

No. 006594

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MALISSA ANN CRAWLEY, #212641

Petitioner/Appellant

v.

WILLIAM D. CATOE, Director, Department of Corrections,
State of South Carolina, and

CHARLES M. CONDON, Attorney General
of the State of South Carolina, and

STEPHEN K. BENJAMIN, Director-Designate, South Carolina
Department of Probation, Parole, and Pardon Services,

Respondents

**BRIEF *AMICI CURIAE* IN SUPPORT OF
THE APPELLANT
SUBMITTED BY**

AMERICAN PUBLIC HEALTH ASSOCIATION, SOUTH CAROLINA MEDICAL ASSOCIATION,
NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, SOUTH
CAROLINA ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, AMERICAN
NURSES ASSOCIATION, SOUTH CAROLINA NURSES ASSOCIATION, AMERICAN COLLEGE
OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL WOMEN'S
ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., SOCIETY OF
GENERAL INTERNAL MEDICINE, AMERICAN ACADEMY ON PHYSICIAN AND PATIENT,
ALLIANCE FOR SOUTH CAROLINA'S CHILDREN, THE CONSORTIUM FOR SUBSTANCE
ABUSING WOMEN AND THEIR CHILDREN, ASSOCIATION FOR MEDICAL EDUCATION AND
RESEARCH IN SUBSTANCE ABUSE, ASSOCIATION OF REPRODUCTIVE HEALTH
PROFESSIONALS, NATIONAL FAMILY PRESERVATION NETWORK, NATIONAL CENTER
FOR YOUTH LAW, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, INSTITUTE FOR
HEALTH AND RECOVERY, NOW LEGAL DEFENSE AND EDUCATION FUND, 52%, AND
LEGAL ACTION CENTER.

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I. INTERESTS OF THE AMICI CURIAE

The South Carolina Supreme Court's unprecedented expansion of the state's child abuse and neglect law in Whitner v. State, 492 S.E.2d 777 (S.C. 1997), cert. denied, 118 S. Ct. 1857 (1998), requires the unfamiliar application of this body of law to fetuses, despite manifest scientific uncertainty regarding many of the conditions that endanger fetal health and well-being. The scientific uncertainty in this area gives rise to at least three major issues of personal and constitutional import. First, as a matter of medical research, Petitioner could not have had constitutionally adequate notice that her ingestion of cocaine while pregnant constitutes child abuse or neglect. Second, the Whitner decision imposes on South Carolina's medical and social services providers a strict duty to report some of their most medically vulnerable clients to state authorities for possible prosecution. The scope of this duty is rendered so vague and sweeping by Whitner that many of the South Carolina professionals who serve pregnant women now face criminal sanctions for failing to report women for a potentially infinite array of conduct or circumstances that might possibly endanger a fetus. Third, the Whitner decision compels health care providers to breach the medical privacy of pregnant women who ingest drugs (including, perhaps, alcohol and nicotine) notwithstanding the fact that patient confidentiality is an essential and proven part of effective medical care and drug treatment. *Amici Curiae* -- medical, public health, social services and legal providers, and their state and national professional associations -- are uniquely positioned to inform this Court about these issues.¹

II. INTRODUCTION

The novel application of South Carolina's child neglect and abuse statute to pregnant women and their fetuses raises the fundamental issue of whether the Petitioner, Ms. Malissa

¹Descriptions of the *Amici Curiae* are set forth in the Appendix to this brief.

Crawley, had fair warning, as required by the Constitution, that her conduct violated S.C. Code § 20-7-50. This question has both jurisprudential and scientific dimensions. *Amici Curiae* set forth below a careful review of the scientific research regarding prenatal cocaine exposure as it existed at the time of Petitioner's conviction. *Amici* contend that manifest uncertainty in the body of scientific evidence in this area compels the conclusion that Petitioner lacked constitutionally adequate notice to be prosecuted under the state's child abuse and neglect law. From the vantage point of medical science it is not (and certainly was not at the time of prosecution) clear that minimal ingestion of cocaine would harm a fetus. Accordingly, Petitioner was deprived of her Due Process right to adequate notice that the child abuse statute could be applied to maternal cocaine use.

Amici further observe that the Whitner decision, by radically expanding the definition of child abuse and neglect to fetuses, imposes potentially limitless obligations on health care and social services providers to report to state authorities an ill-defined yet vast array of conduct that might adversely affect fetuses. As the Whitner majority points out, the state child abuse and neglect statute permits a parent to be prosecuted "for an action that is likely to endanger the child *without regard to whether the action is illegal in itself.*" Whitner, 492 S.E.2d at 781-82 (emphasis added). Because the Whitner decision imposes a duty of unknowable dimensions and sweeping breadth upon these providers, the decision renders S.C. Code § 20-7-510 unconstitutionally vague.

Additionally, *Amici* argue that the Whitner decision forces health care providers to breach the medical privacy of some of their most vulnerable patients without furthering a compelling state interest. In so doing, the Whitner decision violates the constitutional right to privacy of pregnant women.

It is important to state at the outset that in submitting this brief *Amici Curiae* in no way condone the use of cocaine or any other drugs -- including alcohol or nicotine -- during pregnancy, by either parent. Nor do *Amici* claim that there are no health risks associated with cocaine use during pregnancy. Nor do they deny that science may someday demonstrate that maternal or paternal ingestion of cocaine poses harm to the developing fetus. *Amici* in no way wish to minimize the potential harms of drug abuse for individuals, their families and their communities. Indeed, *Amici* are committed to reducing drug related harms at every reasonable opportunity. Consistent with this commitment, and for the reasons set forth below, *Amici Curiae* urge the court to grant the petition for writ of habeas corpus.

III. ARGUMENT

A. THE PETITION SHOULD BE GRANTED BECAUSE MS. CRAWLEY COULD NOT HAVE POSSESSED CONSTITUTIONALLY ADEQUATE NOTICE THAT HER ACTIONS CONSTITUTED CRIMINAL CONDUCT

Prior to the Whitner decision, child abuse had never been defined to include prenatal exposure to a substance or chemical, and in particular, not to cocaine exposure. The Whitner ruling served as the first and only warning that the child abuse statute, commonly understood to apply to demonstrably harmful actions taken against children, would apply to actions which the state Attorney General speculates, in the absence of scientific evidence, might harm a fetus. By granting the Attorney General the discretion to extend, arbitrarily and without notice, a criminal statute in ways that could not be anticipated, the Whitner decision violates the Fourteenth Amendment Due Process requirement that a criminal statute must make "it reasonably clear at the relevant time that a defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 267 (1997).

