047 w/app

IN THE SUPREME COURT OF FLORIDA

JENNIFER CLARISE JOHNSON,

Petitioner,

vs. CASE NO. 77,831

STATE OF FLORIDA,

Respondent.

_____/

Original

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

LOUISE F. MELLING
ERIC LIEBERMAN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
For the National Emergency
Civil Liberties Committee
740 Broadway
New York, New York 10025
(212) 254-1111

LYNN M. PALTROW*
JANET BENSHOOF
CATHERINE ALBISA
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JAMES SWEETING, III
2111 E. Michigan Avenue
Suite 210
Orlando, Florida 32806
(407) 898-2770
Florida Bar No. 715311

JAMES K. GREEN
American Civil Liberties Union
Foundation of Florida, Inc.
250 Australian Avenue
Suite 1300
West Palm Beach, Florida 33401
(407) 659-2009
Florida Bar No. 229466

*Counsel of Record

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I. SECTION 893.13(1)(C)(1) PLAINLY DOES NOT APPLY TO THE FACTS OF THIS CASE AND MUST BE INTERPRETED CONSISTENT WITH THE RULES OF STATUTORY CONSTRUCTION.

The prosecution argues that the rules of construction upon which petitioner relies, Petitioner's Inital Brief ("IB ___") 13-26, do not apply in this case because the meaning of §893.13(1)(c)(1) is unambiguous. Answer Brief of Respondent ("AB ___") 15, 22. Specifically, the prosecution contends that the terms "delivery" and "persons under the age of eighteen" clearly encompass the passage of cocaine through an umbilical cord to an infant in the process of being born.[1/] These terms, however are ambiguous. Indeed, the definitions by the prosecution are irreconcilable within the context of §893.13(1)(c)(1) and lead to absurd results if applied throughout the Comprehensive Drug Abuse Prevention Act. Finally, to give the statute the meaning urged by the prosecution would usurp the legislative function. See Brown v. State, 358 So.2d 16, 20 (Fla. 1978) ("The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary.").[2/]

The word "delivery" is defined as a "transfer" from one person to another. §893.02, Fla. Stat. (1989). "Transfer," the prosecution contends, "is not a term which

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[1] The prosecution fails to address why, if this language is clear, the courts in State v. Vinson, 298 So.2d 505, 507 (Fla. 2d DCA 1974), aff'd, 345 So.2d 711 (Fla. 1977), and United States v. Swiderski, 548 F.2d 445, 449-51 (2d Cir. 1977), found §893.13(1)(c)(1) and its federal counterpart to be ambiguous. Nor does the prosecution explain why the term "any person under the age of 18 years" in the drug delivery statute may be expanded to include a child born addicted, when the Attorney General concluded that the same language in the child abuse statute could not be interpreted in this way. Informal Attorney General Opinion issued to Representative Lippman (Dec. 18, 1986) (Appendix Exhibit 1) ("Ex. __"). See also State v. Gethers, No. 89-2961, slip op. at 6-7 (Fla. 4th DCA Sept. 18, 1991) (holding application of criminal child abuse statute to woman who used cocaine during pregnancy contrary to legislative intent and state policy) (Ex. 2).

[2] When the legislature intends a statute to reach situations involving the future interests of children conceived but not yet born, pregnancy, or birth, it states so explicitly. See IB 20 n.17. See also §732.106, Fla. Stat. (1989) ("afterborn heirs"); §440.151, Fla. Stat. (1989) ("afterborn children"); §390.001, Fla. Stat. (1989) ("fetus"); §383.144, Fla. Stat. (1989) ("infants" and "high-risk infants"); §415.503(9)(a)(2), Fla. Stat. (Supp. 1990) ("newborn infants"); §63.212 (6)(d),(e), Fla. Stat. (Supp. 1990) ("intended father" and "intended mother"); §383.04, Fla. Stat. (1989) ("person in attendance at the birth of a child"); §381.382, Fla. Stat. (1989) ("minor who is pregnant); and §40.013, Fla. Stat. (1989) ("expectant mother"). See Stern v. Miller, 348 So.2d 303, 307 (Fla. 1977) (refusing to recognize stillborn fetus as person under Florida's wrongful death statute in part because the legislature had the opportunity to define further the meaning of the term "person" and chose not to do so).

requires a statutory definition" and, because "any competent person knows what this word means," resort to rules of statutory construction is not necessary. AB 21. Yet the three judges on the panel in Swiderski, 548 F.2d at 450, all presumably "competent persons," found "transfer" unclear. In addition they concluded, contrary to what the prosecution would probably consider the "common understanding" of the term "transfer," that it did not apply to the passage of drugs between two adults who intended to share drugs they possessed jointly. This Court, too, must find the definition of delivery ambiguous and, like the Swiderski court, construe the statute consistent with the legislative scheme.

