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FILED

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE OF FLORIDA, Petitioner,	
v.	Case No. 87,719 2d DCA Case No. 95-0510
KAWANA ASHLEY, Respondent.	
KAWANA ASHLEY, Petitioner,	
v.	Case No. 87,750 2d DCA Case No. 95-0510
STATE OF FLORIDA, Respondent.	

ORIGINAL

RESPONDENT/PETITIONER'S REPLY BRIEF

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INTRODUCTION

There are two fatal flaws that run throughout every one of the State's arguments.

First, the State distorts law, medicine and logic to create a new crime, making a woman liable for the death of her fetus under the existing Florida manslaughter and murder laws. They can only do this by two leaps of creative lawyering: importing unsettled tort doctrine into criminal law and making the fetus a person retroactively for the purposes of some Florida existing felonies (murder and manslaughter), but not others (abortion). Serious criminal charges cannot **be** manufactured by prosecutors weaving together disparate crimes to try to criminalize even the most odious fact pattern, Due process in criminal law, more than any other area, demands that the legislature pass clearly written and carefully defined statutes. Due process does not just mean a defendant is entitled to a trial and a lawyer before conviction; the essence of due process is that all citizens are apprised ahead of time just what is and what is not a crime.

Second, the State refuses *to* acknowledge the unique, complicated, and interdependent physical tie between a woman and her fetus. The fetus is in and part of a woman's body and totally dependent on it. Acts done to a woman or to a fetus inevitably effect both. If Ms. Ashley had died, her fetus would have died. If the fetus had died in her, Ms. Ashley's health or life could have been imperiled. It is these very elemental facts of life that have made law enforcement throughout history treat a

woman's acts upon herself, whether the self-destructive act is suicide or self-abortion, different than if she were to murder another human being or kill another woman's fetus (feticide).

Prior to Roe v. Wade, 410 U.S. 113 (1973), one-fourth of all girls attempting suicide were teenagers like Ms. Ashley who were or thought they were pregnant. McCrae v. Califano, 491 F. Supp. 630, 676 n.45 (E.D.N.Y.) (citing Teicher, "A Solution to the chronic Problems of Living: Adolescent Attempted Suicide," in Current Issues in Adolescent Psychiatry 129, 136 (J.Schoolar, ed. 1973)), rev'd on other grounds, 448 U.S. 297 (1980). Does this mean that the girls who didn't die should have been prosecuted for manslaughter if they miscarried? The State never answers the well-known fact that attempted suicide or even suicidal ideation was the most prevalent reason doctors certified women for life-saving abortions prior to Roe. See, e.g. Ashley Br., Exhibit 1. See also Grunebaum, et al., "The Family Planning Attitudes, Practices and Motivations of Mental Patients," 128 Amer. J. Psychiatry 470 (1971). Viability was a nonissue then as it is in this case. A woman's life or health prevails over any state interest in the fetus even after viability. Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992).

ARGUMENT

1. Inconsistent Intent Requirements. The State argues that the charge of third degree murder based on the underlying felony of abortion is not internally inconsistent. The State is wrong for two reasons.

First, the State argues that the death of the infant was accidental for purposes of the third degree murder statute because while Ms. Ashley meant "to cause fetal death, the live birth was unintended." Petitioner/Respondent's Reply Br. at 4 ["State's Reply Br. at --"]. In other words, the State argues, the fetus "accidentally" became a person because of an unintended live birth. But "accidental" in the third degree murder statute refers to the accidental death, not the accidental live birth **or** the unintentional creation -- through a live birth -- of **a** person. See Fla. Stat. § 782.04(4) (1995).

Second, the State argues that Ms. Ashley's fetus became a person retroactively for purposes of the homicide statute when it was born alive, but that this retroactive personhood status applies only to the third degree murder statute, not the abortion statute. This defies logic. Third degree murder requires another felony as part of its charge of killing a person. If the born-alive doctrine applies to make the fetus a person for purposes of the third degree murder statute, then the fetus must also have been a person for the abortion statute. This cannot be so.

2. Pregnant Woman's Immunity from Prosecution. The State has abandoned its argument that pregnant women were liable for criminal abortion at common law, but continues to argue that this common law immunity has been abrogated by Florida's abortion statutes. However, because the State has presented no evidence of legislative intent to abrogate the woman's immunity, see

Ashley Br. at 20-21, it has not overcome "the presumption that no change in the common law is intended unless the statute is explicit and clear in that regard." State v. Ashley, 670 So. 2d 1087, slip op. at 9 (Fla 2d DCA 1996) (citing Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (statute must unequivocally state that it changes the common law)).

