

Whitner v. South Carolina (1997)

In the case *Whitner v. South Carolina* in 1997, the South Carolina State Supreme Court defined the concept of a child to include viable fetuses. This allowed grounds for prosecution of a pregnant woman's prenatal activity if those activities endangered or could potentially endanger the fetus within her. The case brought the issue of fetal rights versus pregnant women's rights to light. The case also explored whether or not the conviction of a pregnant woman was in the best interest of a fetus, because fear of prosecution could lead the woman to not seek prenatal care or to seek an abortion outside of licensed clinics.

Cornelia Whitner moved to Easley, South Carolina, in 1989, and shortly thereafter began using crack cocaine. Whitner paid for cocaine by engaging in prostitution and stealing. The state charged Whitner, a single mother of two children, with child neglect of her second child while she was pregnant with her third child in December 1991. Whitner pled guilty. Judge Frank Eppes in Pickens County, South Carolina, sentenced Whitner to probation and required that she abstain from drugs and alcohol. If she violated these conditions she faced a prison sentence of ten years. The state also removed both of Whitner's children from her home and placed them with her family members.

Whitner's third child, Tevin Dashaun Whitner, was born on 2 February 1992 at the Easley Baptist Medical Center and tested positive for cocaine. On 5 February 1992, authorities took custody of Tevin and arrested Whitner for child neglect. Whitner went before Judge Eppes again on 20 April 1992 and pled guilty to criminal child neglect under section 20-7-50 of South Carolina Children's Code. This section states, "Any person having legal custody of any child...who shall...refuse or neglect to provide...the proper care and attention for such child...so that the life, health or comfort of such child...is endangered or is likely to be endangered, shall be guilty of a misdemeanor." Eppes sentenced Whitner to prison for eight years and Tevin was placed under the custody of his great aunt. At this time, Whitner did not appeal.

After hearing of her case, American Civil Liberties Union lawyer Rauch Wise, of Greenwood, South Carolina, took Whitner's case while she was detained. With Wise's counsel, Whitner then filed a petition for post-conviction relief, seeking to prove that her original case was handled unfairly. Wise argued that Eppes' court did not have the authority to convict Whitner based on the South Carolina Children's Code, that the circuit court erred when it accepted her guilty plea, and also that the court provided ineffective assistance of counsel. Judge Larry R. Patterson, of the thirteenth state circuit court in Greenville, South Carolina, granted the petition on both grounds. Patterson stated that child abuse did not apply to a fetus. Whitner, therefore, could not have pled guilty to a nonexistent crime. After spending nineteen months in prison, Whitner was freed in November 1993.

Travis Medlock, South Carolina's Attorney General, appealed the case to the State Supreme Court to reinstate Whitner's sentence. In 1994, Charles Condon became Medlock's successor and continued the fight to return Whitner to prison. Condon argued two main points, which were heard by the South Carolina Supreme Court, located in Columbia, South Carolina, on 31 May 1995. The state's first argument was that the circuit court did have authority to accept Whitner's guilty plea, and that the post-conviction relief judge, Patterson, had erred. The second was that the post-conviction relief court erred in deeming Whitner's previous counsel as ineffective.

Wise, in addition to Lynn Paltrow and Lisa Tankoos, both from the Center for Reproductive Law and Policy in New York, New York, represented Whitner before South Carolina's Supreme Court. Whitner's lawyers argued against applying the Children's Code to a fetus, and claimed that Whitner was not given fair notice that her behavior was prohibited. Furthermore, Whitner's lawyers argued that prosecuting Whitner for the use of crack cocaine while pregnant with a viable fetus infringed

upon a woman's right to privacy. In response to Whitner's lawyers argument of lack of fair notice, the Court, in an opinion written by Justice Jean Toal, insisted that it was common knowledge that cocaine use has the potential to harm a viable fetus. In response to Whitner's lawyers second argument, the Court held that the state was protecting the life and health of a viable fetus, therefore, Whitner's rights were not violated.

The Court agreed with the state on both arguments, and it reasoned that in its prior rulings, the Court had held a viable fetus as a person for wrongful death and murder statutes. Defining a person under the age of eighteen as a child, the Court included a viable fetus under the definition and held that the Children's Code should be interpreted broadly. The Court said that it would be ludicrous to recognize a viable fetus as a person for homicide laws but not for child abuse statutes.

On 15 July 1996, the South Carolina Supreme Court voted three to two that the post-conviction relief court erred in granting the petition, and reinstated Whitner's eight remaining years in prison. Justices Jean Toal, John Waller, and E. C. Burnett concurred, and Chief Justice Ernest Finney and Justice James E. Moore dissented. On 26 May 1998, Whitner's attorneys joined in an appeal with Malissa Ann Crawley, a woman similarly prosecuted, to the US Supreme Court in Washington, DC. The US Supreme Court refused to hear arguments from Whitner and Crawley.

In his dissent, Justice Moore argued that by including viable fetuses under the Children's Code, almost any action performed by a pregnant woman that potentially endangers her fetus would constitute unlawful neglect. Justice Moore also noted that while a pregnant woman may receive only two years in prison for obtaining an illegal abortion, she may face up to ten years in prison for taking illegal drugs. Furthermore, Justice Moore, along with a variety of healthcare professionals and social workers, worried that the Whitner decision would result in women avoiding prenatal care altogether.

The aftermath of *Whitner v. South Carolina* highlighted the issue of pregnant women's right to privacy. After the South Carolina Supreme Court's ruling, some questioned which behaviors of pregnant women the state could punish. Many critics pointed to alcohol and tobacco, which are legal, but have potentially harmful effects on the fetus, and wondered whether pregnant women could be prosecuted for using those substances as well. Although other states at the same time were considering bills regarding cocaine use during pregnancy, the South Carolina Supreme Court was the first high court in the US to uphold a conviction of a mother for endangering the life of her fetus through prenatal conduct.

Since *Whitner v. South Carolina*, a number of women have been arrested and charged for a variety of crimes due to harm or attempted harm to their fetuses. The charges include drug trafficking, child abuse, child endangerment, attempted murder, and murder. In regard to the prosecution and punishment of pregnant women, a number of medical and public health associations have released public statements in opposition to such practices. These associations include the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Public Health Association, among others. All of their statements echoed the same concern that women will decline prenatal or open medical care and social support out of fear of prosecution.

As of 1 September 2010, fifteen states ruled substance abuse during pregnancy as child abuse and three considered it grounds for involuntary commitment to a substance abuse treatment or mental health institution. As of 2010, only nineteen states offered drug treatment programs for pregnant women and only nine gave priority access, or top priority to services, to pregnant women.

Sources

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