In The

Supreme Court of Maryland

September Term, 2024
Docket No. 7

MOIRA E. AKERS

Petitioner,

v.

STATE OF MARYLAND

Respondent.

On Writ of Certiorari to the Appellate Court of Maryland

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ACLU OF MARYLAND IN SUPPORT OF PETITIONER BY WRITTEN CONSENT

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STATEMENT OF THE CASE

In Maryland, all people are guaranteed the right to freely make decisions about whether to terminate or continue their pregnancies without interference from the State. In violation of this unequivocal right, the State admitted evidence of Ms. Akers' decision-making process about whether to terminate her pregnancy, including evidence that she conducted internet research about abortion, as proof of her criminal intent. Admission of this evidence penalized Ms. Akers for exercising her statutorily protected reproductive rights. Doing so not only infringed upon Ms. Akers' rights but undermines the meaning of these rights for all Marylanders. This Court should safeguard these rights protected by Maryland law, and, just as it does with other statutory and constitutional rights, hold that the exercise of this right is inadmissible as evidence of guilt. Alternatively, admission of this evidence as well as evidence that Ms. Akers did not obtain prenatal care violated Maryland's Rules of Evidence.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Maryland is the state affiliate of the American Civil Liberties Union, with approximately

thirty thousand members in Maryland, working to empower Marylanders to exercise their rights so that the law values and uplifts their humanity. Both organizations (collectively "ACLU") advocate for the right of individuals to freely make decisions about their own reproductive lives.

STATEMENT OF FACTS

Amici rely on the statement of facts contained in Ms. Akers' brief.

ARGUMENT

I. ADMITTING EVIDENCE THAT MS. AKERS CONSIDERED TERMINATING HER PREGNANCY AS PROOF OF CRIMINAL INTENT VIOLATED MARYLAND'S STATUTORILY GUARANTEED REPRODUCTIVE RIGHTS.

When Ms. Akers researched information about pregnancy termination, she was exercising her rights guaranteed by Maryland Health General § 20-209 to freely make decisions about her reproductive health. Despite this protection, the prosecution admitted evidence that Ms. Akers contemplated terminating her pregnancy as proof of her intent to commit murder. Admitting this evidence as proof of criminal intent penalized Ms. Akers for exercising her protected rights and amounted to the very interference the statute was designed to prevent. The appellate opinion sanctioning this prosecutorial strategy not only infringed upon Ms. Akers' rights but weakens the meaning of the right for all Marylanders. To safeguard the reproductive rights guaranteed by Section 20-209, this Court should reverse the appellate

decision and hold that a person's consideration about whether to obtain an abortion is inadmissible as proof of guilt.

A. Standard of review for admissibility of evidence based on a statutory violation.

Though courts generally have broad discretion to make evidentiary decisions, a court abuses that discretion when it "acts beyond the letter or reason of the law." *Kelly v. State*, 392 Md. 511, 530-31 (2006) (internal quotation and citation omitted). When abuse of discretion turns on statutory or constitutional interpretation, this is a question of law subject to *de novo* review. *See Lawrence v. State*, 475 Md. 384, 398 (2021) (reviewing whether court abused its discretion regarding jury instruction by engaging in a *de novo* statutory interpretation to discern meaning of a criminal statute); *Longshore v. State*, 399 Md. 486, 537 (2007) (finding abuse of discretion where court admitted evidence in violation of a constitutional right).

B. Ms. Akers was exercising her statutorily guaranteed rights when she researched information about abortion.

Maryland Health General § 20-209 grants all Marylanders the right to freely decide whether to terminate a pregnancy. This statutory right is broad and unequivocal, providing that prior to viability "the State may not interfere with the decision of a woman to terminate a pregnancy[.]" Md. Health Gen. § 20-209(b). This Court has recognized that Maryland law guarantees the right "'to decide whether to bear a child'" and that Section 20-209 demonstrates

"clear, strong, and important Maryland public policy" to protect a person's right to obtain an abortion. *Lab. Corp. of Am. V. Hood*, 395 Md. 608, 624-25 (2006) (quoting *Reed v. Campagnolo*, 332 Md. 226, 237 (1993)).