The State's argument is so farfetched that they reach back not to a clear holding on legislative history, but imply that former Justice Ervin advocated in Walsingham v. State, 250 So. 2d 857 (Fla. 1971), for a change in the law making the pregnant woman liable under the criminal abortion statutes. State's Reply Br. at 6-7. Far from advocating for the pregnant woman's liability, Justice Ervin wrote that the abortion statute "intrudes into the area of personal liberty of women and does it crudely in vague, uncertain, archaic language." Id. at 864 (Ervin, J., concurring).[1]

3. Homicide Statutes Require Two Separate People. The State's reliance on Knighton v. State, 603 So. 2d 71 (Fla. 4th DCA 1992), is misplaced because in Knishton the defendant who shot a pregnant woman was separate from the fetus which was

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[1] The State's "interpretation" of State v. Carey, 76 Conn. 342, 345 (1904), see State's Initial Br. at 14-15; State's Reply Br. at 7, is similarly flawed. First, that court notes that women were immune from prosecution under the common law. Carey, 76 Conn. at 351. The fact that Connecticut created a separate "statutory crime of attempting to secure her own miscarriage," Id. at 345, which clearly applied to the woman alone, supports Ms. Ashley's argument. While Connecticut specifically and clearly abrogated the common law immunity with enactment of this special statute, Florida has done nothing of the kind.

inside the woman, not inside him. In this case, the defendant and the fetus were one and the same; prior to birth, a fetus is "living tissue of the body of the mother." Hilsman v. Winn Dixie Stores, Inc., 639 So. 2d 115, 117 (Fla. DCA 4th 1994) (mother may recover for loss of fetus "as an injury to her own body") (internal quotations omitted) (emphasis added); McGeehan v. Parke-Davis, 573 So. 2d 376 (Fla. DCA 2d 1991) (same); Singleton v. Ranz, 534 So. 2d 847 (Fla. DCA 5th 1988) (same).[2]

4. Born-alive Doctrine. The State cites no criminal cases to support its position that the "born-alive" rule applies to a pregnant woman's actions, and relies solely on cases holding third parties liable for causing the death of a born-alive fetus. In fact, while the State cites People v. Hall, 557 N.Y.S.2d 879 (A.D. 1st Dept. 1990) (holding a third party who harmed a pregnant woman liable for death of her fetus which had been born alive), the State fails to distinguish the New York Court of Appeals' ruling in Evans v. People, 49 N.Y. 86, 93 (1872), the only case in this country to address criminal liability for death of a fetus which was born alive as a result of an abortion to which the mother consented. In Evans, the New York high court held that a doctor causing premature birth and death of twins

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[2] Shinall v. Pergeorelis, 325 So. 2d 431 (Fla. 1st DCA 1976), holding that a mother cannot contract away her illegitimate child's right to support from its putative father, is inapposite. That case did not involve a conflict of interests between the child and the mother; in fact, the petition for support was instituted by the child's mother. The court acknowledged this, noting "the separation of the abortion issue from the unborn's property right which was recognized in Roe v. Wade." Id. at 433.

would have been guilty of abortion, not homicide, notwithstanding that the twins had been born alive and lived for a few days.[3]

The State's attempt to distinguish State v. Osmus, 276 P.2d 469 (Wyo. 1954), fails. In Osmus, the court held that a pregnant woman whose newborn died as a result of her negligent failure to obtain proper prenatal care **or** medical care at birth could not be guilty of manslaughter. Bennett v. State, 377 P.2d 634 (Wyo. 1963), cited by the State, see State's Reply **Br.** at 20, did not discuss this part of the Osmus ruling, as it concerned a mother's prosecution for strangling her child after it was born, not the woman's actions during her pregnancy.

The State continues to insist, see State's Reply Br. **at** 9, contrary to the evidence,[4] that at the time of Ms. Ashley's self-mutilating act, her fetus was viable.[5] It is ironic that

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[3] See also State v. Gonzalez, 467 ***So.*** 2d 723 (Fla. 3d DCA 1985) (holding abortion and feticide statutes superseded homicide statutes), review denied, 476 So. 2d 675 (Fla. 1985). Because the fetus was not born alive, the Gonzalez court did not have to address, nor did it decide, the issue presented here.

[4] Ms. Ashley's fetus was not viable, See Opposition to Motion to Strike at 1-3.

