

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

2008-SC-0095-D
(2006-CA-1561)

INA COCHRAN

APPELLANT

v.

Appeal from Casey Circuit Court
2006-CR-0003

COMMONWEALTH OF KENTUCKY

APPELLEE

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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STATEMENT OF THE CASE

On December 29, 2005, Ina Cochran was admitted to the Ephraim McDowell Regional Medical Center in Danville, Kentucky, where she gave birth to a baby girl. The following day, both Ms. Cochran and her daughter were tested for illicit drugs. Based on the results of those tests, the Commonwealth sought and obtained an indictment against Ms. Cochran on January 9, 2006. The indictment charged Ms. Cochran with Wanton Endangerment in the First Degree and Persistent Felony Offender in the Second Degree.

The Casey Circuit Court dismissed the indictment, without a written opinion, stating that this Court's decision in *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993), barred prosecution of Ms. Cochran under the wanton endangerment statute. The Commonwealth appealed to the Kentucky Court of Appeals. Even though this Court has never revisited its decision in *Welch*, the Court of Appeals, in a decision in which no two judges agreed on a single rationale, essentially held that *Welch* was no longer good law and reversed the dismissal of the indictment. *Commonwealth v. Cochran*, No. 2006-CA-001561 (Jan. 11, 2008).

SUMMARY OF ARGUMENT

This Court's decision in *Welch* is unambiguous: The Kentucky legislature did not intend the criminal abuse statutes to be used to punish women who become and choose to remain pregnant despite a substance abuse problem. *Welch*, 864 S.W.2d at 284-85. This holding is consistent with the conclusions of virtually every state court to address a similar question. And, as demonstrated below, the *Welch* decision is consonant with this Court's ruling in *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004). Thus, the Court

of Appeals' decision to reverse the dismissal in this case was contrary to the precedent of this Court and should be overturned.

Moreover, even if *Welch* were no longer good law (which it is), the longstanding principle of statutory construction — that courts must seek an interpretation of a statute that renders it constitutional — compels reversal of the Court of Appeals' decision below. Specifically, to construe the statute at issue here in a manner that would permit Ms. Cochran's prosecution would render it unconstitutional in at least two respects. First, application of the wanton endangerment statute to Ms. Cochran because of her status as a pregnant woman would impermissibly infringe upon fundamental constitutional rights of privacy and autonomy. Second, the wanton endangerment statute fails to provide women with notice that becoming and remaining pregnant could result in criminal penalties. Thus, to interpret the statute to reach any of the myriad acts or omissions by a pregnant woman that *could potentially* result in fetal harm would render the statute unconstitutionally vague. Moreover, such an unfettered delegation of authority to police and prosecutors would undoubtedly result (as it has here) in inconsistent, ad-hoc and subjective enforcement of the statute in violation of the Due Process Clause.

ARGUMENT

I. THIS COURT'S DECISION IN COMMONWEALTH V. WELCH IS GOOD LAW AND CONTROLS THE OUTCOME IN THIS CASE.

In *Welch*, this Court unequivocally rejected the argument that the state's criminal abuse statutes reach pregnant women who become and remain pregnant despite a drug dependency. 864 S.W.2d at 280. That case is almost identical to the case now before this Court: The Commonwealth accused Ms. Welch of using drugs while pregnant; after

giving birth, she was convicted of criminal abuse in the second degree. *Id.* at 280. The Court of Appeals vacated her conviction and this Court affirmed. *Id.* at 280-81.¹

The *Welch* decision, and its underlying rationale, should control the outcome of this case for two reasons. First, *Welch* is consistent both with legislative intent² that alcohol and drug dependency by pregnant women should not be addressed by means of criminal prosecutions and with basic principles of statutory construction. Second, subsequent judicial opinions addressing whether the state may prosecute a person who harms a pregnant woman and thereby kills a viable fetus are not inconsistent with *Welch* and therefore do not present “compelling and urgent reason[s]” to overrule *Welch*.

Schilling v. Schoenle, 782 S.W.2d 630, 633 (Ky. 1990).