Petitioner's brief to this Court explains how the South Carolina Supreme Court's decision

in Whitner was not foreshadowed by, and constitutes a radical break with, established state common law and legislative history. As *Amici* demonstrate, the Whitner decision also lacks foundation in medical research. Science simply does not support the essential premise upon which Ms. Crawley's arrest, indictment, prosecution, plea, conviction and incarceration rest: that the ingestion of cocaine during the third trimester of pregnancy adversely effects the growth and development of the fetus or child.²

In advancing this argument, *Amici* do not claim that ingestion of cocaine during pregnancy is not without danger to mother and/or fetus. Indeed, a sweeping and unpredictable array of activities and conditions experienced by pregnant women can potentially affect fetal health. Prior to the Whitner decision, South Carolina had never claimed that these activities — from alcohol and nicotine consumption to poor diet and lack of exercise — could constitute child abuse. *Amici* do contend, however, that the state of scientific knowledge regarding intrauterine cocaine exposure does not (and did not) provide constitutionally adequate notice for the state to prosecute, convict and imprison Petitioner for her conduct.

The extension of South Carolina's child endangerment statute to fetuses invites careful review of relevant scientific data regarding prenatal cocaine exposure. In a typical child endangerment case there are objective indicia of harm (or threats of harm) for all to assess: for example, bruises, malnutrition, cognitive deficits, behavioral or psychological problems, and/or eyewitness accounts. When the health and well-being at issue is that of a fetus, however, the harm or potential harm is not immediately evident to the lay person. Instead, it is both necessary

² To be precise, Petitioner's conviction in fact rests on the more far-reaching premise that ingestion of an undetermined amount of cocaine of uncertain purity or potency over an unknown period of time endangers the health or well-being of a fetus. Indeed, the record in this case leaves open the possibility that Petitioner ingested only a small amount of cocaine of unknown origin on single occasion shortly before giving birth -- an exposure pattern that would have the least likelihood of causing harm to a fetus. Indeed, Ms. Crawley's child, Antwon, was born healthy and without any sign of *in utero* harm. At present, science cannot substantiate the claim that cocaine exposure endangers fetal health irrespective of the magnitude and pattern of the exposure.

and proper to look to medical science for information about how maternal and paternal conduct affect fetal growth and development. Because reliable medical research at the time of Ms. Crawley's conviction failed to show that prenatal cocaine exposure causes fetal harm, Petitioner was deprived of the adequate notice required by law.

In January 1992, Ms. Crawley was indicted, convicted and sentenced to five years in prison for violating § 20-7-50 of South Carolina's Children's Code for using cocaine while pregnant. That same month, an article appearing in the prestigious Journal of American Medical Association concluded that:

review of the current literature on the subject [of the adverse effects in infants born to cocaine-using mothers] indicates that available evidence from the new born period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development Findings about neurobehavioral effects in the newborn period have been inconsistent or contradictory. Significantly, no prospective study of unique long-term consequences of intrauterine cocaine, non-opiate exposure has been published in the peer-review literature.³

Accordingly, the four authors of this peer-reviewed article — researchers from Yale University, the National Institute of Child Health and Human Development and the Boston University School of Medicine — recommend “a suspension of judgment about the developmental outcome of cocaine-exposed babies until solid scientific data are available.”⁴ A standard pediatrics textbook published the following year reaches the same conclusion, observing that “[t]o date no hypothesized or demonstrated effect of in utero cocaine exposure has been found to be specific to that drug. No studies have shown that prenatal cocaine exposure causes unique developmental

³ Linda C. Mayes, et al., The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992) (internal citations omitted).

⁴ Id. at 408.

dysfunction.”⁵ In 1997, five years after Petitioner’s conviction, scientists continued to urge a suspension of judgment, stating that “[k]nowledge concerning the biological effects of cocaine exposure on the newborn is inconclusive at present.”⁶

This measured approach to the issue of cocaine and pregnancy stands in marked contrast to the media hype of the late 1980’s regarding the so-called “crack baby” epidemic:

Children exposed to cocaine prenatally . . . have been portrayed in the popular media as inevitably and permanently damaged. . . . [T]he public outcry for the punishment of substance-using mothers and the disenfranchisement of their children as unsalvageable, almost demonic “biologic underclass” rests not on scientific findings but upon media hysteria fueled by selected anecdotes.⁷

Indeed, a number of studies have found no detectable increase in the rate or severity of birth defects associated with cocaine use during pregnancy.⁸ From the perspective of science, the

⁵ D. A. Frank, et al., Maternal Cocaine Use: Impact on Child Health and Development, in 40 *Advances in Pediatrics* 65, 92 (1993). Also in 1993, a publication of Harvard Medical School reported that a “1991 combined analysis of 20 studies on cocaine and pregnancy found few effects that could be specifically attributed to cocaine.” Update on Cocaine: Part I, 10 *Harv. Mental Health Letter* (Harv. Med. Sch.), Aug. 1993 at 3.

⁶ E. Hutchins, Drug Use During Pregnancy, 27 *J. of Drug Issues* 463, 465 (1997) (emphasis added).

⁷ Frank et al., *supra* at 65 (1993). See also J. Morgan & L. Zimmer, The Social Pharmacology of Smokeable Cocaine: Not All It’s Cracked Up to Be, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 149-154 (C. Reinerman & H. G. Levine eds. 1997) (virtually all adverse outcomes found in fetal studies involving cocaine were reported in the mass media as evidence that crack causes damage in babies even though no study has convincingly shown that to be so); L. E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 11-26 (1997) (same).

