

COPY

IN THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI, )  
)  
PLAINTIFF )  
)  
v. )  
)  
RENNIE T. GIBBS, )  
)  
DEFENDANT. )

CASE #: 2007-0031-CRI

FILED  
NOV 23 2009

*Opalene W. Ableson*  
Circuit Clerk

**MOTION AND BRIEF FOR LEAVE TO FILE BRIEF OF AMICI CURIAE**

Pursuant to Miss. R. App. Pr. 29(a), the National Association of Social Workers, the National Association of Social Workers—Mississippi Chapter, the Mississippi Youth Justice Project, the Mississippi Human Services Agenda, the American Civil Liberties Union of Mississippi, the Mississippi National Organization for Women, the American Academy of Addiction Psychiatry, the Association for Medical Education and Research in Substance Abuse, the National Council on Alcoholism and Drug Dependence, Inc., the Association of Reproductive Health Professionals, the National Association of Nurse Practitioners in Women’s Health, the National Women’s Health Network, the Center for Gender and Justice, the Baron Edward de Rothschild Chemical Dependency Institute, the Black Women’s Health Imperative, and Citizens for Midwifery respectfully move this court for leave to file an *Amicus Curiae* brief in the above-captioned matter.

*Amici Curiae*’s proposed brief provides an overview of scientific and medical information regarding the state of knowledge about the causes of stillbirth in general, the specific research regarding the actual risks of prenatal exposure to cocaine, and the medical consensus concerning the nature of addiction and recovery. No brief currently before the Court provides

such an analysis and without this brief, critically important “matters of fact and law [might] otherwise escape the court’s attention.” Miss. R. App. Pr. 29(a)(4).

*Amici* include Mississippi and national physicians, nurses, counselors, social workers, drug treatment specialists, public health practitioners, advocates for women and children’s health and their professional associations.

*Amicus Curiae* **National Association of Social Workers (“NASW”)** is the world’s largest association of professional social workers with 145,000 members in fifty-six chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. NASW believes that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict. NASW’s policy statement, Alcohol, Tobacco, and Other Drugs, supports “an approach to ATOD [alcohol, tobacco and other drug] problems that emphasizes prevention and treatment” and efforts to “eliminate health disparities that accrue from ATOD problems and discriminatory practices from the criminal justice system.” (NASW, *Social Work Speaks*, 8th ed., 2009).

*Amicus Curiae* **National Association of Social Workers—Mississippi Chapter (“NASW-MS”)** has 877 members and is particularly interested in this case due to its significant local impact.

*Amicus Curiae* **Mississippi Youth Justice Project (“MYJP”)** is a non-profit legal and public policy advocacy organization that works to reform Mississippi’s juvenile and criminal justice systems. MYJP represents individual children in criminal and delinquency matters in both

youth and circuit court. As counsel in the federal class action *Morgan v. Sproat* (No. J75-21(N)), MYJP attorneys represent over 100 court-involved children confined at the Oakley Training School. The organization drafts and lobbies for legislation seeking to improve Mississippi's juvenile and criminal justice systems. MYJP also facilitates family support groups for the parents and guardians of incarcerated and court-involved children and has conducted public education around issues of fairness and equity in the criminal and juvenile justice systems for hundreds of Mississippians throughout the state.

*Amicus Curiae* **Mississippi Human Services Agenda** ("MHSA") is a nonprofit organization that advocates for policies that promote human rights and poverty alleviation. MHSA conducts research and advocacy with an emphasis on welfare, education, and health in Mississippi's communities.

*Amicus Curiae* **American Civil Liberties Union of Mississippi** ("ACLU-MS") defends and protects the constitutional rights of Mississippians across the state through advocacy, education and litigation. One of its main projects involves reforming the state's criminal justice system to fight for more alternatives to incarceration, more rehabilitation services for drug offenses, full restoration of voting rights for people with felony convictions, ending racial profiling as a law enforcement tool and ending the state's mandatory minimum sentencing law. ACLU-MS works to end the over-incarceration of youth in Mississippi's training schools and to end unfair school policies and practices that criminalize students. ACLU-MS is part of a nationwide, non-profit nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution of the United States. The ACLU-MS serves to preserve and extend constitutionally guaranteed rights to all people, but consistently has served those who have historically been denied their rights.

*Amicus Curiae* **Mississippi National Organization for Women** is a chapter of the National Organization for Women (“NOW”). NOW is the largest, most comprehensive women’s advocacy group in the United States. NOW has 500,000 contributing members and 550 chapters in all 50 states and the District of Columbia. Its purpose is to take action to bring women into full participation in society—sharing equal rights, responsibilities and opportunities with men, while living free from discrimination.

*Amicus Curiae* **American Academy of Addiction Psychiatry (“AAAP”)** is an international professional membership organization made up of practicing psychiatrists, university faculty, medical students and other related professionals founded in 1985 with approximately 1,000 members in the United States and around the world. AAAP is devoted to promoting accessibility to the highest quality treatment for all who need it by providing continuing education for addiction professionals, disseminating new information in the field of addiction psychiatry, and encouraging research on the etiology, prevention, identification, and treatment of the addictions. AAAP opposes the prosecution of Regina McKnight based on the belief that instead of promoting prenatal care and treatment, the threat that women’s use of illegal substances can be disclosed to law enforcement for use in criminal prosecutions will likely discourage some pregnant women from seeking prenatal care and treatment of their substance use disorder and negatively impact the confidential psychiatrist-patient relationship.

*Amicus Curiae* **The Association for Medical Education and Research in Substance Abuse (“AMERSA”)** was founded in 1976 by members of the Career Teachers Program, a multidisciplinary health professional faculty development program supported by the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse. AMERSA has since grown to over 300 members representing physicians of several specialties (MD and DO), nurses, social workers, psychologists, pharmacologists, dentists, and other professionals.

