



Guidelines for Defense Attorneys

Please contact Pregnancy Justice at info@pregnancyjusticeus.org for assistance relating to any information in this section or the Guide generally.

Women facing prosecution for acts or omissions that create perceived risks to their pregnancies are often in incredibly vulnerable positions. Their bodies are used as evidence against them. They may feel stigmatized, dehumanized, violated, and dismissed. They may have confided in medical professionals or sought medical care only to have their confidential discussions with their caregivers and their medical records turned over to law enforcement.

In a criminal legal system that incentivizes law enforcement to secure arrests and convictions, defense attorneys should be acutely aware of the aggressive tactics that law enforcement may use against their clients and be ready to question their own assumptions about pregnancy, the impact or not of drug use on pregnancy, and stereotypes about maternal behavior.

Particularly in the reproductive arena, police, prosecutors and judges may be motivated by personal beliefs or political influences causing them to seek out and favor evidence to fit their theory of criminalization or distort criminal statutes that were never intended to be applied to pregnancy.

In defending cases of pregnancy criminalization, defense attorneys should consider the following:

- 1. Pursue early and aggressive bail applications.**
 - » When given the choice of immediate release in exchange for a guilty plea, many clients will feel pressured to take a plea deal, particularly if they have children at home. This is especially true the longer a client remains in jail while awaiting trial.¹⁵⁵ In Tennessee, Anna Yocca pleaded guilty to a felony charge of attempted procurement of a miscarriage in no small part due to the fact that she had already spent more than a year in jail.¹⁵⁶
 - » In order to avoid this pressure, work to keep the client out of jail by pursuing an early and aggressive bail application. Be prepared to counter arguments that your client presents any danger to the community. Some judges apply exorbitant bail in order to inhibit a defendant from becoming pregnant again or to prevent the defendant from using drugs. In some cases, your client may be able to seek financial assistance from dedicated reproductive legal defense bail funds.¹⁵⁷
 - » If substance use disorder is a concern, be prepared to present a drug treatment organization that is able to accept your client into their program immediately following release. Any constitutional issues with the arrest or the prosecution should be expressed in the bail application (see below for more on constitutional issues) and, potentially, in an appeal or *habeas* petition contesting an inappropriate bail decision.

Proving causation

between a mother's acts or omissions and a miscarriage is virtually impossible, and a court should be made aware of this in no uncertain terms as early and often in the process as feasible.

2. Challenge evidence and use experts.

- » In many cases, the criminal charge is based on the erroneous assumption that a woman engaged in acts or omissions that harmed the fetus. Defense attorneys should challenge the causal link between the alleged behavior and the alleged harm to the fetus in as many ways as possible, in light of the fact that miscarriages are extremely common and can be caused by myriad factors.¹⁵⁸
- » Proving causation between a mother's acts or omissions and a miscarriage is virtually impossible, and a court should be made aware of this in no uncertain terms as early and often in the process as feasible. This may include obtaining experts like forensic pathologists and OBGYNs to challenge any causal links allegedly based on the evidence. Obtaining the medical records of the client is essential both to show the lack of causation of the alleged harm and to show that a condition could have been caused by something else.
- » For instance, in Mississippi, Rennie Gibbs was indicted for murder based on the belief that she caused her stillbirth by using cocaine. She endured seven years of legal proceedings before the charges against her were finally dropped. Medical experts who later examined the autopsy reports concluded that the more likely cause of death was umbilical cord compression.¹⁵⁹ Michelle Roberts, in Virginia, was charged with murder of her fetus because the skull of the buried and decomposed remains had holes. The charges were dismissed after the defense experts demonstrated that the deceased fetus, in fact, had a known condition that resulted in late closure of the natural separation of the parts of the fetal skull, and that the injuries were clearly not due to Roberts' behavior.¹⁶⁰
- » It is also critical to challenge the expertise of the opposing expert and file *Daubert* motions to address the relevancy and reliability of their opinions.¹⁶¹ For example, law enforcement officials are improper experts to give opinions on medical and scientific facts.¹⁶² Similarly, the average medical doctor, including a pediatrician, is not a trained researcher and is not qualified to say a certain drug has caused a certain outcome.¹⁶³ In Mississippi, Lattice Fisher was charged with murder based on a finding that that her fetus was born alive when the medical examiner relied on the discredited "lung float test."¹⁶⁴ After defense experts challenged the reliability of this archaic test, the DA presented the case before a new grand jury using accurate scientific information, and the grand jury "no billed" the matter so the charges were dismissed.¹⁶⁵
- » The prosecution's purported scientific evidence can carry substantial weight, and if unchallenged, may dangerously prejudice the client. In South Carolina, Regina McKnight was convicted of homicide by child abuse after her pregnancy ended in a stillbirth based on testimony from the prosecution's experts that she caused the stillbirth by using cocaine.¹⁶⁶ Although it was later proven that the stillbirth was the result of an infection, McKnight served more than eight years in prison. When McKnight's conviction was overturned, the South Carolina Supreme Court noted that "recent studies show that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor."¹⁶⁷
- » If an autopsy has been performed, the defense attorney should reach out to the medical examiner who performed the death investigation to review the medical examiner's report. The defense attorney should ask the medical examiner to explain why they reached the conclusions they did, including any scientific literature relied upon when reaching those conclusions. Additionally, a

