

IN THE
SUPREME COURT OF INDIANA

Cause No.

| | | |
|-------------------|---|---------------------------------------|
| BEI BEI SHUAL. |) | Appeal from the Marion Superior Court |
| |) | |
| Appellant, |) | Court of Appeals Cause No.: |
| |) | 49A02-1106-CR-00486 |
| v. |) | Trial Court Cause No.: |
| |) | 49G03-1103-MR-014478 |
| STATE OF INDIANA, |) | |
| |) | Hon. Sheila Carlisle, Judge |
| Appellee. |) | |

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

INTEREST OF *AMICI* 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

 I. WOMEN SHOULD NOT BE PROSECUTED BECAUSE OF THE
 OUTCOMES OF THEIR PREGNANCIES 5

 A. *Punitive policies wrongly treat health problems as criminal
 behavior* 6

 B. *Punitive policies are counterproductive to the important goal of
 promoting fetal welfare because they will discourage many women
 from seeking health care* 7

 II. INDIVIDUALS SHOULD NOT BE SUBJECTED TO PROSECUTION
 FOR SUICIDAL BEHAVIOR 10

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Statute

Ind. Code § 35-42-1-6 (2011) 9

Other Authorities

American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 Pediatrics 639 (1990) 6, 7

American College of Obstetricians and Gynecologists, Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 Obstetrics & Gynecology 1127 (2005). 6-9

American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 Obstetrics & Gynecology 200 (2011). 7, 8

American College of Obstetricians and Gynecologists, News Release, *Depression During Pregnancy: Treatment Recommendations, A Joint Report from APA and ACOG*, August 21, 2009 10

American Foundation for Suicide Prevention, *Facts and Figures by Gender*, 2011 10

American Foundation for Suicide Prevention, *National Statistics*, 2011. 10

American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (1990) 5-7, 9

American Nurses Association, *Position Statement on Opposition to Criminal A Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Service for Alcohol and Drug Dependent Women of Childbearing Age*. (Apr. 5, 1991) 6

American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts*, Position Statement, APA Document Reference No. 200101 (Mar. 2001) 6

American Psychological Association, *Resolution on Substance Abuse by Pregnant Women* (Aug. 1991). 6

Indiana State Suicide Prevention Coalition, *Suicide Prevention State Plan* (2004) 11

Institute of Medicine, *Reducing Suicide: A National Imperative* (2002) 10

Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *New Eng. J. Med.* 1202 (1990) 9

Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 *Buffalo L. Rev.* 737 (1991) 9

Veronika E.B. Kolder, et al., *Court-ordered Obstetrical Interventions*, 316 *New Eng. J. Med.* 1192 (1987) 9

Model Penal Code and Commentaries (Official Draft and Revised Comments) § 210.5, Comment 2 (American Law Institute 1980). 11

Social Work Speaks, National Association of Social Workers Policy Statements, *Mental Health* (8th ed., 2009)) 11

The National Institute of Mental Health, *Suicide in the U.S.: Statistics and Prevention*, April 27, 2010 10

The Suicide Prevention Resource Center, *Suicide Prevention Basics- About Suicide*. 10

INTEREST OF AMICI

Amici are health care organizations and health care experts dedicated to promoting maternal, fetal, child, and mental health. *Amici* also include experts in bioethics and law dedicated to promoting ethical and legal standards that will foster the public's health.

In furtherance of their missions to provide high quality health care and medical education and to develop sound ethical and legal standards, *amici* advocate on behalf of better public policies before courts and legislatures.

SUMMARY OF ARGUMENT

Punishing pregnant women because of fetal injury is counterproductive to the important goal of protecting fetal well-being. Accordingly, under long-standing policies, health care organizations, many of which are *amici* in this case, have opposed criminal prosecutions of pregnant women whose actions are believed to have harmed their fetuses.

Position statements rejecting criminal prosecution have been issued by the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American Medical Association, the American Nurses Association, the American Psychiatric Association, the American Psychological Association, and other professional associations in health care.

In this case, a criminal prosecution is especially inappropriate. The harm to Ms. Shuai's newborn allegedly was the unfortunate consequence of an attempt by Ms. Shuai to commit suicide. Like other states, Indiana recognized long ago that suicide is not a matter for punishment by law enforcement officials but a matter for treatment by psychiatric professionals.

