MOIRA E. AKERS,	IN THE
Petitioner,	SUPREME COURT
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2024
Respondent.	Petition Docket No. 20

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

A jury convicted Akers of murdering her newborn son just moments after he took a breath. She had not disclosed her pregnancy to anyone, even her husband. At her trial for second-degree murder and related charges, the State offered evidence that at a time when Akers could have legally terminated her pregnancy, she searched the internet for at-home methods to end pregnancy, and she never sought prenatal care (which she had received when pregnant with her other two children). The trial court deemed that evidence relevant and determined that its probative value was not substantially outweighed by the danger of unfair prejudice.

The Appellate Court affirmed in an unreported opinion that does not warrant review by this Court.

Although the Appellate Court addressed a novel question, it did so in a limited holding cabined to the highly unusual facts of this case. It correctly held first, that the evidence cleared the low bar of relevance, and second, that the trial court's balancing of probative value and any potential prejudice called for an exercise of discretion with which the Appellate Court appropriately opted not to interfere. Further review of that decision is neither necessary nor in the public interest, and so this Court should deny the Petition.

QUESTION PRESENTED

Should this Court decline to review the Appellate Court's fact-specific holdings first, that where a defendant was charged with murdering her newborn infant after concealing her pregnancy, her internet searches about how to terminate a pregnancy at home and her decision not to seek prenatal care constituted legally relevant evidence and second, that the trial court correctly exercised its discretion in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice?

STATEMENT OF FACTS

The State adopts the facts set forth in *Moira E. Akers v. State*, No. 925, Sept. Term, 2022, slip op. at 2-3 (App. Ct. Md., January 30, 2024) (Cert. Pet. App. Exhibit A).

REASONS FOR DENYING THE PETITION

The Appellate Court declined to be distracted by the political swirl that Akers has created in an effort to obfuscate the core issue. The legal issue at the heart of this case is relevance, not abortion. Akers and various non-profit organizations[1] would have this Court impose an absolute ban on all evidence related to a party's contemplating termination of a pregnancy. (Pet. at 13 (asserting that there is "no permissible relevance" of such evidence to an intent to kill or harm the child later born)). This Court should decline to consider the proposed adoption of an inflexible, morals-based relevance test, particularly when the Appellate Court expressly limited its holding to the facts of the case before it. Accordingly, this Court should deny the petition.

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[1] Three amicus briefs have been filed in support of the Petition. The State addresses them below in part A.

A. This case does not raise a novel legal issue, and the tangential presence of an issue relating to a woman's right to choose does not justify granting the Petition.

Akers is wrong that the controversy over abortion creates a novel legal issue or otherwise raises a matter in this case that requires this Court's review.

First, the case did not present a novel *legal* issue. (Pet. at 8). Rather, it required the Appellate Court to analyze straightforward legal issues about relevance and the weighing of evidence under Maryland Rule 5-403, albeit against a backdrop that involved Akers' decision not to seek prenatal care and her exploration of options to terminate the pregnancy at a time when she was legally able to do so.[2] Thus it was that the court applied well-established law about relevance when it ruled that evidence of Akers' lack of prenatal care and searches about home remedies to terminate her pregnancy cleared the "low bar" of relevance. *See* slip op. at 19-20, 22-27 (ruling on the relevance of evidence that Akers failed to get prenatal care and conducted on-line searches about home remedies

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[2] The State discusses below in Part C in greater detail the fact that the Appellate Court applied the law in a legally correct fashion, and its analysis was sound.

for abortion, respectively; and discussing among other cases *Thomas v. State*, 372 Md. 342, 351 (2002), and *Snyder v. State*, 361 Md. 580, 592 (2000)). The court also explained why the out-of-state cases forwarded by Akers (discussed *infra* n. 7 and accompanying text) did not apply. Slip op. at 23-27.

