

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2003-CP-26-5752

Regina D. McKnight, #275068

Petitioner,

v.

State of South Carolina

Respondent.

BRIEF, *AMICI CURIAE* OF SOUTH CAROLINA MEDICAL ASSOCIATION, SOUTH CAROLINA NURSES ASSOCIATION, SOUTH CAROLINA ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, SOUTH CAROLINA COALITION FOR HEALTHY FAMILIES, CAROLINA HEALTH CENTERS, INC., NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., SOUTH CAROLINA CHAPTER, LRADAC, THE BEHAVIORAL HEALTH CENTER OF THE MIDLANDS, ET AL, IN SUPPORT OF PETITIONER, REGINA MCKNIGHT

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INTEREST OF AMICI CURIAE

Amici include South Carolina and national physicians, nurses, counselors, social workers, public health practitioners, and their professional associations.¹ These individuals and organizations have recognized expertise and longstanding concern in the areas of maternal and neonatal health and in understanding the effects of drugs and other substances on users, their families and society, and the ways those effects can best be minimized.

It is important to note that each and every *amicus curiae* is committed to reducing potential drug-related harms at every reasonable opportunity. Thus, *amici* do not endorse the non-medical use of drugs – including alcohol or tobacco – during pregnancy, by either parent. Nor do *amici* contend that there are no health risks associated with cocaine (or other drug or alcohol) use during pregnancy. Nonetheless, it is entirely consistent with *amici*'s public health and ethical mandates to bring to this Court's attention the medical and scientific information that is relevant to the case at hand.

Amici join this brief because Ms. McKnight's conviction cannot be reconciled with evidence-based, peer-reviewed, medical and scientific research nor can it be reconciled with legal standards regarding effective assistance of counsel.

STATEMENT OF THE ISSUES ON APPEAL

Amicus curiae adopt the Statement of Issues on Appeal set forth by Petitioner McKnight.

STATEMENT OF THE CASE

Amicus curiae adopt the Statement of Facts as set forth by Petitioner McKnight.

¹ Descriptions of the *amici* are set forth in Appendix A of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae wish to bring to this Court's attention the medical and scientific evidence that Regina McKnight's trial counsel ("Trial Counsel") failed to present to the jury in *South Carolina v. McKnight*.

Ms. McKnight suffered a stillbirth and she was convicted of homicide. Her conviction and twenty year sentence are at odds with our Nation's legal and scientific traditions.

In a bare majority, this Court expanded the scope of South Carolina's straightforward and uncontroversial "homicide by child abuse" statute. According to that decision, South Carolina's homicide statute now permits a conviction based on any conjecture that a pregnant woman engaged in activities "public[ly] know[n]" (not personally known) to be "potentially fatal" to a fetus. *State v. McKnight*, 352 S.C. 635, 645-46, 576 S.E.2d 168, 173 (2003).

In light of this expansion of homicide law, and particularly in light of the vast range of conditions, circumstances, and actions known to heighten pregnancy risk, it is vital that convictions be based on valid scientific evidence rather conjecture and misinformed popular opinion.

Amici note that Trial Counsel need not have become a medical expert to provide effective assistance of counsel. Trial Counsel did however need to understand what constitutes scientific expertise and to have conducted an independent investigation of the law and facts relating to the key question of causation. As the first trial in this case indicates, had the Trial Counsel done this, she would have found numerous resources

available to develop a meaningful and successful defense in the case at bar. *See* Petitioner’s Brief at 30-36.

Finally, *amici* bring to this court's attention the dangerous public health implications of upholding the denial of post-conviction relief. The conviction in this case is based on a controversial interpretation of law that is contrary to the recommendations of every leading medical group. To allow this conviction to stand in spite of the constitutionally deficient performance by Trial Counsel will send a dangerous message to pregnant women throughout the state. Women will be even less likely to seek prenatal care and to disclose health problems to their health care providers, if they are fearful that they will not only be prosecuted if they fail to guarantee a healthy pregnancy outcome, but that they will also have no guarantee of effective assistances of counsel and a fair trial. Avoiding health care is detrimental to both maternal and fetal health. For these and other reasons, as will be detailed below, the judgment of the post-conviction relief (“PCR”) court must be overturned, and Ms. McKnight must be granted a new trial.

ARGUMENT

I. IN CASES INVOLVING THE PROSECUTION OF PREGNANT WOMEN THE QUINTESSENTIAL OBLIGATION OF TRIAL COUNSEL IS TO ENSURE THAT A CONVICTION IS BASED ON SCIENTIFIC FACT, NOT MISINFORMED OPINION.

