The state asked directly, "During your delivery of (J.), was blood flowing through the umbilical cord?" Dr. Tompkins answered, "Yes, it was." (R 23) On redirect, the prosecutor again established that the cord was functioning when he delivered Baby J. (R 42) During the time after expulsion from the birth canal and before the cord was clamped and cut, he testified that the baby would receive fluid from the umbilical cord. (R 23)

As to Baby C., Dr. Mitchell Perlstein also testified that the umbilical cord was functioning, delivering maternally altered blood from the placenta to the baby, in the period of time after the expulsion from the birth canal and before the cord was clamped and cut. (R 58-60)

The state provided direct testimony that both of the umbilical cords were functioning in the critical moments upon which prosecution is predicated. However, even assuming arguendo that the doctors' testimony can be viewed as negative testimony, no error is presented. Since the births were normal in every

way[17] neither doctor had any reason to suspect that the cord was not functioning. In State v. Henderson, 521 So.2d 1117 (Fla. 1988), this Court reiterated the rule that if the trier of fact decides that the attention of the witness whose testimony is negative in character is **actually directed** to the fact or situation about which he later testifies, the fact finder may consider such negative testimony and accord to it the weight it may deem proper. Since both doctors had their attention actually directed to the matter at hand, the birth of the children, even if their testimony is viewed as negative, the trial court was still entitled to rely on that evidence. The fact remains that the testimony is direct, not circumstantial. The cases cited by petitioner concerning longstanding rules in circumstantial evidence cases are inapposite given the direct testimony in this case. Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986); Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986). See also, State v. Law, 557 So.2d 187 (Fla. 1989)

It is uncontroverted in this case that Johnson used cocaine contemporaneous to the birth of her children, in both cases only hours before their births. This is not an inference. Both sides agree that the cocaine derivative is in the blood 48 to 72 hours after it is ingested. This is not an inference. There is no suggestion that the placenta blocks the cocaine metabolite or that it is not transferred to the baby. Dr. Gore testified how

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[17] Baby J.'s birth involved meconium stain fluid (the product of the child's first bowel movement was expelled before birth), but this complication is "not uncommon" for cocaine users. See footnote 11, supra. (R 13, 27, 236)

the metabolite is transferred from the blood to the urine. Each child tested positive for the presence of cocaine or its derivative after their births. This is no inference. The proof in this case is very similar to prosecutions which occur every day for driving under the influence of alcohol. In the typical DUI case, the state establishes the use of alcohol has occurred through the arresting officer or other witnesses. Sometime after the defendant is arrested (and no longer driving) a chemical breath test is conducted showing a blood alcohol level for the time the test was taken. An expert is then called to extrapolate the test result back to the time that the defendant was driving, and provides an opinion, based upon facts developed at trial and hypotheticals, as to whether or not the defendant's blood alcohol level was greater than .10 at the time he was driving.

The same process occurred in this case. The state established that the defendant used cocaine in close proximity to the birth of her children. The proof established the length of time that cocaine and its derivatives remain in the system. Sometime after the births of the children, both of them and, in one instance, the mother as well, tested positive for cocaine or its derivative. Testimony was presented from an expert that based upon his knowledge of cocaine and its effect on the body, and the test results at a later time, in his opinion, at the critical moment in time after birth but before the umbilical cord was cut, cocaine derivatives passed from the mother to the children via the umbilical cord. (R 152-164) The fact finder evaluated this testimony, found it to be credible, and found the

fact proven. The state's case was not premised on inferences, but rather direct testimony which is uncontroverted. No error is presented.

B. INTENT

Petitioner contends that the state failed to prove that she acted with the requisite intent because the delivery of this drug to her babies was something she "could not control". (IB 44) She argues that, "...her intent to use or possess cocaine cannot be collapsed with the intent to deliver..." (IB 44) The state disagrees.

Section 893.13, Florida Statutes, (1987) does not require the state to establish intent or knowledge, although lack of knowledge is a defense for the jury to consider. State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982); State v. Medlin, 273 So.2d 394 (Fla. 1973), see also, State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982); Grimmage v. State, 427 So.2d 338 (Fla. 1st DCA 1983). In this case, the defense suggested lack of knowledge, and therefore, the state offered evidence for the trier of fact to consider that established guilty knowledge. One month before Baby J. was born, the defendant consumed $200 worth of crack cocaine in one evening, and later called an ambulance after she became concerned of the effect of the drug on her unborn child. (R 140-146) Petitioner's mother testified that she repeatedly warned the defendant about cocaine use during each pregnancy. (R 112-114) Even though the state under Medlin was not required to prove knowledge or intent since both are presumed from doing the prohibited act, nevertheless, to counter a defense argument

directed to the trier of fact, the state produced competent, substantial evidence that Jennifer Johnson knew that when she smoked cocaine her children were also ingesting cocaine.

The claim that because of her addiction, her conduct was out of her control has serious implications. People who commit crimes are held responsible for those acts whether or not they are addicted to narcotics. "I couldn't help it" is not a valid defense. The record is uncontroverted that Jennifer Johnson never sought help for her addiction, while she was pregnant or not pregnant.[18] Her addiction does not mitigate the crimes that she committed, or render her volitional acts involuntary. As the trial court stated,

> The fact that the defendant was addicted to cocaine at the time of these offenses is not a defense. The choice to use cocaine or not to use it is just that--a choice. Once the defendant made that choice, she assumed the responsibility for the natural consequences of it.