AMERSA prides itself on its multidisciplinary and multispecialty membership, and its members benefit from the diversity of perspectives. AMERSA members have been responsible for many important advances in substance abuse education and research. AMERSA members have developed, implemented, and evaluated state-of-the-art curricula, educational programs, and faculty development programs. Our members have developed clinical and research measures for substance abuse services and professional education. They are actively engaged in research related to substance abuse education, clinical service, and prevention.

*Amicus Curiae* **National Council on Alcoholism and Drug Dependence (“NCADD”)**, with its nationwide network of affiliates, provides education, information, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD historically has provided confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. In 1990, the NCADD Board of Directors adopted a policy statement on “Women, Alcohol, Other Drugs and Pregnancy” recommending that “[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services.”

*Amicus Curiae* **Association of Reproductive Health Professionals (“ARHP”)** is a national non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, physician assistants, pharmacists, researchers, and educators, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, legislators, other professionals, and the public at large. ARHP is concerned that the threat of prosecution, conviction, and incarceration will undermine accepted health care standards and will interfere

with the ability of physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women to provide appropriate, quality health care.

*Amicus Curiae* **National Association of Nurse Practitioners in Women's Health** ("NPWH"), formerly National Association of Nurse Practitioners in Reproductive Health, is a professional organization founded in 1980 that represents nurse practitioners who provide care to women in both the primary care setting and in women's health specialty practices. The U.S. Department of Education recognizes NPWH as the designated organization for the accreditation of women's health nurse practitioner programs. NPWH is committed to assuring access of quality health care to women of all ages by nurse practitioners, and to protecting a woman's right to determine the course of her own health care. NPWH programs and publications offer special expertise in reproductive health care and nurse practitioner issues.

*Amicus Curiae* **National Women's Health Network** ("NWHN") improves the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. The Network aspires to a health care system that is guided by social justice and reflects the needs of diverse women. The National Women's Health Network was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN has established core values to guide us in our work as advocates for women's health: (1) We value women's descriptions of their own experiences and believe that health policy should reflect the diversity of women's experiences, (2) we believe that evidence rather than profit should drive the services offered and information that is made available to women to inform their health decision making and practices, (3) we value analysis of science that takes into consideration systems of power and oppression, (4) we believe that the government has an obligation to safeguard the health of all people, (5) all women should have

access to excellent health care and (6) women's normal physiological changes over the lifespan should not be unduly medicalized.

*Amicus Curiae* **Center for Gender and Justice (“CGJ”)** seeks to develop gender-responsive policies and practices for women and girls who are under criminal justice supervision. The Center is committed to research and to the implementation of policies and programs that will encourage positive outcomes for this underserved population.

*Amicus Curiae* **Baron Edward de Rothschild Chemical Dependency Institute (“the Institute”)** has over 35 years of leadership in the field of addiction treatment, first at Beth Israel Medical Center proper, then in 1988 under the name of the Chemical Dependency Institute, and now under its new name. The Institute comprises a variety of clinical programs that care for some 13,000 individuals annually; these programs are provided on an inpatient as well as ambulatory basis, and include both long-term rehabilitation as well as acute intervention. They have served as models for clinicians from around the world for over three decades. The Institute also has an active, highly respected research staff that has published scores of seminal findings in peer-reviewed professional journals. Institute staff members are active participants in international conferences and have played a very strong advocacy role, in America and abroad, for humane policy reform and expansion as well as enhancement of treatment services. The Institute brings its expertise to this Court to explain that punitive government interventions will only deter pregnant substance abusers from obtaining prenatal care and drug treatment and undermine health outcomes for mother and child.

*Amicus Curiae* **Black Women’s Health Imperative** is the only national non-profit organization devoted solely to the physical, mental and spiritual health and well-being of the nation's 19.5 million Black women and girls. The Black Women’s Health Imperative (Imperative) is dedicated to moving health and wellness to the top of the life agenda of every

Black woman, as well as making it a top priority on the nation's policy and research agenda. The organization's aim is to deepen the public's resolve to invest in community-based strategies and participatory research that contribute to Black women and their families leading healthier, longer lives in safe and healthy communities. Founded in 1983, by noted health activist, MacArthur "Genius" and author, Byllye Y. Avery, the Imperative promotes the empowerment of African American women as educated health care consumers and caregivers and is the leading force for the elimination of both racial and gender health disparities for African American women.

*Amicus Curiae Citizens for Midwifery ("CfM")* is a national, non-profit, and consumer-based group that promotes maternal and child health through advocating the Midwives Model of Care and seeks to have these practices recognized as an accepted standard of care for childbearing mothers. In focusing on the normalcy of childbirth and the uniqueness of each childbearing woman and family, this model includes monitoring the physical, psychological, and social well-being of childbearing mothers, providing pregnant women with individualized prenatal care and hands-on assistance during labor and delivery, minimizing technological interventions, and identifying women who require obstetrical attention. As an organization, CfM also provides information on midwifery and childbirth issues, encourages and provides guidance for midwifery advocacy, and represents consumer interests regarding midwifery and maternity care.

Because of their involvement serving and protecting pregnant women and girls, all proposed *amici* have "substantial legitimate interests that will likely be affected by the outcome of this case and . . . will not be protected by those already parties to the case." Miss. R. App. Pr. 29(a)(4).

For the forgoing reasons, *Amici* respectfully request that this Court grant their motion for leave to file an *Amicus Curiae* brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above and foregoing by placing a copy of the same in the United States mail, postage prepaid and addressed to their regular mailing address, as follows:

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This the 19th day of November, 2009.