This Court stands alone in the Nation for having sustained a homicide conviction for a woman who experienced a stillbirth. No other court has treated drug dependency during pregnancy as equivalent to “depraved heart” homicide. Further, although numerous prosecutions have been attempted under similar circumstances, no court in the

Nation, apart from this one, has sustained a conviction of a pregnant woman under any general criminal statute, on the premise that her conduct or circumstances risked or caused harm to the fetus she was carrying.² Similarly, every legislature in the Nation to have considered these issues, as many have, have rejected a criminal law approach, and every leading medical, public health and substance abuse treatment organization has unequivocally condemned such prosecutions in strong terms.³ *See Ferguson v. City of*

² The Court should be aware of additional precedent rejecting a punitive approach to the issue of drug use and pregnancy which was both in existence at the time of Ms. McKnight's case and that has been further established since this Court's decision. *See, e.g., See State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006), *cert. quashed* by 141 N.M. 763, 161 P.3d 260 (2007) (refusing to apply child abuse statutes to punish a woman for continuing her pregnancy to term in spite of a cocaine addiction); *Kilmon v. Maryland*, 394 Md. 168, 905 A.2d 306 (2006) (holding that the reckless endangerment statute does not apply to the context of pregnancy); *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (reversing the convictions of Tracy Ward and Rhonda Smith, who had both been convicted of delivery of a controlled substance to a "child" for their alleged in utero transfer of drug metabolites to their fetuses, holding that the plain language of the statute made clear that the state legislature did not intend the drug delivery statute to apply to the context of pregnancy); *State v. Aiwohi*, 109 Haw. 115, 123 P.2d 1210 (2005) (holding that according to the plain language of the Hawai'i manslaughter statute, the definition of person did not include fetus); *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (Ct. App. 1995) (dismissing child abuse charges filed against a woman for heroin use during pregnancy; court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *State v. Dunn*, 82 Wash. Ct. App. 122, 916 P.2d 952 (1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"), *rev. denied*, 130 Wash.2d 1018, 928 P.2d 413 (1996); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for continuing to term in spite of a drug problem on ground that such application misconstrues the purpose of the law).

³ American Medical Association, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate."); *see also*

Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 21 (1993) (If pregnant women . . . feel that they will be 'turned in' by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment.);

American Society of Addiction Medicine, Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (1989) (The imposition of criminal penalties solely because a person suffers from an illness is inappropriate and counterproductive. Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole.);

National Association for Perinatal Addiction Research and Education, *Policy Statement No. 1, Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive* (1990) (The prospect of criminal prosecutions places health care practitioners in a conflict position, forcing them to choose between maintaining their patients' confidentiality or reporting them, ultimately to the police, a position many doctors and nurses find intolerable. The key to intervention will be access to health care for high risk women, not the threat of criminal prosecution.);

American College of Obstetricians and Gynecologists, *ACOG Committee Opinion 321* (Nov. 2005) ("Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses."); American College of Obstetricians and Gynecologists, *Information about Methamphetamine Use in Pregnancy* (Mar. 3, 2006) ("[m]andated reporting of pregnant women for substance use may endanger the relationship of trust between the physician and patient. . . [s]eeking obstetric-gynecological care should not expose a woman to criminal or civil penalties or the loss of custody of her children.");

March of Dimes, *Statement on Maternal Drug Abuse 1* (Dec. 1990) ("The March of Dimes is concerned that legal action, which makes a pregnant woman criminally liable solely based on the use of drugs during pregnancy, is potentially harmful to the mother and to her unborn child . . . Fear of punishment may cause women most in need of prenatal services to avoid health care professionals.");

National Association of Public Child Welfare Administrators, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (1991) ("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 Laws, regulations, or policies should strengthen, not hinder, families in need of help.");

National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (A "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 interest of infants and children . . .");

American Nurses Association, *Position Statement* (1992) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.");

American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts, Position Statement, APA Document Reference No. 200101*, (2001) ("policies of prosecuting pregnant and/or postpartum women who have used either alcohol or illegal substances during pregnancy, on grounds of 'prenatal child abuse'[and their] subsequent incarceration, either in jails, prisons or in locked psychiatric unit both deprives the mother of her liberty and seriously disrupts the incipient or nascent maternal-infant bond. . . . Such policies are likely to deter pregnant addicts from seeking wither prenatal car or addiction treatment, because of fear of prosecution and/or civil commitment.");

Center for the Future of Children Staff, *The Future of Children: A Publication of The Woodrow Wilson School of Public and International Affairs at Princeton University and the Brookings Institution, Drug-Exposed Infants: Recommendations*, 1 *The Future of Children* 9 (1991) ("A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecutions 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.");

U.S. General Accounting Office, *ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment*

Charleston, 532 U.S. 67, 84, n.23 (2001).