In the same way, the court applied the law relating to Maryland Rule 5-403 when it concluded that the trial court did not abuse its discretion in determining that the probative value of evidence about lack of prenatal care and on-line searches about how to end the pregnancy was not outweighed by the risk of unfair prejudice. *See* slip op. at 20-22, 27-30 (applying the law on Rule 5-403 to issue of lack of prenatal care and on-line searches, respectively). Again, that decision did not call for resolution of any "novel legal issue." Rather, it required that the Appellate Court apply established law to a unique set of facts to determine that the circuit court acted within its discretion.

Second, as for Akers' claim that the case involves a matter of "exceptional public importance" (Pet. at 7), the State does not disagree that the question of a woman's right to choose is a controversial one raising moral, political, social, and personal

concerns for many. But that pronouncement has nothing to do with this case. This Court should not create an anomalous body of law simply because Akers has identified what she deems a "divisive issue" (Pet. at 7), that did not bear on the outcome here. The point of the State's introduction of the searches was not to demonize Akers for considering abortion—if it were, that would deserve the criticism levelled by Akers and amici—but to highlight that even early on, she was exploring ways to terminate the pregnancy without assistance, both because she was avoiding detection of the pregnancy and because she harbored negative feelings about it that were probative of her intent to kill Baby Akers if he was born alive.[3] Thus any suggestion that Akers was a victim of, for example, a lack of access to abortion services falls flat.

Third and related, three organizations have weighed in on the ostensible public importance of this case, all of whom assert interests relating to the question Akers raises in the Petition:

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[3] The opinion details the searches the State sought to introduce, including among others, "rue tea for abortion," "does Rue extract cause you to miscarry[,]" "misoprostol in mid-trimester termination of pregnancy, both oral and vaginal[,]" along with evidence that Akers viewed a website titled "woman [sic] resort to over-the-counter remedies to end pregnancy[.]" Slip op. at 13-14.

- **The American Civil Liberties Union and ACLU of Maryland** argue that this Court should grant the Petition because the Appellate Court's ruling "chills the rights of all Marylanders to freely decide whether to continue or terminate a pregnancy," and because allowing evidence that someone contemplating ending a pregnancy as "proof of guilt concerning a later pregnancy outcome" will lead to fear that a decision around pregnancy termination "will be used against them" in a later prosecution. (ACLU Br. at 2).

- The non-profit organization **If/When/How**, which seeks to "end the criminalization of people for their pregnancy outcomes," focuses its argument on the notion that abortion is commonplace and the contemplation of abortion "has no tendency to prove that a person would commit a crime against their newborn." (IWH Br. at 1, 3). It further argues that evidence that a defendant "had or contemplated an abortion is prejudicial because of abortion stigma." (*Id.* at 6).

- **Pregnancy Justice**, a nonprofit group "focused on criminal defense for people charged with crimes in connection with their pregnancies," argues that the Appellate Court "contravened Maryland law rejecting fetal personhood principles." (PJ Br. at 1, 2).

There are of course nuances to each amicus brief that the State cannot address here due to word limitations. But a common thread runs through them all. Not one acknowledges that the jury accepted the State's theory of the case: that Akers delivered her baby at term and then murdered the newborn, hiding his body in a bedroom closet in a bag covered by bloodied towels. The case is not about someone who considered abortion resources and later

suffered an "adverse pregnancy outcome" (ACLU Br. at 7), nor does it concern a self-managed abortion gone awry (IWH Br. at 4-5), nor inappropriately recognize the concept of "fetal personhood." (PJ Br. at 2-3). Nor for that matter did the State introduce abortion history unconnected to the victim (IWH Br. at 7-8), which is addressed in cases that the court appropriately viewed as categorically distinct from this one. Slip op. at 23-27; *see infra* part C.1.

To the contrary, expert testimony (the admission of which was affirmed and Akers no longer challenges) showed that Baby Akers took a breath and therefore met the definition of a "person" under the law. *See* Md. Code Ann., Health-General § 4-201(n) (defining a "live birth" as "the complete expulsion or extraction of a product of human conception from the mother, regardless of the period of gestation, if, after the expulsion or extraction, it breathes or shows any other evidence of life, . . . whether or not the umbilical cord is cut or the placenta is attached."). Where the facts of the case do not involve charging or punishing non-criminal behavior connected with contemplating abortion, but instead relate to the murder of a person, the social, political, and related issues identified by amici fall away.

