

IN THE SUPREME COURT OF FLORIDA *at Florida Chap*

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JENNIFER CLARISE JOHNSON, :

Petitioner, :

vs. : CASE NO. 77,831

STATE OF FLORIDA, :

Respondent. :

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ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT

MEMORANDUM OF LAW OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, INC., THE AMERICAN NURSES ASSOCIATION, THE AMERICAN SOCIETY OF ADDICTION MEDICINE, THE AMERICAN SOCIETY OF LAW & MEDICINE, THE ASSOCIATION OF MATERIAL AND CHILD HEALTH PROGRAMS, THE BUCKS COUNTY COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, THE CENTER FOR LAW AND SOCIAL POLICY, THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST, THE COALITION ON ALCOHOL AND DRUG DEPENDENT WOMEN, THE DRUG POLICY FOUNDATION, THE FLORIDA CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, THE FLORIDA FEMINIST TASK FORCE, THE FLORIDA NURSING STUDENTS' ASSOCIATION, THE ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION, THE LEGAL ACTION CENTER, THE LOUISIANA COALITION FOR MATERIAL AND INFANT HEALTH, THE MARIPOSA WOMEN'S CENTER, THE MONROE COUNTY COALITION FOR CHOICE, THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, THE NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL BLACK WOMEN'S HEALTH PROJECT, THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, THE NATIONAL COUNCIL OF NEGRO WOMEN, INC., THE NATIONAL LATINA HEALTH PROJECT, THE NATIONAL LAWYERS GUILD, SOUTHERN REGION, THE NATIONAL PERINATAL ASSOCIATION, THE NATIONAL WOMEN'S HEALTH NETWORK, PROJECT HEALTHY CHOICES, THE WINTER PARK AREA CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN (WINTER PARK AREA NOW), AND THE WOMEN'S LEGAL DEFENSE FUND, AS AMICI CURIAE IN SUPPORT OF PETITIONER.

NADINE TAUB
 Rutgers University
 School of Law
 15 Washington St.
 Newark, New Jersey 07012
 (201) 648-5637

JERRI BLAIR*
 Lockett & Blair, P.A.
 351 West Alfred St.
 P.O. Box 130
 Tavares, Florida 32778
 Florida Bar Number 0525332

*Council of Record

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INTEREST OF THE AMICI CURIAE

THE AMERICAN PUBLIC HEALTH ASSOCIATION (APHA), founded in 1872, and with a membership of 55,000, is the oldest and largest multi-disciplinary society of public health professionals in the world. Throughout its 119 year history, the APHA has been in the forefront of countless efforts to protect and promote personal and public health. Included in these efforts have been numerous activities dedicated to the control of licit and illicit drug use.

THE APHA's membership includes physicians, nurses, social workers, behavioral scientists, bioethicists and maternal and child health specialists who are experts in both prenatal care, neonatology, women's health issues and drug abuse prevention and treatment. Included in this group of experts are both practitioners and researchers.

THE APHA has long espoused a public health model, as opposed to a criminal deviancy model, as the means of addressing and resolving the drug problem. In particular, it believes that if pregnant women who use drugs are to be helped, prenatal care and drug treatment must be made available to every pregnant woman, and that barriers to such care must be eliminated.

By submitting this brief, the APHA wishes to assist the Court in arriving at an outcome that furthers the goals of both good law and good public health policy -- providing pregnant women not with punishment, but with the best possible care.

THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, INC. (AMWA) is a nonprofit organization of 12,000 women physicians and medical students, with a primary mission to promote quality health care for women. AMWA believes that chemical dependency is a disease requiring treatment and rehabilitation and does not believe that criminal punishment is an appropriate treatment for pregnant, drug-addicted women.

THE AMERICAN NURSES ASSOCIATION (ANA) is the only full-service professional organization for the nation's entire registered nurse population. From the halls of Congress and federal agencies to board rooms, hospitals and other health care facilities, ANA is the strong voice for the nursing profession.

ANA is the spokesperson for the nation's two million registered nurses through its 53 constituent state and territorial associations. As the leader in the legislative arena and with the media on nursing issues, ANA serves as the official spokesperson for registered nurses. Another primary goal of the association is to serve as an advocate for quality patient care.

Dedicated to ensuring that an adequate supply of highly skilled and well trained nurses is available, ANA is committed to meeting the needs of nurses as well as health care consumers. ANA and its constituents work at local, state and national levels, on issues such as the shortage of nurses, adequate reimbursement for nursing services, health and safety and more.

Through ANA's political and legislative program, the association has taken firm positions on everything from AIDS policies and a patient's right to self-determination, to access to health care and adequate reimbursement for health care services.

The association takes an equally firm position against the prosecution of pregnant substance abusers, and therefore signs on as an amicus to this brief.

THE AMERICAN SOCIETY OF ADDICTION MEDICINE (ASAM) is a nationwide organization of more than 3,600 of the nation's foremost physicians specializing in addiction medicine. We believe that the proper, most effective solution to the problem of substance abuse during pregnancy lies in medical prevention, i.e., education, early intervention, treatment and research on chemically dependent pregnant women. We further believe that state and local governments should avoid any measures defining alcohol or other drug use during pregnancy as "child abuse," and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health services.

THE AMERICAN SOCIETY OF LAW & MEDICINE (ASLM) traces its beginnings to the Massachusetts Society of Examining Physicians (1911) and was formally incorporated as the ASLM in 1972. The ASLM is interested in this case because our organization seeks to ensure that health policy and law are rational and founded upon a

clear understanding of scientific and medical facts. The ASLM also seeks to ensure that health policy and law are not needlessly discriminatory. Discrimination in health care policy is contrary to public health goals in that it will dissuade people from coming forward for treatment and is contrary to established bio-ethical values.

THE ASSOCIATION OF MATERNAL AND CHILD HEALTH PROGRAMS (AMCHP) is a national non-profit organization representing state public health programs funded under Title V of the Social Security Act, the Maternal and Child Health (MCH) Services Block Grant. State MCH programs are responsible for promoting the health of all mothers and children, consistent with the year 2000 National Health Objectives. State Title V programs support maternal and infant services; preventive and primary child health services; and specialized health services for children with actual or suspected developmental or chronic health impairments. State Title V programs support care for over 3 million low-income women and children annually. AMCHP members are vitally concerned about the implications of criminal prosecution of drug dependent pregnant women in assuring access to needed health services. We are most concerned that prosecution will likely deter alcoholic and drug dependent women who are pregnant from seeking both prenatal care and treatment for their addiction; resulting in substantially increased risks to their health and that of the fetus. The Association believes that treatment and

rehabilitation for alcoholism and/or drug dependence of affected women should take precedence over punishment.

THE BUCKS COUNTY COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE (BCCADD) is a licensed Drug and Alcohol Prevention and Intervention agency which serves all members of the Bucks County community. BCCADD is an affiliate of the National Council on Alcoholism and Drug Dependence (NCADD). In their current policy statement NCADD states:

Alcoholic and other drug-dependent pregnant women have become subject to charges of child abuse and prosecution rather than to the support of the health care system. This punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interest of infants and children by involving the sanctions of the criminal law in the case of a health and medical problem. Moreover, there is increasing evidence of disparities regarding the screening and reporting of positive toxicologies of newborns, with women of color, poor women and women receiving care in public hospitals having the greatest likelihood of being subject to drug testing and subsequent reporting to legal authorities." (NCADD policy statement "WOMEN, ALCOHOL, OTHER DRUGS AND PREGNANCY," April 29, 1990).

This appeal raises issues of vital significance to all people who have diligently worked to de-stigmatize the disease of addiction, so critical in our efforts to get people whose lives are being destroyed by alcohol and/or other drug use into treatment. By criminalizing addicted women we further diminish

the humanity of women, who need help for themselves as well as for their children, and treat them solely as a vehicle of transmission. It is our experience that the end result of this is a decrease in these women getting drug and alcohol, prenatal, and other critical human services, as well as a diminishing of their belief that they are worthy and capable of recovery.

THE CENTER FOR LAW AND SOCIAL POLICY (the Center) is a nonprofit public interest law firm with offices in Washington, D.C. The Center provides training and litigation assistance to attorneys whose clients are largely low-income women seeking help with public assistance, family or health issues. The Center is concerned that criminal prosecution will deter low-income pregnant women with substance abuse problems from seeking needed medical care, a situation potentially harmful to the women and their children.

THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST (CSPI) was founded in 1971 to promote good health and nutrition. CSPI is a non-profit consumer organization based in Washington D.C. CSPI is funded primarily by 250,000 members as well as foundation grants. In 1981, as part of our overall mission, we began a campaign to reduce the devastating health and social consequences of drinking alcoholic beverages and to change alcohol's role in American life. Our past accomplishments include: successfully campaigning with more than 100 other organizations for federal

legislation to require health and safety messages on alcoholic beverages; working with Hispanic and public health organizations to successfully end hard-liquor advertising on Spanish-language television; and publishing numerous reports including Chemical Additives in Booze, which, blew the whistle on the widespread use of additives in alcoholic beverages, leading to the voluntary reduction in their use. We are actively working for mandatory rotating health and safety warning messages on all alcohol advertisements to warn consumers about the possible risks associated with drinking alcohol; expanded warning requirements on alcoholic beverage containers to include rotating health messages, calories, ingredients, and a toll-free number that refers callers to alcoholism treatment centers; and substantially increased state and federal alcohol excise taxes as a way to reduce alcohol-impaired driving and fund prevention, treatment, and research programs. We are also concerned about the devastating effects of substance abuse, and support a treatment based response. We therefore sign on as amicus to this brief.

