No. 06-3108

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JANE ROE,

Plaintiff-Appellee,

v.

LARRY CRAWFORD, Director of the
Missouri Department of Corrections, *et al*.,

Defendants-Appellants.

On Appeal from the Western District of Missouri, No. 05-04333

BRIEF OF *AMICI CURIAE* SENATOR CHUCK GROSS AND SENATOR DELBERT SCOTT IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE WESTERN DISTRICT OF MISSOURI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Affirming the State's compelling interests, *Amici* Senators Chuck Gross and Delbert Scott support Defendants' policy prohibiting transportation of pregnant inmates for elective abortions. In addition to supporting the State's penological interests in preserving and efficiently utilizing prison security, staff, and funds, *Amici* affirm the State's valid and compelling interests in protecting the life and health of women and unborn children, as outlined in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Furthermore, as Senators, *Amici* affirm the State's right to establish policies and regulations that support those interests. *Amici* hold that because an elective abortion has competing risks, it cannot constitute "serious medical need."

Amicus Senator Chuck Gross represents the 23rd District and is Chair of the Senate Appropriations Committee, the responsibility of which is to oversee the state budget – including those penological costs involved in transporting incarcerated women for abortions. Senator Gross was elected to the Missouri Senate in 2000 and 2004 and was a member of the Missouri House of Representatives from 1992 to 2000. Representing the 28th District,

[1] According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief.

Amicus Senator Delbert Scott was elected to the Missouri Senate in 2002 and is the Majority Caucus Secretary. He was a member of the Missouri House of Representatives from 1985 until 2000.

In light of the State's compelling interests, *Amici* urge this court to reverse the judgment of the Western District of Missouri.

SUMMARY OF THE ARGUMENT

In *Estelle v. Gamble*, the United States Supreme Court set forth the standard to be used in determining whether, by denying certain medical treatments to incarcerated persons, prison authorities violate the Eighth Amendment's "cruel and unusual punishment clause." In order to prevail on a claim, a plaintiff inmate must demonstrate 1) that a condition constitutes "serious medical need" and 2) that by failing to treat that condition or by treating it inadequately, the prison authority's actions rise to the level of "deliberate indifference."

In the case at hand, the district court both misinterpreted the Supreme Court's decision in *Estelle* and ignored relevant case law applying *Estelle* to abortion issues. The district court relied upon the outdated and internally contradictory decision in *Monmouth County Correctional Institutional Inmates v. Lanzaro* and failed to consider or even mention the Circuit split created by the Fifth Circuit's decision in *Victoria W. v. Larpenter*. Moreover, neither *Monmouth* nor the district court's decision complies with long-standing Supreme Court precedent. However, when Supreme Court jurisprudence and *Victoria W.* are properly considered, it is clear that elective abortions do not constitute "serious medical need" and that the state's policy of refusing to transport women for elective abortions does not

rise to the level of "deliberate indifference." Further support for this conclusion is found in studies demonstrating that women choosing abortion do not choose elective abortions for medical purposes.

ARGUMENT

Among many other erroneous conclusions, the Western District of Missouri ruled that Defendant's policy refusing to transport inmates for elective abortions violates the Eighth Amendment's "cruel and unusual punishment" clause[2] because non-therapeutic, or *elective*, abortions constitute "serious medical need." *Roe v. Crawford*, 2006 U.S. Dist. LEXIS 49099, **28-31 (W.D. Mo. July 18, 2006). In reaching this conclusion, the district court ignored relevant case law and misapplied the case law it did consider. The court also failed to consider the fact that women choosing abortion do not consider elective abortions a "serious medical need."

I. THE DISTRICT COURT IGNORED RELEVANT CASE LAW WHEN IT DECIDED PLAINTIFF'S EIGHTH AMENDMENT CLAIM

The United States Supreme Court has never ruled on whether the Eighth Amendment's "cruel and unusual punishment" clause includes

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

denying elective abortions for incarcerated women.[3] In fact, relatively few lower courts have considered the issue.[4] Yet this lack of case law makes the district court's omission of relevant decisions in its "analysis"[5] even more glaring.

Because the district court failed to discuss relevant case law, an examination of the Supreme Court's use of the "deliberate indifference to serious medical needs" standard, along with a discussion of relevant case law dealing with abortion and the Eighth Amendment, is in order.

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[3] Neither has the Supreme Court ruled that the Fourteenth Amendment "right" to abortion survives incarceration.

[4] *See, e.g.*, *Gibson v. Matthews*, 926 F.2d 532, 535 (6th Cir. 1991) (stating that at the time of defendants' actions, there were no reported cases involving abortion rights of prisoners); *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 594 (E.D. La. 2002) (*Victoria W. II*) (noting that neither the Supreme Court nor the Fifth Circuit had ever addressed the extent to which the government can regulate abortion in the context of incarceration); *id*. at 600 ("[N]either the United States Supreme Court nor the Fifth Circuit have found abortion to be a serious medical need."); *Victoria W. v. Larpenter*, 2001 U.S. Dist. LEXIS 3044, *22 (E.D. La. March 16, 2001) (*Victoria W. I*) ("[T]here is no *jurisprudence constante*, no binding precedent, nor even a significant body of law addressing the issue of whether abortion is a serious medical need under *Estelle*."); *Doe v. Barron*, 92 F. Supp. 2d 694, 696 (S.D. Oh. 1999) (stating that neither the Supreme Court nor the Sixth Circuit had addressed the issue whether a state prison can refuse access to abortion services).