¹ Other courts have consistently rejected similar prosecutions under criminal child abuse, reckless or wanton endangerment, drug delivery, homicide, or related statutes. These courts have held that prosecutions of pregnant women who continue their pregnancies despite a substance abuse problem are without legal basis, unconstitutional, or both. *See, e.g., Kilmon v. Maryland*, 905 A.2d 306, 311, 314 (Md. 2006) (collecting cases) (reasoning “courts must attempt to construe statutes in a common sense manner” and reversing conviction for reckless endangerment based on ingestion of drugs during pregnancy); *State v. Martinez*, 137 P.3d 1195, 1197-98 (N.M. Ct. App. 2006), *cert. quashed* by 161 P.3d 260 (2007) (refusing to apply child abuse statutes to punish woman dependant on cocaine for continuing pregnancy to term); *Reinesto v. Superior Court*, 894 P.2d 733, 735-36 (Ariz. Ct. App. 1995) (dismissing child abuse charges filed against woman for heroin use during pregnancy because the ordinary meaning of “child” excludes fetuses, and because concluding otherwise would offend due process notions of fairness and render statute impermissibly vague); *Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman dependant on illegal substances would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice, and render statute unconstitutionally vague); *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for continuing to term in spite of a drug problem on ground that such application misconstrues the purpose of the law). *But see Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997) (distinguishing, *inter alia*, *Welch* because it was based on an “entirely different [body] of case law from South Carolina”).

² Because Appellant’s brief adequately addresses this point, Brief for Appellant at 2-7; 12-19, we will not repeat those arguments here.

In *Welch*, this Court concluded that applying Kentucky’s criminal abuse statutes to penalize a pregnant woman for allegedly harming her fetus would render the statutes impermissibly vague. *Welch*, 864 S.W.2d at 283. Indeed, the Court noted that this “‘interpretation of the statutes, if validated, might lead to a ‘slippery slope’ whereby the law could be construed as covering the full range of a pregnant woman’s behavior — a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.’” *Id.* (quoting as persuasive *Commonwealth v. Kemp*, No. 2707 C 1991, Common Pleas of Westmoreland County, Pa. Criminal Division, Sl. Op. at p. 12). This Court further concluded that if the General Assembly had intended the criminal abuse statutes to reach pregnant women who become and remain pregnant despite a drug dependency, it would have said so expressly. *Id.* According to the *Welch* Court, the Preamble of the Maternal Health Act of 1992 — which includes the General Assembly’s finding that punitive actions against pregnant substance abusers are counterproductive and should be eschewed in favor of treatment³ — *established* that “the General Assembly

³ Specifically, the Maternal Health Act states:

The General Assembly finds that . . . punitive actions taken against pregnant alcohol or substance abusers would . . . discourag[e] these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn; and . . . the General Assembly finds it is necessary to treat the problem of alcohol and drug use during pregnancy solely as a public health problem by seeking expanded access to prenatal care and to alcohol and substance abuse education and treatment programs. . . .

1992 Ky. Acts, Ch. 442 (H.B. 192). *See also Kilmon*, 905 A.2d at 314 (describing findings of Maryland legislature that “criminalizing drug addiction for this one segment of the population, pregnant women[,] was not the proper approach to the problem and had, in fact, proved ineffective in other States in deterring either that conduct or addiction generally on the part of pregnant women.”).

intends no additional criminal punishment for the pregnant woman's abuse of . . . drugs apart from [a] punishment" applicable to all. *Id.* at 283-85.⁴

The same reasoning applies here. In all relevant respects, the criminal abuse statute at issue in *Welch*, Ky. Rev. Stat. Ann. § 508.110, is the same as the wanton endangerment statute at issue here, Ky. Rev. Stat. Ann. § 508.060. Both prohibit "wanton" conduct that places a person at risk of "serious physical injury." *See id.*⁵ Therefore, under *Welch*, the indictment against Ms. Cochran cannot stand.