THE COALITION ON ALCOHOL AND DRUG DEPENDENT WOMEN and their Children is a group of national and state organizations concerned about the health and welfare of alcohol and drug dependent women and their families. Coalition members include organizations concerned about women's health care, legal issues, alcohol and drug problems, civil rights, child welfare, and maternal and child health. The Coalition is organized to enhance access to

preventive and educational services, health care, prenatal care, and alcoholism and drug addictions treatment for women, and to ensure the availability of health and social services for their children. The Coalition believes that the interests of women and their children are best served through the health care and social services systems. This appeal raises issues of importance to us because of our firm position that women should not be singled out for punitive measures based solely on their use of alcohol and other drugs during pregnancy.

THE DRUG POLICY FOUNDATION is a privately funded, tax-exempt, non-profit organization which provides a forum for the development of effective drug policies. The Foundation was founded in 1987 and is made up of thousands of individuals from a variety of professions involved with the drug issue from throughout the United States and around the world. Among the Foundation's advisory board members are individuals who have been leading officials in federal, state and local drug law enforcement agencies, as well as eminent researchers and physicians in the field of drug use. In the case sub judice the Foundation is concerned that the use of criminal laws is doing more harm than good in that women will be discouraged from seeking prenatal care due to the fear of prosecution. The resources spent on such counterproductive prosecutions could be better spent on making prenatal care and drug treatment more easily accessible to pregnant addicted women.

THE FLORIDA CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN is a statewide organization with over 10,000 members in Florida. NOW's purpose is to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men. Our network of over 35 chapters statewide works on a variety of issues including the legal rights of women, health care access for women and children particularly prenatal care, substance abuse issues for women, and issues of discrimination involving sexism as well as racism. We are extremely concerned that all women have access to prenatal care and that help and treatment is available to women carrying the extra burden of substance abuse during pregnancy. Florida NOW joins this brief in order to voice its opposition to a policy that deals with chemical dependency and addiction in primarily a punitive as opposed to a treatment oriented way.

THE FLORIDA FEMINIST TASK FORCE is a statewide organization which addresses issues of oppression, violence and militarism as they relate to the lives of women. We are aware that the majority of women who are drug addicted have also suffered physical and sexual violence and that the majority of women prosecuted in Florida for being drug-addicted while pregnant have been women of color. Our belief is that such criminal punishment simply revictimizes women rather than providing protection and remedy. At best it is a short-sighted interpretation of the law

which aids neither mother nor child; at worst its application lends itself to racial bias.

THE FLORIDA NURSING STUDENTS' ASSOCIATION (FNSA) is a constituent of the National Student Nurses' Association, the largest independent health professional student organization in the United States. The FNSA opposes prosecution of women for their use of drugs during pregnancy. Research, as well as the experiences of the public health nursing units who regularly handle such cases, show that the threat of prosecution drives women into hiding, endangering the medical outcome and lifetime potential of mother and infant. As an alternative to prosecution, FNSA encourages the development and funding of prenatal care programs, with drug treatment as a necessary adjunct.

THE ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION (IADDA) is a statewide, nonprofit organization with 119 agency members and over 500 individual members. The Association's primary purpose is to enhance the quality and quantity of alcohol/drug abuse prevention and treatment services. IADDA seeks to promote sound public policy at the state and national level. The Association is deeply concerned about legislation and court decisions which discourage women from seeking alcohol/drug treatment and prenatal care. Any court decision which increases the likelihood that criminal penalties will be imposed on

pregnant, addicted women will prove harmful. Women will hide their addiction and avoid treatment/prenatal care if they believe they may be prosecuted.

THE LEGAL ACTION CENTER is the only not-for-profit organization in the United States specializing in the legal issues of concern to the drug, alcohol and AIDS prevention and treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting women with drug and alcohol problems and their families. We work to enact public policies which promote increased access to care for them. We also represent individuals who have faced discrimination because of their drug and alcohol dependencies. This appeal raises issues of great importance to the Legal Action Center and the individuals and treatment programs we represent.

THE LOUISIANA COALITION FOR MATERNAL AND INFANT HEALTH is a state organization representing hospitals that provide obstetric services, professional associations and individuals concerned with maternal and infant health. The Coalition's position is that the preferred methods of dealing with drug use during pregnancy are prevention, intervention and treatment alternatives rather than punitive actions. It is actively involved in supporting state legislation compatible with that position. The Coalition believes that criminalizing drug use by women during

pregnancy will keep women from seeking basic prenatal care. Although it remains concerned that adequate drug treatment programs are not available, the Coalition believes that good prenatal care combined with the motivating force of motherhood can work to produce drug free deliveries. Criminal penalties will not solve the core problem.

THE MARIPOSA WOMEN'S CENTER provides services for women with alcohol and substance abuse problems. We are concerned about the impact of prosecutions, such as this one, on the health of women and their children. We believe these prosecutions are not in the public interest.

THE MONROE COUNTY COALITION FOR CHOICE advocates the constitutional right to privacy and reproductive choice for all women and promotes policies that protect the health and welfare of women and their children. Towards these goals, the Coalition opposes the criminal prosecution of pregnant addicts. The imposition of criminal sanctions is punitive, not rehabilitative; it drives women away from prenatal care or drug treatment out of fear of prosecution, thereby undermining the health of the newborn, the mother, and the family. The Monroe County Coalition for Choice firmly believes that, "criminally punishing pregnant addicts is irrational and contrary to sound public health policy."

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL), has almost 500,000 members in 41 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible and preserving women's fundamental reproductive rights. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality. NARAL believes it is both counterproductive and irrational to punish pregnant addicts for a status which they cannot change, given the lack of access to crucial reproductive services, drug treatment programs, and adequate prenatal care, especially for low-income women like Jennifer Johnson.

THE NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS (NAADAC) represents more than 24,000 alcoholism and drug abuse counseling professionals nationwide. NAADAC believes that criminal prosecution will not deter drug use or in any way solve the problem of pregnant women addicted to drugs. Rather, it sends a dangerous message to pregnant addicts that it is better to avoid treatment than run the risk of arrest and criminal punishment.

THE NATIONAL ASSOCIATION OF SOCIAL WORKERS (NASW) is the largest association of professional social workers in the world with over 135,000 members in 55 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 Florida Chapter of NASW has over 4,200 members.

NASW believes that criminal prosecution of women who used drugs during their pregnancy is inimical to family stability and runs counter to the best interests of the child.

THE NATIONAL BLACK WOMEN'S HEALTH PROJECT (NBWHP) was founded as a self-help and health advocacy organization to improve the chronic poverty and declining health status of Black women and their families. Today it consists of a network of 88 developing and established chapters in 24 states, serving a broad-based constituency of almost 2,000 members. The NBWHP is deeply concerned about the results of the recent Florida study revealing that Black pregnant women are disproportionately reported (and therefore prosecuted) for substance abuse, even though abuse is equally prevalent between the races. The NBWHP is further concerned that the fear of prosecution will deter women from seeking needed medical care, thereby exacerbating the already poor health status of Black women and their families. As it is, Black people suffer the highest rate of infant mortality and neo-natal deaths in the Western world. The NBWHP joins this

brief to voice its opposition to the harmful and counterproductive policy of criminalizing pregnant women for their drug abuse.

THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE is a leading voluntary health agency in the field of alcoholism and drug addiction. Since 1944, NCADD has educated the public about alcoholism and drug dependence as treatable illnesses and has served as an advocate for alcoholic and other drug dependent persons and their families. This appeal raises issues of importance to NCADD and to its 190 affiliated councils because of policy adopted by NCADD which encourages expanded access to treatment for drug dependent pregnant women and which opposes the criminalization of drug use during pregnancy.

THE NATIONAL COUNCIL OF NEGRO WOMEN, INC. (NCNW), headquartered in Washington, D.C., is an umbrella organization of national organizations. The NCNW has worked for a half century to harness the strengths of Black women and their families in the struggle for civil and human rights. NCNW opposes the prosecution of pregnant women for substance abuse as it is both discriminatory in practice and fundamentally misguided.

THE NATIONAL LATINA HEALTH PROJECT is a national advocacy group established to promote policies that ensure and improve the health on Latina women. Currently, there is inadequate access to

health care for Latinas. Prosecuting women with substance abuse problems can only create additional barriers.

THE NATIONAL LAWYERS GUILD, SOUTHERN REGION, (NLG) is an organization comprised of progressive and public-interest lawyers, law students and legal workers throughout the southeastern United States. NLG members represent individuals and organization seeking to maintain and expand women's rights to privacy and reproductive freedom under the U.S. Constitution and Bill of Rights. The NLG and its members believe that the criminal prosecution of women for their drug use during pregnancy will further weaken women's constitutional rights and deter many women from seeking needed medical care.

THE NATIONAL PERINATAL ASSOCIATION (NPA) is an organization comprised of approximately 4500 members of existing multidisciplinary regional or state perinatal organizations and an at-large caucus. Member organizations include representatives from all perinatal health professionals and administrative disciplines as well as consumers. The National Perinatal Association believes that health is influenced by all factors in the human life cycle which affect the well-being of the family from prior to conception through the next generation. The National Perinatal Association respect the rights of each individual to a wholesome, full life. The Association and its

member organizations are dedicated to promoting perinatal health through fostering delivery of optimal care, education, research and ordering of national priorities. This appeal raises issues of grave concern to the NPA as its members are responsible for providing medical care during pregnancy and childbirth, and for developing health care policies to support pregnant women and their fetuses. NPA Believes that criminalizing the use of drugs by women in pregnancy is a dangerous policy as it endangers the physician/patient relationship of trust and could keep women at a high risk of complications from lack of proper care during pregnancy.

