IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. KELLY A. FOREMAN, Defendant-Appellant,	)	SUPREME COURT CASE NO. 2020-0866 Appeal from the Seneca County Court of Appeals, Third Appellate District Court of Appeals Case No. 13-19-01

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION IN SUPPORT OF APPELLANT KELLY A. FOREMAN

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INTRODUCTION

Appellant Kelly A. Foreman was arrested, charged, and convicted in Seneca County not for something she did there, but for merely existing there while in a certain condition: "drug user." This distinction between *doing* something and *being* something lies at the heart of this case's constitutional issue. The presence of cocaine or metabolites, as detected in Appellant's umbilical cord and in her newborn's urine and stool, was not offered to prosecute earlier possession or use of cocaine. Such a hypothetical prosecution could not be brought in Seneca County, as there was no evidence that it occurred in or around that venue, leaving the court with no basis for jurisdiction.

Instead, the presence of metabolites was offered as an offense in itself: an offense of drug possession that is said to have occurred entirely at the time when Appellant was in the hospital in Seneca County. If the Government's theory holds, then Appellant was not only powerless to refrain from "offending" in that moment, but she would also have been powerless to refrain from continuously "offending" for days, weeks, and even *months* prior to that moment. This would not have been because of an addiction or compulsion, but because her "drug user" status physically could not be relinquished, regardless of any action or inaction on her part. In the Government's view, she was subject to arrest anywhere in Ohio, at any time—or multiple times—prior to her child's birth, because she was committing a new offense in each moment simply by being.

To punish such a "status" offense is an affront to the protections of both the Eighth Amendment and Article I, Section 9 of the Ohio Constitution. Moreover, should this Court uphold the Government's theory, it would risk a devastating impact on patients' ability to seek medical treatment. Physicians who detect the presence of metabolites could not only be compelled to testify—as is already the law—but might well be affirmatively required to report their patients to law enforcement. This Court's jurisprudence warns against such a result.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the American Civil Liberties Union of Ohio Foundation ("ACLU of Ohio") is a nonprofit, nonpartisan membership organization devoted to protecting the basic civil rights and liberties of all Americans. For nearly a century, the ACLU of Ohio and its national affiliate organization, the American Civil Liberties Union, have litigated questions involving civil liberties in the state and federal courts, helping to establish dozens of precedents that today form part of the basic framework of our constitutional jurisprudence. Among the liberty interests crucial to the ACLU of Ohio and its membership are the protections against cruel and unusual punishment provided by the United States Constitution and the Ohio Constitution. These rights are directly threatened by the decision of the Third Appellate District in this case.

STATEMENT OF THE CASE AND THE FACTS

The ACLU of Ohio adopts Appellant's statement of the case and the facts, a few aspects of which warrant emphasis here.

First, Appellant was charged and tried for possession of cocaine in her body at Tiffin Mercy Hospital in Seneca County. Although the presence of cocaine or metabolites may constitute evidence of an earlier offense—the offense of having possessed cocaine, outside of her body, at some point in time before using it—there is no evidence to demonstrate that such an earlier offense occurred in Seneca County. *See* 3d Dist. Op. ¶ 12 (Appellant reported that she used cocaine, but stated that she did not use it at her home, in front of her children, or in front of her fiancé). Venue would not have been proper in Seneca County for such an offense of unknown location, nor did the court below hold otherwise. The only circumstance factually tied to Seneca County is the presence of cocaine and/or metabolites—the ensuing substances after cocaine was metabolized—in bodily substances at the hospital. *Id.* at ¶¶ 11, 35 n.3.

Second, the particular facts of this case foreshadow the scope of its potential impact. Cocaine or metabolites were found in the urine and meconium—first stool passed after birth—of Appellant's child, by a toxicology screen. Testimony at trial established that meconium is "retained by the fetus and accumulates substances for … several months, usually the second or third trimester." *Id.* ¶ 11. This presents one instance in which a criminalized status like Appellant's can remain in effect, with no chance of relinquishment, for months.