The prosecution should not be allowed to criminalize an act that the General Assembly has expressly chosen not to criminalize.

Amici, who are experts in matters of maternal, fetal, children's and mental health, as well as in bioethics and law, therefore urge the court to accept transfer of this case from the Indiana Court of Appeals and reverse the decision of the trial court.

ARGUMENT

I. WOMEN SHOULD NOT BE PROSECUTED BECAUSE OF THE OUTCOMES OF THEIR PREGNANCIES

More than twenty years ago, when concerns arose about the risks to fetal welfare from drug use by pregnant women, major health care associations began to consider how public policy should address the issue. Prosecutors in a number of states had leveled criminal charges against pregnant women for using cocaine or other illicit drugs, but many health professionals questioned whether a punitive approach made sense toward women who were responding to the physiological drives of their drug addiction.

In June 1990, the American Medical Association (AMA) issued a report, "Legal Interventions During Pregnancy,"¹ in which it assessed the considerations involved in prosecutions of pregnant women. For a number of reasons, the AMA rejected any role for criminal sanctions (or civil liability) because of actions by pregnant women that might result in fetal injury.² Similarly, in a series of statements, the American College of Obstetricians and Gynecologists (ACOG) rejected criminal prosecutions of pregnant women because of fetal harm.

¹ American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (1990) (hereinafter "AMA").

² *Id.* at 2670.

In its analysis, “Maternal Decision Making, Ethics, and the Law,”³ the ACOG Committee on Ethics concluded that “pregnant women should not be punished for adverse perinatal outcomes.”⁴ Other health care associations share the views of ACOG and the AMA. In its policy statement, the American Academy of Pediatrics observed that “punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health.”⁵ The American Nurses Association noted that “[t]he threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment.”⁶ And according to the American Psychological Association, “no punitive action should be taken against women on the basis of behaviors that may harm a developing fetus.”⁷

The health care organizations cited several reasons for their positions, which continue to be their official policies:

A. *Punitive policies wrongly treat health problems as criminal behavior.*⁸

When pregnant women put their fetuses at risk by using illicit substances or attempting suicide, the women do so because they have a health problem.⁹ If prosecutors respond by bringing

³ American College of Obstetricians and Gynecologists Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 *Obstetrics & Gynecology* 1127 (2005) (hereinafter “ACOG”).

⁴ *Id.* at 1135.

⁵ American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 *Pediatrics* 639, 641 (1990) (hereinafter “AAP”).

⁶ American Nurses Association, *Position Statement on Opposition to Criminal A Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age*. (Apr. 5, 1991)

⁷ American Psychological Association, *Resolution on Substance Abuse by Pregnant Women*, (Aug. 1991). See also American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts*, Position Statement, APA Document Reference No. 200101 (Mar. 2001) (also opposing criminal prosecution of pregnant women for the use of substances that risk harm to fetuses, urging treatment as the appropriate response).

⁸ ACOG, *supra* note 3, at 1133-34; AMA, *supra* note 1, at 2667-2668.

⁹ American Psychiatric Association, *supra* note 7.

criminal charges, they are in effect punishing the women for their health status. Prosecution for drug abuse represents punishment for the disease of addiction;¹⁰ prosecution in this case represents punishment for the illness of depression.

The proper response when pregnant women appear to threaten the welfare of their fetuses is to make available the psychological and other medical treatment that can address the women's conditions. Indeed, studies overwhelmingly show that these women are very concerned about the possible consequences for their fetuses, and are eager to obtain treatment once they learn that they are pregnant.¹¹

In its analysis, the AMA specifically considered whether an absolute rejection of punitive sanctions against pregnant women for fetal harm might be too extreme a position to take.¹² In concluding that an absolute prohibition against prosecution is the correct policy, the AMA observed that when women act in ways that could harm their fetuses, they generally also are acting in ways that are harmful to themselves. Accordingly, as in this case, psychiatric treatment is the appropriate response.

B. Punitive policies are counterproductive to the important goal of promoting fetal welfare because they will discourage many women from seeking health care.