Notably, the plain language of the statute protects not only the ability to access abortion care, but also prohibits the State from *interfering* with a person's *decision* to terminate a pregnancy. As defined by Merriam-Webster, "decision" is the "act or process of deciding," or a "determination arrived at after consideration." *Decision*, Merriam-Webster (2024). "Interfere" is defined as "to enter into or take a part in the concerns of others" or "to interpose in a way that hinders or impedes." *Interfere*, Merriam-Webster (2024). By its plain text, the statute broadly prohibits the State from acting in any way that hinders or impedes a person's process of deciding whether to continue or terminate a pregnancy.[1] This decision-making process necessarily includes a

[1] Recently enacted legislation confirms this understanding of the broad protections guaranteed by Section 20-209. This past year, the Legislature enacted the Right to Reproductive Freedom Act proposing a constitutional amendment that "*confirms* an individual's fundamental right to an individual's own reproductive liberty" guaranteed by Maryland law. Right to Reproductive Freedom Act, Ch. 245, § 3(b)(2), H.B. 705 (Md. 2023) (emphasis added). The amendment states that "every person, as a central component of an individual's right to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy." *Id.* § 1. By *confirming* the reproductive rights guaranteed under Maryland law in this way, the Act expresses a legislative understanding that Section 20-209 broadly protects a person's "ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy." *Id.*

person's ability to seek out and obtain information about how and whether to obtain an abortion. A contrary interpretation would protect a merely theoretical right to decide to terminate a pregnancy without the ability to obtain the information necessary to make or effectuate that decision.

Ms. Akers was exercising rights guaranteed under Section 20-209 when she conducted research about terminating her pregnancy. By searching the internet about the use of medication and homeopathic remedies to cause a miscarriage, Ms. Akers was engaging in a decision-making process to determine whether and how to continue or terminate her pregnancy, a right protected by Section § 20-209. Indeed, throughout its opening and closing, the prosecution framed this conduct as indicative of the "choices" and "decisions" she made concerning her pregnancy. (E 63, 64, 288, 291, 292) Though these "decisions" and "choices" are the very conduct that Section § 20-209 is supposed to protect, the State used Ms. Akers' exercise of her rights as evidence of guilt.

C. Admitting evidence that Ms. Akers exercised her rights as proof of guilt penalized her for protected conduct and undermines the meaning of the right for all Marylanders.

The admission of evidence that a person exercised a protected right as proof of guilt amounts to "a penalty imposed by courts for exercising" a privilege and thus "cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965) (holding that invocation of

Fifth Amendment right to silence cannot be used against a person at trial). Thus, the United States Supreme Court has "condemn[ed] the practice of imputing a sinister meaning to the exercise" of a constitutional right, warning that a right "would be reduced to a hollow mockery" if juries could infer guilt from its exercise. *Slochower v. Bd. of Higher Ed. of N.Y.C.*, 350 U.S. 551, 557 (1956).

This Court has likewise long recognized that if the exercise of a right can be used as evidence of guilt, that right would have little significance. Expanding upon the United States Supreme Court's holding in *Griffin*, this Court held fifty years ago that admission at trial of a person's mere silence during police questioning would undermine the Fifth Amendment right. *Younie v. State*, 272 Md. 233, 244 (1974) (holding that "[s]ilence in the context of a custodial inquisition is presumed to be an exercise of the privilege against self-incrimination from which no legal penalty can flow"). A contrary rule allowing the police to testify as to an accused's silence, this Court warned, would "cloak[] the precepts of Miranda in an armor of gauze." *Id.* at 242 (internal citation and quotation omitted).