This conclusion is not undermined by the Court's decision in *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004). Read together, this Court's opinions in *Welch* and *Morris* reflect a necessary distinction: that, where the legislature so permits, the state may prosecute an individual who inflicts harm on a pregnant woman and her developing fetus, but the state may not, consistent with constitutional norms, prosecute a pregnant woman struggling with a drug addiction who chooses to carry her pregnancy to term. In *Morris*, the Court held that a person who harms a pregnant woman and thereby kills a viable fetus may be prosecuted for homicide despite the fact that the fetus was never "born alive." *Id.* at 663 (overruling *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983)). Thus, *Morris*

⁴ In addition, the recently passed Fetal Homicide law reaffirms that the State's approach to protecting maternal and fetal health does not permit prosecuting a pregnant woman for allegedly harming her fetus. That law, while authorizing homicide prosecutions of individuals who cause the death of a fetus, explicitly prohibits prosecution of the pregnant woman herself. *See* Ky. Rev. Stat. Ann. § 507A.010(3) ("Nothing in this chapter shall apply to any acts of a pregnant woman that caused the death of her unborn child.").

⁵ The statute under which Ms. Cochran was charged is distinguishable only in that it requires a showing of both "extreme indifference to the value of human life" and "a substantial danger" of serious physical injury. Ky. Rev. Stat. Ann. § 508.060. As such, the distinction between the two statutes is one without a difference in this context, as the *Welch* decision in no way turned on the element of *mens rea* or the likelihood that the prohibited acts result in actual injury.

did not revisit — let alone alter — the rationale in *Welch* that criminal laws are not intended to punish a pregnant woman whose actions (or inactions) during pregnancy allegedly result in harm to her fetus.⁶ Rather, *Morris* is properly viewed as an extension of the rationale in *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992), in which this Court upheld the manslaughter conviction of an individual who injured a pregnant woman “whose baby then died postpartum from prenatal injury.” *Welch*, 864 S.W.2d at 282. Because, as Justice Wintersheimer observed, “[i]n [the *Morris*] case, we are determining the rights of the unborn child and mother vis-à-vis criminal acts of *others*,” *Morris*, 142 S.W.3d at 668 (Wintersheimer, J., concurring) (emphasis added), *Morris* cannot be read to overrule *sub silentio Welch*, which addressed only the pregnant woman's own conduct. *See generally Mickens v. Taylor*, 535 U.S. 162, 172 (2002) (“The notion that [a case] created a new rule *sub silentio* ... where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the ... issue [] is implausible.”).⁷

In short, *Welch* and *Morris* are each controlling with respect to two different questions: *Welch* as to whether the state may prosecute a pregnant woman for acts or

⁶ Notwithstanding the Court of Appeals’ assertions to the contrary, *see Commonwealth v. Cochran*, No. 2006-CA-001561, and Commonwealth’s Response to Motion for Discretionary Review at 3-4, this Court’s decision in *Welch* did not rely on *Hollis*. *See Welch*, 864 S.W.2d at 282. As such, the reversal of *Hollis* does not undermine *Welch* in any respect.

⁷ Similarly, to the extent *Morris* expanded the reach of Kentucky’s penal code by including viable fetuses within the statutory definition of “persons,” this does not compel a different conclusion from that reached in *Welch* because application of the *Morris* definition to pregnant women’s conduct would create unconstitutional results. *See* Section II, *infra*; *see also Flynt v. Commonwealth*, 105 S.W.3d 415, 423 (Ky. 2003) (“if there are two ways to reasonably construe a statute, one upholding the validity and the other rendering it unconstitutional, we must adopt the construction which sustains the constitutionality of the statute”) (internal quotations and citations omitted).

omissions alleged to harm her fetus; and *Morris* as to whether the state may prosecute someone else who inflicts harm on a pregnant woman and her developing fetus. While *Morris* permits the latter, it did so consistent with *Welch* and the fetal homicide statute, both of which prohibit the former.