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STATE OF MISSISSIPPI,

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*Stephanie N. Abinger*  
Circuit Clerk

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**BRIEF OF *AMICI CURIAE*,**  
**NATIONAL ASSOCIATION OF SOCIAL WORKERS,**  
**THE NATIONAL ASSOCIATION OF SOCIAL WORKERS—MISSISSIPPI CHAPTER,**  
**THE MISSISSIPPI YOUTH JUSTICE PROJECT,**  
**THE MISSISSIPPI HUMAN SERVICES AGENDA,**  
**THE AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI,**  
**THE MISSISSIPPI NATIONAL ORGANIZATION FOR WOMEN,**  
**THE AMERICAN ACADEMY OF ADDICTION PSYCHIATRY,**  
**THE ASSOCIATION FOR MEDICAL EDUCATION AND RESEARCH IN**  
**SUBSTANCE ABUSE,**  
**THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC.,**  
**THE ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS,**  
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**HEALTH, THE NATIONAL WOMEN'S HEALTH NETWORK,**  
**THE CENTER FOR GENDER AND JUSTICE,**  
**THE BARON EDWARD DE ROTHSCHILD CHEMICAL DEPENDENCY INSTITUTE,**  
**THE BLACK WOMEN'S HEALTH IMPERATIVE,**  
**AND CITIZENS FOR MIDWIFERY,**  
**IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS.**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

INTERESTS OF AMICI..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

    I. This Prosecution Is Not Substantiated By Science ..... 3

        A. Cocaine Has Not Been Found to Cause Stillbirths ..... 5

        B. The Pathologist’s Conclusions Are Not Supported by Science..... 7

    II. The Prosecution of Ms. Gibbs’ Under the State’s Depraved Heart Murder Statute Will  
        Harm the Health of Mothers and Children ..... 8

        A. This Prosecution Will Deter Drug-Dependent Pregnant Women and Girls from  
            Seeking Health Care ..... 8

        B. This Prosecution Will Deter Pregnant Women and Girls from Sharing Vital  
            Information with their Doctors ..... 10

        C. Prosecuting Drug-Dependant Women and Girls For Suffering A Stillbirth  
            Discourages Women and Girls from Carrying Pregnancies to Term ..... 11

    III. This Prosecution Reflects a Misunderstanding of the Nature of Addiction ..... 12

        A. Addiction Is Not Simply A Voluntary Act that Is Cured by Threats..... 12

        B. Addiction Is A Difficult Medical Condition for Children to Overcome ..... 13

CONCLUSION..... 15

## TABLE OF AUTHORITIES

### Cases

<i>Automobile Workers v. Johnson Controls</i> , 499 U.S. 187, 205 (1991).....	5
<i>Automobile Workers v. Johnson Controls</i> , 886 F.2d 877 (7th Cir. 1989) .....	5
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United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Substance Abuse Treatment Facility Locator.....	13

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## INTERESTS OF AMICI

*Amici* include Mississippi and national physicians, nurses, counselors, social workers, drug treatment specialists, public health practitioners, advocates for women and children's health and their professional associations.<sup>1</sup> These individuals and organizations have recognized expertise in the areas of maternal and neonatal health, and in understanding the effects of drugs and other substances on users, their families and society.

At the outset, it must be noted that each *amicus curiae* is committed to reducing potential drug-related harms at every opportunity. Thus, *amici* do not endorse the non-medicinal use of drugs—including alcohol or tobacco—during pregnancy, by either parent. Nor do *amici* contend that there are no health risks associated with cocaine use during pregnancy. Nonetheless, it is entirely consistent with *amici*'s public health and ethical mandates to bring to this Court's attention the relevant medical and scientific information—none of which supports the prosecution of Ms. Gibbs for murder.

*Amici* join this brief because Ms. Gibbs' prosecution cannot be reconciled with evidence-based, peer-reviewed, medical and scientific research, or with the clear and explicit language of Mississippi law.

## SUMMARY OF ARGUMENT

Rennie Gibbs was only fifteen years old when she became pregnant. She turned sixteen while pregnant, and then, in approximately her 36th week of pregnancy experienced a stillbirth. Ms. Gibbs also had a drug problem. The decision to prosecute her as an adult for homicide because she attempted to continue her pregnancy to term is unsupported by law or public policy. This Court should grant Ms. Gibbs' Motion to Dismiss. To do otherwise would be contrary to the plain language and meaning of the State's depraved heart murder statute, undermine

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<sup>1</sup> A full description of each *amicus curiae* is included in the Motion for Leave to File Brief of *Amicus Curiae*.

legislative intent, usurp the legislative function, require the court to radically rewrite and expand the State's homicide law, and cause considerable fear and confusion among health professionals and their pregnant patients. This prosecution jeopardizes the well-being of women and their children.

*Amici* believe there is a strong societal interest in protecting the health of children. In the view of *amici*, however, such protective instincts are *undermined*, not advanced, by prosecuting pregnant women and girls who experience pregnancy losses that may have been caused by a vast range of conditions, circumstances and actions they may experience during pregnancy. Indeed, the policy of prosecuting pregnant women and girls with drug dependency or other health problems is contrary to law, scientific research, and the consensus judgment of medical practitioners and their professional organizations. Furthermore, given the paucity of treatment available in Mississippi, low income women and children would be particularly vulnerable to punishment if unable to access drug treatment or prenatal care due to barriers of poverty.

This amicus brief underscores the fact that the prosecution of Ms. Gibbs' lacks any legal, medical or scientific foundation. Interpreting Mississippi's depraved heart murder statute to apply to the context of pregnancy will lead to absurd and dangerous public health consequences. Moreover treating an addiction as evidence of a depraved heart lacks foundation in medicine and science.

Such prosecutions deter pregnant women from seeking prenatal care and drug and alcohol treatment. And they create a disincentive for pregnant women who do seek medical care from disclosing important information about drug use to health care providers out of fear that the disclosure will lead to possible criminal sanctions.