Stillbirths affect tens of thousands of women in the United States each year. *See* R.L. Goldenberg et al., *Stillbirth: A Review*, 16 *Journal of Maternal-Fetal & Neonatal Medicine* 79, 79 (2004) (“stillbirth is one of the most common adverse outcomes of pregnancy . . . in the year 2000, there were nearly 27,000 of these events.”) Having decided to bring the criminal law into the delivery room, this Court is under a particular obligation to ensure that the hundreds of South Carolina women who may now have their stillbirths addressed through the criminal justice system be assured that they will receive fair trials based on admissible and accurate scientific evidence.

It should be clear to this Court, as it should have been to Trial Counsel, that pregnant women charged with crimes are not like other defendants. As the Illinois Court of Appeals noted when refusing to create a tort of prenatal maternal negligence:

The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.

Stallman v. Youngquist, 125 Ill.2d 267, 278-79, 531 N.E.2d 355, 360 (1988).

Because pregnancy and pregnancy loss occur inside a woman's body, the State in cases like McKnight's can, in effect, make out virtually every element of circumstantial

for Pregnant Women 5, 20 (1991) (identifying “the threat of prosecution” as a “barrier to treatment for pregnant women.”).

case of guilt by simply producing evidence of a stillbirth, and the fact of cocaine use or any other unwise or unpopular behavior. Indeed, the State seemed well aware that the nature of pregnancy itself and common prejudices and presumptions about pregnant women could be used to win a conviction. It is thus clear that the failure of Trial Counsel to attack the State's case for causation is error of the most basic sort. In other words, in these kinds of prosecutions, ceding the issue of causation is not an option for competent counsel.

In a prescient passage, the *Stallman* court warned of the role prejudice and presumption, rather than probative scientific facts could play in cases involving pregnant women.

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 woman 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?

Id. at 277-78.

Clearly, effective representation in cases that make continued pregnancy and continued addiction elements of the crime would have to include an effort to counteract the numerous prejudicial and stereotypical beliefs that are bound to influence the judge and jury. Indeed, on the basis of popular literature, warning labels, and general confidence in the advances of modern medicine, many people wrongly believe that women have a high degree of control over their pregnancy outcomes. *See e.g.*, A.

Eisenberg et. al., *What to Expect When You're Expecting* 54-57 (2d ed. 1996) (popular pregnancy advice book warning women to avoid contact with anyone who is smoking, to avoid changing a cat litter box, consuming unpasteurized cheese or undercooked meat, gardening without gloves, inhaling when handling household cleaning products, and ingesting caffeine). The longstanding and constant medical reality, however, is that as many as 20-30 percent of all pregnancies will end in miscarriage or stillbirth. In fact, stillbirth is one of the most common adverse outcomes of pregnancy, *see* R.L.

Goldenberg, *Stillbirth: A Review*, 16 *Journal of Maternal-Fetal & Neonatal Medicine* 79, 79 (2004), and it occurs despite the best intentions and numerous precautions taken by health care professionals and individual women.

Addiction is a medical condition about which there is enormous misinformation, and cocaine is a drug about which there is pervasive prejudice and resistance to scientific analysis from the general public. When the activity alleged to have caused the stillbirth involves addiction, it is clear that the essence of effective assistance of counsel is to ensure that the jury bases its decision on scientific fact, not conjecture disguised as expertise and bolstered by stigma.

Trial Counsel in this case utterly failed to recognize this obligation and as a result Ms. McKnight was unjustly convicted of homicide.

II. IN A CASE WHERE THE CLAIM IS THAT A PARTICULAR DRUG CAUSED A PARTICULAR PREGNANCY OUTCOME, THERE WAS CLEAR AND WELL ESTABLISHED PRECEDENT THAT TRIAL COUNSEL SHOULD HAVE FOLLOWED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL.

Trial Counsel in this case need only have been familiar with the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to have outlined the

kind of investigation and defense that should be mounted in any case, whether criminal or civil, where the evidentiary issue is: Did a particular drug cause a particular pregnancy outcome? In fact, the State has, in both its original charging documents and its opening statements, made clear that it defined its burden strictly in terms of causation. *See* R.p. at 113-116.