Soon after, this Court held that the exercise of the right to plead not guilty and proceed to trial could not be considered by a court when imposing a sentence, explaining:

> [O]ur part in the administration of justice requires that we find that a consideration of Johnson's failure to plead guilty was impermissible because a price may not be exacted nor a penalty imposed for exercising the fundamental and constitutional right of requiring the State to prove, at trial, the guilt of the petitioner as charged. This is as unallowable a circumstance as would be the imposition of a more severe penalty because a defendant asserted his right to counsel or insisted on a jury rather than a court trial.

Johnson v. State, 274 Md. 536, 543 (1975). The magnitude of this error was so great that even though it was unclear "what extent" Mr. Johnson's decision to plead not guilty "actually affected the judge's ultimate determination [of his sentence], if at all," it was necessary to vacate the sentence and remanded for a new sentencing hearing "free of any taint" to ensure that no penalty resulted from Mr. Johnson's exercise of his right. *Id.* at 538. This rule of exclusion was required to protect the meaning of the underlying right even with the lower bar for admission of evidence at sentencing hearings. *Smith v. State*, 308, Md. 162, 166 (1986) (explaining that rules of evidence do not govern sentencing proceedings).

Applying these principles in *Longshore*, this Court more recently held that the exercise of the right to refuse consent to a search is inadmissible as evidence of guilt at trial, explaining that "[a]n unfair and impermissible burden would be placed upon the assertion of a constitutional right if the State could use a refusal to a warrantless search against an individual." 399 Md. at 537. In reaching this conclusion, this Court recognized that an

"individual's assertion of the constitutional right to refuse a search of his car cannot be used as evidence of his guilt if the constitutional protection against unreasonable search and seizure is to have any meaning." *Id.*

These principles apply equally to the exercise of statutory rights. *See Abdul-Maleek v. State*, 426 Md. 59, 73-74 (2012) (vacating sentence where court referenced Abdul-Maleek's exercise of his statutory right to trial on appeal). This is because the source of a right does not weaken the right's importance or impact whether a person should be freely able to exercise it. *Cf. Dorsey v. State*, 276 Md. 638, 657 (1976) (finding State bears identical burden to establish harmless error for statutory and constitutional violations, explaining that "[a]lthough the Amendments to the United States Constitution are commonly considered a source of fair judicial procedure, other nonconstitutional evidentiary and procedural rules, signifying state policy with respect to judicial fairness, are often a defendant's primary source of protection").

Here, Ms. Akers exercised her statutorily guaranteed reproductive rights when conducting research about ways to end her pregnancy. By admitting Ms. Akers' search and browsing history as evidence of guilt, the State penalized Ms. Akers for engaging in what should have been fully protected conduct. Like in *Longshore*, *Johnson*, *Younie*, and *Abdul-Malek*, this Court should hold that doing so is impermissible. *See Longshore*, 399 Md.

at 537 (holding that a person's refusal to consent to search "may not later be used to implicate guilt").

Such a rule applies with even greater force to the exercise of rights guaranteed by Section 20-209 given its language prohibiting any State *interference* with a *decision* relating to pregnancy termination. Allowing the jury to infer guilt based on Ms. Akers' contemplation of abortion necessarily *interferes* with her *decision* to terminate her pregnancy. If mere silence or a refusal to consent to a search is inadmissible where the language of those rights does not expressly protect interference with the decision to exercise the right itself, then evidence that a person considered obtaining an abortion should be inadmissible where Section 20-209 specifically prohibits state action that could affect that decision-making process.

