6429 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 29, 1997

Janet T. Butcher, General Counsel
South Carolina Department of Social Services
P. O. Box 1520
Columbia, South Carolina 29202-1520

Dear Ms. Butcher:

You reference Whitner v. State of South Carolina, Op. No. 24468 (October 1997) and wish to know how that case relates to the mother's non-criminal conduct. Whitner held that a viable, unborn fetus is a "child" for purposes of child abuse and neglect statutes. You make the following analysis and comment with regard to the South Carolina Supreme Court's recent decision in Whitner, granting a petition for rehearing, and rejecting petitioner's constitutional claims:

> [t]he Supreme Court readily disposed of Whitner's argument that she had a privacy interest in carrying her child to term and that prosecution for behavior during her pregnancy violated that interest. Using crack cocaine was illegal conduct. The court said that applying a criminal penalty for child neglect to Whitner for using crack cocaine during pregnancy did not "restrict Whitner's freedom in any way that it was not already restricted. The State's imposition of an additional penalty when a pregnant woman with a viable fetus engages in the already proscribed behavior does not burden a woman's right to carry her pregnancy to term; rather the additional penalty simply recognizes that a third party (the viable fetus or newborn child) is harmed by the behavior."
>
> ... After Whitner, reports to DSS that a woman is harming her viable fetus or threatening her viable fetus by

engaging in legal conduct can trigger investigation and intervention. Activities such as smoking cigarettes, drinking alcohol, not following physicians orders, taking unprescribed but legal drugs, and not obtaining prenatal care could become subject to child protective services intervention, depending on the effect of the conduct on the viable fetus.

DSS is in the process of developing policies and procedures that will deal with the Whitner decision and the changes it has brought. The balancing of interests will be complex when legal behavior is involved. The State will be presented with medical opinions that might be conflicting or noncommittal about the level of risk posed to the fetus by the mother's different behaviors. If harm or a substantial threat of harm were established by a preponderance of evidence (See S.C. Code Ann. Section 20-7-490(3), (4) and Section 20-7-650(F) [Supp. 1996]), the State first would ask the mother if she would accept services without coercion from the family court. If that offer of voluntary services fail, the State must recommend an intervention that does not unconstitutionally burden the mother's rights, balancing the level of risk to the fetus against the degree of restriction on the mother.

Request for Advice

We request your advice on how far the State should be prepared to go to assure protection of the fetus when the mother's behavior is not a separate crime. What level of restriction on the privacy rights of the mother would be justified when the activities affecting the fetus are legal activities? We request that you address separately the following stages of the child protective services process: accepting reports, investigating reports, and intervention when the reports are founded.

Law / Analysis

Whitner v. State is a landmark decision in South Carolina law. Pursuant to the South Carolina Children's Code, the term "child" is defined as "a person under the age of eighteen." The question addressed by the Court in Whitner was whether "a viable fetus is a 'person' for purposes of the Children's Code." In its final decision, dated October 27,

1997, the Court reaffirmed its earlier decision which had answered in the affirmative. Justice Toal's analysis leaves no doubt as to the majority's view concerning this question. Referencing the Court's previous decisions in Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960), Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964) and State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) which had held that a viable fetus is a "person" in a variety of other contexts, including the homicide laws, the Court stated:

> Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in Hall that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The Court then turned its attention to the fundamental purpose of the Children's Code in analyzing the applicability of this reading of the word "person":

> [t]he policies enunciated in the Children's Code also support our plain meaning reading of "persons." S.C. Code Ann. § 20-7-20(C) (1985) which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families." (emphasis added). The abuse or neglect of a child at any time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. The policy of prevention supports a reading of the word "person" to include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies "to all children who have need of services." S.C. Code Ann. § 20-7-20(B) (1985) (emphasis added). When coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature

> intended to include viable fetuses within the scope of the Code's protection.

The Court also demonstrated that its previous cases had fully recognized the distinction between the mother's interest and that of the viable, unborn fetus. It is thus evident that the Supreme Court did not view the fetus as simply part of the mother at the stage of viability, but as an independent being. Said the Court,

> [f]irst, Hall, Fowler and Horne were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, Horne also rested on the State's -- not the mother's -- interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly held that the states have a compelling interest in the life of a viable fetus. See Roe v. Wade, 410 U.S. 113, 165, 93 S.Ct. 705, 732, 35 L.Ed.2d 147, 183 (1973); see also Planned Parenthood v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). If, as Whitner suggests we should, we read Horne only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts. We decline to read Horne in a way that insulates the mother from all culpability for harm to her viable child.

(emphasis added).