Any competent counsel would be familiar with the *Daubert* case in light of South Carolina caselaw which explicitly refer to the *Daubert* standard in discussing the admissibility of expert testimony. *See In re Robert R.*, 340 S.C. 242, 246, n.3 531 S.E.2d 301, 303, n.3 (Ct. App. 2000) (“Although our supreme court in Council declined to adopt the *Daubert* standard, instead selecting an approach based on both the South Carolina Rules of Evidence and prior South Carolina case law, at least one observer has noted that the two standards are very similar”) (internal citations omitted), *State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 50 (1995) (citing *Daubert*’s language: “[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence”) (internal citations omitted). Although the South Carolina Supreme Court has declined to expressly adopt the *Daubert* standard, the South Carolina standard set forth in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), and later elaborated upon by *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) is functionally equivalent.⁴

⁴ Although the Jones Factors were never explicitly stated in that case, they were labeled the “Jones” factors by subsequent cases. These factors, which assist a court in determining whether proffered expert scientific testimony is sufficiently reliable enough to be admissible are: “(1) the publication and peer review of the technique, (2) prior application of the method to the type of evidence involved in the case, (3) the quality control procedures used to ensure reliability, and (4) the consistency of the method with recognized scientific laws and procedures.” *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999).

While the holding in *Daubert* is not dispositive of the case now before this Court, it is discussed herein to highlight the factual and legal similarities presented by that case, involving expert testimony attempting to linking the use of a pharmaceutical drug, Bendectin, to birth defects, and *McKnight*, which involves expert testimony seeking to link the use of an illegal drug, cocaine, to stillbirth. In *Daubert*, two minors brought suit against Merrell Dow Pharmaceuticals, claiming that they suffered limb reduction birth defects “because their mothers had taken Bendectin, a drug prescribed for morning sickness to about 17.5 million pregnant women in the United States between 1957 and 1982.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1313 (9th Cir. 1995). On remand, the 9th Circuit explored in-depth the limits of scientific evidence concerning the causes of birth defects in general, and the specific evidence that the plaintiffs offered that their birth defects were caused by the drug Bendectin. The court noted on the issue of birth defects in general, that:

For the most part, we don't know how birth defects come about. We do know they occur in 2-3% of births, whether or not the expectant mother has taken Bendectin. Limb defects are even rarer, occurring in fewer than one birth out of every 1000. But scientists simply do not know how teratogens (chemicals known to cause limb reduction defects) do their damage:

43 F.3d at 1313-14 (internal citations omitted). In terms of causation, or the “biological chain of events that leads from an expectant mother’s ingestion of a teratogenic substance to the stunted development of a baby’s limbs,” the court cautions that “[n]o doubt, someday we will have this knowledge . . . in the current state of scientific knowledge, however, we are ignorant.” *Id.*

The court recognized that in some cases, such evidentiary problems could be overcome, and looked specifically at the proffered evidence linking Bendectin to the pregnancy outcomes in that case. Considering whether the testimony reflected “scientific knowledge,” was “derived by the scientific methods and “amounted to good science,” the court concluded that the plaintiffs’ evidence was not admissible as expert scientific testimony. 43 F.3d at 1315.

Factors that led to this holding included: that only one of the plaintiff’s experts had done original research, *id.* at 1317 n.4; that none of the experts based his testimony on preexisting or independent research, *id.* and that there was no proof that the analysis supporting the proffered conclusion had been subjected to normal scientific scrutiny through peer review and publication. *Id.* at 1319.

The court specifically rejected the testimony of Dr. Palmer, who was the only expert willing to testify that Bendectin caused the limb defects in each of the children.

In support of this conclusion, Dr. Palmer asserts only that Bendectin is a teratogen and that he has examined the plaintiffs' medical records, which apparently reveal the timing of their mothers' ingestion of the drug. Dr. Palmer offers no tested or testable theory to explain how, from this limited information, he was able to eliminate all other potential causes of birth defects, nor does he explain how he alone can state as a fact that Bendectin caused plaintiffs' injuries.

Daubert, 43 F.3d at 1319.

The court concluded that “[t]he record in this case categorically refutes the notion that anyone can tell what caused the birth defects in any given case, ” *id.* at 1313, and that Dr. Palmer's testimony was "rendered inadmissible by the total lack of scientific basis for his conclusions." *Id.* at 1322, n.18.

The parallels between the *Daubert* case and *McKnight* are profound -- including the similarity between Dr. Palmer's testimony about Bendectin, and Dr. Woodard's testimony about cocaine (as will be discussed in further detail below). With *Daubert* as a model, not only for challenging the admissibility of scientific evidence,⁵ but also by providing numerous bases for effective cross examination, there is no excuse for Trial Counsel's deficient performance in this case.