The prosecution also argues that Johnson's newborns, still attached by the umbilical cord, were "undisputably minor persons" within the meaning of the statute. AB 17. The prosecution maintains that children forced to use drugs and infants born to women with substance abuse problems are indistinguishable and therefore that both are covered by the word "person." Id. But the two are so obviously different that HRS has separate categories for infants effected by a woman's "substance abus[e] during her pregnancy" and "minor[s]" whose parents have given or encouraged them to take drugs.[3/] Indeed if the meaning of "person" were indisputably clear, the prosecution would not need to rely on an interpretation of a statute unrelated to the drug delivery law,[4/] on tort law from other jurisdictions, and on trial testimony to establish this word's meaning. AB 18-21. The fact that birth is a process that takes place over a period of

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[3] HRS Manual 205-10, at A1-4-31-34 (Jan. 1, 1989) (distinguishing between "Drug Dependent Newborn" and "Substance Misuse"); see also HRS Interoffice Memorandum, Policy Clarification - SUBSTANCE MISUSE Codes (Feb. 6, 1990).

[4] Duncan v. Flynn, 358 So.2d 178 (Fla. 1978), provides that for purposes of the wrongful death statute, live birth and personhood occur upon severance of the umbilical cord. See Duncan, 342 So.2d 123, 126 (Fla. 2d DCA 1977) (adopted by the Supreme Court); see also Duncan, 358 So.2d at 180 (Karl, J., dissenting) (characterizing majority as adopting "absolute rule . . . which fixes the occurrence of live birth upon severance of the umbilical cord"). Only when "death occur[s] prior to the cord being severed" is there an inquiry whether the infant nonetheless attained a separate and independent existence. 342 So.2d at 126 (emphasis added). Thus, even if the Duncan analysis could be transplanted to the drug delivery statute, it would not help the prosecution because Johnson's babies lived.

time makes it impossible to assert that the word "person" unambiguously applies at any particular moment in the passage from interdependence to independence.

In fact, the "plain" meanings ascribed by the prosecution to "delivery" and "person" cannot be reconciled. Conceding that a newborn must have a separate existence to be considered a "person," the prosecution contends that a newborn still attached to its mother by the umbilical cord has achieved this existence because "[t]he 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." AB 20. Yet essential to the prosecution's "delivery" argument is the claim that the infant did not have an independent circulation of blood. AB 42. In other words, the prosecution makes the irreconcilable arguments that the newborns still attached were so independent as to be treated as "persons," yet so dependent as to be "delivered" cocaine metabolites. As both cannot be true, this Court should not adopt the prosecution's contradictory explanations of the statute's terms.

Moreover, the definitions of the terms of §893.13(1)(c)(1) supplied by the prosecution would, if adopted, lead to absurd results. Carawan v. State, 515 So.2d 161, 167 (Fla. 1987).[5/] For example, the prosecution's definitions would make a pregnant woman who uses a legally prescribed drug guilty of delivery of a controlled substance if that prescription drug passed through the umbilical cord to the still-connected newborn. §893.05, Fla. Stat. (1989).[6/] Similarly, drug users who give urine samples to their

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[5] Under rules of statutory construction, the terms "delivery" and "person" each should be given a consistent meaning throughout the Florida Comprehensive Drug Abuse and Prevention Act. See, e.g., Goldstein v. ACME Concrete Corp., 103 So.2d 202, 204 (Fla. 1958).

[6] The only way to prevent "transfer" of a prescription drug through the umbilical cord from being a crime under the prosecution's theory would be for a physician to name the fetus in the prescription -- providing, of course, that the prescription to the fetus could be considered to have been made in good faith. And while §415.503(9)(a)(2) provides that a drug-dependent newborn shall not be considered to have been harmed if the drug has been "administered in conjunction with medically approved treatment procedures," under the prosecution's theory of this case, this provision, like other language of §415.503(9)(a)(2), would be "overridden" by §415.511 and could not exempt a woman from prosecution for drug delivery. See AB 23-24. After all, Florida's Comprehensive Drug Abuse Prevention and Control Act does not, as the prosecution argues is necessary, specifically exempt or immunize women who use prescribed drugs from delivery of those

doctors would be guilty of drug delivery. The prosecution's interpretation would also allow the State to shut down hospitals under the drug-related "public nuisances" statute since the hospitals are "places or premises" where on "more than two occasions" pregnant women will make illegal drug deliveries to their newborns through the umbilical cord. §893.138, Fla. Stat. (Supp. 1990). And since the umbilical cord "is no different from a hypodermic needle" according to the prosecution, AB 20-21, the pregnant women herself will become illegal drug paraphernalia. §893.147, Fla. Stat. (1989). See Brief Amicus Curiae of the American Society of Law and Medicine at 33-34; Brief Amicus Curiae of the American Public Health Ass'n at 35.