⁸ See A.J. Tuboku-Metzger et al., Cardiovascular Effects of Cocaine in Neonates Exposed Prenatally, 13 *American J. of Perinatology* 1 (1996) (study of chronic cocaine use among pregnant subjects finding no direct effects on the health or development of newborns); B.B. Little et al., Is There a Cocaine Syndrome? Dymorphic and Anthropometric Assessment of Infants Exposed to Cocaine, 54 *Teratology* 145 (1996) (finding no recognizable constellation of dymorphic features to distinguish between cocaine-exposed and non-exposed infants); N.S. Woods et al., Cocaine Use During Pregnancy: Maternal Depressive Symptoms and Infant Neurobehavior over the First Month, 16 *Infant Behavior and Dev.* 83, 92 (1993) (finding no differences in neurobehavioral performance of cocaine-exposed infants when compared to non-exposed infants); C.D. Coles et al., Effects of Cocaine and Alcohol Use in Pregnancy on Neonatal Growth and Neurobehavioral Status, 14 *Neurotoxicology and Teratology* 23, 31-32 (1992) (finding prenatal cocaine exposure effects fetal growth but that cocaine-exposed infants do not appear otherwise impaired physically or behaviorally in the neonatal period); B.M. Lester et al., Data Base of Studies of Prenatal Cocaine Exposure and Child Outcome, 27 *J. of Drug Issues* 487 (1997) (computerized assessment of scientific literature concluding that knowledge about the existence or extent of effects of prenatal cocaine exposure on child outcome is limited, scattered, and compromised by methodological shortcomings); E. Hutchins, Drug Use During Pregnancy, 27 *J. of Drug Issues* 463, 466 (1997). See also GOMEZ, *supra*, at 23-25 (1997) (discussing the failure of longitudinal studies to find statistically significant differences between cocaine-exposed children and non-exposed children).

“hysteria and poorly considered reactions of . . . the public have made the ‘crack baby’ for years an embarrassing episode.”⁹ The Medical University of South Carolina (“MUSC”) was not immune to this hysteria. In October, 1989, the obstetric service of MUSC adopted a protocol wherein pregnant women who were deemed at risk for drug use were required to consent to urine drug screens in return for medical services. Women with positive drug screens were subjected to random drug testing throughout their pregnancies. Missed medical appointments or further positive screens led to their arrest. In 1994, the Division of Human Subject Protections of the National Institutes of Health, determined that the MUSC policy was tantamount to unethical human experimentation which “raise[d] serious concerns about the adequacy of MUSC’s institutional system of protections for human subjects”¹⁰

Future research may demonstrate with a reasonable level of confidence whether various levels of cocaine exposure at different points of gestation affect fetal development. Until then, the inconclusiveness of science on these points should check, not hasten, an urge to impose criminal liability. The fact remains that at the time of Ms. Crawley’s pregnancy in 1991, medical science could not demonstrate that in utero exposure to cocaine caused adverse health effects for the fetus or child. As a result, Petitioner could not have had fair warning that her conduct exposed her to criminal sanctions. Accordingly, this Court should grant the petition for habeas

⁹ C.D. Coles, Saying “Goodbye” to the “Crack Baby”, 15 *Neurotoxicology and Teratology* 290 (1993). See also D.R. Neuspel, Cocaine and the Fetus: Mythology of Severe Risk, 15 *Neurotoxicology and Teratology* 305 (1993) (“mythology of severe risk” of gestational cocaine exposure persists despite contrary scientific evidence). It should be noted that some researchers have found an increase in genitourinary tract malformations and decreases in birth weights, body length and head circumferences of cocaine-exposed neonates. However, researchers note that the pregnant cocaine users in such studies have clustering of other serious reproductive risk factors — notably, elevated tobacco and alcohol use — and a lack of prenatal care that “confound” conclusions about cocaine’s toxicity. Researchers also observe that these findings do not appear to be predictive of longer-term physiological, behavioral or cognitive deficits. See, e.g., H. Hurt et al., Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing, 151 *Arch. Pediatric & Adolescent Med.* 1237 (1997).

¹⁰ Letter of J. Thomas Puglisi, Chief, Compliance Oversight Branch, Division of Human Subject Protections, Department of Health and Human Services (Sept. 30, 1994). The Office of Civil Rights of the Department of Health and Human Services undertook a separate investigation into MUSC’s policy. The investigation led MUSC to abandon its policy per a settlement agreement between MUSC and the Office of Civil Rights.

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- B. THE PETITION SHOULD BE GRANTED BECAUSE THE WHITNER DECISION CREATES A CRIME OF SUCH SWEEPING BREADTH THAT EVERY PREGNANT SOUTH CAROLINIAN AND HER MEDICAL OR SOCIAL SERVICES PROVIDER RISKS CRIMINAL PROSECUTION.

The State of South Carolina has opened the door to prosecutions of women for any range of actions that could adversely affect fetuses. The majority opinion in Whitner, 492 S.E.2d at 781-82 (“parent can be prosecuted [for child abuse] . . . without regard to whether the action is illegal in itself”), and the reported prosecution for child abuse of a South Carolina woman for ingesting alcohol while pregnant¹¹ make clear that the underlying legality of the woman’s conduct is not a factor which narrows the scope of conduct subject to prosecution under the child abuse statute. The conviction of Ms. Crawley makes equally clear that a woman’s conduct is prosecutable despite the lack of scientific evidence showing that her actions were likely to endanger her fetus.

The unprecedented Whitner decision imposes a duty of unknowable dimensions and sweeping breadth on all state health and social services providers who serve pregnant women. As *Amici* explain below, the potentially limitless reporting obligations newly imposed on medical and social services providers by the Whitner decision render S.C. Code § 20-7-510 unconstitutionally vague.

The reporting statute provides in relevant part:

A physician, nurse, dentist, optometrist, medical examiner or . . . any other medical, emergency medical services, mental health, or allied health professional or . . . school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or child care worker in any day care center or foster care facility, police or law enforcement officer . . . or persons responsible for processing of films or any judge shall report in accordance with this section when in the person's

¹¹ See Melissa Manware, Infant born drunk: Intoxicated mom is facing charges, The State, Sept. 24, 1998 (reporting arrest of pregnant woman for drinking alcohol).

professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect.

S.C. Code § 20-7-510 (A) (emphases added). A health care or social services professional's knowing failure to report a case of child abuse or neglect constitutes a misdemeanor punishable by fine and/or imprisonment of up to six months. S.C. Code § 20-7-560.

The Whitner decision radically expands the concept of child abuse, requiring health and social services professionals to report an ill-defined yet vast array of conduct that might adversely affect a fetus. As Petitioner's conviction underscores, the reporting obligations of health care and social services providers are triggered even where scientific evidence fails to show that the parental conduct "is likely to endanger" the fetus. Whitner, 492 S.E.2d at 781-782. This standardless extension of child abuse law has caused substantial confusion and fear among both pregnant women and the professional communities that serve them. South Carolina practitioners must now divine, upon threat of imprisonment, what conduct by a pregnant woman may adversely affect her fetus's "physical or mental health or welfare." S.C. Code § 20-7-510 (A). They must then report all women with viable pregnancies whom they have reason to believe engage in such conduct to state authorities for possible prosecution.