III. MS. MCKNIGHT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Amici understand the constraints of time, heavy workloads, and multiple deadlines faced by defense counsel, and are in no way suggesting that Trial Counsel become as well-versed as the medical community regarding medical issues. However, following the guidance of *Ard v. Catoe*,⁶ Trial Counsel was ineffective for (1) failing to conduct an independent investigation that would have revealed readily accessible scientific information, evidence, and potential experts who could have testified regarding the etiology of stillbirths, the state of scientific knowledge regarding prenatal exposure to cocaine, and the nature of addiction; (2) failing to effectively cross examine the state's

⁵ See *In re Robert R.*, 340 S.C. 242, 246, n.3 531 S.E.2d 301, 303, n.3 (S.C. Ct. App. 2000) (“Although our supreme court in Council declined to adopt the *Daubert* standard, instead selecting an approach based on both the South Carolina Rules of Evidence and prior South Carolina case law, at least one observer has noted that the two standards are very similar”).

⁶ As this Court explained in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (Waller, J.) because of the strong presumption that counsel did provide adequate assistance, in order to prove ineffective assistance of counsel, it must be shown that “(1) counsel’s performance was deficient and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Id.* at 596.

Deficient performance includes the trial counsel's failure to perform his/her duty to conduct a reasonable investigation, which requires that “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts.” *Ard* at 597, 331-32 (citing *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla. 1986), *aff’d* 828 F.2d 670 (11th Cir. 1987)). Failure of defense counsel to “aggressively re-examine the government’s forensic evidence” or to “conduct appropriate analyses of all [evidence]” also constitutes deficiencies in performance. *Id.*

experts, and to call witnesses that were favorable to the defendant; and (3) failing to adequately challenge the State's case for causation which was based largely on misinformation, myth and prejudice, rather than scientific fact.

A. Trial Counsel Failed to Investigate and Present Readily Available Evidence that the Causes of Stillbirth are Often Entirely Unknown and Even Where Strong Associations are Believed to Exist, Causation Cannot be Found.

Like the birth defects discussed in *Daubert*, it is the consensus of the medical community that the causes of stillbirth, to a large extent, are not fully understood. "In the United States, stillbirth accounts for a large proportion of all perinatal losses, although its causes remain incompletely understood." Ruth C. Fetts, MD, MPH, *Etiology and Prevention of Stillbirth*, 193 Am. J. Obstetrics & Gynecology 1923-35 (2005). At least ten percent, but as many as fifty percent, of all stillbirths go entirely unexplained.⁷ As a recent article, summarizing research available before 2001, states: "In many cases it is difficult to be certain of the etiology of stillbirth. First, many cases are unexplained, despite intensive investigation of potential causes. Second, more than one condition may contribute to stillbirth in an individual case."⁸ Moreover, "it may not be possible to precisely determine which disorder was directly responsible for the loss. Indeed, it is

⁷ Williams Obstetrics, 1073-1075 (F.G. Cunningham et al. eds., 21st ed. 2001) at 1075. See also M.A. Sims & K.A. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 261 (2001) ("Despite efforts to identify the etiologic factors contributing to fetal death, a substantial portion of fetal deaths are still classified as unexplained intrauterine fetal demise.")

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

⁸ R.M. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, 196(5) Am. J. of Obstetrics & Gynecology, 433-44 (2007).

likely that some cases of stillbirth are due to complications from multiple factors. Finally, conditions may be *associated* with stillbirth without directly *causing* them."⁹

Accordingly, experts warn that “the associations between exposures and stillbirth should be viewed with caution.” C. Stanton et al., *Stillbirth Rates: Delivering Estimates in 190 Countries*, 367 *Lancet* 1487-94 (2006) (“Data for the causes of stillbirth, especially largely preventable causes such as syphilis, are needed to prioritise action and reduce stillbirths. However even in settings with the possibility of extensive investigation, the cause of death might not be established in a third of stillbirth.”).

Thus, had Trial Counsel investigated the question of stillbirths and causation, she would have found information establishing the inherent uncertainty in determining the causes of stillbirth and making it clear that it might not be possible for the State to prove causation under any circumstances.

1. Trial Counsel Failed to Investigate and Present Readily Available Evidence that Cocaine Has Not Been Found to Cause Stillbirth.

Like the research available about Bendectin at the time of *Daubert*, the research about cocaine at the time of the *McKnight* trial failed to establish, as a matter of science, a causal link between exposure to that drug and stillbirths. Even five years after the trial in this case, researchers have concluded that the state of scientific research is still not comprehensive enough for any conclusions about causation to be drawn. *See* Stanton at 1487-94 (“The need for more and better data regarding stillbirths than currently available is clear.”), *see also* P.V. Thadani, Phd, et al., *National Institute on Drug Abuse Conference Report on Placental Proteins, Drug Transport, and Fetal Development*, 191

⁹ *Id.* (emphasis added).