THE NATIONAL WOMEN'S HEALTH NETWORK (the Network) is a national advocacy group representing 500,000 women through its individual and organizational members. The Network's goals include ensuring that all women have access to appropriate prenatal, delivery and post-partum care. Toward those goals, the Network works to eliminate cultural, economic, educational and legal barriers to health care for women. We oppose criminal prosecution of pregnant addicts, which threatens to create yet another barrier to health care that will endanger the health of women and their future children.

PROJECT HEALTHY CHOICES provides treatment for women who suffer from addiction. We are therefore very concerned about policies that impair rehabilitative efforts. Prosecuting

pregnant substance abusers only serves to deter women from health care and impairs maternal fetal health.

THE WINTER PARK AREA CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN (WINTER PARK AREA NOW) is one of 37 chapters in the State of Florida and part of a national network that is working to bring women into full participation in the mainstream of American society. We support national and local action to eliminate prejudice and discrimination against women in government, industry, the political parties, education, science, medicine, law and the judiciary. NOW Supports access to safe and legal abortion, to effective birth control, to reproductive health and education. NOW's membership at the local, state, and national level believes that criminalizing the use of drugs by pregnant women is a dangerous policy. Confidentiality is breached in the doctor/patient relationship and pregnant women at high risk of complications during pregnancy are driven away from the necessary health care. Even for women seeking help with a drug problem during pregnancy, there are few if any treatment facilities in Florida that offer them treatment.

THE WOMEN'S LEGAL DEFENSE FUND, a non-profit national advocacy organization of over 2500 members, works at the federal and state levels for policies that offer equal opportunity to women, responds to women's basic economic and health needs, and enables women and men to live and work with dignity and

participate fully in family and community life. Because WLDF believes that reproductive freedom for women is fundamental to the achievement of these goals, it files amicus briefs in major reproductive rights and health cases, advocates for reproductive rights and health care for women before Congress, and provides policy options about reproductive health programs to state legislators.

PRELIMINARY STATEMENT

Jennifer Johnson is a twenty-five year old woman of color who was addicted to cocaine when she gave birth to two of her children. Neither Carl, born October 3, 1987, nor Jessica, born January 23, 1989, was addicted to cocaine;¹ in fact both were full term and healthy. Record on Appeal ["RA"] 46, 54, 65. The State learned of Ms. Johnson's prenatal drug use only because she confided in her obstetrician and nurse about her addiction problems prior to delivering Jessica (as she had confided to the physician who delivered Carl in 1986). RA 39. Prompted by Ms. Johnson's disclosure, the obstetrician and nurse tested her urine as well as that of Jessica. When both tested positive for benzoylecgonine, a metabolized inactive form of cocaine, RA 162, hospital personnel were instructed to report the results to the Florida Department of Health and Rehabilitative Services ("HRS") pursuant to §415.503(9)(a)(2), Fla. Stat. (Supp. 1990). An Investigation Case Worker, dispatched to the hospital by HRS, interviewed Ms. Johnson.

Despite the fact that §415.503(9)(a)(2) provides that "no parent shall be subject to a criminal investigation solely on the basis of [an] infant's drug dependency," the case worker apparently notified Detective Dan Prast of the Seminole County Sheriff's Department about the positive drug tests on Ms. Johnson

¹ Based on available data, "at this time it is inaccurate to describe a cocaine-exposed newborn as crack-addicted." Zuckerman, Drug-Exposed Infants: Understanding the Medical Risk, 1 The Future of Children 26, 31 (1991) [hereinafter "Drug Exposed Infants"].

and her newborn. Detective Prast then initiated a criminal investigation. Johnson cooperated with Detective Prast by allowing him to "interview" her because she believed, perhaps naively, that the authorities were not trying to arrest her, but rather intended to help her. RA 568. As she stated, "[i]f I see somebody trying to . . . help me . . . I'm gonna cooperate."² RA 568. Johnson was unable to obtain the help she sought despite her willingness to "cooperate," in large part because as a woman on Medicaid with a debilitating drug addiction, the medical help she required was elusive at best.

Rather than receiving the help she wanted, Ms. Johnson was arrested. Unable to properly charge her with an existing crime, the prosecution contorted the Florida statute that makes it a felony to deliver drugs to a person under the age of eighteen, §893.13(1)(c)(1), Fla. Stat (Supp. 1990), to try to make it "fit" the case of a substance abuser who becomes pregnant and carries that pregnancy to term.³ On July 13, 1989, a trial court

² Johnson had previously sought help because she was concerned about the effect of her cocaine use on her future offspring. On December 22, 1988, she called emergency medical services; her chief complaint was listed on the intake sheet as "concern for baby." RA 569. As she later explained to Prast, she thought that if she confided her drug addiction to hospital personnel, they would refer her to "a drug place or something, cause I really didn't have no where to stay I just wanted to get some help." RA 562-63. Johnson was never sent to a "drug place," nor did she receive the "help" she sought. Instead, her effort to seek help was ultimately turned against her when, at trial, the prosecutor relied on her expressions of concern for her future baby's health as "evidence" of guilt. RA 144-45, 148.

³ Ms. Johnson was also charged with child abuse, but found not guilty because there was no evidence that either child had been harmed. See RA 365-66. Despite initial alarming reports suggesting that all crack-exposed babies suffer serious harm, clinical experience establishes that drug-exposed infants
(continued...)

accepted this unprecedented interpretation of the statute and Jennifer Johnson became the first woman in the United States to be convicted of delivering a controlled substance to a minor as a result of her drug use during pregnancy.

On August 25, 1989, Ms. Johnson was sentenced to one year of community control and fourteen years probation.⁴ During that time, she must, among other things, perform two-hundred hours of community service, remain gainfully employed, and submit to any physical or chemical examinations required by her probation or community control officer. RA 391-93.⁵ A majority of the court below affirmed Ms. Johnson's convictions. Johnson v. State, No. 80-1765, slip op. (Fla. 5th DCA Apr. 18, 1991).

Because the State's attempt to prosecute women like Ms. Johnson will have adverse effects on the public health and welfare of women and their future children, particularly on poor

³(...continued)

are a diverse group of babies, some of whom do not show any damage. Center for the Future of Children, Recommendations, 1 The Future of Children 8, 10 (1991) [hereinafter "Recommendations"] (Appendix Exhibit 4) [hereinafter Ex. ___"]. Recent research also reveals that it is difficult if not impossible to differentiate symptoms of poverty, including malnutrition, and lack of prenatal care, from those of prenatal crack exposure. Murphy & Rosenbaum, Blame Poverty for their Learning Disabilities, N.Y. Times, Feb. 27, 1991, at A26.

⁴ Although Ms. Johnson has thus far been spared long-term incarceration, the first-degree felony with which she was charged carries a maximum penalty of thirty years. A violation of her probation would, once again, subject her to that potential sentence.

⁵ In addition to the restrictions described above, Ms. Johnson is prohibited from consuming alcohol, entering a bar without permission from the probation or community control officer, and associating with those who possess drugs. Finally, if she becomes pregnant, she must so notify the probation officer and enter a court-approved program of prenatal care. Id.

women and women of color and their children,⁶ and because Ms. Johnson's prosecution violates her constitutional privacy rights, amici submit this brief in support of a reversal of Ms. Johnson's convictions.

SUMMARY OF ARGUMENT

Under the lower courts' interpretation of §893.13(1)(c)(1), upon giving birth, new mothers with substance abuse problems instantly become drug dealers subject to thirty years imprisonment. Had Ms. Johnson not chosen to carry her pregnancy to term, she would not have been convicted under the delivery statute.

Because the lower courts' interpretation penalizes pregnancy and childbirth it implicates a woman's right to privacy as

⁶ The process through which pregnant women are initially suspected of drug abuse, diagnosed, and ultimately prosecuted by the State, is suffused with enormous discretion. It is thus not surprising that even with mandatory reporting requirements, pregnant black women are more likely to be reported and therefore prosecuted for drug addiction than pregnant white women. Indeed, a 1989 study has concluded that in Pinellas County, Florida, a black woman is 9.58 times more likely than a white woman to be reported for substance abuse, even though abuse is equally prevalent between the races. Chasnoff, Landress & Barrett, The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida, 322 New Eng. J. of Med. 1202, 1203 (1990).

The Secretary of the Florida Department of Health and Rehabilitative Services (HRS), Gregory Coler, endorsed this study and stated that it is likely that the bias found in Pinellas County exists throughout Florida. Holly, Study: Race Affects Drug-Abuse Testing, Miami Herald, Sept. 19, 1989, at 2B. Similar racial bias is present in cases involving criminal prosecutions. Of the approximately sixty prosecutions nationwide of pregnant women for their drug use while pregnant, eighty percent, a vastly disproportionate number, have been women of color. Kolata, Racial Bias Seen on Pregnant Addicts, N.Y. Times, July 20, 1990, at A13. The disparity between the number of women of color and white women prosecuted for drug addiction while pregnant is a strong indication that the women of color have been denied equal protection under the law. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1451 (1991).

guaranteed by the Florida and United States Constitutions. This brief's examination of the nature of addiction, the reasons why women take drugs, and the obstacles preventing women from getting help illustrate that prosecuting pregnant substance abusers not only fails to serve any compelling state interest, but actually undermines legitimate public health efforts to address the problems of drug use during pregnancy.