[5] Rather than examine and analyze the issue, the district court simply applied the Third Circuit's holding in *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

A. The United States Supreme Court Established the Controlling Standard: *Estelle v. Gamble*

The "deliberate indifference to serious medical needs" standard[6] utilized by the district court arose out of the case *Estelle v. Gamble*, decided by the Supreme Court in 1976. 429 U.S. 97 (1976).[7] In discussing the Eighth Amendment, the Court stated,

> The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency, against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are

[6] At the outset, it must be noted that "serious medical need" for purposes of the Eighth Amendment is distinguished from "medical need" or "medical necessity" under the Supreme Court's abortion jurisprudence. Under Eighth Amendment law, "serious medical need" remains strictly medical in nature and includes conditions such as heart attacks and broken bones. In abortion law, the terms "medically necessary" and "health" have become terms of art with broad definitions unique to abortion law. A "medically necessary" abortion is whatever an abortion provider, in his or her subjective judgment, determines it to be. "Health risk," in abortion law, has come to mean the potential for exposure to the chance of a loss of "well-being" under *Doe v. Bolton*, 410 U.S. 179 (1973). *See* American Association of Pro Life Obstetricians and Gynecologists et al., Brief of *Amici Curiae* in Support of Petitioner, *Gonzales v. Carhart*, No. 05-380 (U.S. 2006), at 3-6. There is no basis in law for these terms of art to be applied to Eighth Amendment considerations. In addition, because such terms of art contradict *Casey*, this Court should ask more precisely whether there is substantial, reliable evidence that an abortion procedure is necessary to successfully treat any maternal medical condition considered "serious" under Eighth Amendment jurisprudence. Herein, the phrase "medically necessary" refers to such a standard. *See id*.

[7] While not an abortion case, *Estelle* laid the foundation for each of the abortion cases subsequently discussing Eighth Amendment rights.

> incompatible with "the evolving standards of decency that mark the progress of a maturing society," or which "involve the unnecessary and wanton infliction of pain."

Id. at 103 (citations omitted).

The Court then concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Id*. at 104 (citation omitted). The Court then stated, "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id*. at 106. Hence, the Court created a two-prong standard: 1) deliberate indifference and 2) serious medical need.[8]

The examples given by the court shed light on the types of conditions constituting "serious medical need." Discussing instances of indifference

[8] "If either of the two elements, deliberate indifference or serious medical need, necessary to invoke *Estelle* is absent, plaintiff's action fails to state a cognizable claim." *Bryant v. Maffucci*, 729 F. Supp. 319, 322 n.3 (S.D.N.Y. 1990), *aff'd*, 923 F.2d 979 (2nd Cir. 1991). In *Bryant*, the court explained that a similar test applies for establishing a violation of other constitutional rights, including the right to privacy, and that the inquiry into defendants' actions is identical. *Id*. at 322. Thus, while this brief deals specifically with the Plaintiff's Eighth Amendment claim, it applies with equal force to Plaintiff's Fourteenth Amendment claim and arguments.

manifested by prison doctors in their response to prisoners' needs, the court listed cases involving the following serious medical needs:

- Throwing away a prisoner's ear and "stitching the stump" because it was the "easier and less efficacious treatment;"
- Injecting penicillin with the knowledge that the prisoner was allergic to the drug, and then refusing to treat the allergic reaction;
- The refusal of a paramedic to provide treatment;
- Refusing to administer a prescribed pain killer, rendering a leg surgery unsuccessful by requiring a prisoner to stand despite contrary instructions of the surgeon.

Id. at 104 n.10 (citations omitted).

The Court then cited these additional examples of deliberate indifference manifested by prison guards in intentionally denying or delaying access to medical care:

- Denied treatment for a bleeding ulcer;
- Delayed treatment after an automobile accident, leaving the prisoner with alleged permanent brain damage;
- Failure to meet minimum medical needs of a prisoner with terminal palate and throat cancer;
- Failure to treat a form of tuberculosis;
- Failure to treat a heart condition;
- Refusing medical care for 24 hours after a prisoner broke his neck.

Id. at 105 n.11 (citations omitted).

Finally, the Court cited the following as examples of intentionally interfering with prescribed treatment:

- Refusing medical care and forcing a prisoner to work after a doctor concluded he needed an operation for his injured hand;
- Forcing a prisoner to do heavy manual labor in violation of a medical restriction and refusing medical treatment for the prisoner's heart condition;
- Refusing authorized medications for diabetes, diabetic retinopathy, and high blood pressure.