Am. J. Obstetrics & Gynecology 1858-62 (2004) (noting that “[a]lthough existing data clearly suggest that drugs of abuse do produce alterations in the placental function that can adversely affect the fetus, a number of key issues require attention” and listed the following areas requiring further research: information on how drugs influence the placental barrier, investigations on how the embryo/zygote is protected, studies on the cellular and molecular processes of transport of drugs, and other investigations that have not yet been conducted).

At the time of the trial, scientific literature described two clinical conditions that were associated with prenatal exposure to cocaine, placental abruption and ruptured membranes, which in turn, are also associated, but not causally linked, with an increased risk of stillbirth. See A. Addis et al., *Fetal Effects of Cocaine: An Updated Meta-Analysis*, 15 *Reproductive Toxicology* 341, 348-49, 354 (2001) (hereinafter *Fetal Effects*).¹⁰ However, it must be cautioned, that even with respect to placental abruption, a well documented and studied condition, the medical community still holds that its exact etiology is unknown. See C.V. Ananth et al., *Placental Abruption in the United States, 1979 through 2001: Temporal trends and potential determinants*, 192 *Am J. Obstetrics & Gynecology* 191-8 (2005) (noting that placental abruption “occurs in approximately 1% of all pregnancies, but its cause remains largely speculative.”)

¹⁰ The authors of *Fetal Effects* analyzed all studies employing methodologies suitable for proving cause and effect relationships between cocaine and adverse pregnancy outcomes. Studies were excluded based on several criteria: because they were case reports, editorials, letters, reviews or commentaries, studies without fetal or pregnancy outcomes, in vitro studies or placenta profusion, studies with outcomes not within the scope of the meta-analysis, studies without a control group and studies where cocaine users had not been separated from users of other drugs. *Fetal Effects*, *supra*, at 342. Where rates of developmental effects were found to be higher in children of polydrug users than in those of non-drug using women, the adverse effects were nullified when cocaine exposed children were compared to children exposed to other drugs but not cocaine. *Id.* at 343. This, in turn, suggests “. . . that the various confounders, also occurring in polydrug/no cocaine users, are responsible for this effect.” *Id.* at 354.

Neither placental abruption nor ruptured membranes were present in Ms. McKnight's case. More importantly, at the time of the trial -- while there were studies that raised the question about whether or not prenatal exposure to cocaine were associated with stillbirth,¹¹ none of these studies reached the scientific conclusion that there was a causal connection, much less a statistically significant increase in risk of stillbirths. These facts alone, like the lack of research linking Bendectin to limb reduction defects, should have signaled to Trial Counsel strong grounds for challenging the admissibility of any state expert who claimed to be able to say with certainty that cocaine caused the stillbirth in Ms. McKnight's case. As the forensic pathologist Trial Counsel called at the first trial, but not the second, warned in his widely respected text book, "[t]he mere fact that cocaine is present does not prove that was the cause of death, or even of toxicity."¹²

Significantly, in the years leading up to the trial, two well constructed, independent studies were underway to determine if cocaine could be linked to an increased risk of stillbirths. See T.A. Campbell & K.A. Collins, *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 184 (2001); M.A. Sims & K.A. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 261 (2001). Both were based in South Carolina and both involved Dr. Kimberly Collins, who was eventually called by Ms. McKnight's post-conviction relief counsel to testify at the PCR hearing. The authors of these studies

¹¹ See, e.g., C. Rogers et al., *Findings in Newborns of Cocaine-Abusing Mothers*, 36 J. Forensic Sci. 1074 (1991) (noting that cocaine was present in 40 percent of fetuses who were stillborn or had died within 2 days of birth whose death was not otherwise explained by autopsy, but not asserting the cocaine caused the stillbirths or fetal deaths) and I. Morild & M. Stajc, *Cocaine and Fetal Death*, 47 Forensic Sci. Int'l 181 (1990).

¹² See S. Karch, *The Pathology of Drug Abuse*, 171-75 (2nd ed. 1996).

concluded that the *cause and effect relation of cocaine and fetal demise is not clear and requires additional research*. See *id.* at 187. They further noted that “the direct toxic effect of cocaine on the fetus is not well known,” indicating that it is scientifically inappropriate to declare fetal cocaine exposure to be the sole or even primary cause of fetal death. *Id.* at 264.

Thus, as with Bendectin, the scientific evidence of causation simply did not and does not exist and counsel should have been prepared to use this key fact at trial. Moreover as discussed below, the evidence counteracting misinformation about cocaine in general was readily available to counsel at the time of trial.