Finally, the prosecution offers no legislative history to support its claim that the "scope" of §893.13(1)(c)(1) includes the problem of substance abuse during pregnancy. AB 15-18. Instead, it asserts that newborns are "the most vulnerable human beings" and therefore "deserve protection" under §893.13(1)(c)(1). AB 17. The Florida legislature, however, has already determined that the best way to protect substance-exposed newborns is to provide services and treatment. See infra Section II. This Court may not usurp the legislative function, as the prosecution urges it to do, by expanding the meaning of the terms "delivery" and "person" to include the circumstances of this case. See Stern, 348 So.2d at 307 ("As compelling as these arguments may be . . . we are not at liberty to decide what is wise, appropriate, or necessary in terms of legislation. Only the legislature is so empowered."). The rules of construction, the spirit of the statute, and the principle of separation of powers prohibit the prosecution's unauthorized interpretation of §893.13(1)(c)(1). See IB 13-26.

II. CHAPTER 415 IS NOT INTENDED TO NOR DOES IT PERMIT CRIMINAL INVESTIGATION AND PROSECUTION OF A WOMAN BASED SOLELY ON HER NEWBORN'S POSITIVE TOXICOLOGY.

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drugs to a "person under the age of eighteen."

Despite the State's clear policy not to treat the birth of a substance-exposed newborn as a crime, see IB 22-24; Gethers, slip op. at 6-7 (Ex. 2), the prosecution insists that it is the intent of the legislature and the policy of HRS that women who give birth to such newborns be criminally investigated and prosecuted. This argument has been explicitly rejected in Gethers (Ex. 2) and, as detailed below, is without merit.

The prosecution relies on §415.101 for the proposition that the purpose of Chapter 415 is to provide for the detection and correction of abuse through "'criminal investigations.'" AB 24. The prosecution, however, as it did in the court below, attempts to mislead by citing a statutory provision that applies only to abuse of aged and disabled adults. The purpose of the civil child abuse provisions, in contrast, is to provide "comprehensive protective services for abused or neglected children," in an effort "to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care." §415.502, Fla. Stat. (1989). Rather than punish, the goal is to provide early intervention and offer "protective, treatment, and ameliorative services." §415.505(1)(c)(4), Fla. Stat. (Supp. 1990).

In 1987, when the Florida legislature considered the problem of substance-exposed newborns, it deliberately chose nonpunitive, civil approaches to that problem. With enactment of §415.503(9)(a)(2), the legislature ensured that the problem of substance-exposed newborns would be addressed through a system of identification and civil reporting, so as to provide needed services to newborns born to women who were addicted to or abusing drugs.[7/] See HRS Reg. No. 150-6 (Oct. 15, 1988). The

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[7] The Department of Health & Rehabilitative Services' ("HRS") "utmost concern is adequate funding to ensure quality care, services and treatment for physically drug dependent mothers and infants." Fla. Dept. of HRS, HB 686 (1989), Staff Analysis 4 (Mar. 31, 1989) (Ex. 3).

legislature made unmistakably clear its decision not to resort to the criminal justice system by declaring 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." §415.503(9)(a)(2), Fla. Stat. (Supp. 1990). See IB 22-24; Spitzer, A Response to "Cocaine Babies" -- Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent, 15 Fla. St. U. L. Rev. 865 (1987); Gethers, slip op. at 3-7 (Ex. 2); Johnson v. State, 578 So.2d 419, 423-24 (Fla. 5th DCA 1991) (Sharp, J., dissenting).

The prosecution argues that the terms of §415.503(9)(a)(2), however, are "overridden" by the immunity provision of §415.511(1)(b). AB 23-24. This interpretation renders §415.503(9)(a)(2) wholly without meaning, in violation of basic principles of statutory construction. See, e.g., Cilento v. State, 377 So.2d 663, 666 (Fla. 1979). In addition, it is absurd to suggest, as the prosecution does, that the statute's prohibition of criminal investigation leaves the State free to prosecute women solely on the basis of a newborn's drug dependency. Finally, there is no need for §415.511(1)(b) to grant immunity to women who give birth to substance-exposed newborns, as Johnson is not arguing that she is "immune" from prosecution under statutes that could, in fact, be properly applied to her. Neither the drug delivery nor child abuse statutes make such a birth a crime.[8/]

