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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

V.

KAWANA ASHLEY,

Respondent.

CASE NO. 87,719



KAWANA ASHLEY,

Petitioner

V.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,750

Certified Questions from the District Court of Appeals, Second District

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES FOUNDATION OF FLORIDA, INC.; NOW LEGAL DEFENSE AND EDUCATION FUND; CRIMINAL JUSTICE INSTITUTE; WOMEN'S LAW PROJECT; NATIONAL ORGANIZATION FOR WOMEN IN FLORIDA, INC.; NATIONAL ORGANIZATION FOR WOMEN TAMPA CHAPTER; FEMINIST WOMEN'S HEALTH CENTER OF TALLAHASSEE; WOMEN'S EMERGENCY NETWORK

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## CERTIFIED QUESTIONS

1. May an expectant mother be criminally charged with the death of her born-alive child resulting from self-inflicted injuries during the third trimester of pregnancy?

**2.** If **so,** may she be charged with manslaughter or third-degree murder, the underlying predicate felony being abortion or attempted abortion?

## STATEMENT OF THE CASE

On March *27,* 1994, Kawana Ashley, a nineteen-year-old poor, pregnant woman, shot herself in the stomach, causing the fetus she was carrying to be born prematurely and subsequently to die. State v. Ashley, 670 So. 2d 1087 (Fla. 2d DCA 1996). The State charged **Ms.** Ashley with manslaughter and third-degree felony murder. Id. at 1088. The predicate felony for the third-degree murder charge was abortion or attempted abortion. Id.

**Ms.** Ashley moved to dismiss the charges, asserting that as a matter of law, **she** could not be charged with either crime. The trial Court granted **Ms.** Ashley's motion to dismiss the third-degree murder charge, but denied her motion to dismiss the manslaughter charge. Id. The District Court of Appeal for the Second District affirmed. Id. That court certified the issues presented to this Court as questions of great public importance. Id. at 1093. Ms. Ashley now **asks** this Court to reverse the decision of the Court of Appeal upholding the manslaughter charge **and** to affirm the decision dismissing the third-degree murder charge. Amici curiae respectfully urge this Court to grant the relief sought by **Ms.** Ashley.

## SUMMARY OF ARGUMENT

Neither Florida's manslaughter statute nor its third-degree murder statute applies to prenatal conduct by a pregnant woman that harms the fetus she is carrying, even if the fetus is born alive and subsequently dies. Indeed, no court in this nation has ever applied the born-alive doctrine in the manner sought by the State. A holding permitting criminal prosecution of Ms. Ashley would depart from well-established doctrine that has applied the born-alive rule to actions by third parties, but not to the pregnant woman. The State's theory, if accepted by this Court, could subject to governmental scrutiny and criminal sanction all prenatal conduct that can harm a fetus, in contravention of fundamental privacy and liberty rights. The lower court's misapplication of this doctrine as a basis for holding **Ms.** Ashley liable for manslaughter should therefore be reversed.

The State's attempt to apply the felony murder statute to a woman who seeks to induce her abortion is similarly unprecedented and unfounded. By its terms, the Florida criminal abortion statute applies only to the person who performs an abortion on a pregnant woman. The statute preserves the long-standing common-law immunity afforded a woman who obtains or self-induces an abortion. Because a woman may not be held criminally liable for attempting to self-induce an abortion, **no** predicate felony for the third-degree murder charge exists. Accordingly, the lower court's dismissal of this count of the information should be affirmed.

## ARGUMENT

### I. APPLICATION OF THE BORN-ALIVE RULE TO PROSECUTE WOMEN FOR PRENATAL CONDUCT IS UNPRECEDENTED AND CONTRARY TO DECISIONS OF THIS COURT.