For these reasons, the Court of Appeals was bound to follow *Welch*. Accordingly, this Court should reverse the decision below and affirm the Casey Circuit Court's dismissal of the indictment.

II. APPLICATION OF THE WANTON ENDANGERMENT STATUTE TO MS. COCHRAN WOULD VIOLATE HER CONSTITUTIONAL RIGHTS.

Under well-established principles of constitutional law and statutory construction, "if a statute is reasonably susceptible to two constructions, one of which renders it unconstitutional, the court must adopt the construction which sustains the constitutionality of the statute." *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 96 (Ky. 2000) (internal quotation marks omitted). Because the application of the wanton endangerment statute to Ms. Cochran in this instance would violate her constitutional rights, even in the absence of *Welch* and the overwhelming weight of opinion of sister jurisdictions, this Court should reject any such construction of the statute.

A. The Use of Criminal Laws to Penalize Women Struggling With Drug Dependence Because They Become or Remain Pregnant Violates Their Rights of Privacy and Procreative Autonomy.

Prosecution and punishment of women who become and remain pregnant despite substance abuse problems deprives such women of fundamental constitutional rights. That is the case here: The indictment does not charge Ms. Cochran with *using* drugs or, indeed, with any drug-related crime under Kentucky law; instead, it inflicts extraordinary penalties on her because she carried her pregnancy to term. Although Ms. Cochran does

not contest that she is subject to prosecution under Kentucky's drug laws on the same basis as any other individual, prosecuting her solely on the basis of the alleged harm to her fetus constitutes an unjustified state intrusion into her constitutional rights to privacy, liberty, autonomy and bodily integrity.

The fundamental right to procreate is protected by the Fourteenth Amendment to the United States Constitution. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

Accordingly, the constitutional guarantee of procreative privacy specifically protects women from measures that penalize them for carrying pregnancies to term. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting that the decision in *Roe v. Wade* "had been sensibly relied upon to counter" attempts to interfere with a women's decision to become pregnant or to carry to term). For example, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court found unconstitutional a rule that required pregnant schoolteachers to take unpaid maternity leave because "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms" *id.* at 640, particularly the "freedom of personal choice in matters of marriage and family life." *Id.* at 639. Even when the State acts in the name of protecting the fetus — and even when the asserted concern is prenatal

exposure to an illegal drug — pregnant women are entitled to the full protections of the Constitution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (considering the constitutionality of a public hospital’s policy, implemented in coordination with law enforcement, of drug testing pregnant women and holding that notwithstanding the State’s asserted interest in protecting the fetus, the full protections of the Fourth Amendment applied).

Thus, “where a decision as fundamental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.” *Carey*, 431 U.S. at 686; *see also Vaughn v. Ruoff*, 253 F.3d 1124, 1128-29 (8th Cir. 2004) (recognizing that “a personal decision relating to procreation or contraception is a protected liberty interest,” and that involuntary sterilization has been held constitutional only where “it is a narrowly tailored means to achieve a compelling government interest”).⁸ These rights are protected not only by the U.S. Constitution, but also by the Kentucky Constitution. “The Commonwealth has a long judicial tradition of leaving its citizens alone” and “has made clear that the privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States Constitution.” *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 473-74 (Ky. 1998); *accord Commonwealth v. Wasson*, 842 S.W.2d 487, 491-92 (Ky. 1992).

⁸ The United States Supreme Court has departed from the strict scrutiny standard with respect to the right to choose to have an abortion, which is now protected under an “undue burden” standard. *See Casey*, 505 U.S. at 852, 876-79. However, strict scrutiny remains the standard for evaluating the right to procreate and bear a child. *See id.* at 858-59.