Id. at 105 n.12 (citations omitted).

The Supreme Court also indicated that the determination of whether a treatment or technique is indicated is a matter for medical judgment. The court concluded that the method at issue – an x-ray – was a "classic example of a matter for medical judgment." *Id*. at 107.

While *Estelle* did not address abortion, the following cases have used the *Estelle* two-prong standard in evaluating prison policies restricting abortion access.

B. The Third Circuit Misapplied *Estelle*: *Monmouth County Correctional Institutional Inmates v. Lanzaro*

In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the plaintiff prisoners filed suit challenging the adequacy of healthcare services in the institution. 834 F.2d 326. Specifically, the institution

maintained a policy of providing abortions only when a medical emergency presented a life-threatening situation.[9] *Id*. at 328.

In its analysis, the Third Circuit recognized that "some limitation on very significant rights is justified in the prison context." *Id*. at 333. In examining the lower court opinion, the Circuit stated that the denial of services necessary to exercise a woman's "right" to choose abortion results in a loss of that "right" altogether. *Id*. at 345. Thus, the Circuit theorized, abortion cannot be considered "elective."[10] *Id*. (quoting *Derrickson v. Keve*, 390 F. Supp. 905, 907 (D. Del. 1975)). The Circuit added that a medical need is "serious" if it is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Id*. at 347 (quoting *Pace v. Fauver*, 479 F. Supp. 456, 458 (D. N.J. 1979)). Seriousness may also be determined "by reference to the effect of denying the particular treatment." *Id*. For example, where denial or delay of treatment "causes an inmate to

[9] During litigation, the institution did modify its policy to permit "medically necessary" abortions, including those endangering health as well as life. *Monmouth*, 834 F.2d at 328 n.4.

[10] This holding is directly contrary to *Harris v. McRae*, which holds that states can distinguish between medical procedures. 448 U.S. 297, 325 (1980).

suffer a life-long handicap or permanent loss, the medical need is considered serious." *Id.*

Yet then the Circuit determined that "the relevant medical care is that necessary to effectuate the inmates' *choices* to terminate their pregnancies," leading to the Circuit's conclusory statements that the plaintiff inmates had demonstrated the seriousness of the requested abortions and that denying abortion-related services serves no legitimate penological interest. *Id*. at 348 (emphasis added). Thus, rather than focus on the case law it previously cited concerning serious medical need, the Circuit left it to the inmates' "choices" to determine if medical need was serious. In fact, the Circuit stated that "[c]haracterization of the treatment necessary for the safe termination of an inmate's pregnancy as 'elective' is of little or no consequence in the context of the *Estelle* 'serious medical needs' formulation." *Id*. at 349. Finally, the Circuit went on to broadly conclude that, "in the absence of alternative methods of funding, the County must assume the cost of providing its inmates with needed medical care." *Id*. at 351.

C. The Fifth Circuit Correctly Applied *Estelle*: *Victoria W. v. Larpenter*

More than fifteen years after the Third Circuit's decision in Monmouth – and more than a decade after the Supreme Court's decision in *Planned Parenthood v. Casey* – the Fifth Circuit had the opportunity to

consider a similar prison restriction in *Victoria W. v. Larpenter*. 369 F.3d 475 (5th Cir. 2004) (*Victoria W. III*).[11] Prison policy required that inmates obtain a court order authorizing non-emergency, elective treatments, including abortions. *Victoria W. I*, 2001 U.S. Dist. LEXIS 3044 at **3-4. The Fifth Circuit concluded that a policy requiring judicial approval of elective medical procedures is reasonably related to legitimate penological interests. *Victoria W. III*, 396 F.3d at 485.

In direct contradiction to the Third Circuit, the Fifth Circuit determined that there is a distinct difference between required medical care and elective procedures – including elective abortions. *Id*. at 486-87. The Fifth Circuit held, "while an abortion is time-sensitive and unique in its constitutional protection, ***a non-therapeutic abortion is not a medical emergency***…. A woman's desire for a non-therapeutic abortion does not fit this category…. The constitutional right to choose to abort one's pregnancy does not necessarily categorize it as an emergency." *Id*. at 486 n.52. *See also Victoria W. II*, 205 F. Supp. 2d at 597 n.34 (stating that operation of the Eighth Amendment does not require that incarcerated citizens freely obtain non-medically necessary elective procedures and stating that the Eighth

[11] The lower court originally considered the case in *Victoria W. I* and *Victoria W. II*.

Amendment does not require prisons to provide elective abortions); *Victoria W. I*, 2001 U.S. Dist. LEXIS 3044 at *23 ("[T]his Court simply does not find that abortion is a *clearly established* serious medical need.") (emphasis in the original).