LAW AND ARGUMENT

I. Conviction for Drug Possession Based on the Mere Presence of Drug Metabolites in a Defendant's Body Constitutes Cruel and Unusual Punishment Under the Federal and Ohio Constitutions

A. Criminalization of a Mere Status is Unconstitutional

In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court of the United States examined a state law that made it a crime to have the condition, or status, of narcotics addiction. The trial judge had instructed the jury as follows:

> To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.

Id. at 663 (internal citation omitted, editing marks in original). Reasoning that the statute "imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of irregular behavior there," the Court found that the defendant's conviction violated the Eighth and Fourteenth Amendments. *Id.* at 667.

The Supreme Court took up the act-status distinction again in *Powell v. Texas*, 392 U.S. 514 (1968). In a fractured 4-1-4 decision, the Court affirmed the defendant's conviction under a state statute forbidding public drunkenness. *Id.* at 517. Though the plurality declined to extend

Robinson to forbid prosecution of acts that were occasioned by a compulsion—in that case, alcoholism—it reaffirmed that "criminal penalties may be inflicted only if the accused has committed some act." *Id.* at 533. In effect, the plurality put forth "a simple 'act-excluding' test for status crimes: if the defendant committed an act, even one so unobtrusive as going outside, the defendant forfeited any Eighth Amendment protection under *Robinson*'s status crimes doctrine." Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless*, 62 U. Chi. L. Rev. 1619, 1625 (1995).

Notably, five justices in *Powell* favored a broader reading of *Robinson*. Concurring in the result, Justice White observed that the Eighth Amendment "might … forbid conviction" where an intoxicated person's presence in public is involuntary. *Powell*, 392 U.S. at 548-50; *see* Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas*, 69 Colum. L. Rev. 927, 931 (1969) ("[T]he dissent comes closer to speaking for a majority of the Court than does the plurality opinion."). The dissenting justices found the public-intoxication statute to punish impermissibly a status in conjunction with a location, not an act. *See Powell*, 392 U.S. at 567, 558-59. All five justices outside the plurality agreed that where a defendant could show that avoiding the combination of intoxication and public presence was impossible, then the statute would be unconstitutional as applied. *See id.*; *see* Greenawalt, *supra*.

At minimum, *Robinson* and *Powell* stand for the widely-cited principle that a discrete act, rather than a chronic status, is necessary in order to punish—regardless of how the status was acquired. *See, e.g.*, *Akron v. Rowland*, 67 Ohio St. 3d 374, 387 (1993) ("The case law is legion that people cannot be punished because of their status"); *State v. Oher*, 9 Ohio App. 3d 348, 349 (8th Dist. 1983); *City of Akron v. Neal*, 9th Dist. Summit No. 11847, 1985 WL 10687, *1 (Apr. 17, 1985); *cf. Anderson v. Romero*, 72 F.3d 518, 526 (7th Cir. 1995) (to deny a prisoner

privileges based on HIV-positive status would be a "patent" constitutional violation). It should also be noted that *Robinson* and *Powell* are a floor, not a ceiling, to this Court's constitutional review. The Ohio Constitution's prohibition against cruel and unusual punishment, as this Court has held, provides "unique protection for Ohioans" that is "independent of the protection provided by the Eighth Amendment." *In re C.P.*, 131 Ohio St.3d 513, 529 (2012); Ohio Const. Art. I, Sec. 9; *see also Arnold v. Cleveland*, 67 Ohio St. 3d 35, syl. (1993) ("state courts are unrestricted in according greater civil liberties and protections" than those provided by the United States Constitution). Ohio courts have routinely applied the *Robinson* principle. *E.g.*, *Oher*, 9 Ohio App. 3d at 349 (8th Dist. 1983); *Neal*, 9th Dist. Summit No. 11847, 1985 WL 10687, *1 (Apr. 17, 1985).