defense attorney should obtain their own forensic pathologist expert for testimony and, if the defendant is indigent, make an application to the court for funding to obtain the expert, if necessary. These are critical steps for defense attorneys to get clarity on the forensic evidence involved in their client's case prior to and during trial.

3. Make pre- and post-preliminary hearing/indictment motions to dismiss *in limine* with state and federal constitutional and statutory arguments and preserve all arguments for appeal.

- » While the focus of these cases will often center around the evidence, do not assume that the prosecution is actually authorized under the state's law. Be sure to include all arguments based on the federal constitution and federal law in order to preserve any future potential federal *habeas corpus* challenges following a conviction. It is critical to consider all constitutional and statutory arguments. Every argument possible should be raised before and at trial, and should be preserved for appeal.
- » If the client is charged with child endangerment, child abuse, feticide, or under a general murder statute, consider arguing that the prosecution extends beyond the plain language of the statute. It is possible that the statute does not define "child" to include a fetus¹⁶⁸ or that the statute either explicitly excludes pregnant women¹⁶⁹ or does not explicitly include the acts of pregnant women in relation to their own pregnancies.¹⁷⁰ In many instances, states may have considered—but rejected—an expansion of the statute to include fetuses under the definition of children.¹⁷¹ In such cases, argue that your client had no notice of potential prosecution under the state's construction of the statute in violation of her constitutional right to due process under the Fourteenth

Amendment as well as the relevant provision of the state constitution.

- » Argue that imposing liability on women for being pregnant and engaging in certain acts or omissions is discrimination on the basis of sex and violates equal protection principles.¹⁷² In most cases, but for the pregnancy, the conduct itself would not be considered criminal. There is no comparative liability for men. While all states and the federal government criminalize possession of illicit drugs, most states do not explicitly criminalize drug use and evidence of drug use on its own is rarely sufficient to sustain a possession charge.¹⁷³ As such, a father's drug use (absent additional circumstances) would not be criminalized or monitored in a comparable way to that of a pregnant woman.

4. Consider Fourth Amendment arguments.

- » Despite having the general right to refuse any medical procedure involving themselves or their children, including a drug test, many pregnant or postpartum women and their newborns are drug tested without their knowledge and explicit, informed consent.¹⁷⁴ Often these tests are done in "secret" despite the Supreme Court having ruled that it is unconstitutional to use the results of drug testing obtained under the guise of medical care for law enforcement purposes without informed specific consent to search for evidence.¹⁷⁵ Depending on the circumstances, consider arguments based on a lack of informed consent for a drug test, or that consent was limited to medical purposes and care only.

5. Bring public attention to the case.

- » Where permitted and appropriate, defense attorneys can seek attention from local and national media.¹⁷⁶ Attorneys often shy away from media attention, but public outcry and organizing can be an effective tool to put pressure and scrutiny on law enforcement. Marshae Jones, an Alabama woman who lost a pregnancy after she was shot in the stomach during an altercation, was charged with manslaughter for allegedly causing the death of her fetus by initiating a fight while knowing she was five months pregnant.¹⁷⁷ A week after her story drew national attention, the district attorney announced that she would not be prosecuted.¹⁷⁸
- » Public outcry not only puts pressure on the prosecution, but it can also alert the community and other stakeholders to what is happening. Purvi Patel, an

Indiana woman who was charged under a feticide statute after purchasing and taking mifepristone and misoprostol to terminate her pregnancy, had her conviction overturned on appeal in part because of the different interest groups that got involved in her case, drawing national attention and outrage. Over 25 amicus briefs were filed on her behalf.¹⁷⁹

- » Defense attorneys should seek amicus briefs even at the trial level, even if it's not typical practice.¹⁸⁰ Amicus briefs function to bring national attention to a case and draw in other avenues of help for the defendant.¹⁸¹ They also have been critical for establishing the dangerous medical and public health implications of the criminalization of pregnancy. Amicus briefs should be collected from a variety of groups, prioritizing local groups, especially medical groups,¹⁸² human rights organizations, and experts generally.

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