The lower court's decision upholding the manslaughter charge rests on a far-reaching and unprecedented theory: that a woman's conduct during pregnancy can give rise to criminal prosecution for any harm her child suffers if it is later born alive. This theory lacks foundation in -- and conflicts with -- settled Florida law. The law of this state provides for civil and criminal sanctions where a third party injures a fetus later born alive, but there is no precedent for prosecution of a woman for prenatal conduct that injures a fetus later born alive. To accept the State's theory would expose women to prosecutors' scrutiny and criminal sanction for any harm that might be attributable to prenatal conduct, whether that conduct be attempting an abortion or suicide, drinking, smoking, or even working. The lower court's decision upholding the manslaughter charge should therefore be reversed,

In holding the born-alive rule applicable to **Ms.** Ashley under Florida's manslaughter statute, the Court of Appeal relied upon Kniahton v. State, 603 So. 2d 71 (Fla. 4th DCA 1992). Contrary to the Court of **Appeal's** assertion, however, Kniahton is not "factually similar to this case." See Ashley, 670 So. 2d at 1089. While both Knighton and this case involve a pregnant woman shot in the abdomen and a baby who was born alive prematurely by cesarean section and subsequently died, the two cases are starkly different with respect to the critical issue raised by this appeal: in Kniahton, the shooting was committed by a third party; in this case, **Ms.** Ashley shot herself. The difference is legally significant.

In Stallman v. Youngquist, 531 N.E.2d 355, 357 (Ill. 1988), the Illinois Supreme Court recognized that the relationship of a third party to a fetus is not the same as that of the pregnant woman to her fetus. That court refused to hold a woman liable for alleged negligence during her pregnancy that resulted in serious and permanent injury to her child when later born alive. Id. The court did so even though the "pervasive and established law" of the state already recognized "the right to bring an action for injuries inflicted on a fetus by a person not its mother." Id. The court emphasized:

> It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. . . . No other defendant must go through biological changes of the most profound types, possibly at the risk of her own life, in order to bring forth an adversary into this world.

Id. at 359. The high court of Illinois further recognized that any contrary ruling would "infringe on [a woman's] right to privacy and bodily autonomy." Id. at 360.[1]

Perhaps for these reasons, the State and the lower courts can point to no decision upholding a criminal charge against a woman for prenatal conduct resulting in the death of or injury to the child when later born alive. The decisions of this state militate against the Court embarking on this unchartered course: These decisions respect the unity of interest between a pregnant woman and the fetus she carries, and the constitutional and other harms that arise from treating a pregnant woman as the legal adversary of her fetus.

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1 Although the court in Stallman declined to hold the mother liable for an unintentional tort, its reasoning has equal force in the criminal context.

In the tort context, when considering actions for injuries to a fetus, the district courts of appeal have consistently recognized that *a* fetus "is living tissue of the body of the mother." Singleton v. Ranz, 534 So. 2d 847, 848 (Fla. 5th DCA 1988), review denied, 542 So. 2d 1332 (Fla. 1989). The prospective mother therefore has a cause of action "for the negligent or intentional tortious injury" by a third party to the fetus, "the same as she has for a wrongful injury to any other part of her body." Id.; see also Hilsman v. Winn Dixie Stores, 639 So. 2d 115, 117 (Fla. 4th DCA) (The "fetus, while in the mother's womb, is living tissue of the body of the mother for injury to which the mother may recover damages"), review denied, 649 So. 2d 236 (Fla. 1994); McGeehan v. Parke-Davis, 573 So. 2d 376, 376-77 (Fla. 2d DCA) (wrongfully caused loss of fetus is a legally cognizable bodily injury to the woman who suffers the loss), review denied, 583 So. 2d 1036 (Fla. 1991).

This Court itself has rejected an attempt to hold a pregnant woman criminally liable for prenatal conduct causing harm to the subsequently born-alive fetus. In Johnson v. State, 602 So. 2d 1288 (Fla. 1992), for example, this Court held that a woman could not be convicted of delivery of a controlled substance to a minor for using drugs while she was pregnant. In doing so, the Court reversed the appellate court, which had upheld the conviction based on the very same theory the State is advancing here: that a woman can be held criminally liable for prenatal conduct that harms her fetus if that fetus is subsequently born alive.