Beyond violating Ms. Akers' individual rights, allowing admission of this evidence weakens the right for all Marylanders. Contrary to the appellate opinion's reasoning, the ruling sends a message that the rights supposedly guaranteed by Maryland law contain a major loophole to be exploited by the State if a pregnancy outcome ends in a miscarriage or stillbirth. Yet these outcomes are not uncommon. There are approximately 21,000 stillbirths every year in the United States. *Data and Statistics on Stillbirth*, CDC (May 15, 2024), https://www.cdc.gov/stillbirth/data-research/index.html. In about a third of these cases, health care providers are

unable to determine the cause of fetal demise. *Stillbirth*, Cleveland Clinic: Diseases and Conditions, https://my.clevelandclinic.org/health/diseases/9685-stillbirth. Thus, any Marylander who considers terminating their pregnancy will be presented with a Catch-22: on the one hand, they are told they have the right to freely decide to terminate their pregnancy, but on the other hand, they are told that if they exercise this right, it can be used against them as proof of homicidal intent should the pregnancy not result in a live birth. Such a ruling chills people from exercising their rights under Section 20-209 and undermines the meaning of the right itself. *Longshore*, 399 Md. at 537.

D. The criminalization of abortion post-*Dobbs* underscores the importance of protecting the reproductive rights guaranteed under Maryland law.

The importance of safeguarding Maryland's reproductive rights cannot be understated. Since *Dobbs*, states across the country have enacted laws banning or severely restricting abortion care, forcing pregnant people to continue pregnancies against their will. *Interactive Map: US Abortion Policies and Access After Roe*, Guttmacher Institute, https://states.guttmacher.org/policies/. These laws place the health and lives of pregnant people at risk and have led to an increase in infant mortality. *See* Anjali Nambiar, et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in Two Texas Hospitals After Legislation on Abortion*, 227 Am. J. Obstetrics & Gynecology 648 (2022);

Analysis Suggests 2021 Texas Abortion Ban Resulted in Increase in Infant Deaths in State in Year After Law Went into Effect, Johns Hopkins Bloomberg School of Public Health (June 24, 2024), https://publichealth.jhu.edu/2024/analysis-suggests-2021-texas-abortion-ban-resulted-in-increase-in-infant-deaths-in-state-in-year-after-law-went-into-effect.

The risk that searching for information about abortion care could be used in a later criminal prosecution forces people to alter their behavior and chills their ability to get information, make informed choices, and obtain the care they seek. As warned by the Washington Post shortly after the fall of *Roe*: "A Google search for a reproductive health clinic, online order for abortion pills, location ping at a doctor's office and message about considering ending a pregnancy could all become sources of evidence." Heather Kelly et al. *Seeking an abortion? Here's how to avoid leaving a digital trail*, Wash. Post (Aug. 12, 2022), https://www.washingtonpost.com/technology/2022/06/26/abortion-online-privacy/. While these warnings envisioned the criminalization of reproductive care in states where abortion is banned, this is precisely what happened to Ms. Akers in a state where the right to abortion is protected by law.

The appellate opinion sanctioning these practices makes these fears a reality for the people of Maryland. If simply contemplating an abortion is admissible as proof of criminal intent in a prosecution, law enforcement is

incentivized to deploy their tools of surveillance against pregnant people and scrutinize their reproductive decision-making. *See* Lily Hay Newman, *The Surveillance State is Primed for Criminalized Abortion*, Wired (May 24, 2022), https://www.wired.com/story/surveillance-police-roe-v-wade-abortion/. Whenever there is a pregnancy outcome that does not match the norms and expectations held by law enforcement, the government will be incentivized to investigate whether the person contemplated having an abortion, inviting scrutiny and judgment concerning people's most private and intimate decisions. This scrutiny into a person's personal reproductive health considerations could occur following "a wide variety of pregnancy outcomes and complications," placing many people "in the crosshairs of the criminal justice system." Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 Duke J. Const. L. & Pub. Pol. 1, 91 (2024). In effect, people's reproductive decision-making would become "subject to suspicion and surveillance and the associated harms merely by virtue of being a woman or a person with reproductive capacity." *Id.* at 90-91.