[5] Contrary to the State's contention, see State's Reply **Br.** at 5, Respondent does not confuse the born-alive rule with viability. See Ashley Br. at 2 n.3 (explaining fetus which is born alive need not have been viable). Moreover, the State's reference to Black's Law Dictionary for a definition of viability is misplaced, Florida has defined viability in a manner consistent with the Supreme Court's definition of viability in Roe, 410 U.S. 113 (1973). See Fla. Stat. 390.001 (5). Finally, the State is wrong when it claims that viability is the same as "quickening," see Roe v. Wade, 410 **U.S.** 113, 134, (1973) (defining the ancient concept of "'quickening' -- [as] the first recognizable movement of the fetus ***in utero,*** appearing usually from the 16th to the 18th week," long before viability, which is anywhere between the 24th and 28th week depending on the fetus),

the State uses "born-alive" to retroactively label the fetus as a person, yet refuses to use the official medical declaration of nonviability -- death from prematurity -- to define and correct any prior diagnosis. In any event, whether the fetus was viable is irrelevant to the issue of whether a pregnant woman is criminally liable for her actions that cause the death of a born-alive fetus.

5. **Inapplicability of Tort Law.** The State seeks to import unsettled tort law from other states -- which directly contradicts Florida law -- into existing criminal law to justify this prosecution. This effort fails for two reasons.

First, even if Florida tort law supported liability for a pregnant woman whose prenatal conduct harms her fetus, the requirements of adequate notice, strict construction, and the rule of lenity, prohibit the unprecedented application of tort doctrines in criminal cases. See Gonzalez, 467 So. 2d at 726 ("even when statutory classifications are carved out to extend rights to fetuses, there is a different standard of construction which must be applied when comparing criminal law with the law of tort or property").

Second, unlike many states, Florida courts continue to adhere to the parent-child immunity doctrine. Ard v. Ard, 414 So, 2d 1066, 1070 (Fla. 1982).[6] The case relied on by the

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and State v. McCall, 458 So.2d 875 (Fla. 2d DCA 1984), cited by the State, does not so hold.

[6] The State itself only claims that the parental immunity doctrine "may be in question," State's Reply Br. at 12.

State, Bonte v. Bonte, **616** A.2d 464 (N.H. 1992), is inapposite because, unlike Florida, New Hampshire had already abolished parental immunity. State's Reply Br. at 13. Moreover, Bonte explicitly limited the woman's liability to the extent that insurance coverage was available.[7] Even the State admits that Bonte may not be followed by this Court. Id.

Further, Florida's parental immunity doctrine cannot be evaded by referring back to the criminal law. See State's Reply Br. at 12 (arguing that "a parent has always been liable for causing the death of a child"). The State can't have it both ways. If it relies on tort doctrine to establish the pregnant woman's criminal liability for prenatal conduct which harms her born-alive fetus, it cannot ignore tort doctrine making parents immune from liability,'

6. Failure to distinguish Johnson v. State. The State argues that the long line of cases from courts in twenty-one states, including Florida, see Johnson v. State, 602 ***So.*** 2d 1288 (Fla. 1992), holding that a woman cannot be held criminally

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[7] The State's reliance on Grodin v. Grodin, 301 N.W.2d 869 (Mich. 1981), is similarly misplaced. Like Bonte, Grodin was decided after the Michigan courts had overruled the doctrine of intrafamily tort immunity. Moreover, Grodin has since been rejected by Michigan courts. See Ellis v. Target Stores, 842 F. Supp. 965, 970 (W.D. Mich. 1993) (citing *inter alia* Ashley v. Bronson, 473 N.W.2d 757 (Mich. App. 1991)).

[8] Similarly, the State's attempt to distinguish Stallman v. Youngquist, **531** N.E.2d 355 (Ill. 1988), see State's Reply Br. at 30, fails for two reasons. First, the State attempts to disavow Stallman because it is a tort case, while at the same time relying on the New Hampshire tort case, Bonte. Second, the State argues that Stallman did not address intentional acts, but again, neither does this case.

liable for her behavior during pregnancy which harms her fetus, even where that fetus is born alive, does not apply because the conduct in question was drug use and therefore was "unintentional." See State's Reply Br. at 20. Once again, the State misses the mark.

Even if all the cases cited involved drug use, which they **do** not, see Ashley Br. at 3 n.6, 30 n.35, the fact that the women in those cases took drugs[9] while Ms. Ashley shot herself, does not distinguish those cases from this one. The prosecutor has not charged Ms. Ashley with intentional murder. Instead, Ms. Ashley is charged with manslaughter for which the required *mens rea* is "culpable negligence," Fla. Stat. § 782.07, and third degree murder, punishing "accidental" death, Fla. Stat. § 782.04(4).[10]

7. **Abortion Statute Governs.** As explained in our opening brief, see Ashley Br. at Section I.C.2., the Florida abortion

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[9] The State claims that the Johnson holding was based on "lack of proof of criminal agency." State's Reply Br. at 20. As the Johnson court held, the "primary question" in that case was whether the legislature intended the child abuse statute, which punished harm to a "child," to apply to a pregnant woman's actions which harmed her fetus which was subsequently born alive. Johnson, 602 So. 2d at 1292. The court found that it did not. In so doing, the court reversed the appellate court's decision that the born-alive doctrine did apply. Id. (reversing 578 So. 2d **419** (Fla. 5th DCA 1991)).