Lower courts in this state have also rejected attempts to misconstrue statutes to criminalize women's prenatal conduct. For example, in State v. Gethers, the Fourth District Court of Appeal affirmed the trial court's dismissal of criminal child abuse charges brought against a woman who "permitt[ed] her unborn child to be injured by [her] introduction of cocaine into her own body . . ."

585 So. 2d 1140, 1441 (Fla. 4th **DCA** 1991). The court **held** that the child **abuse** statute did not reach a pregnant woman's conduct that caused harm to a fetus subsequently born alive, See also State v. Carter, No. 89-6274, slip op. at 2 (Fla. Cir. Ct. July 23, 1990) (refusing to apply the drug delivery statute to a woman's prenatal conduct because the fetus was not "another person" separate and distinct from the woman at the time of the incident) (Ex. 1), aff'd, 602 So. **2d** 995 (Fla. 1st DCA 1992).

Similarly, other states have uniformly dismissed charges *of* manslaughter or murder premised on women's prenatal conduct that allegedly caused the death of the child once born. For example, in State v. Barnett, No. 02D04-9308-CF-611 (Ind. Super. Ct. Feb. I1, 1994) (Ex. 2), the Indiana Superior Court dismissed charges of reckless homicide brought against a woman whose drug use and failure to obtain medical help were alleged to have resulted in the premature death of her child when born alive. In People v. Jones, No. 93-5 (Cal. Justice Ct. July 28, 1993) (Ex. 3), the California Justice Court dismissed murder charges brought against a woman whose drug use during pregnancy was alleged to have caused the premature death of her child. See **also** Jauriaue v. Justice Court, No. 18988, Tr. at 52 (Cal. Super. Ct. Aug. 21, 1992) (construing statute to permit murder prosecution "only **as** to **acts** causing death to a fetus by persons other than the mother") (Ex. 4), writ denied, (Cal. App. 1992).[2]

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*2* The courts of other jurisdictions have also routinely dismissed other charges premised on women's prenatal conduct, including charges of child abuse based on women's alleged drug use during pregnancy. See. e.g. Reinesto v. Superior Court, **894** P.2d 733 (Ariz. Ct. **App.** 1995) (dismissing charge of criminal child abuse based on prenatal conduct and recounting similar cases from other jurisdictions).

In each of these cases, the courts of this state and other states have implicitly recognized what the Illinois Supreme Court in Stallman explicitly acknowledged -- that a pregnant woman's relationship to her fetus differs fundamentally from anyone else's relationship to that fetus. In nonetheless holding that the born-alive theory relied upon in Knighton, 603 So. 2d 71, and in Day v. Nationwide Mutual Insurance Co., 328 So. 2d 560 (Fla. 2d DCA 1976), could be applied to this case,[3] the Court of Appeal ignored the well-established principle that, for reasons of constitutional dimension, the born-alive doctrine of Day and Knighton is never applied to hold pregnant women liable.[4]

Application of the born-alive rule to hold Ms. Ashley criminally liable for manslaughter based on her prenatal conduct would open the door to criminal investigation and liability for a vast array of activities in which a woman may engage while pregnant. Such an application could seriously threaten the rights to

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3 The other cases on which the Court of Appeal relied also involve prosecution of third parties whose actions resulted in the death of the infant later born alive. See Jones v. Commonwealth, 830 S.W.2d 877 (Ky. 1992); State v. Hammett, 384 S.E.2d 220 (Ga. App. 1989); Williams v. State, 561 A.2d 216 (Md. 1989) People v. Hall, 557 N.Y.S.2d 879 (N.Y. App. Div.), appeal denied, 565 N.Y.S.2d 771 (N.Y. 1990); Ranger v. State, 290 S.E.2d 63 (Ga. 1982); People v. Bolar, 440 N.E.2d 639 (Ill. App. 1982).