Because the lower courts' interpretation of §893.13(1)(c)(1) cannot survive the strict scrutiny required under the privacy analysis, Ms. Johnson's convictions must be reversed. Additionally, Ms. Johnson's convictions must be overturned because the lower courts' interpretation of Florida's drug delivery statute violates the plain meaning of the statute and leads to absurd results.

ARGUMENT

I

PUNISHING A WOMAN WHO USES ILLEGAL DRUGS BECAUSE SHE BECOMES PREGNANT AND GIVES BIRTH VIOLATES THE CONSTITUTIONAL RIGHT TO PRIVACY.

The Florida Constitution explicitly recognizes a right to privacy that is "much broader in scope than that of the Federal Constitution." Winfield v. Div. of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985).⁷ This right is "clearly implicated

⁷ The people of Florida amended the State Constitution in 1980 to provide: "Right of Privacy. -- Every natural person has the right to be let alone and free from Governmental intrusion into his private life except as
(continued...)"

in a woman's decision whether or not to continue her pregnancy," In re T.W., 551 So.2d 1186, 1192 (Fla. 1989), and her "'right to make that choice freely is fundamental.'" Id. at 1193 (citation omitted).⁸ Because

[t]he right of privacy [under Florida law] is a fundamental right, [this Court applies] the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Winfield, 477 So.2d at 547.⁹

The State seeks to distract attention from the privacy rights at stake in this case by arguing that "the right to privacy does not include the right to use drugs." Answer Brief of Appellee at 40, Johnson v. State, No. 89-1765, slip op. (Fla. 5th DCA Apr. 18, 1991). But that argument misses the point entirely. Both the trial court's rulings and the prosecution's statements make clear that Ms. Johnson's pregnancy was a crucial

⁷(...continued)

otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Art. I, §23, Fla. Const. This privacy right provides "an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions." Rasmussen v. South Florida Blood Serv., 500 So.2d 533, 536 (Fla. 1987).

⁸ In In re T.W., 551 So.2d at 1190-91, this Court found it appropriate to reach the issue of privacy under the Florida Constitution prior to addressing federal constitutional concerns.

⁹ Even if no fundamental constitutional rights are implicated by a prosecution, criminal penalties may not be imposed unless they are "reasonably related to achieving [a] legitimate legislative purpose." State v. Saiez, 489 So.2d 1125, 1129 (Fla. 1986).

and indispensable element of the alleged crime. The trial judge said, "The defendant also made a choice to become pregnant and to allow these pregnancies to come to term." RA 367. Similarly, the prosecution said: "When she delivered the baby, she broke the law in the State." RA 365. Had Jennifer Johnson not been pregnant at the time she used cocaine, she could not have been criminally prosecuted under §893.13(1)(c)(1).

Although Ms. Johnson is equally subject to prosecution for possession of drugs as any other Florida resident, the imposition of special penalties or prosecutions based on the fact that she was pregnant implicates her privacy right under the Florida Constitution. The fact that a pregnant addict who wishes to avoid criminal prosecution may have no option other than to obtain an abortion further illustrates that reproductive privacy rights are implicated by the lower courts' interpretation of §893.13(1)(c)(1). See Johnson, slip op. at 13 (Sharp, J., dissenting) ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.").

A more general right to privacy is also at stake because, in order to prosecute a woman like Jennifer Johnson, the State "'must intrude into her most private areas, her inner body" Commonwealth v. Pellegrini, No. 87970, slip op. at 6 (Mass. Sup. Ct. Oct. 15, 1990).¹⁰ Because the fetus is

¹⁰ That similar prosecutions might occur because of a woman's legal behavior during pregnancy is not mere speculation. For example, in 1986, (continued...)

physically part of a woman's body, her every action has the potential to affect fetal health. Thus, "'the level of state intervention and control over a women's body required by this prosecution' would set a dangerous precedent for numerous other pregnancy-related restrictions on women." Id. at 9.¹¹

¹⁰(...continued)

Pamela Rae Stewart was arrested under a criminal child support statute and charged with "failing to follow her doctor's advice to stay off her feet, to refrain from sexual intercourse, refrain from taking street drugs, and seek immediate medical attention, if she experienced difficulties with the pregnancy." People v. Stewart, No. M508197, slip op. at 4 (San Diego Mun. Ct. Feb. 23, 1987). Prosecutors later admitted that drugs had little to do with the case. Schacter, Help is Hard to Find for Addict Mothers, Los Angeles Times, Dec. 12, 1986, §II, at 20. In Albany County, Wyoming, a pregnant woman who entered a hospital for treatment for injuries inflicted by her husband was tested for alcohol, arrested, jailed, and charged with criminal child abuse because the state argued that by drinking alcohol she had endangered her fetus. State v. Pfannenstiel, No. 1-90-8CR, slip op. (County Ct. of Laramie, Wy., complaint filed Jan. 5, 1990). See Levandosky, Turning Women into 2-Legged Petri Dishes, Casper [Wyo.] Star-Tribune, Jan. 21, 1990 at A8. The charges, however, were dismissed in both cases.

¹¹ Indeed, the State apparently believes that it has the right "to require a certain degree of prenatal care once [a woman] elects . . . [to] carry the child to full term." Answer Brief at 42. Such a view of pregnancy was explicitly rejected by the highest court of Illinois in Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988). In that case, the Court refused to recognize a tort for maternal prenatal negligence in part because it would permit an unlimitable basis for state intrusion in pregnant women's lives:

If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. It must be asked, by what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be guided in determining whether a pregnant women did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?

(continued...)

For these reasons, courts in Massachusetts and Michigan have held that prosecuting a woman because she was pregnant at the time she used cocaine implicates her right to privacy.

Pellegrini, slip op. at 6; People v. Bremer, No. 90-32227-FH, slip op. (Mich. Cir. Ct. Jan. 31, 1991).

Although the State may assert that it has a compelling interest in promoting healthy births sufficient to override the pregnant woman's privacy, as Point II demonstrates the criminal prosecution of drug-using women for becoming pregnant is not only grossly ineffective, but, indeed, undermines the State's asserted public health interest by deterring women from seeking prenatal care and drug treatment. As the Academy of Pediatrics has concluded, these "[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health" American Academy of Pediatrics, Committee on Substance Abuse, Drug-Exposed Infants, 86 Pediatrics 639, 641 (1990).

¹¹(...continued)

Id. at 360. The court refused to turn woman and fetus into "legal adversaries" or to adopt the "legal fiction" that the fetus "is a separate legal person with rights hostile . . . to the woman." Id. See also In re A.C., 573 A.2d 1235, 1244 (D.C. App. 1990) (rejecting argument that because a woman "'has chosen to lend her body to bring [a] child into the world' [She] has an enhanced duty to assure the welfare of the fetus, sufficient even to require her to undergo caesarean surgery.").

II

THE LOWER COURTS' CONSTRUCTION OF §893.13(1)(c)(1) LEADS TO RESULTS THAT ARE IRRATIONAL, COUNTERPRODUCTIVE AND AT ODDS WITH SOUND PUBLIC HEALTH POLICY.

The decision below reflects thinly veiled anger at Ms. Johnson and women like her. Without appreciating the nature of addiction or the complex social and psychological factors that influence women's substance abuse, the courts below portray Ms. Johnson's drug use as simply a matter of willpower alone. RA 513-14; Johnson, slip op. at 2; id. at 2 (Cobb, J., concurring). However, as presented below in Point II A, addiction is a disease and, therefore, unlikely to be deterred by the additional penalties created by §893.13(1)(c)(1) for women who use drugs and have babies. The decisions below also suggest that drug-use by women like Ms. Johnson constitutes intentional disregard for the well-being of their future children. But as Point II B explains, drug use by such women may be better understood as a reflection of the violence and despair in their own lives. Indeed, some substance abusers who are pregnant are especially motivated to seek drug treatment during pregnancy. Unfortunately, as explained in Point II C, that help is almost nonexistent. Moreover, as Point II D describes, whether or not drug treatment is available, the reproductive health care women need to make responsible choices simply is not accessible to many low-income women of color like Ms. Johnson.

Finally, Point II E demonstrates how utterly counterproductive and ill-advised is the lower courts' interpretation of

§893.13(1)(c)(1). Judge Sharp correctly noted, "prosecuting women for using drugs and 'delivering' them to their newborns appears to be the least effective response to this crisis. Rather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected." Johnson, slip op. at 11-12 (Sharp, J., dissenting).

The public health community is in agreement that a punitive approach to drug use during pregnancy, by driving women away from health care, will exacerbate, not solve, the problem. Among the organizations that have published policies or recommendations opposing the creation of new penalties directed at drug use by pregnant women are the American Public Health Association,¹² the American Academy of Pediatrics,¹³ the American Medical Association,¹⁴ the American Society on Addiction Medicine,¹⁵ the

¹² The American Public Health Association "recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed." American Public Health Association Policy Statement No. 9020, Illicit Drug Use by Pregnant Women, 8 Am. J. Pub. Health 240 (1990) (Ex. 2).

¹³ "The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant." American Academy of Pediatrics, Committee on Substance Abuse, Drug Exposed Infants, 86 Pediatrics 639, 642 (1990). "The [Academy] is concerned that such involuntary measures may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment." Id. at 641.