The vagueness of Whitner's reporting requirement is demonstrated by the breadth of its sweep in two directions. On the one hand, health and social services providers must now guess whether a vast array of everyday conduct and common conditions could endanger the health and well-being of a fetus. Do rigorous sports, vigorous exercise, loud music, busy intersections, or vehicles with no air bags or anti-lock brakes, for instance, endanger fetal health or well-being? Reasonable people may draw different conclusions from these and other examples which to a greater or lesser degree strike intuitive (if not defensible) chords about acceptable risk-taking by

pregnant women. But such divergences of opinion simply illustrate the unconstitutionally vague nature of the statute as it now applies to medical and social services providers.

On the other hand, the facts and reasoning of the Whitner decision also saddle South Carolina medical and social services providers (among others) with the obligation to report conduct that is known to endanger fetal health but which has never before been punished. For example, there is longstanding scientific consensus that various licit substances, including alcohol¹² and tobacco,¹³ can cause serious, irreversible harm to the developing fetus. The same is also true of a wide range of commonly prescribed medications. These include psychiatric medications, such as anticonvulsants,¹⁴ Lithium and other mood-stabilizers,¹⁵ antipsychotics, and

¹² Fetal Alcohol Syndrome is the leading cause of mental retardation in the United States. L. P. Finnegan & S. R. Kandall, Maternal and Neonatal Effects of Alcohol and Drugs in SUBSTANCE ABUSE, A COMPREHENSIVE TEXTBOOK 513, 529 (J.H. Lowinson et al. eds., 1997) [hereinafter "COMPREHENSIVE TEXTBOOK"].

¹³ Low birth weight, sudden infant death syndrome, spontaneous abortion, premature rupture of the membranes, and abnormal placentation are associated with maternal tobacco use. See, e.g., L.C. Castro et al., Maternal Tobacco Use and Substance Abuse: Reported Prevalence Rates and Associations with the Delivery of Small for Gestational Age Neonates, 81 *Obstetrics and Gynecology* 396 (1993); Office on Smoking and Health, The Health Consequences of Smoking: Nicotine Addiction 602 (1988). The teratogenic effects of tobacco and alcohol are particularly relevant because women who ingest cocaine during pregnancy are more likely to use tobacco and alcohol than are non cocaine-users. M. Bendersky et al., Characteristics of Pregnant Substance Abusers in Two Cities in the Northeast, 22 *Am. J. Drug & Alcohol Abuse* 349, 353 (1996).

¹⁴ A leading scientific text notes that the teratogenic affects of anticonvulsants were identified in the 1960's, especially those caused by the drug Dilantin, commonly prescribed for epileptics and that "[n]o dose response curve has been demonstrated, nor has a "safe" dose been found below which there is no increased teratogenic risk." K.L. JONES, SMITH'S RECOGNIZABLE PATTERNS OF HUMAN MALFORMATION 495 (5th ed. 1997) [hereafter "SMITH'S RECOGNIZABLE PATTERNS OF HUMAN MALFORMATION."]. Other anticonvulsants associated with facial malformations, mental deficiencies, speech disorders, and cardiovascular defects include trimethadione, paramethadione, valproic acid, and warfarin. *Id.* at 495-505. With respect to trimethadione in particular, it warns that "the frequency and severity of defects associated with maternal use of these drugs during pregnancy are high enough to warrant consideration of early elective termination of pregnancy." *Id.* at 500 (citing G.L. Feldman et al., The Fetal Trimethadione Syndrome, 131 *Am. J. Dis. Child* 1389 (1977)). Another standard medical text notes: "An association of fetal abnormalities with anticonvulsants is strengthened by increasing reports of cleft palate, cardiac abnormalities, craniofacial anomalies, nail and digit hypoplasia, visceral defects, and mental subnormality in children of epileptic mothers taking anticonvulsant drugs." THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1859 (R. Berkow ed., 16th ed. 1992) [hereafter "MERCK MANUAL."].

¹⁵ "Among psychotropic drugs, lithium has been more strongly associated with congenital anomalies than have other agents [N]umerous publications indicate an increased incidence of cardiovascular abnormalities, particularly an increase in Ebstein's anomaly in infants born of lithium-treated mothers." J.G. BERSTEIN, HANDBOOK OF DRUG THERAPY IN PSYCHIATRY 415 (2d ed. 1988) (citing G.E. Robinson et al., The Rational Use of Psychotropic Drugs in Pregnancy and Postpartum 31 *Can. J. Psychiatry* 183 (1986)).

benzodiazepines (the class of medications which includes Valium, Librium and Xanax),¹⁶ as well as some antibacterials (especially Tetracyclines),¹⁷ anticoagulants,¹⁸ thyroid medications,¹⁹ and antihypertensive drugs.²⁰ Even “[l]arge doses of aspirin may result in delayed onset of labor, premature closure of the fetal ductus arteriosus . . . or neonatal bleeding.”²¹ Additionally, prenatal exposure to poor nutrition, substandard housing and a lack of social supports and services (all of which are associated with poverty) can also profoundly affect infant health.²² After Whitner, medical and social services professionals who encounter a pregnant or parenting woman in one of these scenarios may be duty-bound to report her to state authorities.

As these examples illustrate, the reporting obligations of South Carolina professionals vis-a-vis pregnant women are potentially limitless. Indeed, nearly three years after Whitner was decided, confusion over the sweep of state law *continues* to infect state agencies and high ranking officials in South Carolina. Officials in the South Carolina Department of Alcohol and Other

¹⁶ Id. at 407 (“Lithium presents a significant risk to fetal development if taken during the first trimester Benzodiazepines and meprobamate have a significant risk of teratogenic effects. . . .”). The specific birth defects (or “anomalies”) associated with these and other psychiatric medications taken during pregnancy include: growth retardation and oral clefts (barbiturates); cleft palates, neurologic depression and low Apgar scores (benzodiazepines); “severe anomalies in 12% of newborns” (meprobamate); respiratory distress (antidepressants); chromosomal gaps and breaks, congenital heart anomalies; reduced thyroid function; and external ear malformations (lithium carbonate and the other mood-stabilizing drugs). Id. at 407-421 (citing W.S. Barry and S.M. St. Clair, Exposure to Benzodiazepines in Utero 1 *Lancet* 1436 (1987)); M.J. Whittle and K.P. Hanretty, Prescribing in Pregnancy: Identifying Abnormalities, 293 *Br. Med. J.* 1485 (1986).

¹⁷ Tetracycline has been associated with permanent discoloration of the teeth, enamel hypoplasia, and a lowered resistance to caries, as well as retarded bone growth, especially when taken during the latter part of the pregnancy. MERCK MANUAL at 41.

