**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | | |
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| CHELSEA BECKER,<br>Petitioner, | ) | Supreme Court No. _____ |
| | ) | Court of Appeal No: F081341 |
| v. | | |
| SUPERIOR COURT OF KINGS COUNTY,<br>Respondent; | ) | Kings Super. Ct. No. 19CM-5304 |
| THE PEOPLE,<br>Real Party in Interest | ) | |

# PETITION FOR REVIEW

Of the October 15, 2020 unpublished decision of the
Court of Appeal, Fifth Appellate District
**Denying Petitioner's Writ of Prohibition**


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TO BE FILED IN THE SUPREME COURT

APP-008

| CALIFORNIA SUPREME COURT | COURT OF APPEAL CASE NUMBER: F081341 |
|---|---|
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| APPELLANT/ PETITIONER: CHELSEA BECKER<br>RESPONDENT/ REAL PARTY IN INTEREST: KINGS COUNTY SUPERIOR COURT<br>PEOPLE OF THE STATE OF CALIFORNIA | |

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party (*name*): PETITIONER, CHELSEA BECKER

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest (*Explain*): |
|---|---|
| (1) JACQUELINE GOODMAN | ATTORNEY FOR PETITIONER/DEFENDANT |
| (2) ROGER T. NUTTALL | ATTORNEY FOR PETITIONER/DEFENDANT |
| (3) SAMANTHA LEE | ATTORNEY FOR PETITIONER/DEFENDANT |
| (4) | |
| (5) | |

[ ] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: OCTOBER 23 2020

ROGER T. NUTTALL
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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## QUESTION PRESENTED FOR REVIEW:

Petitioner is being prosecuted for murder based on the allegation that her own use of narcotics caused her pregnancy loss. Does section 187 of the California Penal Code authorize prosecution of a woman for murder for her pregnancy loss based on her own voluntary and volitional act?

## STATEMENT OF THE CASE

Petitioner experienced a stillbirth on September 10, 2019. On November 5, 2019 the Kings County District Attorney (hereafter District Attorney or DA) charged her with murder in violation of Penal Code section 187. The undisputed factual basis for that charge is the September 10, 2019 stillbirth and the allegation that Petitioner caused the stillbirth by using methamphetamine during pregnancy. On April 2, 2020, Petitioner filed a motion for demurrer and (in the alternative) Petitioner's nonstatutory dismissal on the ground that section 187 does not authorize the prosecution of a woman for the loss of her own pregnancy. On June 4, 2020, the trial court denied Petitioner's motion. Petitioner sought review in the Court of Appeal, but on October 15, 2020, a majority summarily denied relief. *See* Becker v. Sup. Ct. of Kings County, Order Denying Petition for Writ of Prohibition (Oct. 15, 2020) (hereinafter "Order"), see Appendix 1. Justice Peña dissented, noting that he was persuaded to vote to issue an Order to Show Cause based on the plain language of the statute, the legislative history and intent in 1970 when the murder statute was amended, and subsequent expressions of legislative intent. *See id.*, J. Peña dissenting (hereinafter "Dissent") p. 2-5. On October 20, 2020 Petitioner filed a Petition for Rehearing in the Fifth District Court of Appeal and "called to the Court of Appeal's attention" that the court had not addressed the Superior Court's denial of the nonstatutory motion to dismiss.[1] On October 26, 2020, the Petition for Rehearing was denied.

[1] Petitioner recognizes that the summary denial may have been final upon filing and therefore that rehearing may technically be barred by CRC 8.264 and 8.268. Nonetheless, Petitioner sought rehearing in light of CRC 8.500(c)1 and 2, which states that "unless the party has called the Court of Appeal's attention to any alleged omission" that issue may be deemed forfeited for further review. The Petition for Rehearing was intended to accomplish exactly what CRC 8.500(c)2 requires, e.g. to call the Court of Appeal's attention to an omission in its holding.

## REVIEW IS NECESSARY TO RESOLVE THE IMPORTANT QUESTION OF WHETHER A WOMAN CAN BE PROSECUTED FOR MURDER BASED ON THE OUTCOME OF HER PREGNANCY

Review is necessary to secure uniformity of decisions in the trial courts and to settle an important question of law. Cal. Rules of Court, rule 8.500(b)(1).

### Summary of Argument

Petitioner Chelsea Becker is one of millions of Americans who each year experience a pregnancy loss, miscarriage and stillbirth, and one of thousands who experience still birth (pregnancy loss after 20 weeks) each year in California. She is also one of millions of people engaged in an ongoing struggle with drug dependency. Ms. Becker has suffered from substance use disorder and, as a result, was unable to stop using methamphetamine over a period of years including during each of her four pregnancies. Her first three pregnancies continued to term, and she gave birth to babies that are healthy and growing. On September 10, 2019, Petitioner's last pregnancy ended, as did thousands of other women in California and across the country, in a stillbirth. These facts are not in dispute and indeed they form the foundation of the prosecution against Petitioner. *See* District Attorneys Opposition to the Writ of Prohibition p. 7-8.

On October 31, 2019, the Kings County District Attorney (DA) charged Petitioner with one count of Murder of a Human Fetus, a felony, in violation of California Penal Code section 187(a), based on the allegation that Petitioner's pregnancy ended in stillbirth as a result of her drug use. *See* Criminal Complaint (Ex. 1) to Writ of Prohibition[2]. In

[2] Hereinafter all references to Petitioner's exhibits contained in the volume of exhibits filed in support of the Writ of Prohibition will be referenced simply as Ex. __.