Because the Fifth Circuit affirmed the lower court's opinion in *Victoria W. II*, that lower court opinion also provides insight into the alleged "serious medical need" of elective abortions. After first examining what a state is not obligated to provide,[12] the lower court concluded the following:

> Considering the entire body of abortion jurisprudence from the High Court, all cases decided outside of the prison context where one would expect the right's scope to be at its broadest, it is resoundingly clear that the nature of the abortion right, as held by the United States Supreme Court, is one of protecting a woman's freedom of choice – it does not translate into an

[12] The state is under no duty to provide, fund, or encourage abortion. *Victoria W. II*, 205 F. Supp. 2d at 592 (citing *Maher v. Roe*, 432 U.S. 464 (1977) (holding that the "government has no duty to fund abortions in order to facilitate an indigent woman's ability to obtain an abortion, even where the state chooses to fund pro-life choices"); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that "laws strictly forbidding the use of public funding to pay for abortions are not unconstitutional"); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that "the government can permissibly condition receipt of federal funding for services related to childbirth on the state's abstention from facilitating abortions in any way, including counseling and referral); *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989) (holding that the "state can validly ban any public employee within the scope of his employment from performing or assisting in an abortion, and preclude the use of public facilities for such purposes); *H.L. v. Matheson*, 450 U.S. 398 (1981) ("The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions.")).

> affirmative constitutional obligation on the part of the government to facilitate abortions for its citizens.

Victoria W. II, 205 F. Supp. 2d at 592. Because it is "well-accepted" that imprisonment brings about the "necessary curtailment of many constitutional rights," federal courts must accord a certain level of deference to prison authorities. *Id*. at 592 (citing *Turner v. Safley*, 482 U.S 78, 85 (1987).

In balancing the rights of inmates with the interests of prison authorities in security and proper prison administration, the Supreme Court has found that "even the most sacred of our fundamental constitutional rights are subject to some amount of restriction in the prison context," including the right to access the courts, First Amendment rights, inmate to inmate correspondence, search and seizure rights, and family life and reproductive rights. *Id.* at 594 (citations omitted). As the Fifth Circuit affirmed, the lower court found that inmate security is "unarguably" a valid penological concern, especially when a prisoner desires a medical procedure that is only available offsite, is completely elective, and is unnecessitated by medical concerns. *Id*. at 594-95 (citing the Supreme Court in *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).[13]

[13] The lower court also found that accommodating an elective abortion request would "unarguably" have an effect on the prison guards and prison

In specifically addressing the Eighth Amendment issue and noting that, "[a]t its heart, the Eighth Amendment … proscribes 'physically barbarous punishments,'" the lower court gave the following examples of "serious medical needs":

- Potentially life-threatening decubitus ulcers on a paraplegic;
- A broken jaw;
- A herniated disc requiring corrective surgery;
- Coronary heart disease;
- Risk of suicide; and
- Heart attack.

Id. at 600 (citations omitted).[14] In light of these examples, the court concluded that a non-therapeutic abortion sought for financial and emotional reasons is not a serious medical need for purposes of the Eighth Amendment, stating the following:

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resources generally. *Victoria W. II*, 205 F. Supp. 2d at 595. Because one or two guards must travel with an inmate for an abortion, a "crucial resource is affected." *Id*. *See also id*. at 597 (stating that prison authorities have a valid penological interest in minimizing instances in which inmates are transported for non-medically indicated procedures, "an aspect of security that the *Monmouth* court did not consider").

[14] Examples given by the court in *Victoria W. I* included heart attack symptoms, hand injuries that could result in permanent disability, and diagnosed need for prescribed psychotropic medication. *Victoria W. I*., 2001 U.S. Dist. LEXIS 3044 at *20.

> An elective abortion sought for non-medical reasons … is simply lacking in similarity and intensity to the other medical conditions that have been found to be serious medical needs under the Eighth Amendment.

Id. at 601. In other words, an elective abortion does not compare to the "egregious treatment that the Eighth Amendment proscribes." *Id*. Rather, if an abortion is necessary to save a mother's life, then it rises to the level of "serious medical need" and is no longer considered "elective." *Id*.

D. Other related decisions denied relief to plaintiff inmates

As stated in *Victoria W. II*, "[a]ll of the remaining few cases addressing access to abortion in prison denied relief to plaintiff for various reasons." *Id.* at 596 n.30.[15] In *Gibson v. Matthews*, the Sixth Circuit refers to the *Monmouth* issue as "a novel constitutional decision." 926 F.2d at 535.[16] Rather than follow *Monmouth*, the Sixth Circuit stated that "[t]here is no indication in the holding or even language of any case prior to *Monmouth* that failure to arrange an abortion would be considered 'deliberate indifference to serious medical needs'" under *Estelle*. *Id*. at 536.

[15] In *Victoria W. I*, the court stated that there was no clearly established law requiring prisons to ensure that incarcerated women receive non-therapeutic abortions. *Id.* at *16.

[16] Acknowledging that a prisoner does not lose all constitutional rights, the Sixth Circuit stated that "a large number of rights are significantly curtailed." *Gibson*, 926 F.2d at 535-36.