[10] In Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988), the Illinois Supreme Court held there is no cause of action against a mother for the unintentional infliction of prenatal injuries. The State's attempt to distinguish Stallman on the grounds that this case involves the Defendant's "intentional" act of shooting herself in the stomach, State's Reply Br. at **11**, fails. Because the only *mens rea* necessary here is the defendant's culpable negligence in shooting herself, not any intent the prosecution alleges she had to harm the child, Stallman was similar.

statute applies to an intentional termination of pregnancy. In Florida, as in every other state in the United States, neither a woman choosing to terminate her pregnancy, nor the physician who performs the termination, commits murder. Roe v. Wade, 410 U.S. 113 (1973); Fla. Stat. § 390.001.

The State misses the main distinction between the legal act of abortion and the illegal act of attacking a pregnant woman and causing the death of her fetus, In an abortion, the woman has chosen to terminate her pregnancy, whereas in the attack she has not. Therefore, the abortion statute applies to pregnancy terminations carried out with a woman's consent, which -- when performed late in pregnancy, for **example**, to preserve a woman's life or health -- may or may not result in the death of a fetus which was first **born** alive, On the other hand, the homicide statutes, as applied in Knighton v. State, *603* So. 2d 71 (Fla. 4th DCA 1992), apply to pregnancy terminations resulting from an assault upon the woman, which result in the death of a born-alive child.[11]

Accordingly, the well-established rule that specific statutes govern over general statutes with which they conflict, requires that the abortion statute govern here. The State's attempt to undercut this rule, see State's Reply Br. at **16-18**, is unavailing. Most recently, in McKendry v. State, 641 So. 2d 45,

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[11] Of course, the abortion statutes did not abrogate the third degree murder statute in Knishton, because unlike this case, there was no allegation that the woman had consented to the action which ended her pregnancy.

46 (Fla. 1994), this Court affirmed its ruling in Adams v. Culver, 111 So. 2d 665 (Fla. 1959).[12] None of the cases cited by the State undermine application of Adams in this case; instead, most of the cases simply find that there is no "inconsistency" between the two statutes at issue before them.[13] In State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990), this Court cited Adams approvingly, stating that a specific statute will trump a more general statute where "there . . . [is] a hopeless inconsistency between . . . two statutes."[14] The abortion statute is inconsistent with the homicide statutes, as applied in this case, because, *inter alia*, it gives immunity to the woman who obtains an illegal abortion or self-induces an illegal abortion. See Ashley Br. at Section I-B.

The State also cites State v. Young, 371 So. 2d 1029, 1030

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[12] In McKendry, the court cited Adams approvingly and held that a statute that specifically addressed the criminal penalty for possession of a short-barreled shotgun prevailed over a general statute giving trial judges discretion to suspend criminal sentences, To hold otherwise, the court held, would render the specific language of the shotgun statute "without meaning." Id.

[13] For example, in State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990), this Court held that a statute which did not include marine patrol officers in a list of officials empowered to detain traffic law violators was not "hopelessly inconsisten[t]" with one specifically granting those officers authority to enforce laws. See also, e.g., Florida Police Benevolent Ass'n., Inc. v. Dept. of As. and Consumer Affairs, 574 So. 2d 120, 123 (Fla. 1991); Fayerweather v. State, 332 So. 2d 21, 22; State v. McCurdy, 257 So. 2d 92, 93-94 (Fla. 2d **DCA** 1972); State v. Weir, 488 So. 2d 557 (Fla. 5th DCA 1986).

[14] In addition, the court found that the statute enacted more recently prevailed. Parsons, 569 So. 2d at 438. The abortion statute should prevail as the more recent enactment.

(Fla. 1979), for the proposition that it can elect between statutory offenses covering the same conduct. State's Reply Br. at 17, Contrary to the State's contention, however, that case in no way reverses Adams; rather, Young simply carves out an exception to the general rule; that is, the State may elect which statute to proceed under as between an offense and a lesser included offense. Id.[15] The court held that where the homicide offense of vehicular manslaughter was a lesser included offense of the homicide offense of manslaughter, the State could elect to charge the defendant under the manslaughter statute. Id. at 1030. But the State does not, and cannot, **allege** that the criminal abortion statute, Fla. Stat. § 390.001, is a lesser included offense of the homicide statutes. See, e.g., Sirmons v. State, 634 So. 2d **153, 154** (Fla. 1994) (Kogan, J., concurring),

8. The Right to Abortion. The right to abortion is constitutionally protected throughout pregnancy. See State's Reply Br. at 28-29. In Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Supreme Court reaffirmed the central principles ***of*** Roe v. Wade, 410 U.S. 113 (1973). The Court held that:

> [a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion . . .