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[8] The preposterousness of the prosecution's immunity argument is readily apparent when one considers the provisions concerning pharmacists in the Comprehensive Drug Abuse Prevention and Control Act. Although it is a crime to possess a controlled substance with intent to deliver it, pharmacists may not be prosecuted for dispensing these drugs in good faith in the course of their work. See §893.13(5), Fla. Stat. (Supp. 1990). This is true even though there is no provision granting pharmacists immunity from prosecution. Similarly, although it may be a crime to possess a controlled substance, women may not be prosecuted solely because their newborns are drug dependent. See §415.503(9)(a)(2), Fla. Stat. (Supp. 1990). This is true even though women whose drug use is apparent in their newborns' urine, are not mentioned in the immunity provision of §415.511(1)(b) or an immunity provision of Comprehensive Drug Abuse and Control Prevention Act.

The prosecution also contends that §415.503(9)(g), amending in 1990 the definition of harm in the civil child abuse provision, "indicates that the legislature intended that drug use while pregnant which exposes a child at birth to controlled substances constitutes a crime in Florida." AB 25 (emphasis added). But this provision, read in full rather than as excerpted by the prosecution,[9] clarifies that a newborn's positive toxicology alone does not qualify as "harm" for the purposes of the civil child abuse provision, much less for the criminal child abuse provisions. In addition, this amendment, passed after the defendant's arrest, can have no direct bearing on her case.

Finally, it is simply not the case, as the prosecution suggests, that all forms of harm defined in §415.503 must be reported to the state attorney pursuant to §415.505(1)(g). AB 24. In only seven specifically defined instances is reporting to the state attorney required;[10] a newborn's drug dependency is not among them.[11]

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[9] The prosecution quotes the amendment to the definition of harm as: "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 . . . ." AB 25. Omitted from the text is the following: "and as a result of such exposure the child exhibits any of the following: 1. Abnormal growth. 2. Abnormal neurological patterns. 3. Abnormal behavior problems. 4. Abnormal cognitive development." §415.503(9)(g), Fla. Stat. (Supp. 1990) (emphasis added). Johnson's children exhibited none of these.

[10] Reporting is required where a child is known or suspected to have been harmed or abused by a noncaretaker, §415.504(2)(a), Fla. Stat. (Supp. 1990); has died as a result of child abuse or death, §§415.504(3), 415.505(1)(i)(1), Fla. Stat. (Supp. 1990); has sustained an observable injury or medically diagnosed internal injury as a result of abuse of neglect, §415.505(1)(h), Fla. Stat. (Supp. 1990); is alleged or found to have been a victim of aggravated child abuse as defined in §827.03, §415.505(1)(i)(2), Fla. Stat. (Supp. 1990); is alleged or found to have been a victim of sexual battery or sexual abuse as defined in §415.503, §415.505(1)(i)(3), Fla. Stat. (Supp. 1990); is alleged to have been abused by specified categories of government employees, §415.505(2)(a), Fla. Stat. (Supp. 1990); and where HRS classifies the abuse after investigation as a proposed confirmed report and there is a prior confirmed report of abuse or neglect. §415.505(1)(j), Fla. Stat. (Supp. 1990).

[11] Significantly, this Court in Department of Health & Rehabilitative Services v. Yamuni, 529 So.2d 258, 261 (Fla. 1988), recognized HRS's limited role in facilitating prosecutions. The court rejected the argument that "HRS's primary role in child abuse cases is to identify child abusers for prosecution much as a police department would do." Instead, it emphasized that "the HRS child abuse role is to provide professional, educational, and general services for the health and welfare of citizens." Id.

Consistent with the statute, HRS regulations detailing the procedures to follow when confronted with a report of a physically drug-dependent newborn do not provide for notification of the State Attorney or other law enforcement officials. See HRS Reg. No. 150-6 (Oct. 15, 1988).[12/] This regulation, not the idiosyncratic action of an HRS employee upon which the prosecution relies, reflects the department's interpretation of the statute. See AB 25. Moreover, an opinion of the State Attorney General confirms that the instances in which reporting to law enforcement is required are limited.

> [T]he legislature has limited the reports furnished to the State Attorney . . . to those reports which upon investigation reveal suspected criminal abuse. Such an interpretation is consistent with the purpose of the act, as amended, which focuses on the department's role in providing rehabilitation and ameliorative services.

Op. Att'y Gen. 078-15 (1978) (emphasis added).[13/]

Thus the prosecution's application of §893.13(1)(c)(1) is not only unauthorized, it is precluded by Chapter 415 and state policy regarding substance-exposed newborns. See generally Gethers (Ex. 2).