In *Bryant v. Maffucci*, the lower court granted summary judgment in favor of defendants and against the plaintiff inmate. 729 F. Supp. 319, *aff'd*, 923 F.2d 979. In its discussion, the court highlighted the following examples of serious medical need and wanton disregard:

- Allowing a prisoner to "lay in her prison cell, large with child and suffering tortuous cramping and vaginal bleeding;"
- Refusing to suture a prisoner's chin and purposely failing to record the prisoner's wound;
- Delaying for two years to arrange surgery to correct broken pins in a prisoner's hip.

Id. at 323 (citations omitted).

While the Southern District of Ohio has fallaciously adopted *Monmouth* as "precedent," its decisions are of little value in evaluating this Plaintiff's Eighth Amendment claim, as that lower court has not provided analysis for its decisions. *See Roe v. Leis*, 2001 U.S. Dist. LEXIS 4348, *10 (S.D. Oh. Jan. 10, 2001); *Barron*, 92 F. Supp. 2d at 696; *see also Victoria W. II*, 205 F. Supp. 2d at 596 n.30 ("However, in *Doe*, the district court simply adopted *Monmouth* without any analysis in the process of granting plaintiff a temporary restraining order."). Moreover, those decisions run contrary to the Sixth Circuit's treatment of *Monmouth* in *Gibson*.[17]

[17] *See infra* this section.

II. THE DISTRICT COURT ERRED BY FOLLOWING *MONMOUTH* AND IGNORING *VICTORIA W.'S* CONCLUSION THAT ELECTIVE ABORTIONS DO NOT CONSTITUTE "SERIOUS MEDICAL NEED"

A. *Monmouth* is not only internally flawed, but it contradicts established Supreme Court precedent

It is significant that, contrary to the decision in *Victoria W.*, *Monmouth* was decided prior to the Supreme Court's decision in *Planned Parenthood v. Casey*. Thus, the Fifth Circuit in *Victoria W.* is more persuasive, as it benefited from the Supreme Court's analysis in *Casey*, which affirmed the state's interests in preventing and restricting abortion.[18] The Third Circuit's complete disregard for states' interests demonstrates the absence of these principles in *Monmouth*. *See Victoria W. II*, 205 F. Supp. 2d at 598 (stating that the *Monmouth* decision is unpersuasive because made prior to *Casey* and the "undue burden" test).

[18] *See, e.g*, *Casey*, 505 U.S. at 846 (affirming the principle that states have "legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus"); *id*. at 869 (stating that a woman's liberty "is not so unlimited" that the state cannot show its concern for the unborn child from the outset of the pregnancy); *id*. at 871 (stating that states' interests had "been given too little acknowledgement and implementation" in cases after *Roe v. Wade*); *id*. at 875 (stating that some post-*Roe* cases went too far in striking down restrictions, and that such treatment is "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy").

In addition to this hindrance, the *Monmouth* decision suffers from other fatal flaws. First, the Third Circuit confuses abortion jurisprudence with the *Estelle* "deliberate indifference" and "serious medical need" standard. In discussing the Eighth Amendment claims, the Circuit utilizes Fourteenth Amendment arguments to find that abortion constitutes serious medical need.[19] This is best seen when the Third Circuit's circular reasoning is compared to the examples set forth in *Estelle*. In essence, the Circuit assumes that elective abortions constitute serious medical need "merely because abortion is a medical procedure." *Monmouth*, 834 F.2d at 353 (Mansmann, J., concurring).

Obviously, a conclusion that a medical treatment constitutes "serious medical need" because it is a medical treatment begs the question and completely eviscerates the Supreme Court's "*serious* medical *need*" standard.[20] The Third Circuit concludes that characterization of an abortion as "elective" or "therapeutic" is "of little or no consequence in the context of *Estelle*," yet an elective abortion does not compare to the examples provided

[19] The concurring opinion in *Monmouth* suggests that the majority "bootstrap[ped] the liberty interest protected by the Fourteenth Amendment into the Eighth." *Monmouth*, 834 F.2d at 355 (Mansmann, J., concurring).

[20] The concurring opinion in *Monmouth* refers to this assumption as a "quantum leap." *Id.* at 353-54 (Mansmann, J., concurring). It also refers to the majority opinion as "rhetoric." *Id*. at 352.

in *Estelle*. For example, denial of a non-emergency, non-therapeutic abortion does not rise to the level of denying treatment for tuberculosis, cancer, or a broken neck. *See Estelle*, 429 U.S. at 105 n.11. Furthermore, the Circuit's decision leaves room for an inmate to *choose* what treatment she desires and contradicts longstanding Supreme Court precedent allowing states to differentiate abortion from other procedures. *See infra* this section (discussing *Harris v. McRae*) and Part I.B.