¹⁸ Certain anticoagulants can cause nasal abnormalities, bone stipling, bilateral optic atrophy, varying degrees of mental retardation, microcephaly, and occasionally fetal and maternal hemorrhage. SMITH’S RECOGNIZABLE PATTERNS OF HUMAN MALFORMATION at 504.

¹⁹ Some thyroid medications taken during pregnancy can cause severe hypothyroidism, fetal goiter, or scalp defects. MERCK MANUAL at 1859.

²⁰ These drugs may cause fetal respiratory depression, hypotension, paralytic ileus, bradycardia, hypoglycemia, and varying degrees of intrauterine growth retardation. Id. at 1861.

²¹ Id. at 1859; see also L.J. Van Marter et al., Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy, 97 *Pediatrics* 658 (1996) (maternal consumption of aspirin during pregnancy found to be consistently associated with pulmonary hypertension of the newborn, an important cause of respiratory failure in neonates).

²² N.S. Gustavsson & A.E. MacEachron, Criminalizing Women’s Behavior, 27 *J. of Drug Issues* 673, 675-76 (1997).

Drug Abuse Services, for example, recently published 50,000 copies of a brochure warning pregnant women that “it’s . . . a crime in South Carolina” to “smoke, drink . . . or engage in other activities that risk harming” the fetus. South Carolina Department of Alcohol and Other Drug Abuse Services, Important Facts to Remember: A Special Delivery Should Be Handled With Care (emphasis added). When the State Attorney General learned of that message he recalled the brochures and informed the media that his colleagues in state government misunderstood the scope of the law, claiming that only pregnant women who use *illegal* drugs would be prosecuted. Agency Pulls Pregnancy Pamphlets: Brochures Recalled for Inaccurate Statements About Legality of Substance Abuse, August Chron., May 14, 2000, at B2. In apparent disagreement, the state official responsible for redrafting the brochure replied that the brochures do in fact reflect his understanding of Whitner and that he “has not decided whether to make reference to nicotine or alcohol abuse as potentially criminal” in the next edition of the brochures. Id.

In striking down prosecutions similar to that of Petitioner’s, courts in other states have remarked upon the near limitless reach of the state when its criminal codes are interpreted in the manner advanced by South Carolina. In Arizona, for example, the court faced the prosecution for child abuse of a woman who used heroin while pregnant. The court observed that:

Many types of prenatal conduct can harm a fetus, causing physical or mental abnormalities in a newborn A pregnant woman’s failure to obtain prenatal care or proper nutrition . . . can affect the status of the newborn child. Poor nutrition can cause a variety of birth defects: insufficient doses of vitamin C or riboflavin can cause premature births; deficiencies in iron are associated with low birth weight. Poor prenatal care can lead to insufficient or excessive weight gain, which also affects the fetus. Some researchers have suggested that consuming caffeine during pregnancy also contributes to low birth weight. . . . The chance a woman will give birth to a child with Down’s Syndrome increases if the woman is over the age of thirty-five. A couple may pass to their children an inheritable disorder, such as Tay-Sachs disease or sickle-cell anemia. Occupational or environmental hazards, such as exposures to solvents used by painters and dry cleaners, can cause adverse outcomes. The contraction of or treatment for certain diseases, such as diabetes and cancer, also can affect the health of the fetus. . . . We cannot, consistent with the dictates of due process, read [Arizona’s child abuse statute]

that broadly.

Reinesto v. Superior Court, 894 P.2d 733, 736-37 (Ariz. App. Div. 1 1995) (internal citations omitted). A Kentucky court offers a comparable analysis of the problem:

The mother was a drug addict. But, for that matter, she could have been . . . addicted to . . . prescription painkillers, or over-the-counter medication; or for that matter she could have been addicted to downhill skiing or some other sport creating a serious risk of prenatal injury What if a pregnant woman . . . as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road? The "case-by-case" approach suggested by the Commonwealth is so arbitrary that . . . the [Kentucky's criminal child abuse statutes] transgress reasonably identifiable limits; they lack fair notice and violate constitutional due process limits against statutory vagueness.

Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1995).

The resulting confusion and uncertainty about the scope of South Carolina's child neglect and abuse law after Whitner become intolerable when compounded by the criminal sanctions, including imprisonment, that befall those pregnant women and professionals who fail first to divine and then to comply with the newly expanded state law.²³ For these reasons, the Whitner decision renders the state statute unconstitutionally vague. Accordingly, Ms. Crawley's petition for writ of habeas corpus should be granted.

C. THE PETITION SHOULD BE GRANTED BECAUSE THE WHITNER DECISION EVISCERATES PRIVACY RIGHTS OF PREGNANT PATIENTS AND THREATENS TO CAUSE WIDESPREAD AND SERIOUS HARM TO PREGNANT WOMEN.

²³ As the discussion of medical privacy in the next section underscores, the Whitner decision also places treatment providers in a double bind by pitting fetal health against maternal well-being, forcing providers to choose which patient to treat. In light of Whitner, South Carolina physicians might feel legally constrained from recommending or prescribing therapies to their pregnant patients that could, but might not, result in fetal harm -- be it chemotherapy or radiation treatment for cancer, or even the administration of drugs commonly used during labor and delivery which can themselves cause fetal central nervous system depression, anoxia, hypothermia, low Apgar scores, impaired metabolic responses, and neurological depression. MERCK MANUAL at 1861. See In re A.C., 573 A.2d 1235, 1253 (D.C. 1990) (*en banc*) (vacating court-ordered cesarean section, recognizing that in virtually all circumstances the pregnant patient must make the medical decisions regarding her pregnancy, even after fetus is believed to be viable); In re Fetus Brown, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (overturning court-ordered blood transfusion for pregnant patient in which physicians "yelled at and forcibly restrained, overpowered and sedated" the patient in order to carry out the order); In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that courts may not balance any rights a fetus may have against the rights of a competent woman, whose choice to refuse medical treatment as invasive as a cesarean section must be honored even if the choice may harm the fetus).

By expanding South Carolina's child abuse reporting requirement to include cocaine use by pregnant women, the Whitner opinion compels health care providers to breach the medical confidentiality of their pregnant patients. As a result, the health of women and their fetuses -- the very interests that the South Carolina Supreme Court sought to protect -- are now imperiled.