California, a woman's pregnancy loss, for any reason,[3] *is not a crime.* The DA lodged the charge despite the murder statute's explicit provision that the law cannot be used to prosecute "any person who commits an act that results in the death of the fetus if … [t]he act was solicited, aided, abetted, or consented to *by the mother of the fetus*." § 187(b) (emphasis added).

Petitioner was arrested on November 5, 2019 and booked into the Kings County Jail on November 6, 2019 on $5,000,000 bail. *Id.* After a Bail hearing the Kings county Court reduced the bail to $2,000,000. Unable to afford any bail, Ms. Becker has remained in custody since that date. Throughout the COVID 19 pandemic, Petitioner has remained in a county jail that has no records of testing any staff for the virus and, as of the date of the filing of the Petition for Writ of Prohibition in the Court of Appeal, had tested exactly two prisoners. *See* Writ of Habeas Corpus filed by Petitioner (#F081362) Kings County COVID 19 Testing Records (Ex. 10).

Because Penal code section 187 does not, as a matter of law, permit the prosecution of a woman for the demise of the fetus she carried, Petitioner submitted her Notice of Demurrer, Demurrer of Complaint and Nonstatutory Motion to Dismiss in the trial court on April 2, 2020. (Ex. 9) (hereinafter "Demurrer/Nonstatutory Motion to Dismiss"). On June 4, the Superior Court heard and denied, on the law, the Demurrer/Nonstatutory Motion to Dismiss in open court. Reporter's Transcript of Demurrer, 19:17-24:26 (Ex. 12) (hereinafter "Transcript of Demurrer").

Petitioner sought writ relief thereafter with the California Court of Appeal, Fifth Appellate District. On July 2, 2020 Petitioner filed her Petition for a Writ of Prohibition seeking to prohibit the trial court from

[3] Petitioner contests causation as a matter of science in this case but this issue has no impact on the strictly legal issue raised in the Writ of Prohibition. Even if the District Attorney's allegations of causation are accepted, there is no crime.

exceeding its jurisdiction by permitting the continuation of a prosecution not authorized by the Legislature and in violation of Petitioner's constitutional rights. Petitioner also filed a Petition for Writ of Habeas Corpus (#F081362) on July 7, 2020 based on her continued and unlawful incarceration. The Court of Appeal, in separate orders, summarily denied both Petitions on October 15, 2020. *See*,Order Denying Petition for Writ of Prohibition, Appendix 1. The Petition for Habeas Corpus is the subject of a separate, but related, Petition for Review.

In denying the Petitions for Writs, the Court of Appeal based its ruling *exclusively* on its finding that Petitioner's Demurrer had not adequately developed the facts demonstrating the facial deficiency of the charging document. However, the court ignored the fact that the Petitioner had also moved to dismiss via a nonstatutory motion to dismiss.

In her motion to dismiss filed in the Superior Court, Petitioner presented the singular issue of law regarding section 187 via a demurrer *and* a nonstatutory motion to dismiss. *See* Ex. 9 to Writ of Prohibition. In that motion, Petitioner made clear that,

> If this Court, for any reason, determines that it cannot address the uncorrectable legal infirmity of this prosecution by sustaining Ms. Becker's demurrer, it may, in the alternative, grant a nonstatutory motion to dismiss. "Use of the nonstatutory or pretrial motion to dismiss has been sanctioned by our Supreme Court . . . A pretrial nonstatutory motion to dismiss is now accepted as an appropriate vehicle to raise a variety of defects." (Stanton v. Superior Court (1987) 193 Cal.App.3d 265, 271, citing Murgia v. Municipal Court (1975) 15 Cal.3d 286, 294, fn. 4.)[3]
>
> Where, as here, constitutional rights are implicated, the propriety of such a motion is even more compelling. "[…] we have no doubt in light of the constitutional nature of the issue as to the trial court's authority to entertain such a claim." (People v. Duncan

> (2000) 78 Cal.App.4th 765, 772, quoting Murgia, supra, 15 Cal.3d at p. 294, fn. 4.) "A nonstatutory pretrial motion to dismiss the indictment or information has been recognized as a proper method to raise various defects in the institution or prosecution of a case." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 404, p. 573.) It has been held that a nonstatutory motion to dismiss can serve the same function as a demurrer. (See McKay v. County of Riverside (1959) 175 Cal.App.2d 247, 248-249; Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 299.)
>
> Fn. 3 - In addition, Kings County Local Rule 526 contemplates pre-trial "motions of a constitutional dimension" without any particular statutory basis. (Local Rule 526, ¶ A.)

*Id.* at pp 3-4.

On October 20, 2020 the Petitioner filed a Petition for Rehearing in the Fifth District Court of Appeal based on its failure to even acknowledge, much less address, the nonstatutory motion to dismiss.

Inasmuch as there is no bar to the court addressing the specific question of law raised in Petitioner's Demurrer and certainly in her Nonstatutory Motion to Dismiss, Petitioner seeks review of the Court of Appeal's order denying her Petition for a Writ of Prohibition.