Taking cocaine is a volitional act. It is "well known" generally, and known specifically by this defendant, that cocaine passed from her body to her children. The trial court correctly determined that the defendant in this case knowingly committed the volitional act of delivery of cocaine to a minor. The

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[18] The argument by petitioner and amici concerning the lack of available treatment facilities is purely academic because **Johnson never sought such treatment.** Moreover, in recent years, the availability of treatment has increased dramatically. Groves, Williams and Petersen, Florida Department of Health and Rehabilitative Services, Alcohol and Drug Abuse Program, January, 1991.See also, §91-282, Laws of Fla. (1991)

district court found that the defendant in this case had the requisite knowledge, a fact unassailed by petitioner. The district court's conclusion that taking cocaine is a volitional act is equally valid. Johnson has failed to sustain her burden of demonstrating otherwise.

C. CONTROLLED SUBSTANCE

For the first time on appeal, Johnson contended that the State "...did not prove that benzolecgonine was a 'controlled substance' within the meaning of the Florida Comprehensive Drug Abuse Prevention and Control Act." (IB 45) The failure to raise this claim in the motion for judgment of acquittal precludes review on appeal. Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985), dismissed, 488 So.2d 830. It is well established that in order to preserve an issue for appellate review, the same specific legal argument must have been presented to and determined by the lower court. Bertolotti v. State, 514 So.2d 1095 (Fla. 1987); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Thomas v. State, 424 So.2d 193 (Fla. 5th DCA 1983). When an objection is made on one ground before the trial court, no new or different grounds can be raised on appeal. Steinhorst, supra.; See also, Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1983). The argument advance by petitioner in this subsection was not presented to the lower court in any manner, and therefore appellate review is precluded.

Petitioner did more than passively fail to object or otherwise raise this claim below. The stipulation entered into

by the parties below affirmatively conceded this claim. See, Ray v. State, 403 So.2d 956 (Fla. 1981)(Affirmative action by defense counsel, coupled with failure to object, precludes review.) Included in this stipulation were the following undisputed facts: That C.J. and J.J. "...tested positive for the presence of cocaine in their systems. Their urine was collected for testing after their respective births but the same day as their respective births. Jennifer Johnson also tested positive for cocaine after the birth of (J.J.)....The results of all testing of Jennifer, (J.) and (C.) Johnson indicate that **all had cocaine in their systems** (urine) up to 72 hours prior to the collection of the urine samples used for tests."(emphasis added) (R 510) This stipulation alone constitutes sufficient, competent evidence that the substance detected was a controlled substance or its derivative. See, Frank v. Bloom, 634 F.2d 1245,1251 (10th Cir. 1980)(Admission of a factual matter in a pleading is admissible as substantive evidence.) Rule 2.060(L), Rules of Judicial Administration (Admission by counsel binds his client.) Had the state not agreed to enter into this stipulation, it would and could have presented additional evidence that benzoylecgonine is a derivative of cocaine within the statutory definition. See, Parker v. State, 408 So.2d 1037 (Fla. 1986). The defense should not be permitted to stipulate to an element at trial, then claim on appeal that the state failed to prove that element. The state respectfully requests a plain statement that this claim, and all other unpreserved claims, are procedurally barred from review on appeal. Harris v. Reed, ___U.S. ___, 109 S.Ct. 1038 (1989).

One of the factual findings that the trial court made in its verdict was that the state established beyond a reasonable doubt that after the births of Baby J. and Baby C., but before their umbilical cords had been severed, "...a derivative of cocaine, which the Defendant had introduced into her body, passed into theirs." (R 366, 513) The trial court found as fact, therefore, that benzoylecgonine is a derivative of cocaine, a controlled substance. An appellate court will not substitute its judgment for that of the trial court on questions of fact where there is record evidence to support those findings. Demps v. State, 462 So.2d 1074 (Fla. 1984) Petitioner has the burden of overcoming the strong presumption of correctness afforded to factual findings inherent in a trial court's order. Wasko v. State, 505 So.2d 1314 (Fla. 1987).

In addition to the stipulation, there is other evidence in this record to support the trial court's factual determination that benzoylecgonine is a derivative of cocaine. (R 75-76; 153-155) Even if subject to review despite the failure to object and despite the affirmative act of stipulating to the issue now claimed to be unsupported by evidence, petitioner has not sustained her burden of demonstrating that the factual finding that the substance was a derivative of cocaine was incorrect. No error is presented.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to answer the certified question in the affirmative and to affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by United States Mail to Lynn M. Paltrow , American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York, 10036; Louise F. Melling, National Emergency Civil Liberties Committee, at 740 Broadway, New York, New York, 10025, Alison B. Marshall, counsel for NAPARE, at 1150 Connecticut Avenue, Suite 1100, Washington, D.C. 20036, Marisa T. Mendez, FAWL, Dade County Chapter, 201 S. Biscayne Blvd. Ste. 1300, Miami, FL 33131, Wendy K. Mariner, Counsel for American Society of Law and Medicine, at 80 East Concord Street, Boston, MA 02118, Charlene M. Carres, at P.O. BOX 1031, Tallahassee, FL 32302, Karen S. Wiviott, counsel for American Medical Association, 515 N. State Street, Chicago, Illinois, 60610, Jerri Blair, counsel for American Public Health Association, et al., 351 W. Alfred St., P.O. BOX 130, Tavares, FL 32778, this 29th day of August, 1991.

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