As the Supreme Court recognized in Jaffe v. Redmond, 518 U.S. 1 (1997), confidentiality and trust between patients and treatment providers are not solely matters of principle: "the mere possibility of disclosure [of patients' confidences] may impede development of the . . . relationship necessary for successful treatment." Id. at 10.

To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people²⁴

Unsurprisingly, what is true about patients generally, applies with particular force to those with substance abuse problems:

It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.²⁵

This is even more urgently the case when drug-dependent patients are pregnant. Drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine: in most cases, a patient's drug use is not apparent if the patient does not disclose it.²⁶

²⁴Robert Arnold, et al., Medical Ethics and Doctor/Patient Communication, in THE MEDICAL INTERVIEW: CLINICAL CARE, EDUCATION AND RESEARCH 345, 365 (Mack Lipkin, Jr., et al. eds., 1995); Aaron Lazare, Shame, Humiliation, and Stigma in the Medical Interview, in id. at 333.

²⁵Mary Jeanne Kreek & Marc Reisinger, The Addict as a Patient, in SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 822, 826-27 (Joyce H. Lowinson, et al. eds., 1997). Cf. 42 U.S.C. § 290dd-2 (prohibiting federally assisted drug-abuse treatment programs from divulging patient identities and records); id. at § 9501(1)(H) (codifying patients' "right to confidentiality" of mental health records).

²⁶I. Chasnoff, Drug Use in Pregnancy: Parameters of Risk, 35 The Pediatric Clinics of North Am. 1043, 1410 (1988).

When, as under Whitner, medical confidentiality is subverted, not only are pregnant drug users deterred from seeking medical care, but those women who do see physicians and nurses are less likely to provide the type of candid disclosure of sensitive information such as drug use that is often vital for effective medical treatment. Open communication between treatment providers and their pregnant patients regarding drugs is necessary to ensure optimum safety before, during and after deliveries.²⁷ When substance abuse, including cocaine use, is known to care givers, the care givers can focus on providing a number of proven interventions that substantially increase the health outcomes. One of the most effective preventative measures against infant mortality is early, high-quality, comprehensive prenatal care.²⁸ Indeed, prenatal care has been shown to markedly improve pregnancy outcomes among women with addictions: pregnant women who use drugs but who have at least four prenatal care visits have been found to significantly reduce their chances of delivering low birth weight babies.²⁹ Even if the pregnant patient does not reduce or discontinue drug use, health risks associated with prenatal drug exposure can be mitigated substantially through prenatal care and counseling if the patient embraces the therapeutic relationship.³⁰ Adequate parenting skills and a supportive environment also appear to help lessen the risk of serious harm.³¹ In short, a climate of confidentiality, openness and trust is essential if patients are to disclose drug-use and/or seek continued care and counseling from health professionals in order to reduce the potential harms caused by substance use.

²⁷See David J. Birnbach et al., Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay, 84 *Anesthesia Analg.* 76 (1997) (patients using cocaine “may have untoward responses to anesthesia”); D. Campbell et al., Unrecognized “Crack” Cocaine Abuse in Pregnancy, 77 *British J. Anaesthesiology* 553, 555 (1996) (eliciting concrete information about drug use is important because the “interaction of cocaine with other local anaesthetics makes the calculation of a safe maximum dose difficult”).

²⁸See, e.g., SOUTHERN REGIONAL PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 6 (1993).

²⁹Andrew Racine et al., The Ass’n Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 *JAMA* 1581, 1585-86 (1993).

³⁰Id.

³¹See, e.g., Finnegan & Kandall, supra, at 529.

By stark contrast, the Whitner decision casts treatment providers as *quasi* law enforcement agents, forcing them to divulge to state authorities patient confidences and information elicited in the confines of the examination room. In gutting principles of patient privacy, the Whitner decision threatens to undermine the ethical obligations, professional training, and standard of practice followed by physicians and other health care providers. The Whitner decision may also require some providers to act in conflict with federal law. See 42 U.S.C. § 290dd-2, also known as the “Federal Drug Treatment Confidentiality Statute” (prohibiting federally assisted drug-abuse treatment programs from divulging patient identities and records).³² At the very least, Whitner forces treatment professionals into a painful and cruel dilemma -- whether to breach patient confidentiality so essential to medical care and drug treatment services, or violate state law and be subject to sanctions, even imprisonment. This conflict presents an untenable situation for South Carolina’s health care providers who seek to adhere to the basic tenet: Above all else, to do no harm.

³²Although this federal confidentiality provision “do[es] not apply to the reporting under State law of incidents of suspected child abuse and neglect,” id. 290dd-2(e)(2), it is not at all clear whether the South Carolina Supreme Court’s expansion of the term “child abuse” in Whitner to cover maternal prenatal actions falls within the narrow exception envisioned and intended by Congress. This legal uncertainty, and the demands of seemingly conflicting legal mandates, further exacerbates the confusion, fear and frustration faced by South Carolina’s physicians and other health care professionals.

CONCLUSION

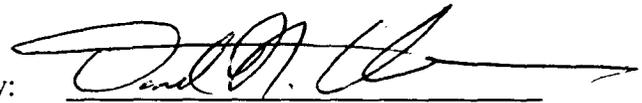
For the foregoing reasons, *Amici Curiae* respectfully request this court to grant the petition for habeas corpus.

Respectfully submitted,

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June 28, 2000

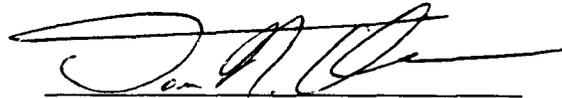
CERTIFICATE OF COMPLIANCE PER RULE 32(a)(7)(B)

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, undersigned counsel hereby certifies that the Brief *Amici Curiae* in Support of the Petition for Writ of Habeas Corpus of the American Public Health Association *et al.* complies with the type-volume limitation for *Amicus* briefs as set forth in the Federal Rules of Appellate Procedure. There are 6347 words in this brief.