The South Carolina Supreme Court's majority also rejected Whitner's argument that "an interpretation of the statute that includes viable fetuses would lead to absurd results obviously not intended by the legislature ...." In this regard, she contended that any attempt to interpret the word "child" to include viable fetuses would make "every action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, ... [as constituting] unlawful neglect under the statute." However, Justice Toal disagreed with this reasoning, noting that "... the same arguments against the statute can be made whether or not the child has been born." In other words, she concluded, "[a]fter the birth of a child, a parent can be prosecuted under Section 20-7-

50 for an action that is likely to endanger the child without regard to whether the action is illegal in itself." Justice Toal further reasoned that

> [o]bviously, the legislature did not think it "absurd" to allow prosecution of parents for such otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children. We see no reason such a result should be rendered absurd by the mere fact the child at issue is a viable fetus.

In its recent granting of a petition for rehearing the Whitner Court somewhat modified its earlier opinion to address and dispose of the various constitutional issues which had been raised. With respect to the argument that § 20-7-50 (endangerment of a child) did not give fair notice, or was impermissibly vague as applied in the context of harm to a viable, unborn fetus resulting from the mother's use of cocaine, the Court reiterated that

> [t]he plain meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in Section 20-7-50. Whitner had all the notice the Constitution requires.

Whitner also contended that application of § 20-7-50 to an unborn, viable fetus violated her federal constitutional right to privacy. Again, the Court found such argument to be unpersuasive. The Court specifically rejected any argument that application of the abuse and neglect statute somehow undermined Whitner's privacy rights with respect to an abortion or a right to carry a child to term:

> First, the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling. See, e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The United States Supreme Court in Casey recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but throughout the expectant mother's pregnancy. See Casey, 505 U.S. at 877, 112 S.Ct. at 2821, 120 L.Ed.2d at 716 (plurality opinion).

> Even more importantly, however, we do not think any fundamental right of Whitner's -- or any right at all, for that matter -- is implicated under the present scenario. It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionality recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.
>
> Moreover, as a practical matter, we do not see how our interpretation of section 20-7-50 imposes a burden on Whitner's right to carry her child to term. In [Cleveland Board of Education v.] LaFleur [414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974)], the Supreme Court found that the mandatory maternity leave policies burdened women's rights to carry their pregnancies to term because the policies prevented pregnant teachers from exercising a freedom they would have enjoyed but for their pregnancies. In contrast, during her pregnancy after the fetus attained viability, Whitner enjoyed the same freedom to use cocaine that she enjoyed earlier in and predating her pregnancy -- none whatsoever. Simply put, South Carolina's child abuse and endangerment statute as applied to this case does not restrict Whitner's freedom in any way that is not already restricted. The State's imposition of an additional penalty when a pregnant woman with a viable fetus engages in the already proscribed behavior does not burden a woman's right to carry her pregnancy to term; rather, the additional penalty simply recognizes that a third party (the viable fetus or newborn child) is harmed by the behavior. (emphasis added).

Specifically, you have asked "how far the State should be prepared to go to assure protection of the fetus when the mother's behavior is not a separate crime." You ask "[w]hat level of restriction on the privacy rights or the mother would be justified when the activities affecting the fetus or potentially affecting the fetus are legal activities?"

Of course, Whitner involved a criminal prosecution for child abuse and endangerment based upon the mother's illegal substance abuse. In granting the petition for rehearing, the Court stressed that no privacy rights (or any other rights) of the mother were implicated because the use of crack cocaine is illegal. To prosecute Whitner for child endangerment for the use of an illegal substance was merely the State's imposition of an "additional penalty" in recognition "that a third party (the viable fetus or newborn child) is harmed by [such] ... behavior." In other words, the Court was entirely satisfied that in view of the fact that the woman's behavior was already illegal whether or not she was pregnant, that such illegal conduct disposed of any invasion of her privacy rights entirely. Based upon the specific facts before the Court, the woman possessed no privacy interest to commit an illegal act whether or not she was pregnant.

The case becomes much more difficult, however, where the facts present in Whitner are not involved -- i.e., where the woman's conduct is entirely legal in and of itself. No case in South Carolina has yet had such a factual scenario litigated. While concededly, there is other language in Whitner which indicates that the Court is not drawing the line on the basis of legal versus illegal conduct for purposes of the applicability of the Children's Code (language referenced above), the bottom line is that it was not necessary in Whitner that the question of the mother's legal conduct be faced. Again, Whitner was a criminal case where the underlying facts involved crack cocaine, an obviously illegal substance in South Carolina.