Perhaps the most glaring flaw in *Monmouth* is that it provides greater access to abortion for incarcerated women than the Supreme Court has provided for free women. "[O]ne of the most well-settled principles of abortion jurisprudence is that the state has no obligation to fund, procure, or facilitate abortions for its citizens." *Victoria W. II*, 205 F. Supp. 2d at 598. In *Maher v. Roe*, the Court upheld a Connecticut prohibition of the use of public funds for abortions, with the exception of those that are "medically necessary." 432 U.S. 464 (1977). The Court reasoned that the state is free to use its power of funding to encourage childbirth over abortion. *Id*. In the companion case *Beal v. Doe*, the Court upheld a Pennsylvania statute that restricted the use of Medicaid funds for abortion to those that are "medically necessary," rejecting a challenge that the restriction violated Title XIX of the Social Security Act. 432 U.S. 438 (1977). In a third companion case,

Poelker v. Doe, the Court upheld a St. Louis policy prohibiting the performance of abortion in public hospitals. 432 U.S. 519 (1977).

Then in 1980, the Supreme Court upheld the Hyde Amendment, which restricts federal funding of Medicaid abortions to cases of life endangerment.[21] *Harris v. McRae*, 448 U.S. 297 (1980). The Court also held that states participating in the Medicaid program are not required by Title XIX of the Social Security Act to fund medically necessary abortions for which there is no federal reimbursement under the Hyde amendment, reasoning that a state government could distinguish between abortion and "other medical procedures" because "abortion is inherently different" and that "no other procedure involves the purposeful termination of potential life." *Id*. at 325. Thus, *Monmouth's* holding that elective abortions constitute serious medical need simply because of the medical nature of abortion is completely at odds with *Harris v. McRae*, in that it neither allows a distinction between abortion and other procedures nor between medically necessary abortions and elective abortions.

Likewise, in *Williams v. Zbaraz*, the Court upheld an Illinois statute prohibiting the use of state funds for abortions, except when necessary to save the woman's life. 448 U.S. 358 (1980). Nine years later, the Court

[21] Since 1994, rape and incest have been included as exceptions.

upheld a Missouri statute which prohibited the use of public facilities or public personnel from performing abortions. *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989). Finally, in *Rust v. Sullivan*, the Court upheld federal regulations prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion. 500 U.S. 173 (1991).

Monmouth flies in the face of these Supreme Court decisions, imposing an affirmative duty on the government to provide abortions. In fact, the Third Circuit held that, in the absence of other funds, a government must assume the cost of providing inmates with abortions. *Monmouth*, 834 F.2d at 351. In other words, Monmouth completely disregards Supreme Court jurisprudence. As stated by the court in *Victoria W. II*,

> [P]erhaps the most troubling aspect of the *Monmouth* decision, is its imposition of an affirmative duty on the part of the government to preserve inviolate the abortion right during incarceration – ***a stance wholly at odds with the jurisprudence*** interpreting prisoner access to virtually every other right guaranteed by the Constitution. The gist of the *Monmouth* decision is that incarceration serves to broaden the right to abortion rather than curtail it any way [sic] – ***a result completely opposite from the norm***. Under Monmouth, inmates are given far greater protections of the abortion right in prison than they would have been entitled to in the free world.

Victoria W. II, 205 F. Supp. 2d at 597, *aff'd*, 369 F.3d 475 (emphasis added).[22] Under *Monmouth*, inmates are granted greater access to abortion than free women.

B. The district court's opinion suffers from the same fatal flaws

By relying solely on *Monmouth* – the only court decision to find such a prison restriction unconstitutional – the district court's opinion in this case suffers from the same fatal flaws. Not only does the district court eviscerate the "*serious* medical *need*" standard,[23] but it also disregards decades of Supreme Court jurisprudence establishing that states do not have an affirmative duty to provide or fund abortions that are not "medically necessary."

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[22] In fact, *Monmouth* elevates the abortion right above all other rights which have been denied to inmates, including familial and reproductive rights such as breastfeeding, conjugal visits, and, as held in the Eighth Circuit, procreation. *Hernandez v. Coughlin*, 18 F.3d 133 (2nd Cir. 1994); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990); *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986). In *Goodwin*, this Circuit affirmed a lower court holding that the fundamental right to procreate does not survive incarceration. *See generally Goodwin*, 908 F.2d 1395. Similarly, the court in *Victoria W. II* stated that an assumption that the abortion "right" survives incarceration at all is a "premise in and of itself debatable under the available jurisprudence." *Victoria W. II.*, 205 F. Supp. 2d at 595.

[23] In addition, the district court appears to collapse the two-prong analysis of *Estelle* into one prong, determining that the policy demonstrates deliberate indifference *because* there is a serious medical need, rather than *in addition to* a serious medical need.

In addition, the district court does not even mention – let alone discuss or analyze – the Fifth Circuit's decision in *Victoria W*. The district court should have at least mentioned the Circuit split on this issue. Instead, it blindly followed *Monmouth*,[24] while ignoring *Victoria W*., which not only complies with Supreme Court precedent regarding state funding and provision of abortions, but was also decided after *Casey*, affording states' interests proper weight.

