Prosecution of Prenatal Substance Abuse Allowed to Stand in McKnight Case

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On October 6, 2003, the United States Supreme Court issued its denial to the petition for writ of certiorari in the case of Regina McKnight. *McKnight v. South Carolina*, 124 S. Ct. 101. Ms. McKnight is believed to be the first woman to have her conviction upheld after prosecution for homicide for the death of a child due to actions taken by the mother while pregnant. The case represents one of the most vexing problems for both the criminal justice system and the public health system. Should pregnant women who are active substance abusers be treated in the health care system or prosecuted in the criminal justice system?

Interestingly, it appears that no state has successfully passed legislation to prosecute a pregnant woman for child endangerment before the child is born. Approximately 26 states have laws allowing prosecution of third parties for injury to a fetus, and Oklahoma has attempted to pass legislation that will allow the state to intervene in custody decisions for a child born to a female substance abuser. South Carolina appears to be the only state that has successfully prosecuted a woman for the death or injury of her child by transmission of controlled substances in utero. Texas will examine this issue as one of its interim legislative charges before the 2005 legislative session.

Prior to the Supreme Court's denial of McKnight's petition, courts in the states where such prosecutions had been attempted had rejected prosecution on several grounds. The first was courts unwillingness to criminalize conduct which, even if dangerous to the mother, has only a secondary effect of danger to the unborn child. That is, a mother's intentional ingestion of a harmful substance cannot in and of itself be taken as an intentional act to harm her child, any more than her continuing to work against doctor's orders or smoking cigarettes may result in harm to the unborn child. Courts have also rejected prosecution of these cases on the grounds that several states have explicitly excepted prosecution of mothers in such circumstances in their child abuse statutes, suggesting that the issue is one which the states have chosen to deal with in their health care systems. Courts have also rejected criminal prosecution of substance abusing mothers under statutory theories of drug delivery or possession of drugs, citing both public health concerns and the fact that such statutes may not give fair warning to mothers that such prosecution could result if their infants were born with controlled substances in their systems. (*But see Commonwealth. v. Pelligrini*, 414 Mass., 402, 608 N.E.2d 717 (1993) in which the court refused a mother's attempt to have her case for criminal possession of a controlled substance dismissed based on the presence of the substance in her son's urine.)

Only in South Carolina has there been a successful prosecution of a mother for child abuse based on the mother's ingestion of a controlled substance during pregnancy. The case may not be a broad mandate for prosecution in other cases, however. It is instructive to review South Carolina's

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1 James G. Hodge, Jr., *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L. R. 5th 461 et sep (1999).
attempts to deal with this issue in its court system.

In 1989, the Medical University of South Carolina, a public institution, began a drug testing program to identify pregnant women who were abusing crack cocaine. Women who tested positive for the drug were referred for prosecution of delivery of a controlled substance to a minor. In 1990, the program was amended to give women a choice between enrolling a substance abuse treatment program or being prosecuted. A federal trial jury found that the tests were consensual, and sided with the hospital. The 4th U. S. Circuit Court of Appeals, while upholding the decision, found that the tests, even if not consensual, fit the "special needs" exception to the Fourth Amendment, which allows non-consensual drug testing when law enforcement can demonstrate a public hazard. Such cases have generally been confined to public employees or those who use public rights of way such as railroads and highways, who have been involved in an accident while on the job. In March, 2001, the U. S. Supreme Court overturned the lower courts, and ruled that hospitals cannot administer nonconsensual drug tests to pregnant women for the purposes of criminal prosecution. *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001). South Carolina continued to prosecute women who abused controlled substances during pregnancy under the theory that such actions violated South Carolina's statutes against child abuse. In 1997, the South Carolina Supreme Court ruled that a viable fetus is a person for purposes of prosecution under such statutes, and the U.S. Supreme Court declined to hear the case. *Whitner v. State*, 328 S. C. 1, 10, 492 S.E.2d 777, 782 (1997), cert. Denied, 523 U.S. 1145, 118 S. Ct. 1857, 140 L. Ed. 2d 1104 (1998).

On May 15, 1999, Regina McKnight gave birth to her third child. The infant, a five pound baby girl, was stillborn. Autopsy results produced traces of cocaine byproducts in the infant's blood, and the pathologist who testified at the trial attributed the baby's death to cocaine use by the mother. The first trial ended in a mistrial after two jurors admitted to researching the case on the Internet. A second jury deliberated only 15 minutes before finding her guilty of the crime of homicide by child abuse by causing the stillbirth of her viable fetus by ingesting cocaine while pregnant. Regina McKnight was sentenced to 20 years in prison, suspended upon service of twelve years.

McKnight argued six grounds on appeal, including that she would have received a lesser sentence for illegally aborting the child prior to birth than she did by carrying the pregnancy to full term. The South Carolina Supreme Court, in a 3-2 decision, upheld the conviction. The dissent argued that child abuse statutes were not intended as the basis for prosecution in such cases, and that the legislature should make that specific determination. More than twenty professional and medical groups around the country filed amicus briefs in McKnight's appeal to the U.S. Supreme Court. The focus of their arguments was that, if the *McKnight* decision were allowed to stand, a mother could be prosecuted for stillbirth even if the stillbirth was not her fault, and that the problems of prenatal substance abuse are better dealt with in the health care system than the criminal justices system because the threat of prosecution can deter women from seeking prenatal care. Nevertheless, the U.S. Supreme Court declined to hear the case. As Texas and other states examine this issue, they will need to consider whether prosecution has proven to be an effective deterrent to substance abuse, as well as the relative costs of imprisoning a woman for the results of her actions as opposed to providing adequate treatment before the injury or death occurs. The answers will not be easy when the egregious facts of such cases evoke such public sympathy for the helpless infant.