4 Florida's feticide statute further evidences the Legislature's intent to limit liability for fetal injuries to persons other than the pregnant woman. Under the feticide statute, liability only attaches when a fetus dies as a result of injury to the pregnant woman "which would be murder if it resulted in the death of such mother." Fla. Stat. § 782.09. Accordingly, only third parties, not the pregnant woman herself, may be held liable because a woman cannot possibly be guilty of her own murder. If the Legislature had intended for the pregnant woman to be held liable under the manslaughter or third-degree felony murder statutes at issue here, surely a pregnant woman would be liable for feticide as well. Cf. Love v. State, 450 So. 2d 1191, 1193 (Fla. 4th DCA 1984) (presence of feticide statute evidences that battery statute was not intended to reach harm to fetus, even if later born alive).

autonomy and privacy of pregnant women in Florida. **As** one commentator has noted:

> Given the fetus's complete physical dependence on and interrelatedness with the body of the woman, virtually every act of the pregnant woman has some effect on the fetus. A woman could be held civilly or criminally liable for fetal injuries caused by accidents resulting from maternal negligence, such as automobile or household accidents. She could **also** be held liable for any behavior during her pregnancy having potentially adverse effects on her fetus, including failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using a general anesthetic or drugs to induce rapid labor during delivery.

Dawn E. Johnsen, Note, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights. Liberty. Privacy. and Equal Protection, 95 Yale L.J. 599, 605-07 (1986) (footnotes omitted).

Criminal proscriptions applied to pregnant women for harm to their own fetuses raise fundamental issues of culpability and foreseeability. Could a pregnant woman be prosecuted for murder or manslaughter if the death of her newborn were linked to her drinking wine, taking prescription or over-the-counter drugs, or inhaling any other "dangerous substance"? Would a pregnant woman who exceeds the speed limit while driving and triggers an accident resulting in the death of a subsequently born child be subject to criminal penalties? What liability would there be for the woman whose family income depends on her working around toxic substances, exposure to which during pregnancy she knows can result in a fatal birth defect? Would a murder charge be authorized for the woman who refuses permission for fetal surgery, where the lack of treatment

results in the birth of an infant that cannot survive? **See, e g.**, In re A.C., 573 A.2d 1235 (D.C. **App.** 1990) (en banc) (vacating a lower court order that required a dying woman to undergo a cesarean section against her will for the purported benefit of her fetus); In re Doe, 632 N.E. 2d 326 (Ill. **App.** Ct. 1994) (affirming a lower court's refusal to order a cesarean section for purported benefit of fetus against the will of a pregnant woman).[5]

The dangers of boundless liability for pregnant women underlay the California Superior Court's dismissal of charges of murder against a woman for her prenatal conduct in the Jauriaue case. **As** that court stated: "[I]f we adopted the construction sought by the District Attorney we would have to follow that construction to its logical conclusion, and murder charges could result from smoking, drinking, working in [a] contaminated atmosphere, failure to follow doctor's orders, and many other circumstances that come to mind and some that would not even be predictable at this time." Jauriaue, Tr. at 53 (Ex. **4).** See **also** Reinesto, **894** P.2d at 736 ("Were we to extend the statute to prenatal conduct that affects a fetus in a manner apparent after birth -- conduct that would **be** defined **solely** in terms of its impact on the victim -- the boundaries of proscribed conduct would become impermissibly broad and ill-defined."). While the present

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5 The Illinois Supreme Court noted the practical impossibility of developing a standard by which to judge a woman's actions during pregnancy:

> By what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole?

Stallman, 531 N.E.2d at 360.

case involves a rather brutal self-inflicted wound, it nevertheless presents the same issue: Can the state treat a pregnant woman as separate from her fetus and prosecute her for her prenatal conduct?[6]

Contrary to the lower court's assertion, even the common law does not support the application urged by the State. Ashley, 670 So. 2d at 1089. While citing Lord Coke, the lower court failed to mention that **Sir** Matthew Hale, another Justice of the King's Bench writing at the same time as Lord Coke, interpreted the common law in a manner diametrically opposite to Coke's interpretation. Williams v. State, 550 A.2d 722, 723-25 (Md. App. 1988) (citing I Hale, **Pleas** of the Crown 433 (1736)), aff'd, 561 A.2d 216 **(Md.** 1989). Indeed, even anti-choice commentators concede that the common law did not treat the fetus as a person in relation to the pregnant woman herself. See, e.g., C. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L. Rev. 563, 618, 622-23 (1987).