Prosecuting women and girls for continuing to term despite a drug addiction encourages them to terminate wanted pregnancies to avoid criminal penalties. The State could not have intended this result when it adopted the homicide statute.

Finally, this prosecution reflects a basic misunderstanding of the nature of drug dependency. The medical community has long recognized that addiction is not a crime but a medical condition that can respond successfully to treatment.

## ARGUMENT

### I. This Prosecution Is Not Substantiated By Science

The causes of stillbirth are often entirely unknown. Stillbirths affect tens of thousands of women in the United States each year.<sup>2</sup> In Mississippi in 2008, there were as many as 470 reported cases of stillbirths, 89 of which were to girls under the age of 19.<sup>3</sup> A wide range of medical conditions and environmental factors are believed to contribute to fetal death. Nevertheless, a small but significant number of pregnancies result in unexplained pregnancy loss. These inexplicable outcomes account for approximately ten to even fifty percent of all stillbirths.<sup>4</sup>

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<sup>2</sup> R.L. Goldenberg et al., *Stillbirth: A Review*, 16 *Journal of Maternal-Fetal & Neonatal Medicine* 79, 79 (2004) (“stillbirth is one of the most common adverse outcomes of pregnancy . . . in the year 2000, there were nearly 27,000 of these events.”).

<sup>3</sup> Mississippi State Board of Health Handbook on Registration and Reporting of Vital Events: Live Births, Deaths, Spontaneous Fetal Deaths, Induced Terminations of Pregnancy, 19-20 (2009) available at [http://www.msdh.state.ms.us/phs/Handbook\\_Reg\\_Reporting\\_Vital\\_Events.pdf](http://www.msdh.state.ms.us/phs/Handbook_Reg_Reporting_Vital_Events.pdf).

<sup>4</sup> F. Gary Cunningham et al., *Williams Obstetrics*, 21st ed. 1073, 1075 (2001). See also M.A. Sims & K.A. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 *Am. J. Forensic Med. & Pathology* 261 (2001) (“Despite efforts to identify the etiologic factors contributing to fetal death, a substantial portion of fetal deaths are still classified as unexplained intrauterine fetal demise.”).

Experts at a March 26, 2001 National Institute of Health Workshop discussed the possibility that the cause of death for up to 50 percent of stillbirths is undetermined. See SHARE Pregnancy & Infant Loss Support, Inc., *Report on Stillbirth Workshop at the National Institute of Health* (Apr. 2001), available at [http://www.nationalshareoffice.com/about\\_research\\_sb\\_research.shtml](http://www.nationalshareoffice.com/about_research_sb_research.shtml).

Indeed, many people wrongly believe that women have a high degree of control over their pregnancy outcomes.<sup>5</sup> The longstanding and constant medical reality, however, is that as many as 20-30 percent of all pregnancies will end in miscarriage or stillbirth.<sup>6</sup> In fact, stillbirth is one of the most common adverse outcomes of pregnancy,<sup>7</sup> and it occurs despite the best intentions and precautions taken by women and their doctors.

The medical community agrees that the causes of stillbirth are not fully understood.<sup>8</sup> As a recent article states: "In many cases it is difficult to be certain of the etiology of stillbirth. First, many cases are unexplained, despite intensive investigation of potential causes. Second, more than one condition may contribute to stillbirth in an individual case."<sup>9</sup> Moreover, "it may not be possible to precisely determine which disorder was directly responsible for the loss. Indeed, it is likely that some cases of stillbirth are due to complications from multiple factors. Finally, conditions may be *associated* with stillbirth without directly *causing* them."<sup>10</sup>

Accordingly, experts warn that "the associations between exposures and stillbirth should be viewed with caution."<sup>11</sup> There are many alternative explanations for stillbirth, which include

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<sup>5</sup> See e.g., A. Eisenberg et al., *What to Expect When You're Expecting*, 54-57 (2d ed. 1996) (popular pregnancy advice book warning women to avoid contact with anyone who is smoking, to avoid changing a cat litter box, consuming unpasteurized cheese or undercooked meat, gardening without gloves, inhaling when handling household cleaning products, and ingesting caffeine).

<sup>6</sup> C. Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death*, 9(4) *Qualitative Health Research* 504, 505 (July 1999).

<sup>7</sup> R.L. Goldenberg et al., *Stillbirth: A Review*, 16 *Journal of Maternal-Fetal & Neonatal Medicine* 79, 79 (2004).

<sup>8</sup> Laurie Barclay, MD, *ACOG Issues Guidelines for Stillbirth Management*, 113 *Obstetrics & Gynecology* 748-761 (2009), quoting Ruth C. Fretts, MD, from Harvard Vanguard Medical Associates and Harvard Medical School in Boston, Massachusetts, who assisted in the development of ACOG's new practice bulletin, "... we have a long way to go before we have a clearer understanding of the causes of stillbirth."

<sup>9</sup> R.M. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, 196(5) *Am. J. of Obstetrics & Gynecology*, 433-44 (2007).

<sup>10</sup> *Id.* (emphasis added). See also Cunningham, *supra* note 3 at 1073-75 (2001) (noting substantial percentage of perinatal deaths are unexplained).

<sup>11</sup> C. Stanton et al., *Stillbirth Rates: Delivering Estimates in 190 Countries*, 367 *Lancet* 1487-94 (2006) ("Data for the causes of stillbirth, especially largely preventable causes such as syphilis, are needed to prioritize action and reduce stillbirths. However, even in settings with the possibility of extensive investigation, the cause of death might not be established in a third of stillbirths.").

age, race and socioeconomic factors,<sup>12</sup> hypertension, diabetes, thrombophilia, infections, maternal smoking,<sup>13</sup> paternal smoking, paternal workplace exposure to ionizing radiation, exposure to pain medications, and poverty.<sup>14</sup>

Ms. Gibbs' is being prosecuted for *homicide* for an act that the State can not prove caused the stillbirth. Science has yet to provide the tools to determine the cause of many stillbirths, and, in any event those causes are likely beyond any woman's control, and should not be the basis for criminal prosecution.