B. Appellant's Conviction Violates the *Robinson* Principle and Would Lead to Absurdity

Appellant here was not shown to have committed any act that would establish venue in Seneca County. *See* 3d Dist. Op. at ¶ 56. No evidence was offered as to where she acquired or used cocaine, only where she did not: at her home. *Id.* at ¶ 12; *see also id.* at ¶ 57 ("the record indicates that the cocaine had been assimilated into Foreman's system long before she gave birth at a hospital in Seneca County"). In any event, the majority below did not rely upon a prior act to establish venue. It regarded as immaterial where Appellant had previously acquired, possessed, or used cocaine, instead citing the presence of cocaine metabolites in the hospital.

Yet as the dissent observed, the process of assimilating cocaine into the body, wherever that occurred, placed it permanently beyond Appellant's ability to retrieve or control. *Id.* at ¶ 57. As in *Robinson*, this left her with an enduring status of "drug user," which she was powerless to relinquish. It is worth noting that personal possession and use of cocaine is lawful in several

countries.[1] Recreational marijuana has been legalized in fifteen states, including Ohio's immediate neighbor to the north, as well as two territories and the District of Columbia.[2] Under the Government's theory, a person could easily be arrested in Ohio for "possession" of a drug after having consumed it in a jurisdiction that permits it, followed by simply *being* in Ohio. Upon arrest, the drug could not be confiscated; it is part of the person's body.[3] Were the person to be released and travel to a neighboring county, she could be arrested again for the new offense of possession at that time and place.

Cocaine or its metabolites can be detected in urine for days, or in some cases for nearly a week, after use.[4] Meconium, as noted at Appellant's trial, can retain substances for months. *See* 3d Dist. Op. ¶ 11. Hair analysis can demonstrate marijuana use for "up to a year."[5] Cocaine use can be detected in hair *indefinitely*.[6] For that duration, a person with Appellant's status would be

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[1] *See* Estatuto Nacional de Estupefacientes (National Narcotics Statute of Colombia), L.30, enero 31, 1986, Art. 2(j) (Colom.) (original text available at https://www.tni.org/files/ley30-1986.pdf) (possession of 1 gram is legal); Peruvian Crim. Code, Art. 299 (2003) (original text available at https://leyes.congreso.gob.pe/Documentos/Leyes/28002.pdf) (possession of 2 grams is legal).

[2] *See* National Conference of State Legislatures, *State Medical Marijuana Laws* (Nov. 10, 2020), available at https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[3] The ability to control or relinquish the drug distinguishes ingestion cases from concealment cases, where a person inserts into the body a container filled with a prohibited substance, from where it can be retrieved or expelled. *See* 3d Dist. Op. at ¶¶ 29-31 (citing cases).

[4] Marilyn A. Huestis et al., *Cocaine and Metabolites Urinary Excretion after Controlled Smoked Administration*, 31 Journal of Analytical Toxicology, no. 8, at 462-68 (Oct. 2007), available at https://academic.oup.com/jat/article/31/8/462/757791 ("The major metabolites, BE and EME, were present … EME could be detected for a longer time, that is, 31 to 164 h.").

[5] Iltaf Shah et al., *A review of bioanalytical techniques for evaluation of cannabis (Marijuana, weed, Hashish) in human hair*, 13 BMC Chemistry, no. 106 (2019), available at https://doi.org/10.1186/s13065-019-0627-2; *see also* Ana Maria Bermejo & María Jesús Tabernero, *Determination of drugs of abuse in hair*, 4 Bioanalysis, no. 17 (2012) ("The main advantage of analyzing hair is its capacity to provide information over a long period of time … and also the fact that it accumulates the principal substance and not just its metabolites."), available at https://www.future-science.com/doi/pdf/10.4155/bio.12.178.