III. JOHNSON MAY NOT BE DENIED HER CONSTITUTIONAL RIGHTS BECAUSE OF HER ALLEGED DRUG USE OR BECAUSE SHE CARRIED HER PREGNANCIES TO TERM.

A. Johnson Lacked Fair Notice Of The Prosecution's Unprecedented Interpretation Of The Delivery Statute.

As Cohen v. Katsaris, 530 F. Supp. 1092 (N.D. Fla. 1982), illustrates, Johnson's right to fair warning is not vitiated by the fact that her cocaine use was illegal and that she presumably knew it to be such. See AB 26-27. The Cohen court overturned the petitioners' convictions for trespass, because "th[e] statute failed to provide fair warning

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[12] Constructions of a statute by the agency charged with the statute's administration are entitled to great weight. See, e.g., Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So.2d 987, 989 (Fla. 1985).

[13] The opinion referred to §827.07(6), renumbered as part of Chapter 415, which specified in relevant part that "[i]f the department has reason to believe that a child has been criminally abused, it shall immediately . . . notify the State Attorney General . . . ." Id.

that the conduct for which they have now been convicted had been made a crime." Cohen, 530 F.Supp. at 1098. The court so held despite its finding that "the petitioners might have been . . . prosecuted under Florida's breach of the peace, disorderly conduct or unlawful assembly statutes." Id. Similarly, in this case, although Johnson might have been prosecuted for possession of cocaine, she was nevertheless entitled to fair warning that the drug delivery statute could encompass passage of a metabolite through the umbilical cord to her infants in the process of being born. Moreover, if due process required only that the defendant know that her conduct was illegal, there would be no need to define ex post facto laws to encompass judicial acts that "aggravate[] a crime, or make[] it greater than it was, when committed." Bouie v. Columbia, 378 U.S. 347, 352 (1964) (citing Calder v. Bull, 3 Dall. 386, 390 (1798)) (emphasis omitted).

Finally, it is nothing other than absurd to contend, as does the prosecution, that the expanded definition of harm in §415.503(9)(a)(2) of the civil child abuse statute gave Johnson "notice" that her conduct was criminal; that provision does not define a crime nor mandate reporting to criminal authorities. See AB 28-29; IB 22-24.

B. Section 893.13(1)(c)(1) As Interpreted By The Prosecution Violates Johnson's Substantive Due Process And Privacy Rights.

The prosecution argues that the application of §893.13(1)(c)(1) to this case does not violate substantive due process or privacy rights because there is no right to cause "disastrous consequences" by using illegal drugs. AB 35. But the defendant has not been prosecuted for her illegal drug use nor for causing "disastrous consequences" to her children who were born healthy, but rather for the inherently innocent and constitutionally protected act of becoming pregnant and carrying those pregnancies to term.[14/] Because pregnancy is at the very least an element of the crime in this case,

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[14] The prosecution's gloss on this case is that the defendant is a selfish, scheming woman who sought to harm her children and who now asks this Court to recognize a right to "use drugs" and to "abuse her own body." AB 5, 33, 35. This view, however, is plausible only if the court ignores that drug addiction is a disease, that pregnant women are especially disadvantaged in their efforts to overcome that disease, and that pregnant women, by using drugs, do not intend to endanger their developing babies. See IB 29, 30; Brief

this Court must determine whether §893.13(1)(c)(1) as interpretated is supported by a compelling state interest and implemented through the least intrusive means.[15]

The prosecution asserts that the state has a compelling interest in protecting potential life throughout pregnancy. AB 35. This interest, according to the prosecution, allows the state to require that a woman "refrain from causing harm to the future child" and obtain "a certain degree of prenatal care once she elects not to have an abortion and carry the child to full term." AB 35, 37. In other words, the prosecution, based on nothing more than a few law review articles and the opinion of a law school professor, is asking this Court to take the unprecedented step of recognizing fetal rights and using them as a basis for regulating pregnant women through the criminal laws.[16]

Recognizing an enforceable duty of prenatal care would give fetuses more protection than children and permit unlimited state intrusion into pregnant women's lives. See, e.g., Gallagher, Prenatal Invasions & Interventions: What's Wrong with Fetal Rights, 10 Harvard Women's L. J. 9, 42, 43 (1987) ("Prenatal Invasions"); Mariner, et. al. Pregnancy, Drugs, and the Perils of Prosecution, 9 Crim. Jus. Ethics 30, 35 (1990). Because fetuses, unlike persons, are part of a woman's body, it is not possible to treat them like children with independent rights or to apply to fetuses laws developed to protect children, AB 30-31, without subordinating women's rights to privacy, liberty, and

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Amicus Curiae of the American Public Health Ass'n at 15-18; Brief Amicus Curiae of the Nat'l Ass'n for Perinatal Addiction Research and Education at (NAPARE) at 4-7; Brief Amicus Curiae of the American Med. Ass'n at 5-8.