Were the Court to accept the State's theory in this **case,** any of Florida's neonatal and early infant deaths could be the subject of **a** criminal investigation. Women's privacy and autonomy would thus be drastically curtailed.[7] See In re

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6 In this case, the Court of Appeal did not dispute that "culpable negligence" can form the basis for a manslaughter charge. Ashley, 670 So. 2d at 1092. The court even acknowledged that the culpable negligence standard could give rise to charges premised on a woman's "negligent decision-making regarding her pregnancy or ignoring the advise of her doctor." Id. To protect women from undue government intrusion and prosecution, the court relied solely on "the professional responsibility" of the state's attorneys and the protections of the court. Id. at 1092-93. But **as** set forth above, the precedent of this court and the protections of the constitution do not permit this discretion.

7 **As** this Court has recognized, punishing women based on their actions during pregnancy will harm not only women but their fetuses. In Johnson and Gethers, the courts acknowledged that punishing women for drug use during pregnancy could ultimately deter women from seeking prenatal care and

T.W., 551 So. 2d 1186 (Fla. 1989) (recognized enhanced privacy protection guaranteed by Florida Constitution); In re Browning, 568 So. 2d 4 (Fla. 1990) (recognizing right to refuse medical treatment as encompassed in right to privacy). The potential results that would flow from treating fetuses and the women carrying them as possible adversaries counsel against application of the manslaughter statute to a pregnant woman whose born alive child subsequently dies. The better course, and the one to which the Florida courts have strictly adhered prior to this case, is to recognize such harm only when caused by third parties. This Court should, then, reverse that part of the Court of Appeal's decision upholding the manslaughter charge and should once again "decline the . . invitation to walk a path that the law, public policy, reason and common sense forbid it to tread." Johnson, 602 So. 2d at 1297.

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treatment for fear of prosecution. See Johnson, 602 So. 2d at 1296; Gethers, 585 So. 2d at 1143.

## II. THE IMMUNITY AFFORDED A WOMAN WHO SEEKS OR ATTEMPTS TO SELF-INDUCE AN ABORTION BARS PROSECUTION FOR FELONY MURDER.

The Court of Appeal's decision dismissing the charge of third-degree felony murder should be affirmed because the predicate felony -- abortion or attempted abortion -- does not apply to a pregnant woman who **seeks** or attempts to self-induce an abortion. That Florida's criminal abortion statute cannot **be** applied to **Ms.** Ashley is clear from the plain language of the statute, the history of criminal abortion statutes in this state, and the long-standing common-law doctrine granting immunity to a pregnant woman who seeks or attempts to self-induce an abortion.

Florida's criminal abortion statute, enacted in 1979, provides:

> (a) Any person who willfully performs, or participates in, a termination of a pregnancy in violation *of* the requirements of this section is guilty of a felony of the third degree. . . .
> (b) Any person who performs, or participates in, a termination of a pregnancy in violation of the provisions of this section which results in the death of the woman is guilty of a felony of the second degree . , . .

Fla. Stat. § 390.001(10). The plain language of the statute thus distinguishes between the "person" who performs or participates in an abortion and the "woman" whose death results therefrom. See id.[8]

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8 This same distinction appears in Florida's misdemeanor abortion statute. This statute makes it unlawful "for any person to perform or assist in performing an abortion on a person" outside of certain specified facilities, including hospitals and licensed clinics, Fla. Stat. § 797.03. In rendering criminal only the person who performs an abortion on someone else, the statute plainly does not encompass the woman on whom the abortion is performed.