#### A. Cocaine Has Not Been Found to Cause Stillbirths

A positive toxicology for cocaine does not establish causation for a stillbirth. Two well-constructed, independent studies to determine if cocaine could be linked to an increased risk of stillbirths concluded that the *cause and effect relation of cocaine and fetal demise is not clear and requires additional research*. The first study, a ten-year retrospective of pediatric toxicological deaths, found not a single neonatal or fetal death attributed to cocaine use, even

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<sup>12</sup> Laurie Barclay, MD, *ACOG Issues Guidelines for Stillbirth Management*, 113 *Obstetrics & Gynecology* 748-761 (2009). "Risk factors for stillbirth include non-Hispanic black race, with a stillbirth rate of 11.25 per 1000 births in this group, vs less than 6 per 1000 in Hispanic, Asian, American Indian, and white women. Greater prevalence of diabetes, hypertension, placental abruption, and premature rupture of membranes in black women may help explain this disparity... Non-Hispanic black race, nulliparity, advanced maternal age, and obesity are the risk factors most often associated with stillbirth."

<sup>13</sup> Even among activities that are much more definitively linked to adverse pregnancy outcomes than cocaine/illegal drug use, such as cigarette smoking, the connection to stillbirths are complex and modest. See Center on Addiction and Substance Abuse (CASA), *Substance Abuse and the American Woman* 50 (1996) (smoking during pregnancy increases infant mortality from 8.0 per 1,000 to 12.2 per 1,000)). See also Helene M. Cole, *Legal Interventions during Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 *JAMA* 2663, 2666 (1990). "Cigarette smoking may cause "spontaneous abortion, premature birth, increased infant perinatal mortality, low birth weight, and negative effects on later growth and development in infants."

<sup>14</sup> See *Automobile Workers v. Johnson Controls*, 499 U.S. 187, 205 (1991) (noting that "[e]mployment late in pregnancy often imposes risks on the unborn child"); see also *Automobile Workers v. Johnson Controls*, 886 F.2d 877 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk); see also Atkins, et al., *Drug Therapy for Hyperthyroidism in Pregnancy: Safety Issues for Mother and Fetus*, 23 *Drug Safety* 229 (2000); Khattak, et al., *Pregnancy Outcome Following Gestational Exposure to Organic Solvents: A Prospective Controlled Study*, 281 *JAMA* 1106-09 (1999); C. Stanton et al., *Stillbirth Rates: Delivering Estimates in 190 Countries*, 367 *Lancet* 1487-94 (2006); R.M. Silver, et al., *Work-up of Stillbirth: A Review of the Evidence*, 196(5) *Am. J. of Obstetrics & Gynecology*, 433-44, (2007); Cynthia Daniels, *Exposing Men, the Science and Politics of Male Reproduction*, 124 (Oxford, 2006).

where cocaine metabolites were present.<sup>15</sup> The second study focused on the 42 fetal deaths referred for autopsy between 1990 and 1999.<sup>16</sup> In 29 percent the cause of death was undetermined.<sup>17</sup> All of the cocaine associated deaths were designated as “natural” or “undetermined.” In short, in a large number of fetal deaths, forensic pathologists were unable to establish causation, and even where cocaine was present, it was not listed as a primary cause of death. Against this backdrop, the State’s assertion that cocaine caused Ms. Gibbs’ stillbirth derives not from medicine or science, but from prosecutorial overreaching.

In 2001, The Journal of the American Medical Association (“JAMA”) published a comprehensive analysis of developmental consequences for the fetus or child based on maternal cocaine use during pregnancy.<sup>18</sup> The report exposes as erroneous the belief that prenatal cocaine exposure is associated with developmental toxicity and condemns as “irrational[.]” policies that selectively “demonize” *in utero* cocaine exposure and that target pregnant cocaine users for special criminal sanction.<sup>19</sup>

There are many widely held, deeply rooted misconceptions about cocaine. For over two decades, the popular press has been suffused with highly prejudicial and inaccurate information about the effects of *in utero* cocaine exposure. However, contemporary research on the developmental impact of cocaine use during pregnancy has debunked the myth that mere exposure to cocaine causes certain fetal harms.<sup>20</sup> It is scientifically inappropriate to declare fetal cocaine exposure to be the sole or even primary cause of fetal death.<sup>21</sup> In 2004, doctors and

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<sup>15</sup> T.A. Campbell & K.A. Collins, *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 184 (2001).

<sup>16</sup> Sims, *supra* note 3.

<sup>17</sup> *Id.* at 263.

<sup>18</sup> D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001).

<sup>19</sup> *Id.* at 1621. See also A. Addis et al., *Fetal Effects of Cocaine: an Updated Meta Analysis*, 15 Reproductive Toxicology 341-369 (2001).

<sup>20</sup> Campbell, *supra* note 14.

<sup>21</sup> *Id.* at 264.

researchers signed an open letter denouncing the “crack baby” myth and called on the press to refrain from using the medically misleading and erroneous terms “crack baby.”<sup>22</sup>

This is not to say that prenatal cocaine exposure is benign. While current studies are unable to link cocaine use to adverse fetal developments, neither do they exclude cocaine as a potential fetotoxin. More research is needed. But, it is irrational and unjust to charge Ms. Gibbs with murder when science has yet to speak with causal assurance.

#### B. The Pathologist’s Conclusions Are Not Supported by Science

As explained above, the claim that cocaine causes stillbirth is not supported by existing scientific research. Nonetheless, the State is seeking to use the depraved heart statute in an entirely unprecedented manner based on an examination conducted by the State’s witness, Dr. Steven T. Hayne. Amici caution against relying on Dr. Hayne’s medical opinion as the basis for radically expanding state law.