[15] As detailed in Petitioner's Initial Brief, the prosecutor cannot even show that this application of §893.13(1)(c)(1) meets minimum substantive due process requirements, IB 28-34, much less survives the strict standard of scrutiny required by the privacy analysis that is the focus of this discussion. See IB 34-38.

[16] The prosecution's claim that the case "does not involve fetal rights," AB 32, is repudiated by the fact that it relies exclusively on articles asserting the existence of fetal rights, see AB nn.7, 8, 9, 14, 15, and itself characterizes the prosecution as justified because of the interest in "'protecting the fetus,'" AB 31, and in enforcing a "'duty to insure that the fetus is born as healthy as possible,'" AB 37 (emphasis added). See also AB 30, 31, 34, 35. Similarly, the prosecution states that its case does not rest on "acts committed against a fetus," even though the drug use at issue in this case occurred prior to delivery and birth when there was only a fetus. AB 32. See IB 36 nn.51, 52.

bodily integrity.[17] Id. As the articles cited by the prosecution make clear, effectuating a state interest in protecting a fetus from maternal harm would require regulation of not only illegal substances but also alcohol and cigarette use, diet, prenatal care, and health prior to conceiving. AB 30, 31, 37 (citing articles).[18] Indeed, the prosecution's own theory does not limit the application of the asserted state interest to illegal drug use.

Even if the prosecution's asserted interest in potential life were recognized by the courts, it does not follow that the state may punish women for becoming pregnant while addicted to drugs, or infringe on fundamental liberties in other ways, such as prohibiting pregnant women from working in jobs potentially hazardous to the fetus, see International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991), or by requiring pregnant women to undergo surgery on behalf of viable fetuses, In re A.C., 573 A.2d 1235 (D.C. App. 1990) (en banc). This is so because the state must not only demonstrate a compelling interest, but also prove that it "accomplishes its goal through the use of the least intrusive means." Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985).

The prosecution has failed to address, let alone satisfy, this part of the test. It has failed to show how threatening pregnant women with fifteen-year terms in prisons that provide neither drug treatment nor prenatal care will improve the health of future children.[19] Similarly, it has failed to show how separating newborns from their

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[17] Any effort to require prenatal care under threat of prosecution would be unconstitutionally vague as well as intrusive. For example, how much prenatal care would be required to avoid criminal prosecution? And at what point may the state assume a woman has elected not to have an abortion, given the obstacles to abortion and that her medical condition may change during the course of pregnancy?

[18] See, e.g., Sam S. Balisy, Note, Maternal Substance Abuse: The Need to Provide Legal Protection to the Fetus, 60 So. Cal. L.Rev. 1209, 1215, 1218 (1987) (commenting "that maternal alcohol abuse must be regulated" and that "[i]n light of the adverse effects of maternal tobacco use . . . legal intervention is essential to protect the fetus . . .).

[19] As the Report of the Board of Trustees of the American Medical Association ("AMA") explains, "prison health experts warn that prisons are 'shockingly deficient' in attending to the health care needs of pregnant women . . . . Additionally, it is unclear that incarceration would prevent drug use by pregnant women because drugs are readily available in prison." AMA, Board of Trustees' Report, Legal Intervention During Pregnancy, 264 J.A.M.A. 2663, 2667 (1990).

imprisoned mothers and placing these children into foster care will further the health of future children. See Brief Amicus Curiae of the American Med. Ass'n at 24-25. Nor has the respondent provided any evidence to contradict the unanimous opinion of the public health community that these laws endanger fetal health, in part because they frighten women away from what little help is available.[20] And it has not provided any evidence to contradict the conclusion that there are less restrictive and more effective means of addressing the problem.[21] IB 37-38.