The investigation of Ms. Akers exemplifies how such government intrusion and scrutiny occur. Ms. Akers delivered the fetus at home and reported the stillbirth to law enforcement. But upon learning that she had considered an abortion, the police questioned her credibility. Even before the

medical examiner reached a conclusion about whether the fetus was born alive, the lead detective instructed the forensic analyst to scour Ms. Akers' phone for abortion-related searches to be used against her in a potential criminal prosecution. This Court, however, has recognized the harms inherent in state action that "could encourage the policing of pregnancy by those attempting to control the conduct of pregnant women" so that "[a]ll of the woman's conduct during and perhaps even before pregnancy could become subject to judicial scrutiny" and allow for "[a]ll of her conduct could be second-guessed in a court of law if something tragically happens to her viable fetus." *State v. Kilmon*, 394 Md. 168, 181 (2006) (quotation omitted) (quotation and citation omitted). Those dangers are even more acute today than they were twenty years ago.

A rule undermining the protections guaranteed by Section 20-209 would also have far-reaching harmful consequences for reproductive health care in Maryland at large. Even when reproductive care is legally protected, if there is uncertainty about the scope of these protections and a perception that law enforcement could punish someone for obtaining or seeking out certain types of care, "many people will reasonably err on the side of not taking such action." Meghan Boone, *Reversing the Criminalization of Reproductive Health Care Access*, 48:2-3 Am. J. L. & Med. 200, 202 (2022). Individuals unsure about whether seeking out information concerning

reproductive care could lead to criminal liability "may rationally conclude that it is simply not worth the benefit of engaging in the activity," resulting "in a chill on activity that is perfectly legal." *Id.* The appellate court opinion allowing admission of evidence that a person considered an abortion as proof of criminal intent inherently creates uncertainty around the scope and protection guaranteed by Maryland's statutory right, and thus threatens to chill people from obtaining even necessary reproductive care.

Uncertainty also undermines trust between patients and their health care providers that is essential to better health outcomes for Marylanders. *Id.* at 204. If seeking out information concerning reproductive health care can be used proof of criminal intent, pregnant people would be deterred from "fully and honestly communcat[ing]" with their health care providers about a range of medical information including symptoms, medical history, or even use of over-the-counter medication. *Id.* Section 20-209 was enacted to ensure that Marylanders are free to access reproductive care without this fear and uncertainty. The appellate opinion ensures just the opposite.

In sum, admitting evidence that Ms. Akers considered whether to terminate her pregnancy violated her rights guaranteed by Section 20-209. To ensure that all Marylanders can remain free to exercise this right without fear of penalty by the State, this Court should hold that contemplating abortion care is inadmissible as evidence of guilt.

II. ADMISSION OF EVIDENCE THAT MS. AKERS CONSIDERED TERMINATING HER PREGNANCY AND DID NOT OBTAIN PRENATAL CARE VIOLATED THE RULES OF EVIDENCE.

In addition to impermissibly burdening the statutory right, evidence that Ms. Akers considered terminating her pregnancy and did not receive prenatal care was inadmissible as irrelevant under the Maryland Rules of Evidence. Contrary to the State's theory of relevancy, a person's consideration of abortion care or lack of prenatal care do not make that person more likely to have homicidal intent. This logical fallacy is based not on reasonable inferences, but instead on assumption, speculation, and stigma that should play no role in our criminal legal system. Even if the evidence had some minimal probative value, that value was substantially outweighed by the danger of unfair prejudice. Accordingly, the evidence was inadmissible.

A. Standard of review for admissibility of evidence under Rules 5-401 and 5-403.

"The fundamental test in assessing admissibility is relevance." *Thomas v. State*, 372 Md. 342, 350 (2002). If evidence is not relevant, it is inadmissible. *State v. Simms*, 420 Md. 705, 724 (2011) ("[T]rial judges do not have discretion to admit irrelevant evidence."). Relevancy is a legal question subject to *de novo* review. *Id.* at 725, Even if relevant, evidence is inadmissible if its "probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-

403." *Id.* In making this determination, courts weigh "the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (Md. App. 2014). Appellate courts will reverse an evidentiary decision under Rule 5-403 if that decision amounts to an abuse of discretion. *Simms*, 420 Md. at 725. Consequently, an evidentiary ruling should be reversed when "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Levitas v. Christian,* 454 Md. 233, 243 (2017) (cleaned up).