[6] Cocaine metabolites have been detected in hair samples from ancient Peruvian remains dating back to 1000 AD, evidencing the common practice of coca leaf chewing. *See* Angela C.

literally unable to stop continuously reoffending—not because of acts arising from a compulsion or addiction, as discussed in *Powell*, but simply by the condition of existing while her body had not yet eliminated metabolites. This condition would be "chronic rather than acute … it continues after [the action] is complete," and in the view of the majority below, it "subjects the offender to arrest at any time[.]" *Robinson*, 370 U.S. at 662-63. The precise duration would be both unknown to the person, and determined by factors beyond her control: biological factors such as weight or metabolism that could influence the duration of metabolites' presence in her body, and the ability of medical technology to detect those metabolites.

It is critical once again to note that Appellant's acquisition of that status—her use of cocaine—is not the offense at issue. The location of that event is unknown, and venue in Seneca County therefore cannot be based on it. *See* R.C. 2901.12. The Government's theory, rather, provides that once a person acquires the indelible status of drug user, venue is appropriate wherever she may be found, and regardless of any action or inaction occurring in the locale. This approach is incompatible with *Robinson v. California*. *See State v. Robinson*, 254 P.3d 183, 191-92 (Utah 2011) ("[S]imply having the metabolite of a controlled substance in the body is similar to the 'status' of having previously ingested the controlled substance.").

II. Adopting the Government's Theory Could Result in a Chilling Effect for Individuals Seeking Necessary Medical Care

A. The Government's Theory Could Result in Mandatory Reporting of Positive Toxicology Screens

If the Government's theory were to hold—if drug "possession" is contorted to include mere presence of metabolites in the body—then the detection of metabolites would carry

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Springfield et al., *Cocaine and metabolites in the hair of ancient Peruvian coca leaf chewers*, 63 Forensic Science International, nos. 1-3 (1993), *available at* https://www.sciencedirect.com/science/article/abs/pii/037907389390280N.

daunting new significance. It would no longer be vague evidence of a possible past offense of unknown time and place, but plain, possibly conclusive evidence of an offense occurring at the moment and place of screening. The ramifications of such a rule are immense, particularly for the physician-patient relationship.

All Ohioans have a statutory duty to report a felony that they know "has been or is being committed." R.C. 2921.22(A)(1). Physicians are exempt only to the extent that the information in question is privileged. R.C. 2921.22(G)(1). That privilege, however, is not absolute. *E.g.*, *Ward v. Summa Health Sys.*, 128 Ohio St. 3d 212, 2010-Ohio-6275, ¶ 30. Tests conducted in the course of medical treatment are not protected; physicians already may be compelled to testify regarding any test result that "determines the presence or concentration of … a controlled substance … or a metabolite of a controlled substance" in the patient's bodily substances. R.C. 2317.02(B)(1)(c). So long as the physician acquires that information in any setting other than specifically a "bona fide program of treatment or services for drug dependent persons," R.C. 2921.22(G)(5), they are not exempt from the general reporting requirement of 2921.22(A)(1). *See also Ward*, 2010-Ohio-6275, at ¶ 27 ("we must strictly construe the statutory privilege").

The impact of this case could be to expand drastically when such a reporting duty applies. Again, the Government's proposed rule implies that all information needed to charge and convict an individual may be found in a laboratory test result. Possession of such a result, then, could be tantamount to clear knowledge that a felony *is being* committed at the moment of the test, rather than mere suspicion that one *may have been* at some point and in some place. A physician could not only be compelled to testify against a patient, but could even be required to affirmatively report that patient upon completion of a routine screening. *See* R.C. 2921.22(A)(1); *State v. Wardlow*, 20 Ohio App. 3d 1, 3 (1st Dist. 1985) ("R.C. 2921.22 gives a person of ordinary

intelligence fair notice that the conduct of failing to report a serious crime about which a person has knowledge is forbidden by statute"); 3d Dist. Op. at ¶ 2 (the toxicology report in this case led to a conviction under R.C. 2925.11(A), (C)(4)(a), a felony). Medical ethics concerns may be implicated, but would likely be superseded by the reporting requirement. *See Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 401-02, 1999-Ohio-115 ("when a physician's report is made in the manner prescribed by law, he of course has committed no breach of duty toward his patient") (internal citation and quotations omitted); *Kelly v. Accountancy Bd. of Ohio*, 88 Ohio App. 3d 453, 459 (10th Dist. 1993) (R.C. 2921.22 reveals legislative intent "to prohibit recrimination against individuals who make such required disclosures").[7]