Id. at 878. The Court also:

> reaffirm[ed] Roe's holding that "subsequent to

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[15] See also Eville v. State, 430 So. 2d 555, 556 (Fla. **3d** DCA **1983)** (no error in finding defendant guilty of vehicular homicide even though jury acquitted him of manslaughter by driving while intoxicated).

> viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Id. at 879 (quoting Roe, 410 U.S. at 164-165).[16] Accordingly, a State's interest in human life never outweighs the pregnant woman's interest in her life or her health, even after viability. A pregnant woman who is so disturbed by her pregnancy that she shoots herself qualifies for an abortion under this standard.[17] Whether she was offered an abortion when she arrived at the hospital is a question of malpractice law, not criminal law.

9. Violation of Right to Due Process. The State argues that this prosecution does not violate Ms. Ashley's due process right to notice because:

> [i]t is not the first time in recorded Florida history that termination of pregnancy by shooting the mother in the stomach resulted in the live birth of a human being which died thereafter and became the victim of homicide.

State's Reply Br. at 26. Again, the use of the "born-alive doctrine" -- which has never been defined to apply to a pregnant

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[16]The State also attempts to downplay the fact that the Florida Constitution provides broader protection for the right to abortion than the federal constitution. See State's Reply Br. at 25 ("In re T.W. merely held" parental consent statute unconstitutional) (emphasis added). In T.W., this Court struck down a parental consent statute under the Florida Constitution which would have survived review under the United States Constitution. See In re T.W., 551 So.2d 1186 (Fla. 1989).

[17] As noted in our opening brief, even prior to Roe, attempted suicide or acts of dangerous self-abortion or self-mutilation made women eligible for "life-saving" legal abortions, regardless of the stage of pregnancy. See Ashley Br. at 37 n.44 & Exhibit 2.

woman's actions -- to prosecute a third party for his actions which caused harm to a pregnancy, does not give Ms. Ashley notice that the courts would apply the born-alive doctrine in this completely unprecedented way, This is especially true in Florida because Florida maintains parental immunity in tort law, because the pregnant woman is immune from prosecution for both criminal abortion and feticide, see Fla. Stat. s 782.09 (1995), and because Florida courts have rejected other attempts to apply the born-alive doctrine to a pregnant women's prenatal conduct, see supra at Point 5.

Moreover, it is well-established that a defendant must have had notice not just that his or her actions were criminal but also of what statute the actions violate. See Dunn v. United States, 442 U.S. 100, 112 (1979); Douglas v. Buder, 412 U.S. 430, 432 (1973); Bouie v. City of Columbia, 378 U.S. 349, 351 (1964); Gluesenkamp v. State, 391 So. 2d 192, 198 (Fla. 1980), cert. denied, 454 U.S. 818 (1981); People v. Davis, 94 Daily Journal D.A.R. 6630, 6634 (Cal. 1994).[18]

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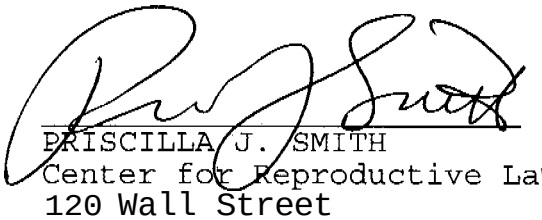
[18] The allegation that Ms. Ashley told the police that she was shot by someone else does not establish that she must have known that her conduct was criminal, or that she was on notice. There are many reasons that a person might want to keep confidential information about an attempted suicide or an attempted self-induced abortion, Either act is one of a disturbed person. Most Americans prefer that information concerning mental health issues and abortions remain private, as much social opprobrium has been attached to each. See, e.g., Thornburgh v. Amer. College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("[flew decisions are more personal and intimate, more properly private, . . . than a woman's decision . . . whether to end her pregnancy.").

CONCLUSION

For the foregoing reasons, Respondent requests that this court dismiss both charges against her.

Dated this 5th day of July, 1996.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 5d. day of July, 1996, I served the attached Respondent/Petitioner's Reply Brief by placing a true copy in a package, postage prepaid, in the United States Mail, addressed as follows:

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