As explained by Judge Peña in his dissent to the denial issued by the Fifth District Court of Appeal, "the sole issue presented by the petition, which the parties agree is a pure question of law, is whether Penal Code section 187, subdivision (b)(3) categorically prohibits the state from charging a mother with the murder of her own fetus." Dissent at 4. The majority's order denying review of that question of law, summarily and without any analysis, was in error and warrants review by the Court. Failure to provide appellate guidance on the question leaves not only Ms. Becker unlawfully imprisoned for the foreseeable future, but also provides license to the Kings County District Attorney and others to

continue to bring charges against women who have stillbirths or miscarriages as a result of *any* conduct which a prosecutor may, in their own discretion, decide should be prosecuted as murder. Indeed, throughout the course of the present case, the DA has regularly cited the *absence* of appellate authority construing section 187(b)(3) as validation for its position that it is free to prosecute women for pregnancy losses alleged to have been caused by their own volitional acts. *See, e.g.,* Respondent's Brief in Opposition to Petition for Writ of Prohibition at 11.

Review is similarly necessary to provide guidance to lower courts as they confront prosecutions like the present, which are neither contemplated nor authorized by statute. To leave Ms. Becker in jail, on an unattainable $2,000,000 bail, so that she shall be required tot develop a trial court record on an issue that is simply not in dispute between the parties, that is, that the fetus that Ms. Becker is charged with having murdered was *her own*,[4] and risk indictment for a non-existent crime is both unjust and unnecessary as a matter of law. The issue before the Court is purely a question of law and one dispositive to the underlying proceeding. There is nothing that the prosecution could establish in the record below that would alter the fact that it seeks to prosecute Ms. Becker for her own pregnancy loss as if it were murder.

The California Attorney General, in his amicus brief filed in this matter in the Court of Appeal, explained the pure legal infirmity of this prosecution when he wrote:

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[4] As noted in the Summary Order issued by the Court of Appeal, " The accusatory pleading states: The "crime of Murder Of Human Fetus in violation of PC187(a), a Felony, was committed in that the said defendant, …, did unlawfully, and with malice aforethought murder a human fetus." If instead of the words "a human fetus," the prosecution has used the words "her human fetus" the Fifth District Court of Appeal would have had no basis at all to summarily deny the Writ. The fact is that there is simply no lack of clarity of whose fetus is at issue in this matter. The prosecution has never contended or argued, that the stillbirth in this case was delivered by anyone other than Ms. Becker. And certainly, Ms. Becker acknowledges and continues to mourn the loss.

> A woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake. The acts in question in this case—the defendant's drug use during her pregnancy—fall squarely within the subdivision (b)(3) exclusion. This Court should grant the writ. […] The Attorney General agrees with Petitioner that the text, purpose, and legislative history of California Penal Code section 187 demonstrate that a woman cannot be prosecuted for murder as a result of her own omissions or actions that might result in pregnancy loss. The superior court erred in concluding otherwise. […] The superior court's contrary interpretation would lead to absurd—and constitutionally questionable— results.[…] It would subject all women who suffer a pregnancy loss to the threat of criminal investigation and possible prosecution for murder. Whether a stillbirth or a miscarriage was due to drug use or some other reason, there is nothing in the statute that would constrain a district attorney's ability to investigate the most intimate aspects of the circumstances of a woman's pregnancy and to bring murder charges against that woman who suffered a pregnancy loss.

Attorney General's Amicus at pp. 5, 8, 11. [5]No woman in California who experiences a miscarriage or stillbirth can be charged with murder based on her own conduct - under any circumstances - and it is incumbent upon this Court to take up the matter and so rule.

To require Petitioner to return to the trial court to participate in a preliminary hearing and risk indictment in order to address an issue of fact that is simply not in dispute in a criminal case "by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public." *Patterson*

[5] Petitioner incorporates by reference the California Attorney General's brief filed in support of her Petition for a Writ of Prohibition,in this matter (CRC 8.504(e)(3)).

*v. Municipal Court* (1965) 232 Cal.App.2d 289, 294. Denial of the present Petition will result in such hardship stemming foremost from the progression of a prosecution that is unconstitutional at its inception and continues only in excess of the Respondent Court's jurisdiction. *See de Jesus Ortega Melendres v. Arpaio* (9th Cir. 2012) 695 F.3d 990, 1002 ("[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns* (1976) 427 U.S. 347, 373). Petitioner asks that this Court take up the matter and so rule.

## I. Review is necessary to settle the outstanding question of law of whether section 187 authorizes prosecution of a woman for murder based on pregnancy loss allegedly caused by her voluntary and volitional acts.

The question of whether Cal. Pen. Code section 187 authorizes the prosecution for murder of a woman who has a pregnancy loss based on her own conduct is one purely of law. *See Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 225 [152 Cal.Rptr.3d 392, 294 P.3d 49] ("…ultimately statutory interpretation is a question of law the courts must resolve.") (quoting *Reno v. Baird* (1998) 18 Cal.4th 640, 660 [76 Cal. Rptr. 2d 499, 957 P.2d 1333]). Indeed, and in the final analysis, no further trial level proceeding is necessary for the court to address the single issue of law which this case presents. Regardless of the facts particular to Petitioner's case, section 187 necessarily precludes the prosecution of *any* formerly pregnant woman for her pregnancy loss, for *any* reason and at *any* stage. *See People v. Davis*. (1994) 7 Cal.4th 797, 810 [30 Cal.Rptr.2d 50, 872 P.2d 591] (holding that because prosecution *of a third party* for feticide did not implicate a woman's privacy interest, Section 187 had no "viability" requirement and applied at any point during the post-embryonic period). To reach any other conclusion would constitute judicial expansion of the statute and would render the statute void for vagueness and violative of Petitioner's Fourteenth Amendment rights to privacy, due process, and equal protection under the laws.