¹⁴ American Medical Association Board of Trustees Report, Legal Interventions During Pregnancy, 264 J. A.M.A. 2663, 2670 (1990) ("Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate."); American Medical Association Board of Trustees Report, Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy, Resolution 131 (1990) ("[T]herefore be it . . . resolved (continued...)

March of Dimes,¹⁶ the National Association of Public Child Welfare Administrators,¹⁷ the Southern Regional Project on Infant Mortality (which is an initiative of the Southern Governors' Association and the Southern Legislative Conference),¹⁸ and the staff of the Center for the Future of Children.¹⁹

¹⁴ (...continued)
that the AMA oppose legislation which criminalizes maternal drug addiction").

¹⁵ The American Society of Addiction Medicine has issued a Position Statement that "[s]tate and local governments should avoid any measures defining alcohol or other drug use during pregnancy as 'prenatal child abuse' and should avoid prosecution, jail or other punitive measures as a substitute for providing effective health services for these women." American Society of Addiction Medicine Policy Statement on Chemically Dependent Women and Pregnancy, ASAM News 6 (Sept./Oct. 1989) (Ex. 3).

¹⁶ "Punitive approaches to drug addiction may be harmful to pregnant women because they interfere with access to appropriate health care. Fear of punishment may cause women most in need of prenatal services to avoid health care professionals." March of Dimes, Statement on Maternal Drug Abuse 1 (Dec. 1990) (Ex. 8).

¹⁷ "Laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents are inappropriate." National Association of Public Child Welfare Administrators, Guiding Principles for Working With Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response 3 (Jan. 1991) (Ex. 10).

¹⁸ "[S]tates should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol." Southern Legislative Summit on Healthy Infants and Families: An American Assembly: Policy Statement 8 (Oct. 4-7, 1990) (Ex. 11).

¹⁹ "A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecution on the basis of allegations that her illegal drug use harms the fetus. Nor should states adopt special civil commitment provisions for pregnant women who use drugs." Recommendations at 8, 9 (1991) (Ex. 1).

A. Addiction During Pregnancy Is A Social Problem Appropriately Addressed By Public Health Authorities, Not The Criminal Justice System.

The trial court below stated, "The choice to use cocaine or not to use it is just that -- a choice." RA 366. Similarly, Judge Dauksch assumed that "[a]ppellant voluntarily took cocaine into her body" Johnson, slip op. at 2. And Judge Cobb asserted: "certainly, it is no undue burden upon an expectant mother to avoid cocaine use during the last several days of her pregnancy." Id. at 2 (Cobb, J., concurring). All these statements reflect a profound misunderstanding of the nature of addiction and the belief that §893.13(1)(c)(1) can properly be applied to Jennifer Johnson because drug use is willful criminal behavior. RA 318.

As long ago as 1925, however, the United States Supreme Court observed that addicts "are diseased and proper subjects for [medical] treatment." Linder v. U.S., 268 U.S. 5, 18 (1925). Thirty-seven years later, the Supreme Court reaffirmed that addiction to drugs is a disease, and not a crime. Robinson v. California, 370 U.S. 660, 667 n.8 (1962). The medical community agrees that addiction is a disease best addressed through treatment rather than punishment. See Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 Am. J. Pub. Health 483, 484-85 (1990).

Ms. Johnson at the time of her arrest suffered from the disease of addiction. RA 366. She used crack cocaine, the most

addictive substance known to the medical community.²⁰ Cocaine addicts like Ms. Johnson have been described as being trapped in a seemingly interminable cycle of "short lived euphoria that is followed by severe depression, driving the addict to recapture the euphoria."²¹ See also National Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 (1989) ("[A]ddicts may be unable to abstain even for a limited period of time."). Nevertheless, application of §893.13(1)(c)(1) to Ms. Johnson and women like her presumes that they

can and will "control" their behavior in response to threats. Yet, the pregnant woman who uses drugs has already demonstrated that she is not deterred by threats; her use of illegal drugs in and of itself carried the possibility of prosecution and imprisonment whether or not she was pregnant, and that possibility did not deter her. There is little reason to believe that an additional threat will be a more effective deterrent.

Recommendations at 15 (Ex. 4). Thus, contrary to the lower courts' assumptions, Ms. Johnson and women like her are unable simply to choose to discontinue their drug use and the additional penalties imposed by §893.13(1)(c)(1) will not further a state interest in getting pregnant women to stop their drug use.

²⁰ Experts Finding New Hope On Treating Crack Addicts, N.Y. Times, August 24, 1989, at 1, col. 5.

²¹ Id.

B. Substance Abuse And Addiction Are Caused By Complex Social And Psychological Factors.

The decisions below attribute to Ms. Johnson an intent to give drugs to her children. Experts, however, have identified several factors that affect a woman's drug use, none of which include the desire to push drugs to their newborns or children to be.

A history of victimization is a key predictor for a woman's substance abuse.²² Incest, sexual abuse, rape, and battering, which threaten all women, are disproportionately present in the lives of women who are drug dependent. In one study, up to 74% of alcohol and drug dependent women reported incidents of sexual abuse.²³ In another study of pregnant addicted women, 19% were severely beaten as children, 15% were raped as children, and 21% were raped as adults. This was in addition to the 70% who reported that as adults they were also beaten.²⁴ These studies are consistent with the anecdotal reports from the few programs

²² D. Kilpatrick, Violence as a Precursor to Women's Substance Abuse: The Rest of the Drug-Violence Story 7 (American Psychological Association, 98th Ann. Conv., Aug. 1990); see also L. Walker, Abused Mothers, Infants, and Substance Abuse: Psychological Consequences of Failure to Protect 12 (Jan. 19-20, 1990) (unpublished manuscript) (prepared for the American Psychological Association Division on Clinical Psychology and Georgetown University Child Development Mid-Winter Conference on Mothers, Infants and Substance Abuse, Scottsdale, Arizona) [hereinafter "Abused Mothers"].

²³ N. Finkelstein, S. Duncan, L. Derman & J. Smeltz, Getting Sober, Getting Well: A Treatment Guide for Caregivers Who Work With Women 244 (1990) (citing from S. Wilsnack, "Drinking, Sexuality, and Sexual Dysfunctions in Women" in Alcohol Problems in Women (S. Wilsnack & L. Beckman eds. 1984)) [hereinafter "Getting Sober, Getting Well"].

²⁴ Abused Mothers at 8 (citing Regan, Erlich & Finnegan, Infants of Drug Addicts: At Risk for Child Abuse, Neglect and Placement in Foster Care, 9 Neurotoxicology & Teratology 315 (1987)).

Growing up in substance abusing families,²⁸ and experiencing poverty, homelessness²⁹ and stress, also puts women at risk for drug abuse.³⁰ Studies confirm that low-income single mothers, like Ms. Johnson, also have higher levels of stress than most groups, low levels of well being, few existing support networks, and high levels of depression, putting them at risk for physical and emotional illness, including substance abuse.³¹

Given the reasons why many women begin to use drugs, the characterization of drug dependent women as drug dealers with criminal intent worthy of punishment makes little sense. No legitimate state interest, much less a compelling interest, can

²⁸ N. Finkelstein, Treatment Issues: Women and Substance Abuse 12, (Sept. 1990) (unpublished manuscript) prepared for the National Coalition on Alcohol and Drug Dependent Women and Their Children (citing N. Finkelstein, Effects of Parental Alcoholism, Family Violence and Social Support on Intergenerational Transmission of Alcoholism in Adult Women (Ph.D Dissertation, Brandeis Univ. 1986)) [hereinafter "Treatment Issues"] (Ex. 5).

²⁹ Johnson was one of many in Florida who, for some time found herself homeless and addicted. RA 544. A South Florida study found that a third of the homeless have untreated drug problems and recommended more treatment for the drug addicted, as one way of attempting to reduce homelessness. Miami Herald, Apr. 27, 1989 at 1A col. 2.

³⁰ Nearly ten percent of Florida's families live below the poverty level and 41% of those families are headed by women without a second wage earner supporting the family. Bureau of the Census, U.S. Department of Commerce, Economic Characteristics: Florida at Table 72 (1980).

³¹ See Treatment Issues at 10; (citing studies from D. Belle, Depression in Low-Income Female Headed Families, 1 Families Today at 323-345 (1979); D. Burden & B. Googins, Boston University Balancing Job and Homelife Study, Managing Work and Family Stress in Corporations (Boston U. Sch. of Soc. Work 1987); and Finkelstein & Derman, "Single Parent Women: What a Mother Can Do" in Alcohol and Drugs are Women's Issues (expected publication date March 1991) (Ex. 5).

that specialize in treating pregnant addicted women that 80-90% of their clients have been victims of rape or incest.²⁵

Significantly, women are often pressured to use drugs in the first instance by the same men who are physically abusive of them.²⁶

Thus, many experts believe that it is likely that women who are abused "self-medicate" with alcohol, illicit drugs, and prescription medication to alleviate the pain and anxiety of living under the constant threat of violence.²⁷

²⁵ Leff, *Treating Drug Addiction with the Woman in Mind*, The Washington Post, March 5, 1990, E1, E4; cf. Martin, *Big Bribe Helps Mothers Fend Off Allure of Crack*, N.Y. Times, Mar. 7, 1990, at B1.

²⁶ The Women's Drug Research Project found that over 85% of the women who used drugs were living with a male spouses or partners who were drug abusers. U.S. Department of Health and Human Services Publication No. (ADM) 87-1177, Treatment Services for Drug Dependent Women, 32-38 ("Characteristics of Drug Dependent Women") (1981); See also *Getting Sober, Getting Well*, at 302.