B. The challenged evidence is irrelevant to proving an intent to kill or to impeaching the credibility of Ms. Akers' adoption plan.

Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. To be relevant, the evidence must be "related logically to a matter at issue in the case[.]" *Snyder v. State*, 361 Md. 580, 591 (2000). In turn, for evidence to be "related logically" to a matter at issue, the court "must be satisfied . . . that its admission increases or decreases the probability of the existence of a material fact." *Id.*

Evidence is not relevant when its probative value turns on a series of inferences that "invite[] the jury to speculate." *Id.* at 596 (finding jury was

improperly "asked to presume" that a failure to inquire into status of wife's murder investigation was probative of an absence of a loving relationship and then "speculate" that this was "indicative" of a guilty conscience). Requiring a "chain" of inferences and assumptions "involves the kind of speculation that removes [the evidence] from the sphere of circumstantial evidence" that this Court has deemed relevant. *Simms*, 420 Md. at 732.

Evidence of a person's conduct is also inadmissible when its relevancy depends on attributing meaning to actions too "ambiguous and equivocal" to support an inference of guilt. *Synder*, 361 Md. at 596. Evidence is therefore irrelevant when a person's conduct can be subject to multiple interpretations. *Weitzel v. State*, 384 Md. 451, 456, 461 (2004) (holding that pre-arrest silence in the presence of the police was "too ambiguous to be probative" of guilt because there are valid reasons for the innocent to refuse to speak to police); *Simms*, 420 Md. at 731 (holding that filing a notice of alibi but not calling an alibi witness was irrelevant as "too ambiguous and equivocal" because this conduct could "support inferences other than an intent to create false exculpatory evidence"). *See also Hunter v. State*, 82 Md. App. 679, 691 (Md. App. 1990) (finding search for legal counsel irrelevant because even if a person believes they may be guilty of an offense, "he may just as well believe

himself entirely innocent or only partly culpable, or he simply may not know whether his acts or omissions are in violation of law").[2]

The fact that Ms. Akers searched for information about pregnancy termination months before she gave birth and did not obtain prenatal care fails these basic tests for admissibility. First, the admission of evidence regarding Ms. Akers' abortion research "invited the jury to speculate" about, among other things, why she sought this information and why she did not obtain an abortion. The jury was then asked to infer that her reasoning was probative of an intent to kill even though people consider obtaining an abortion for legal and legitimate reasons that do not make them any more likely to have any criminal intent. Such conduct is far too "ambiguous and equivocal" to support the theory of relevancy advanced by the State.

This is especially true given how common it is for people to consider an abortion, including self-managed abortion, and the many perfectly valid motivations people have when deciding whether to continue or terminate a pregnancy. Tens of thousands of people obtain abortions every year in Maryland. *Maryland*, Guttmacher Institute, https://states.guttmacher.org/

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[2] In *Weitzel*, *Simms*, and *Hunter*, the courts did not address the issue of whether admission of the conduct violated the related substantive rights, instead ruling on evidentiary grounds that the evidence lacked probative value. As in those cases, should this Court find that the evidence at issue in Ms. Akers' appeal is inadmissible under Maryland's evidentiary rules, it need not address the arguments raised in Point I.

policies/maryland/demographic-info. Many others become pregnant, consider termination, and choose to continue their pregnancy. And scores of people search the internet about ways to self-manage an abortion outside of the medical system.[3] Doing so does not make any of these people more likely to have a homicidal intent. This leap of logic advanced by the State is too speculative to render the evidence admissible.