A review of published articles and funded research indicates that Dr. Hayne himself has conducted no independent research on the effects of prenatal exposure to cocaine. In addition, he has been removed from the State’s designated list of pathologists.<sup>23</sup> In reaching its decision regarding the purely legal question of whether Mississippi’s depraved heart murder statute was intended to punish pregnant woman and girls who suffer stillbirths, this Court must consider that such an interpretation would be based on claims that lack scientific or medical validity made by a pathologist whose findings and conclusions in other cases have been called into question.<sup>24</sup>

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<sup>22</sup> Open Letter from thirty American and Canadian researchers and scientist explaining that such terms as “crack baby” and “crack addicted baby” lack any basis in science, *available at* <http://www.jointogether.org/sa/files/pdf/sciencenotstigma.pdf>. *Meth Science Not Stigma: Open Letter to the Media*, July 25, 2005, *available at*

<http://www.jointogether.org/news/yourturn/commentary/2005/meth-science-not-stigma-open.html>.

<sup>23</sup> See WTOK.com, Newscenter 11, *Mississippi Officials Cut Ties with Pathologist*, Aug. 5, 2008, *available at* <http://www.wtok.com/home/headlines/26283229.html>.

<sup>24</sup> See e.g., *Edmonds v. State*, 955 So.2d 787 at 802-803 (Justice Diaz concurring)(detailing other incidents where Dr. Hayne’s qualifications and findings have been questioned).

## II. The Prosecution of Ms. Gibbs Under the State's Depraved Heart Murder Statute Will Harm the Health of Mothers and Children

The prosecution of those who suffer stillbirths and especially the prosecution of those who use drugs and experience coincidental stillbirths will undermine the quality and accessibility of health care for many pregnant women and girls.

Every leading medical organization and governmental body to consider this issue has concluded that responding to drug use during pregnancy through criminal sanction is likely to undermine the health of pregnant women and children.<sup>25</sup> This is true even if the unsupported claim of harm from exposure to drugs is true, because fear of prosecution operates as a deterrent to pursuing drug treatment, prenatal care, and labor and delivery care, and discourages disclosure of critical medical information to health professionals.

### A. This Prosecution Will Deter Drug-Dependent Pregnant Women and Girls from Seeking Health Care

Pregnant women and girls who face criminal sanctions will be deterred from seeking care that is critical to both their own health and the health of the fetus.<sup>26</sup> This prosecution could serve to deter some women from seeking prenatal care and drug and alcohol treatment altogether, by

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<sup>25</sup> See e.g. Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate."); Am. Psychiatric Ass'n, *Care of Pregnant and Newly Delivered Women Addicts: Position Statement*, APA Document Reference No. 200101 (2001) (policies of prosecuting pregnant "are likely to deter pregnant addicts from seeking either prenatal care or addiction treatment, because of fear of prosecution and/or civil commitment.").

<sup>26</sup> See, e.g., The Southern Legislative Conference, *Southern Reg'l Project on Infant Mortality, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 6 (1993). See also A. Srinivasan & G. Blomquist, *Infant Mortality and Neonatal rates: The Importance of Demographic Factors in Economic Analysis* (2002), available at <http://gatton.uky.edu/GradStudents/srinivasan/InfantHealth.pdf> (examining infant mortality in Kentucky); A. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies).

discouraging pregnant women and girls who do seek medical treatment from disclosing critical information about their drug use to their health care providers, and by creating an incentive for women and girls who cannot overcome their addictions in the short term of pregnancy to have abortions rather than face criminal charges upon the birth of a child.

State and national medical and public health organizations and experts unanimously condemn punitive state interventions during pregnancy because, as one public health expert observed two decades ago in the *New England Journal of Medicine*:

[M]arriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether during pregnancy if failure to follow medical advice can result in . . . involuntary confinement, or criminal charges. By protecting . . . the integrity of a voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses.<sup>27</sup> State law should not deter women from seeking care, whether it is prenatal care,<sup>28</sup> drug treatment,<sup>29</sup> or other general health care, all of which can help improve (but not guarantee) pregnancy outcomes.

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<sup>27</sup> G. Annas, *Protecting the Liberty of Pregnant Patients*, 316 *New Eng. J. Med.* 1213, 1214 (1987).

<sup>28</sup> Prenatal care has been found to be strongly associated with improved outcomes for children exposed to drugs in utero. Racine et al., *supra* note 26; Edward F. Funai et al., *Compliance with Prenatal Care in Substance Abusers*, 14(5) *J. Maternal Fetal Neonatal Med.* 329, 329 (2003); Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19(4) *Seminars in Perinatology* 293, 293 (1995).

Conversely, lack of prenatal care is associated with poor health outcomes for mothers and newborns. See Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, 186(5) *Am. J. of Obstetrics and Gynecology* 1011, 1013 (2002); Vivian B. Faden et al., *The Relationship of Drinking and Birth Outcome in a U.S. National Sample of Expectant Mothers*, 11 *Pediatric & Perinatal Epidemiology* 167, 171 (1997) (finding “increased risk of adverse outcomes among mothers who had no prenatal care”).

<sup>29</sup> The research also shows that drug treatment can be effective for pregnant women and can itself produce beneficial pregnancy outcomes. See Patrick J. Sweeney et al., *The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes*, 20(4) *J. Perinatology* 219, 219 (2000) (finding that neonatal outcome “is significantly improved for infants born to substance abusers who receive[d] drug treatment concurrent with prenatal care compared with those who received [prenatal care but] . . . treatment postpartum”).