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APPENDIX

Amicus Curiae American Public Health Association (“APHA”) is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors (“NAADAC”) is the largest national organization of alcohol and drug counselors, with 17,000 members. Founded in 1972, NAADAC is committed to increasing general awareness regarding the problems associated with alcoholism and substance abuse and to enhancing the care of individual patients through treatment, public education, and outreach programs aimed at prevention. As an organization that certifies alcoholism and drug abuse counselors, NAADAC promotes and monitors adherence to ethical standards throughout the nation. NAADAC promotes quality treatment services for addicted individuals as the cornerstone of an effective national substance abuse policy. To be effective, however, alcohol and drug treatment requires the trust of the patient, a basic building block of which is the assurance of patient confidentiality. Under the ethical guidelines promulgated by NAADAC for its members, alcohol and drug treatment counselors are required to protect patients’ privacy. NAADAC Code of Ethics, Principle 8(a). However, South Carolina alcohol and drug counselors now risk arrest if they fail to report any conduct that may endanger a fetus. The counselors do not know which actions or omissions of their pregnant clients trigger the newly expanded reporting requirements, as the legislature has never enacted a law addressing fetal abuse. The patients also face arrest and prosecution if their treatment provider discloses their identities to authorities. NAADAC is deeply concerned that the confusion and fear that the Whitner decision is causing will undermine the provision and quality of care administered by South Carolina substance abuse professionals to pregnant patients, as well as the willingness of women to seek these essential services.

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors (“SCAADAC”) is the South Carolina affiliate of the National Association of Alcoholism and Drug Abuse Counselors. SCAADAC’s 495 members work as alcohol and drug counselors throughout the state in both the public and private sectors and have special expertise in the substance abuse treatment needs of pregnant women. SCAADAC is troubled by the serious legal and ethical dilemmas facing its membership in the wake of Whitner. SCAADAC is also in a position to document some of the consequences of the Whitner decision. After the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court’s decision upholding her conviction and sentence on July 15, 1996, at least two programs in the Columbia, South Carolina, area that give priority to pregnant women have already reported precipitous

drops in admissions for pregnant women. The records of the Women's Community Residence, a halfway house for women substance abusers, show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997. At the Women's Intensive Outpatient program, an intensive day program which provides child care, admissions of pregnant women declined 54% (from 13% to 6% of the total number of women treated at the facility) during roughly the same period. In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution.

Amici Curiae The South Carolina Medical Association ("SCMA") is the primary professional association for individuals licensed to practice medicine in South Carolina. The SCMA has over 5500 members representing all medical specialties that provide medical services to the citizens of the state. The SCMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina. In 1994, the SCMA served as *Amicus Curiae* to the Supreme Court of South Carolina in Whitner v. South Carolina, requesting that court to grant Ms. Whitner's application for state post-conviction relief.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing over 2.2 million registered nurses in the United States. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal-child health services is particularly critical in efforts to prevent disease and to provide early intervention for health care problems. Thus ANA opposes all barriers to prenatal care. ANA believes that the threat of criminal prosecution is a significant deterrent for substance-using pregnant women in need of prenatal care and treatment. Such a threat benefits no one and only endangers the health of both mother and child.

Amicus Curiae South Carolina Nurses Association ("SCNA"), a constituent member of the American Nurses Association, is a professional organization which represents registered nurses in South Carolina. SCNA's legislative positions strongly support health care for a number of vulnerable populations and the reproductive rights of women. Essential to effective prenatal care is the ability to seek this care from physicians and other health care providers without fear of harm. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the threat of criminal prosecution is a significant deterrent for pregnant women suffering from addictive diseases to seek and obtain prenatal care.

Amicus Curiae American College of Obstetricians and Gynecologists ("ACOG"), founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. The leading group of professionals providing health care to women, ACOG's more than 38,000 members represent over 90 percent of all obstetricians and gynecologists currently practicing in the United States. One of ACOG's many purposes is to educate health care professionals, law and policy makers and the general public about all aspects of women's health care. ACOG attempts to secure prenatal care for all women and promotes

healthy pregnancies for the benefit of both fetuses and mothers. ACOG is concerned that the threat of prosecution will drive pregnant women away from seeking care at a time when information and treatment could significantly improve maternal health and increase the chances of delivering a healthy baby.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the prosecution of pregnant women as a method for preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that punishment for drug abuse will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care. Furthermore, the physicians of AMWA highly value the patient-physician relationship and are concerned that the threat of prosecution will erode this relationship.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five 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. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe 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.

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in primary care Internal Medicine. The Society, which has nearly 3000 members in the United States (including South Carolina) and 11 other countries, publishes the JOURNAL OF GENERAL INTERNAL MEDICINE and is a leader in research and education in the medical care of adults. Many SGIM members have national expertise in issues related to alcoholism and abuse of other substances. SGIM is deeply concerned that the Whitner decision might deprive drug-addicted women in South Carolina of drug-treatment and prenatal services that are essential to the delivery of a healthy child. The change in reporting requirements for physicians will not only discourage women from seeking this vital care but may well interfere with physicians ability to provide it when sought. SGIM believes that effective measures should be instituted to reduce drug and alcohol abuse, especially during pregnancy. However, the application of felony child abuse laws to drug using pregnant women is likely to undermine, not promote, the health of women, fetuses and children.

Amicus Curiae American Academy on Physician and Patient (“AAPP”) is devoted to improving public health through research and education about the doctor-patient relationship, which lies at the core of effective health care. Since its founding in 1979, AAPP has developed, evaluated, and promulgated the leading model of medical education regarding the physician-patient relationship, and has trained over 3,000 physicians. The AAPP has shown that the therapeutic relationship between physician and patient depends on the assurance of confidentiality and physicians’ unfettered ability to counsel and care for their patients. The AAPP, with a membership of more than 550 physicians from 10 countries, is devoted to strengthening the physician-patient relationship, and hence the quality of patient care, by promoting collaborative relationships between doctors and patients. The strength of the therapeutic relationship, in turn, affects the patient’s willingness and ability to follow through with the treatment and the patient’s response to the treatment. To compromise the doctor-patient relationship is to compromise care, and thereby to damage health, increase suffering, escalate medical costs, and decrease life expectancy. The AAPP believes that the Whitner decision, by re-writing South Carolina’s reporting law to include fetal abuse, strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the critical relationship between health care professionals and their pregnant patients.

Amicus Curiae Alliance for South Carolina’s Children (“ASCC”) is a private, nonprofit, statewide advocacy group whose mission is to build coalitions, develop programs, create community based solutions, and lead citizens to action on behalf of children independent of politics and bureaucratic agendas. Founded in 1992, the Alliance is committed to preventative programs and early interventions, which reduce suffering and save tax dollars. ASCC also works for solutions to problems which strengthen the ability of families to respond to their own children’s needs. If left to stand, the Whitner decision will harm children and their families.