### A. The plain language and legislative history of section 187 underscore the lack of statutory authority for Petitioner's prosecution.

Cal. Pen. Code Section 187(b)(3) is explicit in excluding the "mother of the fetus" from prosecution for murder, making it clear that a mother who terminates her own pregnancy - by any means - is not committing murder as a matter of law. The section states, in full:

> **(b)** This section shall not apply to any person who commits an act that results in the death of a fetus *if any of the following apply*:
>
> **(1)** The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.
>
> **(2)** The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
>
> **(3)** The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(emphasis added). The statute is clear in precluding prosecution of any person who complies with the Therapeutic Abortion Act,[6] holds a physician or surgeon's certificate and acted to save the life of the pregnant woman, *or* any person who acted in concert or with the consent of the mother of the fetus. Subpart (b)(3) stands on its own and necessarily applies to a pregnant woman's alleged volitional conduct, *e.g.* conduct in which the pregnant woman has consensually engaged. This is because a pregnant woman who has committed a volitional act, by definition, has consented to the commission of that act. *See* Dissent at 4 (noting the

[6] The Therapeutic Abortion Act was a pre-*Roe* era law adopted in 1967 and repealed and replaced in 2002 with the broader "Reproductive Privacy Act," Health & Safety Code § 123460 *et seq.*

"persuasive force" of the California Attorney General's amicus brief in which he explains that, of course, a woman necessarily consents to her own volitional conduct). The legislative history unequivocally comports with the commonsense interpretation put forth by every trial level court which has addressed this issue, the Petitioner, the Attorney General and Justice Peña in his dissent.

This consistency is particularly underscored in a 1992 affidavit prepared by the author of the amendment of section 187, Speaker of the Assembly, Republican State Assemblyman Craig W. Biddle, for use in *People v. Jarigue,* San Benito County No. 23611, Transcript of Record (Aug. 21, 1992) (https://tinyurl.com/rsnyrvl). *See* Biddle Affidavit (Apr. 23, 1992) (Ex. 13) Speaker Biddle explained that the purpose of section 187(b)(3) was

> to make punishable as murder a *third party's* willful assault on a pregnant woman resulting in the death of her fetus. That was the *sole intent* of AB 816. No legislator ever suggested that this legislation, as it was finally adopted, could be used to make punishable as murder conduct by a pregnant woman that resulted in the death of her fetus.

*Id.* at ¶ 4 (emphasis added). The Biddle affidavit is reflective of the larger history behind section 187, all of which was specifically aimed at facilitating the prosecution of a third-party's assault on a pregnant woman.

In 1970, section 187 was amended in response to the California Supreme Court's decision in *Keeler v. Superior Court* in which this Court held that the state's homicide law did not reach fetuses and could therefore not be used to prosecute the defendant who had attacked a pregnant woman and caused the stillbirth of her child. (1970) 2 Cal.3d 619 [87 Cal.Rptr. 481, 470 P.2d 617]; *see also* Biddle Affidavit, ¶¶ 1-2 (Ex. 13). In response, the Legislature amended section 187 to permit prosecution of a third person, other than the pregnant woman, for the killing of a fetus.

*Wilson v. Kaiser Found. Hosps.* (1983) 141 Cal.App.3d 891, 897, fn. 6 [190 Cal.Rptr. 649].

As Judge Peña points out, however, the Legislature has repeatedly declined

> to enact legislation creating criminal liability for mothers who use drugs while pregnant. In 1987, the Legislature rejected a bill that would have expanded the definition of criminal child endangerment to include substance use during pregnancy. (Sen. Bill No. 1070 (1987–1988 Reg. Sess.) In 1989, the Legislature rejected a bill that would have made use of a controlled substance during pregnancy resulting in fetal demise punishable as manslaughter. (Sen. Bill No. 1465 (1989–1990 Reg. Sess.) In 1991, the Legislature rejected a bill that would have subjected to criminal liability a mother who abused substances during pregnancy that had an impact on her child's health after birth. (Assem. Bill No. 650 (1990–1991 Reg. Sess.) Finally, in 1996, the Legislature rejected a bill that would have criminalized "fetal child neglect." (Assem. Bill. No. 2614 (1995–1996 Reg. Sess.)

Dissent at 4-5. The Legislature has *never* authorized the prosecution of a woman for her conduct while pregnant and its alleged effect on her pregnancy. However, because the law remains "unsettled" in the appellate courts, the Kings County District Attorney's office prosecutors feel free to wrongly exploit the Legislature's response to *Keeler* and have done so at the expense of pregnant women and their children.[7]

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[7] The medical community opposes criminalization of conduct while pregnant as punitive measures have been shown repeatedly to *negatively* affect both mother and child. The American Academy of Pediatrics first published recommendations on substance-exposed infants in 1990 "and reaffirm[ed] [in 2017] its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad." American Academy of Pediatrics, Committee on Substance Use and Prevention Policy Statement, A Public Health Response to

**B. Present case represents a split in both the lower courts' approach to section 187 prosecutions against pregnant women and in the approach of state prosecutors.**