2. *Like Daubert, Where There Were Many Alternative Explanations Other Than Bendectin for Limb Reduction Defects, Trial Counsel Failed to Investigate and Present the Many Other Factors Associated with Stillbirths.*

The court in *Daubert* noted that birth defects occur for a multitude of reasons, and could not, based on the proffered expert testimony, connect the use of Bendectin alone to the plaintiffs’ birth defects, when there were so many other likely causes and confounding factors. Similarly, in the cases where pregnancy loss does in fact occur, medical experts find it exceedingly hard to identify which of the multiple risk factors was responsible. F. Gary Cunningham et. al., *Williams Obstetrics, 21st ed.* 1073-75 (2001) (noting substantial percentage of perinatal deaths are unexplained.). For example, as Petitioner’s Brief explains, stillbirth could have resulted from any variety of natural causes, including chorioamnionitis, funisitis, syphilis, meningitis, pneumonia, sepsis, and chromosomal abnormalities. See Petitioner’s Brief at 34. Furthermore, at the time of

trial, there were extensive literature and studies establishing a wide variety of additional factors that were associated, in varying degrees, with stillbirth.

Trial Counsel failed to raise this host of alternative explanations that includes, but is not limited to, race and socioeconomic factors, hypertension, diabetes, thrombophilia, infections, maternal smoking,¹³ paternal smoking, paternal workplace exposure to ionizing radiation, exposure to pain medications and of course, poverty. *See Automobile Workers v. Johnson Controls*, 499 U.S. 187, 205 (1991) (noting that “[e]mployment late in pregnancy often imposes risks on the unborn child”); *see also Automobile Workers v. Johnson Controls*, 886 F.2d 877 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk); *see also Atkins, et al., Drug Therapy for Hyperthyroidism in Pregnancy: Safety Issues for Mother and Fetus*, 23 *Drug Safety* 229 (2000); Khattak, *et al., Pregnancy Outcome Following Gestational Exposure to Organic Solvents: A Prospective Controlled Study*, 281 *JAMA* 1106-09 (1999); C. Stanton et al., *Stillbirth Rates: Delivering Estimates in 190 Countries*, 367 *Lancet* 1487-94 (2006); R.M. Silver, et al., *Work-up of Stillbirth: A Review of the Evidence*, 196(5) *Am. J. of Obstetrics & Gynecology*, 433-44, (2007); Cynthia Daniels, *Exposing Men, the Science and Politics of Male Reproduction*, 124 (Oxford, 2006).

Any one or combination of these factors are associated with stillbirth. All could have been used by Trial Counsel in a variety of ways to defend her client. In listing these alternative explanations for stillbirth, *amici* do not mean to suggest that Ms. McKnight

¹³ Even among activities that are much more definitively linked to adverse pregnancy outcomes than cocaine/illegal drug use, such as cigarette smoking, the connection to stillbirths are complex and modest. *See CASA Report* at 39 (smoking during pregnancy increases infant mortality from 8.0 per 1,000 to 12.2 per 1,000).

should have been prosecuted for her use of tobacco, her poverty, or her medical conditions. Rather, *amici* observe that Trial Counsel had significant information available to her that challenged the State's conclusions that she did not use at trial.

3. *Trial Counsel Failed to Investigate and Make Use of Readily Available Evidence to Address and Correct Widely Held Misperceptions and Prejudices About Cocaine's Harm.*

Trial Counsel should have been aware that beyond the potentially sensational nature of any murder trial, this one would be influenced by some of the most highly charged issues of our day, including pregnancy, the nature of addiction, and the pervasive misconceptions about cocaine use.

For nearly two decades before trial, the popular press was suffused with highly prejudicial and often inaccurate information about the effects of *in utero* cocaine exposure. In 1986, when crack cocaine began to attract substantial media attention, “six of the nation’s largest and most prestigious news magazines and newspapers had run more than one thousand stories about crack cocaine. Time and Newsweek each ran five ‘crack crisis’ cover stories. . . . [T]hree major network television stations ran 74 stories about crack cocaine in six months. . . . Fifteen million Americans watched CBS’ prime-time documentary ‘48 Hours on Crack Street.’”¹⁴ Local and national press continued in this vein on an ongoing basis. That is why in 2004, doctors and researchers signed an open letter regarding the “crack baby” myth and then in 2005, one on methamphetamine,

¹⁴ Laura Gómez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 14 (1997) (In fact, without knowing that cocaine was used by their mothers, clinicians could not distinguish so-called crack-addicted babies from babies born to comparable mothers who had never used cocaine or crack); see also John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine Not All It's Cracked Up to Be*, in *Crack In America: Demon Drugs And Social Justice* 131, 152 (Craig Reinerman & Harry G. Levine eds., 1997).