Even if the wanton endangerment statute were intended to permit the prosecution of Ms. Cochran in this instance (which it clearly was not), because fundamental privacy rights are implicated, the burden shifts to the Commonwealth to prove that using this statute in this manner — to prosecute women struggling with drug dependency because they become and remain pregnant — furthers a compelling interest. *Carey*, 431 U.S. at 685-86. The Commonwealth cannot establish, however, that such prosecutions serve any legitimate, much less compelling, state interest. That is because such prosecutions are both ineffective and counterproductive. As the American Academy of Pediatrics has concluded (and as the Kentucky Legislature itself recognized in enacting the Maternal Health Act more than fifteen years ago, *see* Section I, *supra*): “Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health” American Academy of Pediatrics, Committee on Substance Abuse, 1994 to 1995, *Drug-Exposed Infants*, 96 *Pediatrics* 365-66 (1995); *see also* Brief *Amici Curiae* In Support of Appellant, submitted by National Advocates for Pregnant Women (“NAPW Brief”) at 8-10. In fact, punitive approaches only heighten risks to fetal health because they effectively drive drug-dependant women from seeking all-important prenatal care as well as substance abuse treatment. *See* NAPW Brief at *id.* For this reason, public health groups are nearly unanimous in opposing such prosecutions. Because the Commonwealth’s application of the wanton endangerment statute to drug-dependant pregnant women unmistakably burdens privacy and liberty interests without furthering a compelling state interest, such application is unconstitutional and should be rejected by this Court.

B. Application of the Wanton Endangerment Statute to Women Struggling With Drug Dependence Because They Become and Remain Pregnant Is Impermissibly Vague and Fails to Give Fair Notice of Prohibited Conduct.

Applying the wanton endangerment statute to Ms. Cochran would also violate her constitutional right to due process of law because the statute provides no notice that becoming and remaining pregnant could ever be penalized under the law, and because the absence of standards within the statute guiding such an application would invite arbitrary and discriminatory enforcement. In order to satisfy the constitutional requirements of due process, criminal statutes must be sufficiently definite that “ordinary people can understand” what conduct is prohibited. *Belle Maer Harbor v. Charter Tp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999) (citing *Kolender v. Lawson*, 461 U.S. 352 (1983)); *see also State Bd. of Elementary & Secondary Educ. v. Howard*, 834 S.W.2d 657, 662 (Ky. 1992); *Commonwealth v. Kash*, 967 S.W.2d 37, 42 (Ky. App. 1997). A statute will be void for vagueness if individuals of ordinary intelligence must guess at its meaning. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973); *see also Thomas v. Commonwealth*, 574 S.W.2d 903, 908-09 (Ky. Ct. App. 1979) (in creating an offense that was not an offense at common law, the legislature must craft a statute that clearly shows what was intended to be prohibited and punished, or the statute will be void for uncertainty). Likewise, a law must provide “minimal guidelines to govern the conduct of law enforcement.” *Belle Maer Harbor*, 170 F.3d. at 556-557 (citing *Smith v. Goguen*, 415 U.S. 566 (1974)); *Kolender*, 461 U.S. at 358. “[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007) (internal quotations omitted) (quoting *Grayned v. City of*

Rockford, 408 U.S. 104, 108-09(1972)). As applied to Ms. Cochran, prosecution under the wanton endangerment statute fails to satisfy any of these requirements.

Based on the plain language of the wanton endangerment statute, a woman of common intelligence could not know that she could be penalized under this law for becoming and remaining pregnant despite a drug dependency.⁹ Moreover, were the wanton endangerment statute interpreted to apply to pregnant women in this instance — despite its plain language and the consistent interpretation of analogous statutes in almost every jurisdiction to have considered the question — the language of the statute would also fail to put women of ordinary intelligence on notice regarding *which* of the myriad acts or omissions potentially threatening fetal health, may subject them to criminal prosecution. So interpreted, this statute would also offer no guidance to police and prosecutors regarding whether and when a pregnant woman should be penalized, thus subjecting pregnant women to the near limitless discretion of law enforcement officials and inviting both arbitrary and discriminatory enforcement of the law.