A finding that considering abortion makes a person more likely to have criminal intent also wrongly equates abortion with murder by inferring that a person who seeks to terminate their pregnancy has the same mental state as a person who is willing to commit homicide. Yet the chain of inferences necessary for the State's proffer of relevancy are grounded in concepts of fetal personhood rejected by both this Court and the Legislature, *Kilmon*, 394 Md. at 173; Md. Crim. Law § 2-103(g). These inferences are plainly foreclosed as a matter of law by Maryland's statutory protection of the right to terminate a pregnancy, however much some people may disagree with that protection. The inferential leap additionally relies on assumptions about the morality of

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[3] During a single month in 2017, for example, there were "more than 200,000 Google searches for information regarding self-managed abortion in the United States." *Opposition to the Criminalization of Self-Managed Abortion,* Am. Coll. of Obstetricians and Gynecologists (July 6, 2022), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2022/opposition-to-the-criminalization-of-self-managed-abortion.

people who consider abortion, playing into bias[4] that should have no legitimate role in our criminal legal system. *Cf. Belton v. State*, 482 Md. 523, 549-552 (2023) (expressing the need for judges to guard against both implicit and explicit bias). There is thus no logical relationship between this evidence and a matter of issue at trial.

Similarly, there is no logical relationship between declining to obtain prenatal care and an intent to kill a child. This Court has recognized a common law right to decline medical care, *Mack v. Mack*, 329 Md. 188, 211 (1993), and the Legislature has expressly declared that the lack of prenatal care is not a crime, Md. Crim. Law § 2-103(f). As in this case, there are numerous reasons a person might not obtain prenatal care that have nothing to do with a nefarious motive including lack of access, lack of resources, or a desire for privacy. Indeed, more than 16% of pregnant people in Maryland receive either no or inadequate prenatal care, a rate higher than the national average. *Where You Live Matters: Maternity Care in Maryland*, March of Dimes (2023), https://www.marchofdimes.org/peristats/assets/s3/reports/

[4] These biases are even more acute concerning the consideration of self-managed abortion. *See Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care*, Guttmacher Institute, https://www.guttmacher.org/gpr/2018/10/self-managed-medication-abortion-expanding-available-options-us-abortion-care ("Abortion stigma is heightened when it comes to self-managed abortion, due at least in part to fear and misunderstanding about the process.").

mcd/Maternity-Care-Report-Maryland.pdf. The court's decision to admit this evidence invited the jury to use these ambiguous actions to make the leap that the lack of such care indicates an intent to kill. But because the absence of prenatal care does not make people more likely to later kill their child, and because the State's proffer of relevancy requires multiple inferences based on assumption and speculation, this evidence was too ambiguous and equivocal to be probative of intent. *See Weitzel*, 384 Md. at 458.

In addition, neither Ms. Akers' consideration of abortion nor her lack of prenatal care impeach the credibility of her plan to bring the infant to a safe haven location following the birth. Instead, this evidence is *consistent* with her adoption plan. Considering abortion and ultimately deciding to continue a pregnancy is consistent with a person's decision to place a baby up for adoption. Lack of prenatal care to ensure that no one found out about her pregnancy, including members of her family who would have disapproved of her adoption plans, is also consistent with a plan to bring a baby to a safe haven location. The State's tenuous theory of relevancy on the issue of Ms. Akers' credibility requires the jury to speculate and make a series of inferences that are not grounded in any actual evidence. Hence, neither of these actions are relevant to impeaching the credibility of Ms. Akers' post-delivery plans.