²⁷ Amaro, Fried, Cabral & Zuckerman, *Violence During Pregnancy and Substance Abuse*, 80 Am. J. Pub. Health 575, 578 (1990) [hereinafter "*Violence During Pregnancy*"]; see also Walker, *The Battered Woman Syndrome* (1984); Hilberman, Overview: The Wife-beater's Wife: Reconsidered, 137 Am. J. Psychiatry 1336 (1980); Getting Sober, Getting Well, at 302 (the use of alcohol or drugs during pregnancy "may be defensive behavior on the part of the woman trying to cope with an intolerable situation."); Randall, Domestic Violence Begets Other Problems of Which Physicians Must Be Aware to Be Effective, 264 Med. News and Perspectives 940, 943 (1990).

be served by punishing acts which are not intended or desired.³² As NAPARE has stated, "these women are addicts who become pregnant, not pregnant women who decide to use drugs and become addicts. They do not want or intend to have their unborn children by using drugs." NAPARE at 2 (Ex. 9).

C. In Light Of The Acute Shortage Of Drug Treatment Programs For Pregnant Women, Punishing Them Pursuant to §893.13(1)(c)(1) Cannot Further Any Compelling State Interest.

The prosecution and trial court both suggested that the application of §893.13(1)(c)(1) to Ms. Johnson was appropriate in part because she failed to get drug treatment during her pregnancy. RA 368, 383. No state interest can be furthered, however, by punishing women for failing to seek non-existent or inappropriate treatment for their drug-related problems. As discussed below, the shortage of drug treatment programs

³² National Association for Perinatal Addiction Research and Education, Policy Statement No. 1, Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive 1 (July 1990) [hereinafter "NAPARE"] (Ex. 9).

As one parent testified:

I can tell you that drug addicts are human beings who have the same hopes and dreams that you do. Drug addicted mothers love their children just like any other mother. I love my children. But it is just not easy to stop using drugs. It has taken a long time and a lot of treatment for me to reach this point in my recovery. Recovering from any kind of addiction is a long-term process, fraught with relapse. It takes a tremendous support system.

Missing Links: Coordinating Federal Drug Policy for Women, Infants and Children: Hearing before Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. (July 31, 1989) (testimony of Elaine Wilcox) at 1.

sensitive to women's needs creates insurmountable barriers for women seeking drug treatment.³³

As Representative and Chair of the Committee on Children, Youth and Families, George Miller stated: "Women who seek help during pregnancy cannot get it."³⁴ According to a recent federal General Accounting Office report to the Senate, many drug treatment programs flatly refuse to take any pregnant women.³⁵ The lack of available treatment reflects the legacy of discrimination against women addicts³⁶ as well as some treatment centers' fear of liability due to medical uncertainty over the optimal management of addiction during pregnancy.³⁷

In Florida, as nationwide, there are not enough treatment programs for drug users who happen to be pregnant. Even though,

³³ Kumpfer, Treatment Programs for Drug-Abusing Women, 1 The Future of Children 50, 53 (1991) [hereinafter "Treatment Programs"].

³⁴ Born Hooked: Confronting the Impact of Perinatal Substance Abuse: Hearing Before the Select Committee on Children, Youth and Families, 101st Cong., 1st Sess. 2 (1989) (opening statement of Congressman George Miller, Chairman Select Committee on Children, Youth and Families) [hereinafter "Born Hooked"]. See also Treatment Programs at 53-56.

³⁵ United States General Accounting Office Report to the Chairman, Committee on Finance, U.S. Senate, Drug-Exposed Infants, A Generation at Risk, GAO/HRD-90-138 at 36-37 (1990) [hereinafter "GAO"].

³⁶ See Suffet, Hutson & Brotman, Treatment of the Pregnant Addict: An Historical Overview, Pregnant Addicts and Their Children: A Comprehensive Care Approach 13, 21 (R. Brotman, D. Hutson, & F. Suffet eds.).

³⁷ McNulty, Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses 16 N.Y.U. Rev. L. and Social Change 277, 301 n.167 (1987-88) [hereinafter "Pregnancy Police"] ("Most centers worry about the liability, so as soon as they discover a woman is pregnant, they refuse her or throw her out of the program. . . Even emergency detoxification programs don't want pregnant women.") (quoting Widespread Abuse of Drugs by Pregnant Women is Found, N.Y. Times, Aug. 30, 1988, at A1).

as the GAO reports, "many health professionals believe that comprehensive residential drug treatment, including prenatal care, is the best approach to helping many women abstain from using drugs during pregnancy and assuring that the developing fetus has the best chance of being born healthy,"³⁸ few such programs exist in Florida. Although there were nearly 4,500 reported pregnant addicts in Florida in fiscal year 1989-90, there are only 135 residential beds available for pregnant addicts in all of Florida.³⁹

Many women in Florida are put on waiting lists even though "[t]reatment experts believe that unless women who have decided to seek treatment are admitted to a treatment facility the same day, they may not return," GAO at 8. In 1989 in the Orlando area, where Johnson lived, more than 200 people, approximately one-third of them women, were on waiting lists for

³⁸ GAO at 37 (emphasis added). As the GAO explains, "residential treatment allows for several needs to be addressed at the same time, thus reducing problems of fragmentation and inaccessibility of services. For example, the interconnected problems of homelessness, substance abuse, maternal and child health, and parenting are addressed in the few residential programs that exist. In addition, these programs limit access to drugs and remove women from the environments in which they became dependent." Id. Those few programs that exist and have adopted this model have had remarkable success. GAO at 38. See also Miller, Chrysalis offered what mother and baby needed, The Annapolis Capital, June 7, 1990 at A7 (describing successful birth outcome of baby born to the first woman allowed to have her baby with her in Maryland's only residential drug treatment program for women.); Martin, Big Bribe Helps Mothers Fend Off Allure of Crack, N. Y. Times, Mar. 7, 1990 at B1 (describing success of New York City's only residential drug treatment program that allows women to stay with their children).

³⁹ Groves, Williams & Petersen, Alcohol, Drug Abuse & Mental Health Program Office, Florida Department of Health & Rehabilitative Services, Alcohol and Drug Abuse Program 10 (January 1991) (Ex. 6).

publicly funded treatment.⁴⁰ Florida HRS reports that in April of 1990, the number of women on the waiting list reached a high of 2,188.⁴¹ From July 1988 to December 1990, an average of 1,031 women were on waiting lists each month, and an average of 2,460 people needed residential care.⁴²

Numerous additional obstacles exist for women. In addition to being scarce, drug treatment is far too expensive for women like Jennifer Johnson.⁴³ See Treatment Programs at 54. Moreover, most Florida programs do not provide child care services which "effectively precludes the participation of women in drug treatment." Chavkin, Help, Don't Jail Addicted Mothers, N.Y. Times, July 18, 1989, at A21 (citing study by the National Institute for Drug Abuse); see also GAO at 9.⁴⁴ In all of Florida,

⁴⁰ Price of Snow Babies, Orlando Sentinel, Dec. 12, 1989.

⁴¹ Memorandum from Doug Lees, Alcohol and Drug Abuse Data Services and Treatment Outcomes Unit, Florida Department of Health and Rehabilitative Services, Substance Abuse Waiting List Data 7 (Feb. 11, 1991) [hereinafter "Substance Abuse Waiting List Data Memorandum"] (Ex. 7).

⁴² See id. at 4. The Department of Health and Rehabilitative Services of Florida reports that the average number of men and women on waiting lists from October to December 1990 for drug treatment in Florida was 2,705. Id. at 1. Earlier in the year, in April of 1990, the number reached 5,800. Id. at 2. Experts said that the decline since April was "because many of those who want help most have despaired of getting it and gone back to the street." Shannon, A Losing Battle, Time Magazine, Dec. 3, 1990, at 46.

⁴³ Declaration of Suzanne Shende at ¶ 4, 5, 7, 8, 9, 10, 11, 12 (Many treatment programs do not accept Medicaid and cost hundreds of dollars a day.) [hereinafter "Shende"] (Ex. 1).

⁴⁴ In a 1986 study involving 3500 surveys distributed to state and private treatment providers, physicians, clergy, and law enforcement personnel, child care was identified as the number one ~~unmet~~ need of women requiring substance abuse treatment. The same study found that only 8% of the treatment providers offered child care, and only 29% offered programs for
(continued...)

only four residential drug treatment centers accept women with their children.⁴⁵ Women like Ms. Johnson are thus forced to choose between getting help for themselves and abandoning their existing children to an often dangerous and overcrowded foster care system. Indeed, many such women must sacrifice their chances for recovery in an effort to keep their families together.

Other obstacles to women's ability to find and obtain drug treatment include the fact that women are more likely than men to encounter opposition to treatment from friends and family, and are less likely to be identified and referred for treatment by professionals.⁴⁶ In addition, treatment is "too often male oriented and male dominated, and therefore, wholly unsuited to [a woman's] needs."⁴⁷ With male to female ratios as high as 10:1,

⁴⁴(...continued)
children. Treatment Issues at 8, (citing study by the Association of Junior Leagues, Woman to Woman Community Services Survey 2 (1988)) (Ex. 5). Malaspina, Clean Living, Boston Globe Magazine, Nov. 5, 1989, at 20 [hereinafter "Clean Living"] ("60% of women in state funded substance abuse programs are mothers, yet few treatment programs accept children.").

⁴⁵ Shende at ¶ 3 (Ex. 1).