C. Missouri's policy survives *Estelle's* two-prong standard

The Missouri prison policy falls squarely in line with Supreme Court jurisprudence and the Fifth Circuit's decision in *Victoria W*. Because abortions will be arranged "if indicated due to threat to the mother's life or health, and if approved by the Medical Director in consultation with the Regional Medical Director,"[25] the policy gives heed to the Supreme Court's jurisprudence regarding the provision of "medically necessary" abortions. The decision of the necessity of an abortion is left to physicians – "a classic example of a matter for medical judgment." *Estelle*, 429 U.S. at 107.

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[24] There was not "a significant enough body of law to clearly establish abortion as a serious medical need under *Estelle*." *Victoria W. I*, 2001 U.S. Dist. LEXIS 3044 at *24.

[25] *See* MO. DEP'T OF CORR. INST. SERV. POLICY & PROCEDURE IS11-58, III.C.

Rather than demonstrate "deliberate indifference," this policy ensures that prisons authorities attend to the "serious medical needs" of the incarcerated women.[26]

Plaintiff has not and cannot demonstrate deliberate indifference. "[I]t is *incarceration* that impinges upon the choice to abort a pregnancy" – *not* the prison policy. *Victoria W. II*, 205 F. Supp. 2d at 596 (quoting *Monmouth*, 834 F.2d at 352 (Mansmann, J., concurring) (emphasis added)). In addition, when a woman is pregnant, it is the pregnancy that constitutes the medical need, and not the treatment option.

Thus, the focus of both *Monmouth* and the district court was incorrect. First, it is not the State that has placed obstacles before inmates trying to pursue certain rights. Rather, it is the inherent nature of incarceration which, in accordance with long-standing precedent, legitimately brings about the "necessary curtailment" of many constitutional rights.[27] Moreover, those decisions confuse medical need with medical treatment. An inmate's pregnancy is a need; an abortion is merely one form of "treatment." Inmates

[26] Contrary to the Fifth Circuit's decision in *Victoria W.* that the underlying penological interests justify restricting abortion, the district court also wrongfully dismissed Defendants' penological interests.

[27] "Some curtailment of even the most fundamental of rights is valid in the prison context …." *Victoria W. II*, 205 F. Supp. 2d at 596.

do not have a right to dictate what form of treatment they receive. Again, such a decision is a "classic example of a matter for medical judgment," which is exactly what the State of Missouri requires. A "medically necessary abortion" – as a treatment – will be provided when the Medical Director and Regional Medical Director indicate an abortion is indicated due to a threat to the mother's life or health.

Furthermore, refusing to transport inmates for abortions does not offend "the evolving standards of decency that mark the progress of a maturing society" or "involve the unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 102-03. As stated by the concurring opinion in *Monmouth*, "[t]he test of 'cruel and unusual' *is a strict one* which considers whether the infliction *grossly exceeds* a legitimate need for force or violates the standards of contemporary society." *Monmouth*, 834 F.2d at 354 (Mansmann, J., concurring) (emphasis added). *See also Victoria W. III*, 369 F.3d at 489 (noting that "deliberate indifference" is a stringent test). The Supreme Court has recognized "the sensitive and emotional nature of the abortion controversy," "the vigorous opposing views, even among physicians," and "the deep and seemingly absolute convictions that the

subject inspires."[28] *Roe v. Wade*, 410 U.S. 113, 116 (1973). Because the issue is so polarized, the district court could not have concluded that the State's efforts to curtail abortion – efforts stemmed by the State's Supreme Court-affirmed interests – rise to the level of "cruel and unusual punishment."

In addition, when the state refuses to transport a woman for an abortion, she is not left unattended and without care. Rather, the woman receives adequate medical, prenatal, and postnatal care. Because the state provides such medical attention, its actions cannot constitute "deliberate indifference" or "wanton infliction of pain." Refusing to transport women for abortions, while simultaneously providing adequate prenatal and postnatal care, simply does not outrage the conscience of the public.

III. STUDIES DEMONSTRATE THAT WOMEN CHOOSING ABORTION DO NOT CONSIDER ELECTIVE ABORTIONS A "SERIOUS MEDICAL NEED"

In addition to the foregoing legal analysis demonstrating the district court's faulty conclusion, studies reveal that elective abortions cannot be

[28] Indeed, polls confirm that virtually half of all Americans consider abortion to be "murder." JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR (1994). Sociologists James Davison Hunter and Carl Bowman have concluded that "[t]he majority of Americans morally disapprove of the majority of abortions currently performed." *Id*.

considered "serious medical need." In fact, publications by leading abortion advocates – including Physicians for Reproductive Choice and Health (PRCH) and the Guttmacher Institute – reveal that women choose abortion for reasons unrelated to medical issues.

In a 2006 report by PRCH and Guttmacher Institute, the five leading reasons women choose abortion were listed, followed by the percentage of women giving that reason:

- Concern for/responsibility to other individuals – 74%
- Cannot afford a baby now – 73%
- Baby would interfere with school/employment/ability to care for dependents – 69%
- Would be a single parent/having relationship problems – 48%
- Has completed childbearing – 38%.[29]

However, not a single medical reason is listed.