This distinction between a third party who performs the abortion and the woman who obtains the abortion -- with the former, but not the latter, criminally liable -- has existed in the laws of this state since the first criminal abortion statutes were enacted in 1868. Those laws imposed liability for a third-degree felony on

> [w]hoever with intent to produce miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein . . . if the woman does not die in consequence thereof. . . .

Laws 1868, c. 1637, subc. VIII, § 9, amended by 71-136, § 770, repealed by 72-196 (emphasis added). Another provision imposed liability for the second-degree felony of manslaughter on

> [e]very person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever or shall use or employ any instrument, or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose . . . in case the death of such child or of such mother be thereby produced . . . .

Laws 1868, c. 1637, subc. III, § 11, amended by 71-136, § 718, repealed by 72-196 (emphasis added). Referring to these early criminal abortion statutes, former Supreme Court Justice Ervin noted, "[t]he mother is not contemplated as one of the class of aborters, not being mentioned as one in the criminal statute . . . . [N]owhere is there a provision, express or implied, for punishing women who abort themselves, either directly or indirectly." Walsingham v. State, 250 So. 2d 857, 862-63 (Fla. 1971) (Ervin, J., concurring).

As the Court of Appeals noted, the distinction between a third party who performs the abortion and the woman who self-induces or consents to an abortion has its roots in the common law. The common law provided that

> an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender in the physical performance of the operation did not make her an accomplice in his crime. . . . It was in truth a crime which, in the nature of things, she could not commit.

Ashley, 670 So, 2d at 1090-91 (quoting State v. Carey, 56 A. 632,636 (Conn. 1904) (internal citations omitted) (emphasis added)). This legal distinction was based on the common sense distinction between actions taken by a person against herself and actions taken by a third party.

> [O]rdinarily, a man may injure his own body by his own hand or the hand of an agent, without himself violating the criminal law. And the person who injures his body with such assent may commit a crime of which the injured party is not guilty . . . . This distinction between a man's injuring his own body himself, or through assent to such injury from another, and the crime that may be committed by another in inflicting such injury, has been strongly drawn in crimes akin to the one under discussion.

Carey, 56 A. at 635-36. Reviewing the decision in Carey approximately seventy years later, the United States District Court for the District of Connecticut noted:

> A necessary part of this reasoning was acceptance of the premise that when a woman consents to an abortion, the only legally cognizable injury she is risking is the injury to herself, and not the unborn child. For if the unborn child was safeguarded by the statute, then

> the woman would be participating in the criminal injury of another person and hence would be an accomplice to the abortionist's crime.

Abele v. Markle, 342 F. Supp. 800, 808 (D. Conn. 1972) (Newman, J., concurring) (footnote omitted), vacated on other grounds, 410 U.S. 951 (1973). See also In re Vickers, 123 N.W. **2d** 253, **254** (Mich. 1963) ("At common law, [a pregnant woman] was not guilty of a crime even though she performed the aborting act upon herself or assisted or assented thereto.").

Those states that have abrogated the common law immunity for women seeking abortions have done **so** explicitly. This **is** true of those statutes adopted both before and after the United States Supreme Court decision holding the federal constitution to protect a woman's right to choose an abortion. Roe v. Wade, 410 U.S. 113 (1973). For example, a New York statute enacted in 1872 provided criminal penalties for "[a]ny woman pregnant with child who **shall** take any medicine, drug, substance or thing whatever, or shall use or employ, or suffer any other person to use or employ, or submit to the use or employment of any instrument or other means whatever, with the intent thereby to produce the miscarriage of the child of which she is **so** pregnant." N.Y. Penal Law of 1875, c. I, Title 2, §10 (enacted as c. 181 of 1872 N.Y. Laws). An Oklahoma statute in force prior to Roe provided: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment . . . or by fine . . . or by both." Cahill v. State, 178 P.2d 657, 658 (Ok. Crim. App. 1947) (quoting Okla. Stat. tit. 21, § 862). Most recently, the criminal abortion statute enacted by Guam in 1990 provided that: "[e]very woman who solicits of any person any medicine, drug, or substance

whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion . . . is guilty [of criminal abortion]." Guam Code Ann. § 31.22 (quoted in Guam Soc. of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, **1424** (D. Guam 1990) (striking statute), affd, 962 F.2d 1366 (9th Cir.), cert. denied, 506 U.S. 1011 (1992)).