Amicus Curiae The Consortium for Substance Abusing Women and Their Children (“The Consortium”) is comprised of more than 60 agencies in the state of Connecticut dedicated to improving the health of and services available to substance abusing and mentally ill women and their children. The Consortium serves as the principal resource in Connecticut for the development and implementation of policy, advocacy, and technical assistance to promote the behavioral health of women and their children, the integration and coordination of services for women and their children, and access to and retention in treatment. Established in 1990 in response to data showing that New Haven led the nation in infant mortality rates, The Consortium oversees the development of client-based models of care for addicted and mentally ill women and their children in the New Haven area and is working to expand their influence to the entire state. The Consortium for Substance Abusing Women and Their children strongly opposes the criminalization of addictive disorders and opposes the extension of child abuse statutes to fetuses as improper and counterproductive measures for promoting maternal and child health.

Amicus Curiae Association for Medical Education and Research in Substance Abuse (“AMERSA”) is a national organization of three hundred health care and social services

professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians, nurses, and social workers who work in general health and social services settings identifying individuals with alcohol and drug problems, providing counseling, and referring them as necessary to treatment specialists; most members are professors at medical schools, nursing schools, or social work programs. To be effective, prenatal care and treatment for pregnant addicts must occur in the context of a confidential, respectful, and trusting relationship between professional and patient. AMERSA believes that a requirement to report pregnant addicts to authorities would produce net harm to the health of mothers and children by deterring such addicts and their families from obtaining prenatal care, addictions treatment, and counseling.

Amicus Curiae Association of Reproductive Health Professionals (ARHP) is a non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, other clinicians, pharmacists, and researchers, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, the media, legislators, and other professionals. In addition, ARHP fosters reproductive health research and, through its membership, assists in the formulation of reproductive health policy. ARHP is accredited by the Accreditation Council for Continuing Medical Education and for the past 35 years has sponsored clinical education for physicians on reproductive health issues. The association is funded by membership dues, donations, conference fees and grants from industry, government agencies and foundations. ARHP is deeply concerned that the Whitner decision and the incarceration of Malissa Crawley threaten to undermine the quality of care provided by physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women in South Carolina.

Amicus Curiae National Family Preservation Network (NFPN) is a non-profit organization dedicated to promoting and preserving the well being of children at risk for being separated from family, or for whom reunification with family, consistent with the child's safety, is a goal. To this end, the NFPN asserts that a child's own family is most often the best environment for the raising and nurturing of that child, and that it is therefore important to offer specially tailored social services to families at risk for the removal of a child or children. Accordingly, the NFPN: supports and promotes quality intensive family preservation services (IFPS) as the best means of serving children at-risk; educates and informs the public about IFPS and the benefits to children of IFPS as a tool to strengthen, stabilize and protect the family; and works to achieve the wider availability of quality IFPS to all children and their families who may need them. Consistent with NFPN's mission, NFPN opposes public policy or law, such as the Whitner decision, that has the effect of reducing the frequency and/or quality of prenatal health visits by pregnant women thus increasing the health risks to the entire family.

Amicus Curiae National Center for Youth Law ("NCYL"), founded in 1970, is a San Francisco-based non-profit organization that works on legal and policy issues affecting poor

children and youth nationwide. NCYL provides technical assistance and training, produces publications, and co-counsels major cases in the areas of health care, child welfare, public benefits, child support, and housing discrimination. NCYL has worked extensively on legal issues affecting drug-exposed infants, and in 1990 and 1995 published special issues of its journal, Youth Law News, on these topics. NCYL believes that the goal of child abuse reporting laws is to identify children who have been abused or neglected so that the state can intervene for their benefit. A system of mandatory child abuse reporting as envisioned by the Whitner decision not only has the potential for driving pregnant women away from prenatal care, but also risks wasting scarce child welfare resources and diverting attention from cases in which children who are at significant risk or have actually suffered abuse or neglect need assistance and protection.

Amicus Curiae Legal Services for Prisoners with Children (“LSPC”) is a legal advocacy organization which has represented incarcerated parents, their children and family members for over 20 years. LSPC staff have been lead counsel or co-counsel on four class action lawsuits which have successfully challenged seriously deficient medical care conditions for women prisoners, including pregnant, substance-dependent women incarcerated in California state prisons and county jails. The organization has represented many hundreds of pregnant women prisoners and pregnant, substance-dependent women who have been subjected to inadequate medical care during their pregnancies, leading in many cases to infant deaths, late-term miscarriages and serious pregnancy complications. LSPC staff have spoken nationally and written extensively on issues affecting pregnant women prisoners, urging policy reform which takes into account the actual consequences of subjecting pregnant, substance-dependent women to inadequate medical care while incarcerated.

Amicus Curiae Institute for Health and Recovery (“IHR”), formerly the Coalition on Addiction, Pregnancy and Parenting, is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol- and drug-dependent women and their families throughout Massachusetts. IHR is committed to establishing collaborative models of service delivery and fostering family-centered services. IHR firmly believes that addiction is an illness requiring treatment, not a crime requiring punishment. IHR members know firsthand the fears pregnant substance abusing women have regarding prosecution and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Prosecution of pregnant women only serves to keep women out of treatment, thereby endangering the health and well-being of more women and children.

Amicus Curiae NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women’s efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major focus of NOW LDEF’s work is to oppose gender discrimination and promote reproductive health. Prosecuting women who give birth while addicted to alcohol or drugs hurts both women and children, for it will only deter women from

seeking treatment for their addictions.

Amicus Curiae 52% is a Charleston, South Carolina, grassroots women's political action group. A not-for-profit organization, 52% seeks to educate the public about issues concerning women and encourages increased participation in electoral politics by those sensitive to such issues. Like the United States Supreme Court, 52% recognizes that the disease of drug dependency should not be treated as a criminal offense. In the case of pregnant and parenting women, 52% takes heed of the large body of research that shows, and the consensus within the medical and public health communities that warns, that criminalizing drug dependency discourages women from seeking and obtaining essential prenatal care, thereby endangering the health of their fetuses and children. Accordingly, 52% joins as *amicus curiae* in this suit challenging the constitutionality of South Carolina's law that targets pregnant and parenting substance abusers for criminal sanctions.

Amicus Curiae Legal Action Center is a non-profit organization with offices in New York City and Washington, D.C. specializing in legal issues of concern to alcohol, drug and AIDS prevention/treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting women with alcohol and drug problems and their families, working to enact public policies which promote increased access to care for them. The Legal Action Center also provides legal representation to individuals who have faced discrimination because of their alcohol and drug dependencies. Ms. Crawley's petition for writ of habeas corpus raises issues of great importance to the Legal Action Center and the individuals and treatment programs it represents.