Up until the present case, California courts at all levels repeatedly affirmed that California law categorically precludes the prosecution a woman for the outcome of her pregnancy based on her conduct while pregnant. *See, e.g. Jaurigue v. People*, San Benito County No. 23611, Transcript of Record (Aug. 21, 1992) writ denied, (Cal. App. 1992) (Cal. Super. Ct. Aug. 21, 1992) https://tinyurl.com/rsnyrvl (dismissed fetal homicide charges against a woman who experienced a stillbirth, alleged to have been a result of drug use, finding statute could not be used to prosecute pregnant woman for the loss of her own pregnancy); *People v. Jones*, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou County July 28, 1993) https://tinyurl.com/wc4xb3x (finding murder statute could not be used to prosecute defendant after newborn's death for alleged drug use and pregnancy); *People v. Tucker*, No. 147092 (Cal. Santa Barbara-Goleta Mun. Ct. June 1973) https://tinyurl.com/y59k2wzz (Demurrer granted where pregnant defendant shot herself and killed her fetus after her husband threatened to leave her if she had another child);[8] *see also*

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Opioid Use in Pregnancy Academy of Pediatrics (AAP); *see also* American College of Obstetricians and Gynecologists, Position Statement, Decriminalization of Self-Induced Abortion (2017) [ACOG "opposes the prosecution of a pregnant woman for conduct alleged to have harmed her fetus"]; American Medical Association, Policy Statement - H-420.962, Perinatal Addiction - Issues in Care and Prevention (last modified 2016) ["Transplacental drug transfer should not be subject to criminal sanctions or civil liability"]; Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 2667 (1990). And, see the Amicus Brief filed by the Drug Policy Alliance in this matter in the Court of Appeal.

[8] These unpublished trial level cases are identified here not as authority but as examples of courts recognizing the inapplicability of P.C. 187(a) to a women's pregnancy loss, *regardless* of the cause and specifically based on drug use while pregnant. Providing the Court with access to these cases does not run afoul of California Rules of court 8.1115(a) because these cases are not unpublished decisions of either the Court of Appeal or of the Superior Court Appellate Division.

*Reyes v. Court* (1977) 75 Cal.A.pp.3d 214 [141 Cal.Rptr. 912] (child endangerment statute cannot be used to prosecute woman for alleged actions while pregnant). While the DA puts great weight on the fact that no published authority exists in California directly addressing whether section 187 can, under any circumstances, be used to prosecute a woman for the loss of her own pregnancy, because it is important for the Court to be at least aware of other efforts to parse this issue, Petitioner asked the respondent court and the Fifth District Court of Appeal to take judicial notice, and she likewise asks this Court to take judicial notice, of the decision in *People v. Olsen* (July 20, 2004, No. C043059) ___Cal.App.4th___ [2004 Cal. App. Unpub. LEXIS 6774, at 1], [2004 WL 1616294]), only in order to demonstrate yet another instance of a court which did directly consider the issues at bar. Like every other California court that confronted this issue, the *Olsen* court rejected the use of section 187 to prosecute a woman for demise of her pregnancy and explained that, while a third party *can* commit the crime of "homicide of a fetus," "a birth mother, who necessarily would consent to her own volitional actions, cannot." *Id.* Judicial notice of *Olsen* is useful because it demonstrates the previous uniformity that courts at every level of our system, with the sole exception of the respondent court, have demonstrated by considering and rejecting the theories and arguments underlying the prosecution of Ms. Becker.

Ms. Becker's prosecution represents a recent trend *toward* prosecuting women for pregnancy loss emerging from the County of Kings.[9] Indeed, the Superior Court's decision to deviate from what had

[9] Petitioner is not the only mother currently incarcerated based on a decision by the Superior Court of Kings County to permit the prosecution of women for drug use during pregnancy, despite a lack of statutory authority. Adora Perez (Fifth District Court of Appeal Case # F077851) was also charged in 2018 with the murder for her own pregnancy loss allegedly caused by ingesting drugs while pregnant - a crime that does not exist. Under the auspices of a plea bargain, she was convicted of

previously been a uniform approach by the lower courts represents a troubling fissure — one that targets and exposes pregnant women to unlawful prosecution — that can only be remedied by swift and explicit guidance from the appellate level.

The dearth of published appellate authority has led to not only a split among the lower courts, but also a split within the executive itself. The State's chief law enforcement officer, Attorney General (AG) Xavier Becerra, filed an amicus brief in the Fifth District Court of Appeal on August 7, 2020 in support of Petitioner and in repudiation of the DA's prosecution and the respondent court's denial of the Petitioner's Demurrer/Nonstatutory Motion to Dismiss. The AG was unequivocal that he "agrees with Petitioner that the text, purpose, and legislative history of California Penal Code section 187 demonstrate that a woman cannot be prosecuted for murder as a result of her own omissions or actions that might result in pregnancy loss." Att'y Gen. Amicus Brief at 8. Underlying this conclusion was the analysis that "[t]he text, purpose, and legislative history of that amendment demonstrate that the Legislature intended only to ensure that a third party who unlawfully kills a fetus does not escape punishment." *Id.* at 5. The AG explained in detail the exceptions under which a person is *not* subject to prosecution for murder and concluded explicitly that "the defendant's [alleged] drug use during her pregnancy—