These laws stand in marked contrast to the Florida abortion statute that gives rise to Ms. Ashley's felony-murder prosecution. The above-cited statutes expressly provide penalties for women who consent to or self-induce an abortion. Significantly, Florida's statute includes no such language. Rather, like most states, Florida preserves the common-law immunity for women who seek or induce an abortion. As the law in other states reflects, the immunity extends to women whether they attempt to self-abort or solicit the assistance of a third party. See. e.g., Commonwealth v. Fisher, 157 A.2d 207, 212 (Pa. 1960) ("It is true that [the pregnant woman] could not be legally convicted of conspiracy to commit abortion on herself since she was the victim of that abortion."); State v. Prude, 24 So. 871 (Miss. 1899) (criminal abortion statute not applicable to pregnant woman who takes a substance or uses an instrument with intent to destroy the child in her womb). **As** the Supreme Court of Tennessee stated when considering a woman's liability under that state's law regulating abortion, "'In the absence of a statute denouncing the attempt of **a** woman to procure her own miscarriage, **she** is not regarded **as** an accomplice, even when her consent is shown.'" Smartt v. State, 80 S.W. 586, 589 (Tenn. 1903) (citation omitted).

Guided **by** this rule, the overwhelming majority of courts addressing the question have held that a pregnant woman could not be held liable even as an accomplice under statutes criminalizing abortions. See. e.g., Thompson v. State,

493 S.W.2d 913,915 (Tex. 1971) (A pregnant woman "was not an accomplice witness although she consented to procuring of the abortion."), vacated on other grounds, 410 U.S. 950 (1973); Heath v. State, 459 S.W.2d 420, 422 (Ark. 1970) (same), cert. denied, 404 U.S. 910 (1971); Zutz v. State, 160 A.2d 727 (Del. 1960) **(same);** Hans v. State, 22 N.W.2d 385 (Neb.), vacated on other arounds, 25 N.W.2d 35 (Neb. 1946) (same); Commonwealth v. Sierakowski, 35 A.2d 790 (Pa. Super. Ct. 1944) (same); State v. Willson, 230 P. 810,811 (Or. 1924) (same); State v. Montifiore, 116 A. 77, 79 (Vt. 1922) (same); State v. Shaft, 81 S.E. 932 (N.C. 1914) (same); Shaw v. State, 165 S.W. 930,931 (Tex. Crim. App. 1914) (same); Gullatt v. State, 80 S.E. 340, 341 (Ga. 1913) (same); Commonwealth v. Roynton, 116 Mass. 343 (1874) (same); Dunn v. People, 29 N.Y. 523, 527 (1864) (same).[9]

All the while women performing or seeking their own abortions were immune from criminal liability, the persons performing the procedure and those arranging it were subject to prosecution and penalty. See, e.g., Thompson v. State, 493 S.W.2d at 915 (charging person performing and person arranging abortion, but not woman consenting to procedure). The seeming illogic did not escape the courts. For example, the Court of Appeals of Maryland explained:

> While it may seem illogical to hold that a pregnant woman who solicits the commission of an abortion and willingly submits to its commission upon her own person is not an accomplice in the commission of the crime, yet many courts in the United States have adopted this rule, asserting that public policy demands its application and that its exception from the general rule is justified by the wisdom of experience.

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9 In many instances, the statutes at issue were similar, if not identical to the Florida law in effect prior to Roe. E.g., Smartt, 80 S.W. at 589; Heath, 459 S.W.2d at 421; Zutz, 160 A.2d at **497;** Hans, 22 N.W.2d at 35-36.

Basoff v. State, 119 A.2d 917, 923 (Md. 1956) (citations omitted).