IV. JOHNSON'S CHALLENGE TO THE INSUFFICIENCY OF THE PROSECUTION'S CASE IS PROPER AND PERSUASIVE.

First, although asserting that it proved by "direct testimony" that benzoylecgonine passed through the umbilical cords during the relevant seconds, AB 45, the prosecution relied solely on evidence that the cords were or appeared to be working during the time of these births, along with generalities about the passage of cocaine through the blood[22] and placenta and estimates of the length of time benzoylecgonine remains in

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[20] The prosecution does not dispute that threats of prosecution will deter women from obtaining health care, but instead argues that if this deterrent effect were acknowledged, then statutes making child abuse a crime would also have to be found invalid because they "may deter parents from obtaining medical care for their . . . abused children." AB 30. But child abuse laws and fetal abuse laws proposed by the prosecution apply in contexts too fundamentally different to be compared. Because the child is separate, a parent can attribute any injuries to accidents or other family members and thus seek medical attention for his or her children without incriminating him or herself. A pregnant woman, however, cannot pretend that someone else is responsible for problems she may be having. Moreover, a battered child can be removed from the parent and protected, counterbalancing any deterrent effect that child abuse and child abuse reporting laws may have. Fetuses, however cannot be removed or protected without addressing the needs and circumstances of the woman herself.

[21] Nor can prosecution be justified as a means to get pregnant drug-using women into treatment. As a recent article in the Journal of the American Medical Association concluded, "[I]n the current context of the scarcity and poor quality of drug treatment programs for women/mothers, a debate over mandatory treatment is symbolic at best and is meaningless in practical terms. . . . At this time, the children of drug-using mothers may be most effectively served by the development of available, efficacious, and welcoming services for women and families." Chavkin, Mandatory Treatment for Drug Use During Pregnancy, 266 J.A.M.A. 1556, 1560 (1991); see also Chavkin, Jennifer Johnson's Sentence: Commentary on "Birth Penalty," J. of Clinical Ethics 140 (Summer 1990). Even assuming that pregnant women if arrested, would get priority for the few spaces available, women should not have to get arrested to get the treatment they need and want.

[22] The prosecution's argument also mischaracterizes the evidence upon which it relies. For example, the defense expert did not, as the prosecution claims, testify that "if the substance was in the defendant's blood, it passed to the children." AB 40. Dr. Kandall testified that blood flow through the cord is a variable process

the blood.[23] See AB 38-45; but see IB 38-42. In doing so, the prosecution ignores testimony of its own witnesses that indicates there was no evidence that the metabolite would be in Johnson's blood, let alone in blood that may or may not have passed through the cords during the critical seconds. The prosecution's witness testified that the metabolite may remain in the urine even when it is no longer in the blood, yet only the urine was tested. RA 158. Moreover, the State does not mention, let alone challenge, the uncontroverted testimony that the only way to prove that benzoylecgonine passed during the relevant seconds would be to test blood from the cord, evidence the prosecution lacked. RA 295-97; see also RA 38. Thus, the prosecution relies only on inferences -- and ones that are unreliably drawn -- to establish that benzoylecgonine passed through the umbilical cords after the newborns emerged from the birth canal.[24] Because this evidence is consistent with a reasonable hypothesis of innocence, namely that the metabolite passed at some point prior to birth, the convictions must be reversed.[25] See generally IB 38-42.

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and there is no guarantee "that [the cocaine metabolite is] in the blood all the time." RA 284-85.

[23] The evidence upon which the prosecution relies to answer Johnson's argument is not direct as the prosecution contends. No witness testified from personal knowledge that the metabolite was passing during the relevant seconds. See Davis v. State, 90 So.2d 629, 631 (Fla. 1956) (defining direct and circumstantial evidence).

[24] The prosecution's suggestion -- that its inferences in this case sufficed because they are akin to those used in the "typical case" charging driving under the influence -- is unavailing. AB 44. The prosecution does not contend nor did it establish at trial that there are methods accepted within the scientific community by which to determine when cocaine was in the blood, based on the presence of a metabolite in the urine. Compare State v. McClain, 508 So.2d 1259, 1260 (Fla. 4th DCA 1987) (expert unable from small quantity of cocaine "to tell within a tolerance of 24 hours when the cocaine was ingested, or whether its presence affected the person's manner of driving"), aff'd, 525 So.2d 420 (Fla. 1988) with Haas v. State, 567 So.2d 966 (Fla. 5th DCA 1990) (discussing use of blood alcohol absorption curve and retrograde extrapolation to assess blood alcohol content). Moreover, even if such methods existed, the question would remain whether in this case the techniques were properly applied and the inferences supported.

[25] The prosecution's argument that Johnson, by failing to renew the motion for judgment of acquittal, waived her challenge to the sufficiency of the evidence is wholly without merit and directly contrary to authority. E.g., Williams v. State, 511 So.2d 740, 742 (Fla. 5th DCA 1987); McGeorge v. State, 386 So.2d 29, 30 (Fla. 5th DCA 1980). In fact, courts have refused to review challenges to the sufficiency of evidence only when the defendant has made no motion for acquittal. E.g., State v. Barber, 301 So.2d 7 (Fla. 1974); Estrada v. State, 400 So.2d 562, 563 (Fla. 3rd DCA 1981). Williamson v. State, 510 So.2d 1052 (Fla. 3rd DCA 1987), upon which the prosecution relies, AB 38, does not even address the question of waiver or Rule 3.380.