⁴⁶ Treatment Issues at 7 (citing studies by Beckman and Amaro, Personal and Social Differences Faced by Females and Males Entering Alcohol Treatment, 45 J. Studies on Alcohol 135 (1986)) (Ex. 5).

⁴⁷ Id. at 2-3 (quoting from Alcohol Abuse Among Women: Special Problems and Unmet Needs 1976: Hearings on S. 3184 Before the Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2nd Sess. 1-2 (1976) (Statement of Sen. William Hathaway, Chairperson)); Treatment Programs at 55.

treatment centers not only fail to address women's needs, but also invite various forms of sexual harassment.⁴⁸

All of these barriers to treatment exist in Seminole County, where Ms. Johnson was arrested. Two years after her arrest, there are still now only two adult residential drug treatment programs, Winter Park Pavilion of Park Health Care and Seminole Community Mental Health Center. Declaration of Suzanne Shende at ¶ 3 (Ex. 1). Neither of these provide services for low-income women. Id. at ¶ 4,5. Winter Park Pavilion has fourteen beds, costs \$575.00 a day, and does not admit women with their children. Id. at ¶ 4. Seminole County Community Health Center has twenty-eight beds, does not accept Medicaid, does not accept women with their children, and "rarely accepts pregnant women because they fear the possibility of medical problems." Id. at ¶ 5.

In District 7, a four county area which includes Seminole County, there are only three treatment programs that provide services to women and accept Medicaid. Id. at ¶ 6-16. One has fifteen beds, does not accept women with their children, and has a waiting list of thirty people which causes up to seven months delay before a patient can get treatment. Another one, the Center for Drug Free Living, has forty beds for women and a waiting list which on average runs well into the hundreds with never fewer than at least eighty people waiting for treatment.

⁴⁸ Reed, Developing Women-Sensitive Drug Dependence Treatment Services: Why So Difficult?, 19 J. of Psychoactive Drugs 151, 154 (1987) [hereinafter "Developing Women-Sensitive Treatment"].

The third program, the Temporary Living Center ("TLC"), is the one Ms. Johnson found and voluntarily entered with her defense attorney's assistance. Chavkin, Jennifer Johnson's Sentence: Commentary on "Birth Penalty," 1 J. Clinical Ethics 140 (Summer 1990). TLC has twenty-four beds and a waiting list that ranges from fifteen to thirty-five women, accepts Medicaid and women with their children, but only if the children are still infants. Thus women with other older children have to leave them in order to obtain treatment. Shende at ¶ 13-14 (Ex. 1).

Finally, the imposition of §893.13(1)(c)(1) on pregnant addicts could not be justified by the claim that women like Johnson must be forced to seek treatment. The number of women waiting for drug treatment in Florida contradicts any suggestion that they do not want to get help. The problem is that there is not enough help for all the women who want it. See Recommendations at 16 (Ex. 4).⁴⁹

D. The Problems Caused by Lack of Access To Drug Treatment For Pregnant Women Are Compounded By Barriers To Prenatal And Reproductive Health Care.

In addition to limited access to drug treatment programs, women who use drugs also face "many barriers blocking access to basic health services." GAO at 36. According to the Florida Department of Health and Rehabilitative Services, the needs of an

⁴⁹ It is possible—in the absence of the threat of criminal prosecution—to attract pregnant women to prenatal care and treatment at a time when they and their future offspring will benefit most. American Medical Association, Drug Abuse in the United States: The Next Generation, Report of the Board of Trustees (I-89) at 12 (1989).

estimated 3,000 pregnant and early post-partum women go unmet each year.⁵⁰ Although comprehensive drug treatment would be the best approach, adequate prenatal and pediatric care can help to counteract the health problems drug users experience. See GAO at 9.⁵¹ Yet, the dearth of drug treatment programs is compounded by Florida's lack of adequate prenatal care for poor women. Johnson's prenatal care for Jessica was typical. She received marginal care at the Seminole County Public Health Unit in Sanford -- which provides no treatment whatsoever for drug addicts.⁵²

As of 1989, in only five other states did fewer women receive early prenatal care.⁵³ The Children's Defense Fund concluded that Florida could not meet the Surgeon General's goal that by 1990, 90% of all pregnant women receive prenatal care in

⁵⁰ Alcohol and Drug Abuse Program at 100 (Ex. 6).

⁵¹ Prenatal care fosters healthier pregnancies and infants, whether or not a woman continues to use drugs during her pregnancy. A 1985 Orlando report concluded, "[i]n the end, it is safer for the baby to be born to a drug abusing, anemic or diabetic mother who visits the doctor throughout her pregnancy than to be born to a normal woman who does not." Gentry, Taxpayers Pay For Lack Of Prenatal Treatment, St. Petersburg Times, Nov. 3, 1986, at 7B. See also D. Hughes, K. Johnson, S. Rosenbaum & J. Liu, The Health of America's Children: Maternal and Child Health Data Book 36 (1989) ("Early and continuous prenatal care is essential for healthy pregnancies and healthy babies. . . Babies born to women who receive no prenatal care are three times more likely to die within the first year than those born to mothers who received adequate care.") [hereinafter "Health Data Book"].

⁵² Jennifer Johnson described the prenatal care provided her by the clinic: "It wasn't much . . . I had been checked by the doctor and I know I didn't have any diseases" RA 559.

⁵³ Children's Defense Fund, The State of America's Children: 1991 at 154 (1991) [hereinafter America's Children].

the first trimester,⁵⁴ and noted that "Florida is moving in the wrong direction on the goal for early prenatal care for all races, whites, and nonwhites." Health Data Book, at 141.⁵⁵ Women of color, however, remain the most vulnerable: fewer than half of all African American women in Florida receive adequate prenatal care. D. Hughes, K. Johnson, S. Rosenbaum, J. Liu, Health Data Book 57 (1989). Poor women of color like Jennifer Johnson also have limited access to the contraceptive and abortion services⁵⁶ that would enable them to make choices about continuing a pregnancy in light of an addiction problem.

Some women who choose to have an abortion do so because they feel they cannot responsibly continue their pregnancies while suffering from an addiction or other health problem. As one woman explained: In the midst of this rollercoaster ride of addiction . . . I realized I could be pregnant. . . . I was frantic, frightened, drained physically, emotionally, spiritually from my alcoholism. I could not manage my own life. The prospect of a baby was overwhelming. . . . I chose to

⁵⁴ Children's Defense Fund, Children 1990: A Report Card, Briefing Book and Action Primer 84 (1990) [hereinafter Children 1990].

⁵⁵ Florida's investment in the Medicaid coverage to pregnant women and infants was also deemed inadequate by the Children's Defense Fund. Children 1990 at 94; Health Data Book, at 71-73.

⁵⁶ The trial court erroneously assumed that Johnson could have prevented her pregnancy or obtained an abortion. (RA 367) In fact, given the lack of federal and state Medicaid funding for abortion, Ms. Johnson could not have freely obtained an abortion if she had so chosen. See generally, O'Hair, A Brief History of Abortion in the United States, 262 J. Am. Med. Assn. 1875 (1989). In fact, low-income women may not even have information regarding abortion. Rust v. Sullivan, No. 89-1391, slip op. at 3-4 (May 23, 1991). Similarly, contraceptive services are not readily available for poor women in the United States. See Smits, Women, Health, and Development: An American Perspective, 104 Annals of Internal Medicine 263 (1986) (poor women in U.S. have decreasing access to birth control). Moreover, it is well known that no contraceptive is 100% effective even if one does have access to them.

have an abortion. . . . I continued efforts toward recovery, and with the help of support of AA, I have not had a drink since April 13, 1982.⁵⁷

This profound scarcity of resources severely undercuts the State's deterrence rationale for its unauthorized exercise of police power, since it underscores the extent to which the State impermissibly seeks to penalize Johnson for a problem she did not have the means to remedy. It simply makes no sense to insist, as both the prosecution and trial court did, that the purpose of these convictions is to send a message to women drug addicts to seek help, when that help is not available or elusive at best. RA 368.

For this reason experts in health care condemn subjecting pregnant women to special criminal prosecutions and instead recommend that society provide better reproductive health care, drug treatment programs, and education.⁵⁸ As the court in Pellegrini pointed out, the state could accomplish its goals through means that do "not interfere with a woman's right to privacy or destroy the fundamental relationship between mother and fetus . . . such as education and making available medical and drug treatment centers for pregnant women." Slip op. at 6. It is thus clear that there are far less restrictive and more

⁵⁷ Excerpt from Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at L-216 by Sarah E. Burns, NOW Legal Defense and Education Fund. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605).

⁵⁸ See infra at 10-11.

effective means of addressing the problems of drug use during pregnancy than by turning women like Ms. Johnson into criminals.

E. The Lower Court's Interpretation of §893.13(1)(c)(1) Threatens To Drive Women At High Risk Out Of The Health Care System.

The prosecution of Ms. Johnson and the lower court's decision have sent a dangerous message to drug dependent women who are pregnant: stay away from the doctor and the hospital because your drug use will be discovered and prosecuted whether your child is healthy or not. Women who do come forward and admit their drug dependence will be treated like drug pushers.

The unprecedented distorted interpretation of Florida's drug delivery statute urged by the State in this case threatens to drive pregnant women who are addicted to drugs and their fetuses out of the health care system entirely. As the GAO reports:

the increasing fear of incarceration and losing children to foster care is discouraging pregnant women from seeking care. Women are reluctant to seek treatment if there is a possibility of punishment. They also fear that if their children are placed in foster care, they will never get the children back.