Underlying this immunity was the view of the woman upon whom an illegal abortion is performed as a "victim," not an "offender." In Richmond v. Commonwealth, 370 S.W.2d 399 (Ky. 1963), the Kentucky Supreme Court explained:

> The generally accepted view is that the woman upon whom an abortion is performed is not an accomplice; that she is a victim rather than an offender. . . . This view most often has been based upon an interpretation of the particular abortion statute as neither in express terms nor by implication making submission to an abortion an offense.

Id. at 400 (citations omitted). See also State v. Burlingame, 198 N.W. 824 (S.D. 1924) ("[The pregnant woman] does not, by consenting to the unlawful operation, become an accomplice in the crime. She should be regarded as the victim of the crime, rather than a participant in it."); Meno v. State, 83 A. 759,760 (Md. 1912) ("A woman on whom an abortion is performed is regarded as a victim rather than an accomplice . . . ."); Peoples v. Commonwealth, 9 S.W. 509,510 (Ky. 1888) ("True, the deceased [pregnant woman], if not an actor, was at least a consenting party to the deed. The law does not, however, regard her as an accomplice. She could not have been indicted for it. She is looked upon rather as the victim than as a co-offender.").

The distinction in liability between a third party who performed an abortion and a woman who obtained an abortion reflects the purpose of the early criminal abortion statutes. As the Georgia Court of Appeals emphasized, the criminal abortion laws were designed for "the protection of . . . pregnant females." Gaines v. Wolcott, 167 S.E.2d 366, 370 (Ga. App.), aff'd, 169 S.E.2d 165 (Ga. 1969). "Surely the appalling, unsanitary and unprofessional conditions under

which such illegal operations are in fact often performed warrant the protection of the law to the woman." Id. at 369. **See** also Abele, 342 F. Supp at 805-06 ("A scholarly analysis of Nineteenth Century abortion legislation . . . **has** outlined solid evidence for concluding that the major evil perceived at the time, that was posed by an abortion was the risk to the health and life of the mother.").

The cases reflect the unsanitary conditions to which women subjected themselves at the prospect of continuing an unwanted pregnancy. Women submitted to practitioners who used a crochet needle and catheter, Heath v. State, 459 S.W.2d 420 (Ark. 1970), or "a tampon with a medication which had a dark color and a foul odor" and was inserted with forceps, Commonwealth v. Hersey, 85 N.E.2d 447 (Mass. 1949). Many were hospitalized and others died. E.g., Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971) (woman hospitalized for two weeks after illegal abortion); Maxey v. United States, 30 App. D.C. 63 (1907) (sixteen-year-old died within ten days of illegal abortion). These women who, lacking a safe alternative, turned to illegal abortion were not prosecuted.

Similarly, Kawana Ashley cannot be prosecuted. With no money and no Medicaid coverage available to pay for an abortion," Ms. Ashley acted in despair. Florida's law, like those of many other states, does not provide for her punishment, but for her protection. As the lower court held, the Florida criminal abortion statutes, like the **statutes** in a majority of states in the nation, do not abrogate the common law which provided that "an expectant mother could not be

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10 Florida Medicaid provides coverage only for those abortions necessary because the pregnancy is life-threatening or results from rape or incest. Nationally, as many as one of five women who are denied Medicaid coverage have no choice but to carry to term. James Trussell et **al.,** The Impact of Restricting Medicaid Fundina for Abortion, 12 Fam. Plan. Persp. 120, 129 (1980).

guilty of abortion." Ashley, 670 So. 2d at 1091. Because the criminal abortion statute thus **does** not apply to the woman who seeks or self-induces an abortion, and because the underlying felony is an essential element of the crime of third-degree felony murder, Ms. Ashley cannot be guilty of felony murder. Accordingly, the trial court's dismissal of this charge was proper and that part of the Court of Appeal's decision affirming the dismissal should be affirmed.

## CONCLUSION

For the reasons set forth above, amici respectfully request that this Court reverse that part of the Court of Appeal's decision upholding the manslaughter charge and affirm that part of the decision dismissing the third-degree felony murder charge in the information against Ms. Ashley.

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