Contrary to the appellate opinion, a finding of relevancy has significant consequences beyond the facts of Ms. Akers' case. Such a ruling subjects the decisions of pregnant people to enhanced and harmful scrutiny and suspicion by the government. Any conduct that might suggest a person did not want to become pregnant or did not want other people to know about their pregnancy could potentially be admissible as proof of criminal intent. Under the State's theory of relevancy, use of contraceptives or concealing one's pregnancy from an employer or abusive partner would be fair game to investigate and admit as evidence against a person in a criminal prosecution. Law enforcement would become tasked with measuring whether a pregnant person did not obtain *enough* health care or if their behavior during pregnancy fell below some undefined standard of acceptability. As warned in *Kilmon*, "criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be." 394 Md. at 178. *Cf. Snyder*, 361 Md. at 598-99 (expressing concern that if a person "grieved in a way that the State deemed out of the norm, irrespective of the significant ambiguity of the conduct" then "any reaction or failure to react to the death of a loved one by a family member or friend could be construed to be probative of guilt"). The appellate ruling on relevancy therefore has dire consequences for all Marylanders who are or may become pregnant.

C. Alternatively, the evidence is inadmissible as substantially more prejudicial than probative.

"[E]ven if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Smith v. State*, 371 Md. 496, 504 (2002). Evidence is inadmissible as "unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which the defendant is being charged.'" *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)) (cleaned up).

It goes without saying that people have strongly held beliefs about abortion. But even people who believe that abortion should not be criminalized can be prejudiced by biases against those who express ambivalence about being pregnant and consider termination. *See* Elizabeth Kukura, *Punishing Maternal Ambivalence*, 90 Fordham L. Rev. 2909, 2918 (2022) (explaining that even when abortion is a protected right, "the decision to terminate is a highly stigmatized one" because this consideration violates ideals and norms of motherhood). These prejudices are even more likely for people who consider self-managing an abortion outside of the traditional medical system. *See* Aleta Baldwin et al., *U.S. Abortion Care Providers' Perspectives on Self-Managed Abortion*, 32(5) Qual. Health Res. 788 (2022)

(discussing stigma and misconceptions about self-managed abortion even among abortion providers).

Similar biases can be aroused through the introduction of evidence that Ms. Akers wanted to keep her pregnancy a secret and did not obtain prenatal care, conduct that did not meet the prosecutor's espoused norms of how a pregnant person should behave. Despite the prevalence of maternal ambivalence, "the dominant cultural narrative of pregnancy and parenthood involves overjoyed reactions at the sight of a positive pregnancy test and public sharing of ultrasounds on social media." Kukura, 90 Fordham L. Rev. at 2920. When conduct does not fit this perceived norm, prosecutors can play off these stereotypes to "convey an image" of a pregnant person whose actions are "not only suspicious, but also criminal." *Id.* This is precisely how the contested evidence was used at Ms. Akers' trial. Its admission diverted the jury from the State's lack of evidence of intent and was instead used to portray Ms. Akers as an unfit parent and bad person in order to return a guilty verdict.

This real probability of prejudice caused by admission of the contested evidence substantially outweighed any minimal probative value. *See Snyder*, 361 Md. at 601 (finding court abused its discretion where jurors "may have been inflamed by the evidence that the petitioner did not show an interest in the police investigation and, therefore, ignored the nonexisting, or weak, link

between the failure to inquire and a consciousness of guilt"). Given its inflammatory nature and potential to arouse bias, this evidence had a "tendency" to cause an "adverse effect" way beyond its minimal probative value, rendering it inadmissible under Rule 5-403. *State v. Health*, 464 Md. 445, 465 (2019).

CONCLUSION

For the foregoing reasons, this Court should reverse Ms. Akers' convictions and remand for a new trial.

Respectfully submitted,

/s/ *David R. Rocah*
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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH 8-112

1. This brief contains 5,683 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, type and size requirements stated in Rule 8-112.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on August 7, 2024, the following Brief of *Amici Curiae* in Support of Petitioner was electronically filed via the MDEC File and Serve Site, and thereby served on all persons entitled to service. I further certify that, pursuant to Rule 8-502(c), on August 7, 2024, two copies of the brief were mailed, prepaid, first-class, to:

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