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manslaughter of a "human being," a crime that would have been impossible for her, under the facts of her case, to commit the crime of manslaughter of a fetus does not exist in California. *People v. Dennis* (1998) 17 Cal.4th 468, 505 [71 Cal.Rptr.2d 680, 950 P.2d 1035] ("California law does not include manslaughter as a crime in the death of a fetus"). She is currently serving a sentence of 11 years based on having sustained a stillbirth alleged caused by drug use during pregnancy, a combination of circumstances that does not constitute a crime in California but which the Kings County DA has made a point of vigorously prosecuting. *People v. Perez (*Mar. 26, 2019, No. F077851) ___Cal.App.5th___ [2019 Cal. App. Unpub. LEXIS 2055].) On October 21, 2020 a Motion for Recall Remittitur was filed in that case. Pursuant CRC 8.1115, this case is not relied upon as authority.

fall[s] squarely within the subdivision (b)(3) exclusion." *Id.* at 5. While the opinion of the Attorney General, in this case set forth in its amicus brief, is not binding on the Court, it is entitled to great weight. *Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1006 [162 Cal.Rptr.3d 367]; *see also* Dissent at 4 (acknowledging that the AG's interpretation, "[a]lthough perhaps not conclusive," nonetheless does have "persuasive force").

Like the emerging fissure in the lower courts, the AG's repudiation of the DA's approach represents a similar discord among the executive. Appellate guidance is necessary to ensure not only that lower courts approach these cases with uniformity, but also so that women can have consistent expectations with regard to law enforcement throughout the state, all of whom purport to enforce the same statutes. The Kings County DA and the Kings County Superior Court are outliers which have opted to criminalize women for their alleged conduct during pregnancy and the outcome of their pregnancies, an approach which is neither rooted in the statute nor in the expressed intent of the Legislature.

### C. Dearth of appellate authority leaves a vacuum in which opportunistic prosecutors may continue to engage in legislatively unauthorized prosecutions.

The lack of appellate authority construing section 187 leaves women vulnerable to unlawful prosecution and provides tacit permission for the lower courts to allow those prosecutions to go forward. In arguing that it should be permitted to prosecute Ms. Becker for the loss of her pregnancy, the DA has repeatedly argued that Petitioner has "provide[d] no appellate authority" for the proposition that section 187 precludes prosecution of a woman for the demise of her own fetus. *See, e.g.,* Respondent's Brief in Opposition to Petition for Writ of Prohibition, at 11. The lower court similarly ruled that it would allow the ongoing prosecution and confinement of Petitioner for her stillbirth based, in part, on its finding that the parties had not "cited a single California appellate case or citable authority that specifically deals with whether or not Penal

Code Section 187 applies to the mother of the fetus." Transcript of Motion Hearing at 19:12-15 (June 4, 2020) (Ex. 12). The trial court thereby purported to justify its judicial expansion of the statute in order to permit the Petitioner's prosecution. Therefore, while the statute's plain language *should* be enough to protect women from unlawful prosecution and confinement, and though it *has* been enough for nearly 30 years, it is clearly *not* enough in Kings County.

It is incumbent, therefore, upon this Court to rectify the Court of Appeal's refusal to take up the issue and to grant review so that it may settle the issue and, consistent with the statute's plain language, legislative history and every other court that has addressed this issue, hold that, as a matter of law, in the State of California no woman can be prosecuted for murder based on her own pregnancy loss or any act or omission which may have caused that loss. As Judge Peña acknowledged in his dissent, the "legislative history tends to support Petitioner's argument." Dissent at 5. However, he is also correct that the statute's exceptions are

> clumsily written and outdated. They were drafted for a pre-*Roe* world with less than precise statutory language to delineate between lawful and unlawful conduct. Although Petitioner presents additional arguments to support her position, it is unnecessary to consider them here. Based on the statutory language and the legislative history of section 187, Petitioner presents a strong case that in enacting subdivision (b) when amending the murder definition in section 187 to include the unlawful killing of a fetus, the Legislature did not intend to include the acts of the mother in the death of her own fetus. This case provides an excellent opportunity for this court to answer this important question of law.

*Id.* Because the Court of Appeal declined to answer this important question of law, Petitioner implores that this Court do so without delay.

## CONCLUSION

Supreme Court review of the present case is necessary both to ensure uniform application of the law in lower courts as well as to settle an important question of law. The question presented by the Petition is one purely of law, needing no further development of acts in the Superior Court and ripe for review by this Court: Does section 187 authorize a murder prosecution of a woman who, through her own acts, sustains a pregnancy loss? In the absence of a clear and resounding "no," women in California will continue to be targeted by opportunistic prosecutors and risk criminal prosecution and liability for any number of volitional acts undertaken during pregnancy that might affect the outcome of that pregnancy. The Legislature has *never* authorized such criminalization of pregnant women. Indeed, over and over, when given the opportunity criminalize the behavior of pregnant women with regard to their own pregnancies, they have consistently rejected such legislative proposals. Petitioner implores this Court to review the matter so that it may so rule.

Date: October 26, 2020

Respectfully submitted,

/s/ Roger T. Nuttall
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## CERTIFICATE OF WORD COUNT

I, Roger T. Nuttall, co-counsel for Chelsea Becker, Petitioner and defendant, do hereby certify and verify, pursuant to the California Rules of Court, rule 8.204(c)(1), that the word processing program used to generate this brief indicates that the word count for this document (Petition for Review) is 5,669 words, excluding the tables, this certificate, and any attachment permitted under rule 8.486(b)(1).

I declare that the foregoing is true and correct to the best of my knowledge and belief at the time of making this verification.