B. Mandatory Reporting Would Disrupt the Physician-Patient Privilege, Contrary to This Court's Approach in Precedent and the Interests of Public Health

As this Court has long acknowledged, physician-patient privilege operates within a careful balance. The privilege's purpose is "to encourage patients to make a full disclosure of their symptoms and condition to their physicians without fear that such matters will later become public." *State v. Antill*, 176 Ohio St. 61, 65 (1964). Against that weighs "the interest of the public in detecting crimes in order to protect society." *Id.* After decades of courts' attempts to weigh these competing policies *ad hoc* under the balancing test set in *Antill*, this Court clarified that the judiciary may not create its own public-policy limitations on privilege unless forced to resolve conflicting legislation. *State v. Smorgala*, 50 Ohio St. 3d 222, 224, syl. ¶ 1 (1990); *see also State v. Jones*, 90 Ohio St. 3d 403, 409 (2000) (while judicially-created policies could not trump legislation, courts could still resolve conflicting statutes using *Antill*'s inquiry).

[7] Employers, athletic associations, or any other entity or person who conducts routine screenings could similarly be required to report, again subject to the "bona fide program of treatment or services for drug dependent persons" exception of R.C. 2921.22(G)(5).

Smorgala withdrew Ohio courts from the business of limiting physician-patient privilege on the basis of public policy, at least where such limitations are not clearly grounded in legislation. *See State v. Gonzalez*, 154 Ohio App. 3d 9, 2003-Ohio-4421, ¶¶ 79-85 (1st Dist.) (discussing the impact of *Smorgala* and *Jones*). But this case threatens to upend that principle of restraint by introducing a stark new limitation on patients' ability to seek medical treatment, skewing the balance described in *Antill* against patient privacy. Such a limitation would be a purely judicial construct contrary to legislative policy. The General Assembly designed the physician-patient privilege "to create an atmosphere of confidentiality" and "encourage the patient to be completely candid with his or her physician, thus enabling more complete treatment." *Ward v. Summa Health Sys.*, 128 Ohio St. 3d 212, 2010-Ohio-6275, ¶ 24 (internal citation omitted). Tests revealing the presence of controlled substances are not privileged, but also not currently subject to mandatory reporting; in practice, if a physician is called to testify, the "details … have already been reported, [and] the only purpose that sustaining the privilege can now serve is to obstruct the course of justice." *Jones*, 90 Ohio St. 3d at 409. Requiring the physician to take the initiative to report a positive test is an enormous imposition on the physician-patient relationship.

The Government's preferred outcome here would risk a powerful disincentive not only to patients' candor in words, but even to objective medical assessments that could raise the specter of a reporting requirement. *Cf. Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (contrasted with a psychotherapy relationship, "[t]reatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination … and the results of diagnostic tests"). A person in Appellant's position might elect not to have her newborn tested. A pregnant mother with an at-risk pregnancy might choose to forgo necessary prenatal care and instead deliver her

child at home. A patient in kidney failure may decline a blood screen before life-saving dialysis. Physicians could no longer use toxicology screens as a routine tool of differential diagnosis, to exclude potential causes for a particular condition. Such outcomes surely are not consistent with any legislative intent; if they were, the legislature would have said so.

CONCLUSION

For the foregoing reasons, Amicus Curiae the American Civil Liberties Union of Ohio urges this Court to reverse the decision of the Court of Appeals for the Third Appellate District of Ohio, Seneca County, in the matter of *State v. Foreman*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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