As the American Medical Association has stated, “Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician’s knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.”<sup>30</sup> The even graver threat that a stillbirth could result in a homicide conviction greatly exacerbates such fears and will hinder access to vital medical care and substance abuse services for women and girls in Mississippi.<sup>31</sup>

B. This Prosecution Will Deter Pregnant Women and Girls from Sharing Vital Information with their Doctors

If this Court allows the prosecution of Ms. Gibbs, any pregnant Mississippian who confides in her health care provider that she has used drugs risks being charged with homicide if she suffers a stillbirth. Even for those women and girls who are not deterred from seeking care, fear of prosecution is likely to discourage them from being truthful about drug use, corroding the formation of trust that is fundamental to any health care provider-patient relationship.

A relationship of trust is critical for women and girls, because “[t]he promise of confidentiality encourages patients to disclose sensitive subjects to a physician.”<sup>32</sup> Open

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<sup>30</sup> Report of American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990). See also American Medical Association, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990) (resolving “that the AMA oppose[s] legislation which criminalizes maternal drug addiction”).

<sup>31</sup> Studies of drug-dependent pregnant women have found that “fear and worry about loss of infant custody, arrest, prosecution, and incarceration for use of drugs during pregnancy” is “the[ir] primary emotional state.” See Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003); M.L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 Drug Alcohol Dependence 199 (1993).

<sup>32</sup> R. Arnold et al., *Medical Ethics and Doctor/Patient Communication*, in *The Medical Interview: Clinical Care, Education and Research* 365 (M. Lipkin, Jr. et al. eds., 1995) (citing W. Winslade, *Confidentiality*, in *Encyclopedia of Bioethics* (W. T. Reich ed.)). See also, S.H. Ebrahim & J. Gfroerer, *Pregnancy-Related Substances Use in the United States During 1996-1998*, 101(2) *Obstetrics and Gynecology* 374 (February 2003) (“Pregnancy-or childbirth-related contact of women with the health care system gives health care providers a unique opportunity to access women who use substances and

communication between drug-dependent pregnant women and girls and their doctors is especially critical.<sup>33</sup> The exceptionally high rates of depression among drug-dependent women mean that their prospects of successfully completing treatment depend on forming a strong “therapeutic alliance” with care providers.<sup>34</sup>

Courts have long viewed confidentiality as fundamental to the patient-care provider relationship. As the U.S. Supreme Court recognized, a “confidential relationship” is a necessary precondition for “successful [professional] treatment,” and “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”<sup>35</sup> Allowing the prosecution of Ms. Gibbs to move forward will erode this relationship, undermining maternal, fetal, and child health.

#### C. Prosecuting Drug-Dependant Women and Girls For Suffering A Stillbirth

##### Discourages Women and Girls from Carrying Pregnancies to Term

Prosecuting drug-addicted pregnant women and girls will not only deter them from seeking treatment and confiding in their doctors, but it incentivizes abortion. The Mississippi legislature surely did not intend the depraved heart murder statute to have this consequence. Courts have recognized that this type of prosecution “may also unwittingly increase the incidence of abortion.”<sup>36</sup> Although it is difficult to know how frequently abortions result from

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possibly their partners to facilitate substance abuse treatment, the benefits of which extend to their infants and future pregnancies.”).

<sup>33</sup> See Kelly et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared For in Obstetrics*, 158 Am. J. Psych. 213-19 (2001).

<sup>34</sup> See Center on Addiction and Substance Abuse (CASA), *Substance Abuse and the American Woman* 64 (1996); *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 Pediatric Annals 548 (1991).

<sup>35</sup> *Jaffee v. Redmond*, 518 U.S. 1 at 10, 12 (1997).

<sup>36</sup> See e.g., *Johnson v. State*, 602 So. 2d 1288 at 1296 (Fla. 1992): “Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”

fear of prosecution, one study reported that “two-thirds of the women [surveyed] who reported using Cocaine during their pregnancies ... considered having an abortion.”<sup>37</sup>

The adverse consequences stemming from the prosecution’s interpretation of the law are severe; the criminal investigation and possible prosecution of girls like Ms. Gibbs sends a perilous message to pregnant addicts *not* to seek prenatal care or drug treatment, *not* to confide their addiction to health care professionals, and *not* to give birth with medical care—or not to carry the fetus to term. Accordingly, such prosecutions fail to serve any legitimate purpose, and undermine maternal and fetal health.

### III. This Prosecution Reflects a Misunderstanding of the Nature of Addiction

The assertion that Ms. Gibbs’ addiction is an act evincing a depraved heart is dangerously misinformed. Medical groups have long recognized “that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors.”<sup>38</sup> Addiction has pronounced physiological factors that heavily influence the user’s behavior and affect his or her ability to cease use and seek treatment.<sup>39</sup>

#### A. Addiction Is Not Simply A Voluntary Act that Is Cured by Threats

The medical profession has long recognized that drug dependence has biological and genetic dimensions and cannot often be overcome without treatment.<sup>40</sup>

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<sup>37</sup> See Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* 112 (New York University Press, 2009).

<sup>38</sup> American Medical Association, *Proceedings of the House of Delegates: 137<sup>th</sup> Annual Meeting, Board of Trustees Report NNN 236, 241, 247* (June 26-30, 1988). See also R. K. Portenoy & R. Payne, *Acute and Chronic Pain*, in *Substance Abuse, A Comprehensive Textbook* 563, 582-84 (J.H. Lowinson et al. eds., 1997) (citing AMA task force); National Academy of Sciences, Institute of Medicine, *Dispelling The Myths About Addiction*, Ch. 8 (1997). See also CME publication *Cocaine Abuse and Dependence* (2008), citing Schuckit, *The Treatment of Stimulant Dependence*, 89 *Addiction* 1559, 1563 (1994). “The etiology of dependence in any one person is multifactorial, representing the convergence of a multitude of biological, psychological, social and interpersonal factors.”

<sup>39</sup> Chaya G. Bhuvaneshwar, MD, et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) *Primary Care Companion Journal of Clinical Psychiatry* 59–65 (2008).