Indeed, were the Commonwealth's interpretation to stand, extensive medical advice exists to prompt such arbitrary and discriminatory enforcement of the statute. For generations, numerous common conditions of and activities by pregnant women have been identified, rightly or wrongly, as posing some threat to fetal wellbeing. For instance, to ensure optimal fetal development, pregnant women are urged to stop smoking entirely and immediately, *see* Heidi Eisenberg Murkoff & Sharon Mazel, *What To Expect*

⁹ Indeed, courts in other states have repeatedly held that application of similarly worded statutes to a pregnant woman struggling with a substance abuse problem violates due process requirements. *See, e.g., Reinesto*, 894 P.2d at 736 (because criminal child abuse statute referred to “child” rather than “fetus,” application to pregnant woman’s conduct would offend due process); *Encoe*, 885 P.2d at 598 (principles of due process prevented court from interpreting child endangerment statute to reach transfer of drugs from mother to newborn through umbilical cord in moments immediately after birth).

When You're Expecting 72-76 (4th ed. 2009); U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure To Tobacco Smoke: A Report of the Surgeon General*, 167-244 (2006); American College of Obstetricians and Gynecologists, *Your Pregnancy & Birth*, 54-55 (4th ed. 2005) [hereinafter ACOG]; to avoid contact with anyone who is smoking and who could thereby subject the fetus to contamination from second-hand smoke, Murkoff & Mazel, *supra*, at 76; U.S. Department of Health and Human Services, *supra* at 170, 244. Pregnant women should also abstain from alcohol consumption as, "the Surgeon General, ACOG and the American Academy of Pediatrics (AAP) advise that no amount of alcohol is safe for pregnant women." Murkoff & Mazell, *supra*, at 71; *see also* ACOG, *supra*, at 55-57. In the name of fetal safety, pregnant women are further urged to refrain from changing a cat litter box, consuming unpasteurized cheese or undercooked meat, and gardening without gloves in order to avoid contracting toxoplasmosis, Murkoff & Mazel, *supra*, at 80; and to wear rubber gloves and avoid inhaling when using household cleaning products in order to limit exposure to potentially harmful chemicals, *id.* at 80-81. Pregnant women are urged to take folic acid before and during pregnancy to protect the fetus from neural tube defects. *Id.* at 127. Pregnant women are also advised to ensure that their drinking water is free of lead, *id.* at 81-82, and to cut back on or give up caffeine, *id.* at 69-70; ACOG, *supra*, at 53. Gaining no less than 25, and no more than 35 pounds, is now encouraged, ACOG, *supra*, at 77-78; Murkoff & Mazel, *supra*, at 166, as is regular but not too strenuous exercise, Murkoff & Mazel, *supra*, at 68-69; ACOG, *supra*, at 37-41. *See also*, Stothard et al., *Maternal overweight and obesity and the risk of congenital anomalies: a systematic review and meta-analysis*, 301 JAMA 636 (2009) (meta-analysis

concluding that maternal obesity is associated with a heightened risk of spina bifida and an increased risk of structural fetal anomalies).

These guidelines only begin to illustrate the tremendous scope of the ruling that the Commonwealth urges upon this Court. As this Court held in *Welch*, were the wanton endangerment statute so construed, pregnant women could not know which regular, daily activities would be criminalized by the statute. “What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn’t wear the prescription lenses she knows she needs to see the dangers of the road?” *Welch*, 864 S.W.2d at 283.¹⁰ Indeed, in *Welch*, this Court explicitly recognized that such a construction of the criminal abuse laws would beget a “lack [of] fair notice and [would] violate constitutional due process limits against statutory vagueness.” *Id.* The Commonwealth’s interpretation of the wanton endangerment statute unavoidably compels the same result.

¹⁰ See also *Kilmon*, 905 A.2d at 311-12 (“[I]f, as the State urges, the statute is read to apply to the effect of a pregnant woman’s conduct on the child she is carrying, it could well be construed to include . . . a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature—everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy . . . to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State’s position were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.”)

CONCLUSION

For the reasons set out above, as well as those fully briefed by Appellant and addressed by other *amici* in support of Appellant, this Court should dismiss the indictment of Ms. Cochran for Wanton Endangerment in the First Degree.

Date: February 24, 2009

Respectfully submitted,



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