EXECUTED on October 26, 2020, under penalty of perjury under the laws of the State of California, in Fresno, California.

/s/ Roger T. Nuttall
ROGER T. NUTTALL

Court of Appeal, Fifth Appellate District
Brian Cotta, Clerk/Executive Officer
Electronically FILED on 10/15/2020 by Nicole Acosta, Deputy Clerk

IN THE

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

IN AND FOR THE

**FIFTH APPELLATE DISTRICT**

| | |
|---|---|
| CHELSEA BECKER,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF KINGS COUNTY,<br><br>Respondent;<br><br>THE PEOPLE,<br><br>Real Party in Interest. | F081341<br><br>(Kings Super. Ct. No. 19CM-5304)<br><br>**ORDER** |

**BY THE COURT:***

Petitioner requests review of the trial court's ruling on her demurrer. A demurrer to an accusatory pleading raises a question of law as to the sufficiency of the accusatory pleading and only tests those defects appearing on its face. (Pen. Code, § 1004.) The accusatory pleading states: The "crime of Murder Of Human Fetus in violation of PC187(a), a Felony, was committed in that the said defendant, …, did unlawfully, and with malice aforethought murder a human fetus." Petitioner fails to make a prima facie showing the accusatory pleading is defective on its face. Her petition is denied. Her request for a stay of proceedings in the superior court is also denied. Our denial does not preclude petitioner from seeking writ relief once the facts of her case become part of the record.

Levy, A.P.J.

Detjen, J.

* Before Levy, A.P.J., Detjen, J. and Peña, J., Dissenting

Dissent, J. Peña,

I vote to issue an order to show cause before this court as to why the relief prayed for in the above entitled matter should not be granted.

The sole issue presented by the petition, which the parties agree is a pure question of law, is whether Penal Code section 187, subdivision (b)(3) categorically prohibits the state from charging a mother with the murder of her own fetus.[1] Petitioner demurred to the criminal complaint, which charged her with the murder of a fetus under "PC 187(a)," and moved to dismiss the complaint. In opposition to the demurrer, the People stated the facts it would prove at trial included the following: "On September 10, 2019, Defendant gave birth to a stillborn child at Hanford Adventist Medical Center whom she had already named Zachariah Joseph Campos. [D]efendant delivered the stillborn baby at 36 weeks gestational, which, at that age, could have resulted in a viable living human being outside of the womb.… [¶] The Coroner's report attached hereto as Exhibit 1, revealed Zachariah Joseph Campos'[s] cause of death was 'Acute Methamphetamine Toxicity.' It also revealed a level of .02 grams % blood ethyl alcohol.… Blood work conducted on the Defendant 'showed positive for methamphetamine.' (Exhibit 1 at p. l.) … [¶] Defendant's mother told Hanford Police that Defendant admitted to using methamphetamine during this pregnancy as she had during her three previous pregnancies.… [D]efendant's other children tested positive for methamphetamine at birth and were adopted out of Defendant's care as newborns. Defendant herself admitted … that she did use methamphetamine while pregnant this time …."

After noting no California cases have ruled on the question of whether section 187 applies to a mother who allegedly killed her own fetus, the trial court overruled petitioner's demurrer, concluding the plain language of the statute did not specifically exclude mothers in the death of their own fetuses and the Legislature could have easily done so. Notably absent from the People's written opposition, their oral argument to the court, or the court's ruling, was the issue of the sufficiency of the pleading, a purported lack of defects appearing on its face, or citation to section 1004.

With no opportunity provided to petitioner to address these issues, my colleagues have determined, sua sponte, and with no legal analysis to support the conclusion, that petitioner fails to make a prima facie showing the accusatory pleading is defective on its face. I do not approve of this approach in this case because I am not convinced the conclusion is correct. Equally important, I am doubtful the conclusion reached by the trial court was correct.

First, in my opinion, the question of the sufficiency of the pleading is not so black and white when one considers the following: What is the role of subdivision (b) on the sufficiency of the pleading, which provides for various exclusions or exceptions to subdivision (a) where the death of a fetus is charged? In the murder of a fetus case, is a

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[1] Further undesignated statutory references are to the Penal Code.

criminal complaint defective or insufficient if it fails to allege that subdivision (b) does not apply? If asked, might petitioner have other possible arguments to support a prima facie case? Was the People's failure to make the argument a tactical decision that implicates waiver and forfeiture principles? An order to show cause with requests for additional briefing would provide a more complete vetting of these questions and perhaps a different conclusion.

Of greater concern, which causes me to exercise my discretion to vote for the issuance of an order to show cause, is the uncertainty in the law, the correctness of the court's ruling on the sole question of law that was considered, and the magnitude and importance of the issue to this and future cases where the mother is alleged to have committed murder pertaining to the death of her own fetus.

**Section 187 and Fetal Murder**

Section 187, subdivision (a), defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Subdivision (b) provides an exception for acts that result in the death of a fetus if any of the following apply:

> "(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.
>
> "(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
>
> "(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus."