Legal commentators have expressed concerns regarding the mother's privacy interest in the context of state intervention on behalf of a viable, unborn fetus where the mother's conduct is entirely legal. For example, one legal commentator, who has analyzed Whitner, has cautioned that

> [a] recurring argument posited by Whitner opponents is that liability for cocaine ingestion during pregnancy would then extend to liability for smoking or drinking during pregnancy or even failing to seek proper medical care. A more absurd argument is that further criminalizing drug use opens the door to the extension of liability for all potentially harmful maternal conduct such as jogging, eating fattening or high cholesterol foods, or reckless driving.
>
> Drugs are illegal. Drinking, smoking, and eating fattening foods are not. Opponents argue that, if the purpose of criminal prosecution is to protect fetal harm, then alcohol use and other harmful conduct by pregnant women must also be outlawed. Drinking is a socially acceptable vice, they

> argue, whereas drug abuse is narrowly viewed as a plague of the urban poor that must be eradicated. These critics, however, fail to see the slippery slope that they have created with such arguments. Illegal activities constitute clearly defined categories, thereby satisfying the due process requirement of fair notice. True discrimination would occur if criminal liability extended to activities like smoking and drinking. These are activities which the general population enjoys and they cannot be denied to a woman simply because she is pregnant. There exists a clear line between harmful and unlawful conduct.
>
> ... Liability from a policy standpoint must be confined to illegal activities. Women have no legal right to use illicit drugs, such as cocaine; they do have a legal right to drink or smoke after a certain age. Illegal drug use, on its own, is criminal actionable ... .

Coady, "Extending Child Abuse Protection To The Viable Fetus: Whitner v. State of South Carolina," 71 St. John's L. Rev. 667, 685-86 (Summer, 1997).

Another commentator has agreed that State intervention against a woman for entirely legal conduct may prove to be very troublesome:

> [t]he balance between these interests [fetal health and mother's privacy], however, does not weigh in favor of state regulation when the conduct that the state would criminalize involves legal substances. The invasion of a woman's rights to privacy and equal protection under the law is much greater when the regulated conduct involves the use of legal substances. Extending maternal liability to include other forms of substance abuse, such as the excessive use of cigarettes and alcohol, would deny certain freedoms to the pregnant woman that society, in general, freely enjoys. According to one another, "criminalizing conduct society otherwise allows ... itself is the imposition of an unequal burden on one class of its members ... not imposed on others."
>
> When weighing the state interest in protecting fetal health against the woman's interest in equal protection, the scale tips in favor of protecting maternal rights. Although the

interests in protecting the fetus from such harmful effects as fetal alcohol syndrome (FAS) may be important, a woman cannot be stripped of her right to engage in conduct that all other members of society can freely enjoy. A statute that would prohibit a pregnant woman from drinking alcohol or smoking cigarettes would be an unjustifiable burden on one class of people and, therefore, a violation of equal protection.

Additionally, this type of broad statute would unconstitutionally infringe on a woman's privacy interests. The state should be able to invade a woman's right to bodily integrity and personal autonomy only when the conduct being regulated is illegal. To conclude otherwise would allow a state to deny a pregnant woman the right to make choices that affect her body.

Furthermore, once the state is allowed to regulate the abuse of legal substances, such as alcohol, nicotine and caffeine, the door is opened to further regulation of maternal conduct. By limiting criminal liability to illegal substance abuse, a clear line is drawn between the type of maternal conduct that can and cannot be prohibited. Drawing a bright line between illegal and legal conduct avoids the problem of notice that would arise under a broad statute prohibiting all maternal conduct that causes harm to the fetus. Most importantly, limiting liability to illegal conduct eliminates the fear that criminal liability will succumb to a slippery slope that would subordinate a woman's rights to fetal rights. If criminal liability is extended to legal conduct, then the possibility that a woman can be prosecuted for failure to follow her doctor's orders, or for failure to seek prenatal care would become a reality. Limiting criminal liability to illegal substance abuse would contain the invasion of a woman's rights within constitutionally permissible boundaries. Finally, any statute that regulates maternal conduct would be narrowly tailored to meet the relevant state interest. The definition of that interest must, therefore, be clear. The state interest should be defined as the protection of the fetus from prenatal fetal injuries that result from illegal drug use by a woman during the term of her pregnancy. A statute that broadly regulates all harmful conduct would not be tailored to meet

> this state interest. Therefore, only a criminal statute prohibiting illegal substance use by a pregnant woman will be constitutional.

Glink, "The Prosecution of Maternal Fetal Abuse: Is this the Answer?" 1991 U. Ill. L. Rev. 533, 568-569 (1991).