Second, State v. Medlin, 273 So.2d 394 (Fla. 1973), does not relieve the prosecution of its burden to prove that Johnson's "delivery" was volitional and knowing. See IB 44. Even the court below found necessary to the prosecution's case proof that Johnson knew that cocaine would "pass to her fetus" and that "birth was imminent." Johnson, 578 So.2d at 420; see also id. at 420-21 (Cobb, J., concurring). In Medlin, the court presumed intent to deliver -- or "criminal intent" -- because the delivery was done volitionally and knowingly. 273 So.2d at 396-97 (relying for analysis and holding on cases in which defendants volitionally committed acts, although not with intent to violate statutes). In this case, the prosecution cannot avail itself of the presumption in Medlin, as the only act Johnson presumably committed with purpose and understanding was her use of cocaine. Cf. Swiderski, 548 F. 2d at 451 (declining to collapse intent to share among joint possessors with intent to deliver). Moreover, the prosecution itself concedes that it had to establish Johnson's acts to have been knowingly committed, even if her intent were initially presumed. AB 45-46. It failed to do so. See IB 42-44.

Nor can the prosecution defeat Johnson's argument by mischaracterizing it. AB 46-47. Addicts, like others, are responsible for those actions over which they have control. Johnson argues only that the passage of the metabolite from her body to that of her fetus or newborn -- "the delivery" -- was not a volitional act, as she did not have control over her internal biological functions. IB 44.

Finally, Johnson did not, as the prosecution contends, concede in a pretrial stipulation that benzoylecgonine is a controlled substance. AB 47-48. The stipulation specifies only that the tests of the newborns' urine "indicate[d] that [they] had cocaine in their systems (urine) up to 72 hours prior to the collection of the urine samples." RA 510. Nowhere does the stipulation concede that benzoylecgonine is a controlled substance within the meaning of §893.03(2). Instead, it only admits that there was evidence that the parent drug cocaine was in the newborns' systems at some earlier time.

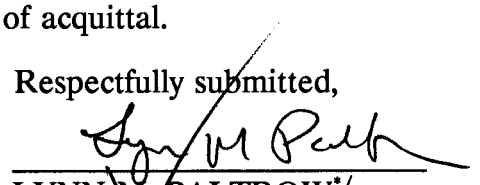
Nor did Johnson waive her argument that the prosecution failed to prove that she passed a controlled substance. AB 47. Because the evidence in this case established that benzoylecgonine was not a "controlled substance," IB 45-48, the crime of delivery was "totally unsupported" and the error fundamental. Troedel v. State, 462 So.2d 392, 399 (Fla. 1984); see also Vance v. State, 472 So.2d 734, 735 (Fla. 1985). Moreover, the error is fundamental because "delivery" of an uncontrolled substance is a nonexistent crime. Cf. Brown v. State, 550 So.2d 142, 142-43 (Fla. 1st DCA 1989); Plummer v. State, 455 So.2d 550, 550 (Fla. 1st DCA 1984).[26]

CONCLUSION

For the foregoing reasons, Jennifer Johnson's convictions should be vacated and the case remanded for the entry of a judgment of acquittal.

Dated: October 2, 1991.

Respectfully submitted,



LYNN M. PALTROW*/
JANET BENSHOOF
CATHERINE ALBISA
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LOUISE F. MELLING
ERIC LIEBERMAN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
For the National Emergency
Civil Liberties Committee
740 Broadway
New York, New York 10025
(212) 254-1111

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[26] The rationale for finding a claim not to have been waived is that the error, if raised below, might "have been cured by allowing the state to . . . supply the missing, technical element." Johnson v. State, 478 So.2d 885, 886 (Fla. 3rd DCA 1985), dismissed, 488 So.2d 830 (Fla. 1986); see also Pinder v. State, 396 So.2d 272, 272-73 (Fla. 3rd DCA 1981). This rationale does not apply to Johnson's argument because the prosecution came forward with evidence, see IB 46-47, and that evidence established that benzoylecgonine is not a controlled substance. See Troedel, 462 So.2d at 399 (court finding evidence insufficient to sustain conviction although argument was not raised by defendant).

* Admitted to appear by order of May 14, 1991. The attorneys wish to thank Teresa Scott, Mike Dowdle, Caitlin Borgmann, Baccha Pham, Gloria Calhoun and Dominique Bravo for their assistance with the Memorandum.