When prosecutors adopt a policy of criminal punishment for pregnant women whose actions are believed to threaten fetal welfare, the prosecutors actually make it less likely that fetal welfare will be promoted.¹³ As studies suggest,¹⁴ this kind of prosecution will discourage other pregnant

¹⁰ ACOG, *supra* note 3, at 1133-34.

¹¹ *Id.* at 1134.

¹² AMA, *supra* note 1, at 2669.

¹³ *Id.* at 2667.

¹⁴ AAP, *supra* note 5, at 641; ACOG, *supra* note 3, at 1134; American Psychological Association, *supra* note 7. See also American College of Obstetricians and Gynecologists,

women who need health care from seeking it. Severely depressed women in Indiana now know that if their physician or other health care provider finds out about any behavior that might be construed as a suicide attempt, they could be charged with attempted homicide or attempted feticide. Other pregnant women also will be deterred from seeking treatment. If trying to commit suicide can trigger criminal charges because of the potential for harm to the fetus, so can drinking alcohol or using other drugs. Instead of getting care for their alcoholism or drug addiction, pregnant women will try to avoid detection by physicians or other health care providers. As a result, physicians, nurses, psychologists and others are less able to provide the kinds of treatment that could address the woman's medical condition and help avert fetal harm. Indeed, infant mortality rose in South Carolina in the years after the state's supreme court held that anything a pregnant woman does that might be harmful to her viable fetus could be prosecuted as child abuse or, if she experienced a stillbirth, as homicide.¹⁵

In short, if this prosecution proceeds, other pregnant women who have taken action that might harm their fetuses will be reluctant to go to a hospital, clinic, or physician's office for fear that they will be reported to law enforcement officials. As a result, measures that could counteract the effects of the action will not be implemented, and the opportunity to prevent harm will have been lost. Ms. Shuai should receive the psychiatric care she desperately needs, and other pregnant women should be assured that their visits to a health care provider will result not in a prison term but in the health care that they and their unborn children need. Fetuses and

Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *Obstetrics & Gynecology* 200 (2011) ("Seeking obstetric-gynecologic care should not expose a woman to criminal or civil penalties.").

¹⁵ ACOG, *supra* note 3, at 1134.

children are healthier when their mothers are healthy. The law should help pregnant women be healthy, not raise barriers to that important goal.

Punitive policies can compromise fetal welfare in another way. Such policies may lead some pregnant women to have abortions.¹⁶ Women who are addicted to alcohol or drugs, for example, would be at risk for prosecution under Indiana’s feticide statute for feticide or attempted feticide. Similarly, any pregnant woman who does anything later viewed as harmful to her fetus would be subject to prosecution—even if her fetus is not yet viable. This could create a perverse incentive to abort a wanted pregnancy to avoid violation of the statute. The law should not force women to choose between having an abortion and risking felony feticide charges under Ind. Code § 35-42-1-6 (2011).

Prosecutions of pregnant women are problematic for a third reason. They not only are flawed in theory, they also are flawed in practice. Coercive or punitive measures have consistently been implemented in a discriminatory fashion. Studies have found that while harm to fetuses can occur from the action—or inaction—of pregnant women from all socioeconomic groups, legal proceedings typically are brought only against some women.¹⁷ Whether in the context of a court order to require a cesarean section or a felony prosecution for the use of illicit drugs, the law extends its reach overwhelmingly to poor or minority women. Indiana courts should not permit a policy that likely will single out for punishment only some classes in society.

¹⁶ AMA, *supra* note 1, at 2667.

¹⁷ *Id.* at 2668; ACOG, *supra* note 3, at 1134-1135. Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *New Eng. J. Med.* 1202 (1990); Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 *Buffalo L. Rev.* 737 (1991); Veronika E.B. Kolder, et al., *Court-ordered Obstetrical Interventions*, 316 *New Eng. J. Med.* 1192 (1987).