GAO at 9. "[C]rack experts agree . . . that bringing criminal charges against addicted women . . . is a sure way to keep others from asking for help."⁵⁹

Pregnant women threatened by criminal prosecutions have already avoided the care of physicians and hospitals to prevent

⁵⁹ N.Y. Times, August 1, 1989 at 14, col.1.

detection. See Gallagher, "Fetus as Patient," Reproductive Laws for the 1990s 185, 214 (S. Cohen and N. Taub eds. 1989). In fact, "some women are now delivering their infants at home in order to prevent the state from discovering their drug use." GAO at 39.⁶⁰

Flight from the health care system has a dramatic and detrimental impact on the health of women and their children. As one public health expert observed:

Even from a strictly utilitarian perspective, this marriage 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 forced treatment, involuntary confinement, or criminal charges. By protecting the liberty of the pregnant patient and 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.

Annas, Protecting the Liberty of Pregnant Patients, 316 New Eng. J. Med. 1213, 1214 (1987).

It is not, however, only the fear of prosecution that deters women from seeking help but also the stigmatizing effect of labeling pregnant women with drug problems as criminals and drug dealers. Many women's treatment experts "contend that as stigma, rejection, and blame increase, drug-abusing women's feelings of guilt and shame increase. This leads to lowered self-esteem,

⁶⁰ "[M]others -- afraid of criminal prosecution -- fail to seek the very prenatal care that could help their babies and them." Missing Links: Coordinated Federal Drug Policy for Women, Infants and Children (Press Release of July 31, 1989) [hereinafter "Missing Links"].

increased depression, immobilization, and isolation. As societal stigma increases, willingness to enter treatment decreases."

Treatment Programs 55-56.

Moreover, for those women who are willing to risk contact with the health care system, the threat of prosecution is likely to discourage them from speaking honestly and openly to their health care providers. Indeed, even the suggestion that seeking health care will lead to criminal sanctions deters honest communication between patient and health care providers. In Florida, for example, after "[u]niformed officers wearing guns entered Bay Front Medical Center . . . to investigate new mothers suspected of cocaine abuse," doctors reported that they could no longer "depend on mothers to tell them the truth about their drug use. . . because word ha[d] gotten around that the police will have to be notified."⁶¹

This is dangerous to both maternal and fetal health because good communication between health care providers and patients, particularly in the prenatal context, is crucial.⁶² The health care worker must be able to discuss fully with the pregnant woman many sensitive matters. Among these are whether she is at risk

⁶¹ Gentry, Angry Doctors Cut Tests After Police Interview Moms, St. Petersburg Times, May 13, 1989, at 1B.

⁶² Overcoming previous negative experiences with medical care and distrust based on insensitive, judgmental, hostile and patronizing behaviors of health care providers has been identified as an important factor in improving physician-patient communication. Curry, Nonfinancial Barriers to Prenatal Care, 15 Women & Health 85, 93 (1989); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1 Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship 69-70 (1982).

of herpes infection, whether she is taking legal or illegal drugs that may harm her fetus, or whether she and the fetus are at risk of AIDS due to unprotected sex or intravenous drug use. Such open dialogue is necessary to promote both maternal and fetal health. Thus, there are multiple reasons to take steps to enhance, rather than replace with threats of criminal prosecution, the confidentiality of the physician-patient dialogue concerning health risks, including illegal use of drugs.

Because prosecution of women like Ms. Johnson sends a dangerous 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 in hospitals, where they are likely to get "caught," -- or not to give birth at all -- such prosecutions fail to serve any state interest, and in fact undermine the State's objectives of promoting maternal and fetal health. The lower court's interpretation of §893.13(1)(c)(1) is both unauthorized and unconstitutional in violation of the right of privacy and must therefore be reversed.

III

THE LOWER COURTS' CONSTRUCTION OF §893.13(1)(c)(1) DISTORTS THE STATUTE'S PLAIN MEANING AND LEADS TO ABSURD RESULTS.

Courts must interpret a statute in a manner that is consistent with the statute's plain meaning. Caminetti v. United States, 242 U.S. 470, 475 (1917). This principle applies with particular force to a statute proscribing criminal conduct. In

fact, "'nothing that is not clearly and intelligently described [in a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.'" State v. Wershow, 343 So.2d 605, 608 (Fla. 1977) (quoting Ex parte Amos, 112 So. 289 (1927)). See also Dunn v. United States, 442 U.S. 100, 112 (1979) ("courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed.") (citation omitted); United States v. Campos-Serrano, 404 U.S. 293 (1971) ("one 'is not to be subjected to a penalty unless the words of statute plainly impose it.'") (citation omitted). Thus, the State bears a heavy burden, one which it cannot meet.

The delivery statute provides, in pertinent part, that ". . . it is unlawful for any person over the age of 18 years to deliver any controlled substance to a person under the age of 18 years." §893.02(4) defines delivery as "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship."

Nowhere does §893.13(1)(c)(1) or its related provisions mention, much less "clearly and intelligently describe[]," that the flow of blood from one circulatory system to another -- the only "conduct" the state purports to punish by this prosecution. Indeed, the blood flow at issue involved neither a "delivery," nor a "controlled substance" as those terms have been defined by the Florida legislature and by the Florida judiciary.

Arguably, a delivery under the statute may take place through the "administration" of a drug from one person to another. (See §893.02(7)). Yet the definition of "administer," does not so much as allude to, much less "clearly and intelligently describe[]"⁶³ anything like the physiological phenomenon of blood flow: On the contrary, the statute itself specifically provides that "'[a]dministers' means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a person or animal." Fla. Stat. §893.02(1) (emphasis added). By its own terms, therefore, the statute excludes indirect "applications" or phenomena, such as blood flow, that occur independent of human volition.

The alleged "delivery" through the umbilical cord, whether to the fetus in utero, or to the newborn ex utero is still only a biological function of pregnancy. It can hardly be disputed that "delivery" as it is used in §893.13(1)(c)(1) requires some voluntary action in addition to the personal use of drugs that the Florida legislature has already addressed through the crime of simple possession. See §893.13(1)(f).

In interpreting Section 893.13(1)(c)(1) to apply to the circumstances of this case, the court below not only ignored the plain meaning of the statutes but also effectively created legislation that will "achieve absurd [and] unreasonable results." Carawan v. State, 515 So.2d 161, 167 (Fla. 1987) (courts are "obligated to avoid construing a particular statute so as to

⁶³ Wershow, 343 So.2d at 608.

achieve an absurd or unreasonable result."); Wakulla County v. Davis, 395 So.2d 540, 543 (Fla. 1981); State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Courts must construe statutes with an eye toward what "reason and logic dictate to be the [legislative] intent." Carawan, 515 So. 2d at 167.

The lower court's construction of §893.13(1)(c)(1) which criminally prosecutes addicted women because they become pregnant, is so ludicrous that the legislature could not possibly have intended such an unreasonable application of this penal law. For example, the state would have this Court believe that the legislature made it a crime punishable by thirty years imprisonment for a woman to "deliver" a cocaine metabolite through the umbilical cord in the seconds after birth while leaving untouched by such serious penalties the pregnant substance abuser who uses drugs throughout her pregnancy but refrains from use in the few days before giving birth. As Judge Sharp pointed out:

[h]ad Johnson given birth one or two days later, the cocaine would have been completely eliminated, and no "crime" would have occurred. But since she went into labor which progressed to birth after taking cocaine when she did, the only way Johnson could have prevented "delivery" would have been to have severed the cord before the child was born which, of course, would probably have killed both herself and her child.

Johnson, slip op. at 5 (Sharp, J., dissenting). This Judge Sharp explained, "illustrates the absurdity of applying the delivery-of-a-drug statute to this scenario. Id.

The statute's application leads to absurd results for other reasons as well. The prosecution's case necessarily depends on blood flow from Ms. Johnson to her newborn in the 60 to 90 seconds after birth but before the cord is cut. Even assuming that some detectable amount of a controlled substance could flow through the cord during the critical seconds, the direction of that flow depends on the position in which the newborn infant is placed during delivery. RA 234. Thus if the doctor holds the baby above the mother or puts it on her stomach the blood flow could be from the baby to the mother. Id. It would be ridiculous to allow a felony conviction for drug delivery to depend on something over which the woman has absolutely no control, namely, the position the newborn is put in by her attending physician.

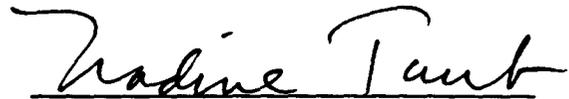
Additionally, the State's construction of the delivery statute would also have the senseless result of making a pregnant woman who uses codeine as prescribed by her physician a criminal, should traces of it be detected in her infant's urine. The newborn, unlike the woman, would not have received the drug by prescription and therefore, under the prosecution's argument would have received the drug in violation of Florida law.

Amici do not believe that the legislature could have intended that Section 893.13(1)(c)(1) be construed in a manner that leads to these absurd results and that is so patently at odds with public health interests and sound policy.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the decision of the District Court of Appeal, Fifth District, and dismiss the drug delivery charges against Ms. Johnson.

Respectfully submitted,



Nadine Taub
Rutgers University
School of Law
15 Washington Street
Newark, New Jersey 07102
(201) 648-5637

Jerri Blair*
Lockett & Blair, P.A.
351 West Alfred Street
P.O. Box 130
Tavares, FL 32778
(904) 343-3755
Florida Bar No. 0525332**

*Counsel of Record

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