Guttmacher Institute lists the same non-medical reasons and percentages in its 2006 publication *Abortion in Women's Lives*.[30] It further

[29] Physicians for Reproductive Choice & Health & Guttmacher Institute, *An Overview of Abortion in the United States* 13 (2006), available at: http://www.guttmacher.org/presentations/abort_slides.pdf (last visited Oct. 2, 2006).

[30] Guttmacher Institute, *Abortion in Women's Lives* 8 (2006), available at: http://www.guttmacher.org/pubs/2006/05/04/A;WL.pdf (last visited Sept. 21, 2006).

explains that most abortion patients – regardless of age, marital status, income, education, ethnicity, or number of existing children – state that concern or responsibility for someone else is a factor in their decision.[31] Two-thirds of women state that "inability to care for a child or concern for the kind of life they could provide for a child (or another child) was a factor."[32] ***Again, not a single medical reason is discussed.***

In these reports, both PRCH and Guttmacher rely heavily on a 2005 study performed by researchers at the Guttmacher Institute.[33] In addition to the reasons and percentages listed above, the study mentioned that seven percent of women did cite personal health concerns or fetal problems as one reason for choosing abortion.[34] However, each of the following reasons ***weighed more heavily*** for women making the abortion decision:

- Having a baby would dramatically change my life, including:
  - Would interfere with education
  - Would interfere with job/employment/career
  - Have other children or dependents

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[31] *Id*. at 9.

[32] *Id*.

[33] L.B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, PERSPECTIVES ON SEXUAL & REPROD. HEALTH 37(3):110, 113 (2005).

[34] *Id*.

- Can't afford baby now, including:
    - Unmarried
    - Student or planning to study
    - Can't afford a baby and child care
    - Can't afford the basic needs of life
    - Unemployed
    - Can't leave job to take care of a baby
    - Would have to find a new place to live
    - Not enough support from husband or partner
    - Husband or partner is unemployed
    - Currently or temporarily on welfare or public assistance

- Don't want to be a single mother or having relationship problems, including:
    - Not sure about relationship
    - Partner and I can't or don't want to get married
    - Not in a relationship right now
    - Relationship or marriage may break up soon
    - Husband or partner is abusive to me or my children

- Have completed my childbearing

- Not ready for a(nother) child

- Don't want people to know I had sex or got pregnant

- Don't feel mature enough to raise a(nother)child

- Husband or partner wants me to have an abortion.[35]

Furthermore, the study admitted that "[o]nly a small proportion of women cited concerns about their own health" and that these health concerns

[35] *Id*. (Table 2).

included the burden of pregnancy.[36] In fact, a common reason was that women felt "too ill during the pregnancy."[37]

Not much has changed in the last 20 years. In a 1988 study, three-fourths of the women chose abortion because having a baby would interfere with work, school, or other responsibilities.[38] Two-thirds stated they could not afford to have a child, and half indicated they did not want to be a single parent or had relationship problems.[39] Only seven percent choose abortion due to personal health problems.[40] In 1985, the most cited reasons for choosing abortion were unreadiness to parent, lack of financial resources, and absence of a partner.[41]

Simply put, if women do not choose abortion for medical purposes, the courts cannot conclude that elective abortions equate to serious medical

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[36] *Id*. at 117.

[37] *Id*.

[38] A. Torres & J.D. Forrest, *Why Do Women Have Abortions?*, FAMILY PLANNING PERSPECTIVES 20(4):169 (1988).

[39] *Id*.

[40] *Id*. at 176.

[41] B. Faria & L.M. Goodman, *Women and Abortion: Attitudes, Social Networks, Decision-Making*, SOC. WORK & HEALTH CARE 11(1):85-99 (1985).

need. Common-sense application of medical definitions furthers this point. As defined by the University of Maryland Medical Center, "[e]lective abortions are those initiated by personal choice. Therapeutic abortions are those recommended by the health care provider to protect the mother's physical or mental health."[42] According to Tabor's Cyclopedic Medical Dictionary, an "elective therapy" is "a treatment or surgical procedure not requiring immediate attention," and "therapeutic" is defined as "having medicinal or health properties" and "a healing agent."[43]

All of these reasons – Supreme Court and lower court jurisprudence, societal studies, and common sense – dictate that elective abortions do not constitute "serious medical need" for purposes of the Eighth Amendment and that Missouri has not demonstrated "deliberate indifference" in refusing to transport women for elective abortions.

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[42] University of Maryland Medical Center, *Abortion: elective or therapeutic*, available at: http://www.umm.edu/ency/article/001512.htm (last visited Oct. 2, 2006).

[43] TABOR'S CYCLOPEDIC MEDICAL DICTIONARY 672, 2170 (20th ed. 2001).

CONCLUSION

The judgment of the Western District of Missouri should be reversed.

Respectfully submitted,

_____

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October 10, 2006

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