<sup>40</sup> See, e.g., “Psychoactive Substance Dependence” is listed as a mental illness with specific diagnostic criteria in the Am. Psychiatric Ass’n., *The Diagnostic and Statistical Manual of Mental Disorders* (4th ed.

As a matter of law and medical science, addiction is marked by “compulsions not capable of management without outside help.”<sup>41</sup> This is why the vast majority of drug-dependent people cannot simply “decide” to refrain from drug use or achieve long-term abstinence without appropriate treatment and support. Because of the compulsive nature of drug dependency, warnings or threats are unlikely to deter drug use among pregnant women and girls; rather, such sanctions are likely to drive addicted women and girls away from critical health care opportunities.

#### B. Addiction Is A Difficult Medical Condition for Children to Overcome

Ms. Gibbs was only fifteen years old when she became pregnant and allegedly ingested cocaine. Given the paucity of treatment options available to her, it is not surprising that she continued her pregnancy to term without obtaining help.

According to the U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (SAMHSA), there is not a single treatment facility within 100 miles of Lowndes County that provides substance-abuse treatment services of any kind (whether publicly or privately funded, inpatient or outpatient) to pregnant, adolescent girls.<sup>42</sup>

In Mississippi, an estimated 10,000 children between the ages of 12 and 17 need, but have not received, treatment for an illicit drug abuse problem. Another 10,000 children in that age group need, but have not received, treatment for alcohol problems.<sup>43</sup> In 2008, only 5.2% of

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1994), used by mental health professionals to diagnose mental illness. See *Linder v. United States*, 268 U.S. 5, 18; 45 S.Ct. 446, 449; 69 L.Ed. 2d 819 (1925); *Robinson v. California*, 370 U.S. 660, 667; 82 S.Ct. 1417, 1420; 8 L.Ed. 2d 758 (1962); American Psychiatric Ass’n, *The Diagnostic and Statistical Manual of Mental Disorders - 4<sup>th</sup> Edition* 176-181 (“DSM-IV-TR”) (2000) (specifying diagnostic criteria for “Substance Dependence”).

<sup>41</sup> *Robinson*, 370 U.S. at 671; 82 S.Ct. at 1422; 8 L.Ed. 2d 758 (*Douglas, J., concurring*); see also 42 U.S.C. § 201(q) (“‘drug dependent person’ means a person who is using a controlled substance . . . and who is in a state of psychic or physical dependence, or both.”).

<sup>42</sup> United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Substance Abuse Treatment Facility Locator, *available at* <http://findtreatment.samhsa.gov/facilitylocator/doc.htm>.

<sup>43</sup> United States Department of Health and Human Services, Substance Abuse and Mental Health Services

all substance abuse treatment admissions in the state of Mississippi were of minors under the age of 18 (or roughly 217 patients).<sup>44</sup>

Girls, upon becoming pregnant, do not suddenly have greater access to health care, better housing, safer environments, or enhanced capacity to overcome behavioral health problems such as addiction.<sup>45</sup> In addition to the lack of appropriate programs there are other barriers such as cost, stigma, and long waiting-lists, which impede access to successful treatment.

Mississippi law protects children in almost every legal sphere.<sup>46</sup> Neither common sense nor science justifies abandoning such protections when a child becomes both pregnant and addicted. To the contrary, given the psychological burdens of teen pregnancy, the burdens of teen motherhood, and the severe consequences of criminal proceedings, the law must protect children from the harsh, punitive nature of the criminal justice system.

Moreover, Ms. Gibbs (at fifteen years old) should not be solely responsible for obtaining proper treatment for a medical condition, especially when no treatment in her county existed. For the State to then subject a teenage girl to the full weight of the criminal justice system by charging her with homicide under a radically new and expanded version of the state's homicide statute violates fundamental tenets of common sense and public policy.

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Administration (SAMHSA), *2007 State Estimates of Substance Use & Mental Health--Mississippi*, "Table 49. Selected Drug Use, Perceptions of Great Risk, Average Annual Marijuana Initiates, Past Year Substance Dependence or Abuse, Needing But Not Receiving Treatment, Serious Psychological Distress, and Having at Least One Major Depressive Episode in Mississippi, by Age Group: Estimated Numbers (in Thousands), Annual Averages Based on 2006-2007 NSDUHs." (2008), available at <http://oas.samhsa.gov/2k7State/Mississippi.htm>.

<sup>44</sup> United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Treatment Episode Data Set (TEDS), "Mississippi State Profile: Substance Abuse Treatment Admissions by Primary Substance of Abuse, According to Sex, Age Group, Race, and Ethnicity" (2008), available at <http://www.dasis.samhsa.gov/webt/quicklink/MS08.htm>.

<sup>45</sup> Chaya G. Bhuvaneshwar, MD, et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion Journal of Clinical Psychiatry 59, 65 (2008). "Even for motivated women, obtaining treatment is not always straightforward. The scarcity of specialized treatment centers has already been noted."

<sup>46</sup> For example, in addressing the rights of minors and the need to afford them extra protection, the judiciary and legislature enacted the Youth Court Act and child support provisions and laws regarding statutory rape. See *Edmonds v. State*, 2004-KA-02081-COA (Miss. 2006) (Lee, J., concurring).

CONCLUSION

Because the prosecution of Rennie Gibbs for homicide by depraved heart is unsupported as a matter of science, is inappropriate as a matter of public health, and is unfounded as a matter of law, *amici curiae* respectfully request this Honorable Court to grant Ms. Gibbs' Motion to Dismiss.

Respectfully submitted,



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*COUNSEL FOR AMICI CURIAE*

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the above and foregoing by placing a copy of the same in the United States mail, postage prepaid and addressed to their regular mailing address, as follows:

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This the 19th day of November, 2009.



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