Moreover, amici ignore crucial context that removes this case from their reach when, like Akers, they seek a wholesale ban on evidence relating to a party's having contemplated terminating the pregnancy that led to the birth of a murder victim. (Pet at 7 n. 6; ACLU Br. at 3 n.1; IWH Br. at 1-2; PJ Br. at 2). Akers concealed not just the *pregnancy* but also the *birth*: she denied being pregnant to EMT personnel and to the nurse and doctor who first saw her at the hospital, such that Baby Akers' birth was only discovered because "a doctor observed a severed umbilical cord protruding from her vagina." Slip op. at 2. She lied to health care providers and police, claiming she only learned she was pregnant after it was too late to terminate the pregnancy legally—a claim refuted by, among other evidence, the timing of the internet search evidence she now challenges. *Id.* at 14-15. Those facts put this case in a different category than those raised by amici.

The State does not mean to suggest that the interests of amici do not matter, but that the facts in this case do not implicate those interests. Ink should not be spilled and wasted in a case where the positions that amici take should be rejected as *not pertinent*, rather than *incorrect*.

Fourth, to the extent the "issue" may recur—even defining the issue broadly as the question of admissibility of evidence that a parent contemplated terminating the pregnancy of a child later killed or abused—it is unlikely that any other case will require a court's consideration of the legal issue in the same way as this one.[4] (Pet. at 8). The context of a particular case drives the analysis of whether certain evidence is relevant, and the facts in this case were stunningly unique. What's more, the presence of and the Appellate Court's reliance on the factual anomalies specific to this case make it unlikely the issues presented in this case will recur. *Cf. Motor Vehicle Admin. v. Delawter*, 403 Md. 243, 255 n.7 (2008) (observing that petition was granted "to resolve the important question presented, which is likely to recur"). To the extent a legally adjacent question does recur, such a case again would

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[4] Undersigned counsel notes a pending unrelated appeal currently before the Appellate Court. *See Connor Kelly v. State of Maryland*, ACM-REG-0654-2023 (presenting contention that trial court erred in admitting evidence of a text message by defendant father during early months of mother's pregnancy in which defendant contemplating pushing mother down the stairs, where he was charged with attempted second-degree murder and child abuse for subsequently breaking one-month old's arm and ribs). The parties have submitted principal briefs in *Kelly*; the court has not yet scheduled oral argument.

present a question of relevance unique to it that requires a context-dependent application of the law on relevance.

B. Even if the Court considered the matter worthy of its attention, this case is not the appropriate vehicle because it was unreported and expressly limited to its facts.

Akers' claim that this decision is effectively a reported opinion because of Maryland Rule 1-104(a)(2)(B) should be rejected. (Pet. at 8). The Appellate Court made abundantly clear that, even beyond its unreported status, the opinion has no meaningful precedential value because of its case-specific analysis and should not be wielded as a shield or sword by any party.[5]

Specifically, the court noted at multiple points in its opinion the unusual and fact-intensive nature of this case and its holding.

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[5] Akers does not explain why the fact that the opinion is "widely available" should bear on this Court's decision as to whether to grant the Petition. The news outlets to which she refers did not report the issuance of the appellate opinion, but only her prosecution and conviction. (Pet. at 9). Other than outlets that regularly provide citation to or publication of unreported opinions, the only citation of the Appellate Court's opinion that Akers provides is to an Appellate Blog containing an article written by an appellate criminal defense lawyer (who, it must be noted, is a partner in the law firm that represents Akers on appeal). (*Id.*).