Section 187 was amended in 1970 in response to *Keeler v. Superior Court* (1970) 2 Cal.3d 619, which held that a fetus is not a "human being" within the meaning of the former version of section 187, and therefore the defendant could not be prosecuted for the murder of his estranged wife's fetus. (*People v. Davis* (1994) 7 Cal.4th 797, 803.) The 1970 amendment added the words "or fetus" to subdivision (a), and added the exceptions listed in subdivision (b). (Stats. 1970, ch. 1311, § 1, p. 2440.) The applicability or scope of these exceptions is not well defined, as they have not been interpreted by any published California cases. The exceptions were also added prior to *Roe v. Wade* (1973) 410 U.S. 113 (*Roe*). Subdivisions (b)(1) and (b)(2) appear to carve out narrow exceptions for medical abortions in certain circumstances, but it is unclear what significance, if any, those sections carry following *Roe.* Moreover, the Therapeutic Abortion Act referenced in subdivision (a) has been repealed and replaced by the broader Reproductive Privacy Act. (Stats. 2002, ch. 385, § 2.)

**Statutory Interpretation**

Petitioner's statutory interpretation claims are based solely on the exception set forth in section 187, subdivision (b)(3). Petitioner makes several arguments that this subdivision categorically prohibits the prosecution of a mother for the murder of her fetus. First, petitioner claims the plain language of the statute prohibits such a prosecution because any intentional act committed by the mother was inherently "consented to by the mother of the fetus." (§ 187, subd. (b)(3).) Second, petitioner contends the legislative history of section 187 and subsequent attempts to pass legislation that would otherwise criminalize conduct by a mother impacting her fetus indicates the Legislature did not intend to permit such prosecution. Third, petitioner claims interpreting section 187 in this way would lead to absurd results, including the prosecution of expectant mothers for many other types of conduct that are arguably dangerous to the health of a fetus.

**Plain Language**

Petitioner argues that a mother cannot be prosecuted for the death of her fetus pursuant to section 187, subdivision (b)(3), asserting that where a mother has engaged in a volitional or voluntary act, she has by definition "consented" to the act. The California Attorney General has filed an amicus curiae brief supporting this interpretation, contending that "[a] woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake." Although perhaps not conclusive, this interpretation of the language appears to me to have some persuasive force.

**Legislative History**

Petitioner contends that the legislative history of section 187 supports the interpretation of subdivision (b)(3) that a mother cannot be prosecuted for the murder of her fetus. Petitioner submits an affidavit from Assemblyman W. Craig Biddle, who was the primary author of the 1970 amendment to section 187. In the affidavit, Biddle states that the sole purpose of the amendment was to "make punishable as murder a third party's willful assault on a pregnant woman resulting in the death of her fetus." (Exhibit 13.) With respect to subdivision (b)(3), he explains: "[T]his latter exception would include illegal abortions obtained by a pregnant woman. While such illegal abortions would, at the time, still be punishable under the state's consensual abortion law (Penal Code § 275), they would not be punishable as murder." (*Ibid*.) He concludes the affidavit by stating that no legislator ever suggested that the 1970 amendment "could be used to make punishable as murder conduct by a pregnant woman that resulted in the death of her fetus." (*Ibid*.)

Petitioner also points to four failed attempts to enact legislation creating criminal liability for mothers who use drugs while pregnant. In 1987, the Legislature rejected a bill that would have expanded the definition of criminal child endangerment to include substance use during pregnancy. (Sen. Bill No. 1070 (1987–1988 Reg. Sess.) In 1989, the Legislature rejected a bill that would have made use of a controlled substance during pregnancy resulting in fetal demise punishable as manslaughter. (Sen. Bill No. 1465

(1989–1990 Reg. Sess.) In 1991, the Legislature rejected a bill that would have subjected to criminal liability a mother who abused substances during pregnancy that had an impact on her child's health after birth. (Assem. Bill No. 650 (1990–1991 Reg. Sess.) Finally, in 1996, the Legislature rejected a bill that would have criminalized "fetal child neglect." (Assem. Bill. No. 2614 (1995–1996 Reg. Sess.)

This legislative history tends to support petitioner's argument. Although Biddle's opinion regarding the scope of subdivision (b)(3) of section 287 is not conclusive and may have limited relevance, it provides context that helps explain the Legislature's intent in amending section 187. Based on Biddle's affidavit, it appears the Legislature intended to exempt mothers who obtain illegal abortions from liability for murder, but not from other statutes criminalizing illegal abortions. This interpretation is bolstered by the failed attempts at criminalizing drug use while pregnant, as it suggests that the authors of the rejected legislation recognized that additional legislation would be necessary to punish pregnant mothers who use drugs, because they cannot be prosecuted for murder under section 187.

**Conclusion**

The 1970 amendments to the homicide statute are clumsily written and outdated. They were drafted for a pre-*Roe* world, with less than precise statutory language to delineate between lawful and unlawful conduct. Although petitioner presents additional arguments to support her position, it is unnecessary to consider them here. Based on the statutory language and the legislative history of section 187, petitioner presents a strong case that in enacting subdivision (b) when amending the murder definition in section 187 to include the unlawful killing of a fetus, the Legislature did not intend to include the acts of the mother in the death of her own fetus. This case provides an excellent opportunity for this court to answer this important question of law.

**PROOF OF SERVICE**

STATE OF CALIFORNIA,)
COUNTY OF FRESNO. )

I am employed in the County of Fresno, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On October 26, 2020, I served the foregoing document described as: PETITION FOR REVIEW on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

Xavier Becerra
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[X] Electronic Service

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[X] {State} I declare under penalty of perjury, under the laws of the State of California the above is true and correct. EXECUTED on October 26, 2020, at Fresno, California.

/s/ Bryan Murray
BRYAN MURRAY