There is not complete agreement in the legal literature concerning the foregoing points of view, however. One commentator argues that the State should follow the civil commitment route, treating drug and alcohol use similarly:

> [b]efore the state can decide how to intervene in cases of gestational substance abuse, it must define the predicate behavior that will trigger state intervention. The state should consider both drug and alcohol abuse when deciding whether to intervene. Abuse of either alcohol or illegal drugs should establish predicate behavior for state intervention. However, the state must narrowly define actions that will spur state intervention because due process requires fair notice of what conduct constitutes a crime or predicate behavior for civil commitment.
>
> State intervention predicated on drug versus alcohol abuse raises different legal questions. Abuse of illegal drugs creates the most convincing case for state intervention. Imposing sanctions on a pregnant woman for abuse of illegal drugs is not a significant infringement of her rights, because there is no fundamental right to use illegal drugs. Therefore, the State need not show a compelling interest to forbid their use by pregnant women. Alcohol, however, is legal. Prohibiting a pregnant woman from abusing alcohol thus represents a greater infringement on her rights. Yet, like use of illegal drugs, alcohol use is not a fundamental right and the state can and does regulate its use.
>
> The state should treat abuse of alcohol during pregnancy the same way it treats abuse of illegal drugs ....

Lichtenberg, "Gestational Substance Abuse: A Call for A Thoughtful Legislative Response," 65 Wash. L. Rev. 377, 384 (April, 1990).

Yet another commentator, this one writing in the South Carolina Law Review, analyzes the Whitner decision in terms of the two conflicting points of view, presenting the arguments both for a very narrow and for broad reading of the decision:

> [t]he Whitner decision raises other potential privacy problems. First, the decision does not specify what activity is considered child abuse. Does the decision encompass only illegal drug use or abuse? Or is the decision so broad as to include any activity by the mother that could have an adverse effect on her fetus? If the broad reading prevails, a pregnant woman could be prosecuted for smoking cigarettes, consuming alcohol, going on amusement park rides in spite of warning signs, disobeying doctor's orders for bed rest or abstinence of sexual intercourse, not taking prenatal vitamins, refusing to eat properly, and the list goes on. If all of these acts are included, then the State's reach into the womb is unprecedented and would infringe upon a woman's fundamental right to procreate or to abstain from unwanted medical procedures.
>
> A counter-argument that supports the ability of the State to restrict all potentially harmful activities is that a narrow application of Whitner, including only illegal drug use, may under-emphasize deterrence of equally harmful behavior. Supporters of this argument point to the fact that the consumption of alcohol and smoking have been proven to have adverse effects on unborn fetuses and should therefore be included. Additionally, the consumption of alcohol, tobacco or illegal drugs is not a fundamental right. Thus, it is argued that because the fundamental right to abortion is not absolute, the State should have the power to restrict lesser rights or privileges when their exercise presents a serious risk of injury to the fetus.

Casto, "Whitner v. South Carolina: Prosecution For Child Abuse Extends Into The Womb," 48 S.C. Law Rev. 657, 665 (Spring, 1997).

Based upon the foregoing, it is our advice that Whitner should be generally limited to its facts. Justice Toal specifically stated that "[w]e need not decide any cases other than the one before us ..." and that "this case ... is the only case we are called upon to decide here." While obviously Whitner is capable of being read both broadly as well as

narrowly, the Court's insertion of the language regarding a woman having no privacy right to engage in illegal substance abuse following the motion for reconsideration leads us to recommend a cautious approach, thereby generally limiting application of Whitner to a mother's use of illegal substances such as crack cocaine. Beyond that, however, the General Assembly should probably be given the opportunity to establish more precise guidelines in this unknown area (where legal activity of the mother is involved) before DSS can approach that situation with the same degree of confidence and assurance that is the case with child abuse or neglect involving children in being or involving viable fetuses where the mother is engaging in illegal activity.

In short, while the Court in Whitner arguably has given DSS the go-ahead to apply the Children's Code to cases involving viable fetuses where the mother's conduct is not in and of itself illegal, we would advise that the agency tread lightly in this area. Where the mother's conduct involves legal activity, only in the most extraordinary of circumstances involving imminent peril to a fetus, should DSS proceed with intervention -- and even there, only with the full blessing and endorsement of the Family Court following a full hearing. Otherwise, DSS should confine its intervention on behalf of a viable fetus to cases where the mother's underlying conduct is illegal, such as illegal substance abuse.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an

REVIEWED AND APPROVED BY:

Zeb C. Williams, III
Deputy Attorney General