See slip op. at 20-21 (noting that "the facts of this case are far from typical"); *id.* at 21 (noting that "[d]ue to the specific facts of this case, we cannot say" that trial court abused discretion); *id.* at 22 (prefacing discussion about admissibility of internet searches with the caveat that "our decision today should be read narrowly, and in strict accordance with the specific facts of this case"); *id.* at 23 (deeming evidence relevant "in the specific facts of this case," and noting "the unique and specific facts of this case"); *id.* at 27 (emphasizing "the exceedingly narrow scope of the relevance determination").

The Appellate Court further added an exclamation point to its view on the case's lack of precedential value when it denied a motion *by Akers* to publish the opinion.[6] Accordingly, it cannot fairly be said that any sensible person would view the court's holding as extending one inch beyond its margins.

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[6] In that motion, filed on February 8, 2024, Akers argued perfunctorily—and in significant tension with her current position that use of the opinion as precedent is undesirable—that "the issues in the case are novel and it is in the interests of justice for the Opinion and Order in this case to be published." The Appellate Court denied the motion on February 13, 2024.

C. The Appellate Court's opinion was correct and is not meaningfully contradicted by decisions in other jurisdictions.

This Court should not take up the Petition because the Appellate Court's analysis and conclusions were correct.

1. The Appellate Court explained why the evidence was relevant, and it distinguished out-of-state authority.

The Appellate Court correctly concluded that evidence about Akers' avoidance of prenatal care and searches about terminating the pregnancy without seeking help was relevant to her purported intent to kill Baby Akers when he was born. Slip op. at 19-20 (discussing relevance of lack of prenatal care), 22-27 (discussing relevance of internet searches).

Within its discussion about relevance of the admission of Akers' searches on ways to terminate the pregnancy, the court explained why out-of-state authority on which Akers relied was not persuasive. Akers cites at length in the Petition to cases that purportedly reach results favorable to her in "similar contexts." (Pet. at 9-12). But the Appellate Court correctly viewed these cases as distinguishable because in actuality, they involved different

contexts—in the main because they involved admissibility of evidence of a defendant, victim, or witness's abortion *history*. *See* slip op. at 23-24 and cases cited therein.[7]

From there, the Appellate Court specifically distinguished the two Florida cases that involved death of a child weeks or months after birth that Akers again raises here. *See* slip op. at 25-27 (discussing *Stephenson v. State*, 31 So.3d 847 (Fla. 3d Dist. Ct. App. 2010), and *Wilkins v. State*, 607 So.2d 500 (Fla. 3d Dist. Ct.

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[7] Four cases cited by Akers in the Petition were addressed and distinguished by the Appellate Court, and all involved the introduction of abortion history. *See Billett v. State*, 877 S.W.2d 913, 914 (Ark. 1994) (affirming exclusion of abortion evidence proffered to show witness bias); *Bynum v. State*, 546 S.W.3d 533, 542 (Ark. App. 2018) (reversing admission of defendant's prior abortions where charges were that she concealed the birth and abused the corpse); *Hudson v. State*, 745 So.2d 1014, 1016 (Fla. D. Ct. App. 1999) (reversing after introduction of evidence of defendant's prior abortions where defendant's newborn was found dead in a box in a closet); *People v. Morris*, 285 N.W.2d 446, 447-48 (Mich. App. 1979) (reversing where court admitted evidence that defendant fought with victim about defendant's prior abortions). The Appellate Court also noted and distinguished *Andrews v. Reynolds Mem. Hosp.*, 499 S.E.2d 846, 855 (W.Va. 1997) (excluding plaintiff's abortion history), which Akers had raised in that court but does not mention here. The four remaining cases that Akers raises in her lengthy string-cite in the Petition (Pet. at 10-12), and that are not discussed elsewhere in this Answer, also involve abortion history—and not one involves a criminal charge of murder of a baby who was born alive.

App. 1992)). It pointed out that *Stephenson* involved the death of a 13-month-old child born with previously unknown medical problems, whose mother was charged with criminal neglect. Because the mother's motive to kill the child would not have arisen until her birth (when the health issues were detected), the fact that she had explored terminating the pregnancy lacked any causal connection and was irrelevant to that later-developed motive. Slip op. at 26. *Wilkins* was differently inapposite, because the appellate court "ordered a new trial for reasons having nothing to do with abortion," noting only a passing concern about the admission of such evidence at the prior trial. Slip op. at 26-27.