II. INDIVIDUALS SHOULD NOT BE SUBJECTED TO PROSECUTION FOR SUICIDAL BEHAVIOR

Suicide is a very serious health problem.¹⁸ Over 34,000 people die by suicide every year in the United States,¹⁹ more than the number who die because of HIV or homicide. Many more people attempt suicide.²⁰ For every death that occurs by suicide, there are an estimated 11 attempted suicides.²¹

Women are especially at risk when attempted suicide is prosecuted as a crime. They try to commit suicide three times as often as men.²² And pregnancy raises their risk. Between 14 percent and 23 percent of pregnant women struggle with symptoms of depression, and some 13 percent take an antidepressant medication during their pregnancy.²³

Working with experts in mental illness, state agencies across the country have developed policies to address the problem of suicide. The Indiana Suicide Prevention State Plan, for example, includes policies to promote public awareness that suicide is a preventable public health problem, to reduce the stigma associated with being a consumer of mental health and suicide prevention services, to develop effective suicide prevention programs, to improve access

¹⁸ Institute of Medicine, *Reducing Suicide: A National Imperative* (2002), available at <http://www.iom.edu/Reports/2002/Reducing-Suicide-A-National-Imperative.aspx>.

¹⁹ American Foundation for Suicide Prevention, *National Statistics*, 2011, available at http://www.afsp.org/index.cfm?fuseaction=home.viewpage&page_id=050fea9f-b064-4092-b1135c3a70de1fda.

²⁰ The Suicide Prevention Resource Center, *Suicide Prevention Basics- About Suicide*, available at http://www.sprc.org/suicide_prev_basics/about_suicide.asp.

²¹ The National Institute of Mental Health, *Suicide in the U.S.: Statistics and Prevention*, April 27, 2010, available at <http://www.nimh.nih.gov/health/publications/suicide-in-the-us-statistics-and-prevention/index.shtml>.

²² American Foundation for Suicide Prevention, *Facts and Figures by Gender*, 2011, available at http://www.afsp.org/index.cfm?fuseaction=home.viewPage&page_id=04ECB949-C3D9-5FFA-DA9C65C381BAAEC0.

²³ ACOG News Release, *Depression During Pregnancy: Treatment Recommendations A Joint Report from APA and ACOG*, August 21, 2009, available at http://www.acog.org/from_home/publications/press_releases/nr08-21-09-1.cfm.

to mental health services, and to promote research on suicide prevention.²⁴ Neither in Indiana or in any other state do guidelines recommend prosecutions of people who attempt suicide.

To be sure, at one time in this country, suicide and attempted suicide were treated as crimes. Like other states, Indiana realized many years ago that suicidal behavior reflects the presence of psychiatric dysfunction rather than criminal intent. As the drafters of the Model Penal Code observed, people attempting suicide are more properly the subject of psychiatric care than law enforcement.²⁵ Accordingly, Indiana law does not penalize suicide or attempted suicide. Indiana law rightly recognizes that the person who attempts suicide needs psychiatric treatment, not criminal prosecution.

The prosecution of Ms. Shuai effectively represents an effort by the prosecution to ignore the clear intent of the Indiana General Assembly. The prosecutor's office is trying to criminalize the act of attempted suicide by pregnant women even though the legislature chose not to include the crime of attempted suicide in the Indiana Code. The prosecution may not substitute its view of what behavior the law should make criminal in place of the judgment of the legislature. If the Marion County Prosecutor believes that pregnant women should be incarcerated after a failed suicide attempt, then the proper forum for making its case is at the Statehouse, not in a courthouse.

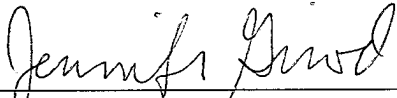
²⁴ Indiana State Suicide Prevention Coalition, *Suicide Prevention State Plan* (2004), at <http://www.indianasuicidepreventioncoalition.org/plan.htm>.

²⁵ Model Penal Code and Commentaries (Official Draft and Revised Comments) § 210.5, Comment 2 at 94 (American Law Institute 1980). See also Social Work Speaks, National Association of Social Workers Policy Statements, *Mental Health* (8th ed., 2009) 229, 235 (“[T]he correctional system should not be used as a de facto mental health system.”).

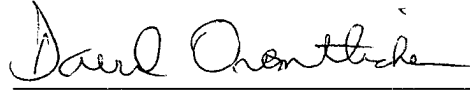
CONCLUSION

Accordingly, *amici* respectfully request that this court grant the petition for transfer and reverse the decision of the trial court.

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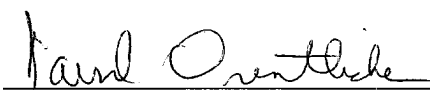
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