The Appellate Court did not take issue with the general proposition that "a person's prior history with abortion untethered to the material facts of a case will generally not be admissible." Slip op. at 24-25. It explained that this case, by contrast, did not involve evidence about abortion history; rather, Akers considered terminating the pregnancy that resulted in the birth of the very child who later became the victim. *Id.* at 25. The court also noted that other evidence about Akers' seeking abortion services had been admitted without objection in the form of testimony from her

health care provider and her medical records. *Id.* at 14-16, 28. It therefore concluded that the trial court correctly deemed the evidence here to be relevant.

2. The Appellate Court appropriately declined to interfere with the trial court's discretionary decisions under Maryland Rule 5-403.

In reviewing the trial court's decision that the probative value of evidence of Akers' lack of prenatal care was not substantially outweighed by the danger of unfair prejudice, the court again limited its holding to the specific facts of this case. It pointed out that Akers had gotten prenatal care during her other pregnancies, and she hid the pregnancy until she could no longer do so. Slip. op. at 21-22.

The court was also mindful of general concerns about the prejudices that could arise based on biases about "how pregnant women are expected to behave." *Id.* at 21. It noted that as a general rule, evidence about a lack of prenatal care would be "irrelevant or minimally probative." *Id.* But in this "far from typical" case, *id.*, "the court could reasonably conclude that [Akers'] lack of prenatal care was probative of her intent during her pregnancy to harm or

cause the death of Baby [Akers] once delivered." *Id.* at 22. That decision was correct given the high degree of deference that the court was required to give the trial court's decision. *See Mason v. Lynch*, 388 Md. 37, 49 (2005) (noting that under the rule, "[t]he trial court's ruling on admissibility will not be overturned on appeal absent a clear abuse of discretion").

In examining the trial court's ruling about Akers' internet searches, the Appellate Court explained that the searches revealed that Akers sought ways to end the pregnancy at home and without help, "therefore permitting the inference that she intended to keep the pregnancy and birth a secret." Slip op. at 28. The evidence also had greater probative value in the balancing process because it affected Akers' credibility (as reflected in her recorded statement to police, which the State admitted into evidence), given her fictionalized account to her husband about an ectopic pregnancy, her claim that when she learned about the pregnancy it was too late to seek an abortion (contradicted by her medical records and the timing of the internet searches themselves), and the fact that there was additional evidence she had gotten abortion referrals

from her doctor (information that came into evidence without objection). *Id.*

The court further pointed out that the issue was sanitized when potential jurors were asked (at Akers' request) whether their beliefs about abortion would affect their impartiality. Slip op. at 29. The prosecutor defused the issue when she pointed out in her opening statement and closing argument that Akers was within her rights to terminate her pregnancy at the time of the searches. *Id.* Applying the "highly deferential" standard of Rule 5-403, and mindful of the fact that issues relating to abortion "carry with them the potential risk of unfair prejudice," the court correctly declined to reverse the circuit court's ruling. Slip op. at 29-30.

* * *

The overall failing of Akers' argument, in combination with amici's perspective, is its tendency to suggest that a decision by this Court to deny the Petition is tantamount to repudiation of a woman's right to choose. But that is not a fair or accurate reading of the record. The Appellate Court correctly ruled on a relevance issue that was not controversial, in a thorough opinion limited to its facts. Accordingly, this Court should deny the Petition.

CONCLUSION

The State of Maryland respectfully asks the Court to deny the petition for a writ of certiorari.

Dated: March 29, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 3,805 words.

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CERTIFICATE OF SERVICE

In accordance with Maryland Rule 20-201(g), I certify that on this day, March 29, 2024, I electronically filed the foregoing "Answer to Petition for a Writ of Certiorari" using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including all lead counsel of record:

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