calling on the press to refrain from using the medically misleading and erroneous terms “crack baby” or “meth baby.”¹⁵

Trial Counsel failed to investigate the facts and make use of the readily available information to counteract such misinformation. As Petitioner’s Brief makes clear, the value of this effort was apparent at the first trial where just one witness, Dr. Karch, (who was not called back at the second trial) counteracted some of the devastating non-scientific misinformation that too often passes for “public knowledge.”¹⁶

As early as January 1992, an article appearing in *The Journal of the American Medical Association* (“JAMA”), one of the most distinguished peer-reviewed medical journals in the United States, reported that:

[R]eview of the current literature on the subject [of the adverse effects in infants born to cocaine-using mothers] indicates that available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development. . . . Findings about neurobehavioral effects in the newborn period have been inconsistent or contradictory. Significantly, no prospective study of unique long-term consequences of intrauterine cocaine, non-opiate exposure has been published in the peer-review literature.¹⁷

A standard pediatrics textbook published the following year reached a similar conclusion, observing that “[t]o date no hypothesized or demonstrated effect of in utero cocaine exposure has been found to be specific to that drug. No studies have shown that prenatal

¹⁵ Open Letter from 30 American and Canadian researchers and scientist explaining that such terms as “crack baby” and “crack addicted baby” lack any basis in science, *available at* <http://www.jointogether.org/sa/files/pdf/sciencenotstigma.pdf>. Meth Science Not Stigma: Open Letter to the Media, July 25, 2005, *available at* <http://www.jointogether.org/news/yourturn/commentary/2005/meth-science-not-stigma-open.html>

¹⁶ The first trial ended in a mistrial. *See* Petitioner’s Brief at 24.

¹⁷ L.C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406 (1992) (internal citations omitted).

cocaine exposure causes unique developmental dysfunction.”¹⁸ In 1997, scientists continued to urge a suspension of judgment, stating that “[k]nowledge concerning the biological effects of cocaine exposure on the newborn is inconclusive at present.”¹⁹ And in 1999, the year Ms. McKnight was indicted, the general consensus among scientists remained the same.²⁰

JAMA published a seminal, comprehensive, and authoritative analysis of all medical research assessing the relationship between maternal cocaine use during pregnancy and adverse developmental consequences for the fetus and child. See D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001) (hereafter “*A Systematic Review*”). This report exposes as erroneous and unfounded the assumptions that underlie the prosecution and conviction of Ms. McKnight.

Using carefully developed selection criteria, the JAMA researchers identified all seventy-five English-language studies of the effects of *in utero* cocaine exposure. See *A Systematic Review* at 1614. They then undertook a detailed review of all the studies that complied with accepted scientific practices.²¹ The researchers concluded that:

¹⁸ D.A. Frank et al., *Maternal Cocaine Use: Impact on Child Health and Development*, 40 *Advances in Pediatrics* 65, 92 (1993). Also, in 1993, a publication of Harvard Medical School reported that a “1991 combined analysis of 20 studies on cocaine and pregnancy found few effects that could be specifically attributed to cocaine.” *Update on Cocaine: Part I*, 10 *Harv. Mental Health Letter* 3 (Aug. 1993).

¹⁹ E. Hutchins, *Drug Use During Pregnancy*, 27 *J. Drug Issues* 463, 465 (1997) (*emphasis added*).

²⁰ J. Held et al., *The Effect of Prenatal Cocaine Exposure on Neurobehavioral Outcomes: a Meta-Analysis*, 21 *Neurotoxicology & Teratology* 619, 624 (1999) (noting “general consensus among researchers that the reproductive effects of cocaine appear to be minimal” and finding that “the effect of prenatal exposure to cocaine on neurobehavior appears to be only marginal and transitory”).

²¹ “Detailed review was ... restricted to studies that ... met 3 criteria: (1) samples were prospectively recruited; (2) examiners of the children were masked to their cocaine exposure status; and (3) the cocaine-exposed cohort did not include a substantial proportion of children also exposed in utero to opiates, amphetamines, or phencyclidine, or whose mothers were known to be infected with the human

[T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors. Many findings once thought to be specific findings of in utero cocaine exposure can be explained in whole or in part by other factors, including prenatal exposure to tobacco, marijuana, or alcohol and the quality of the child's environment.²²

In sum, upon an exhaustive review of the medical research, the **only** effect of prenatal cocaine exposure that the JAMA researchers uncovered is the potential for decreased emotional expressiveness. *A Systematic Review, supra*, at 1620. And even this finding is tempered by the observation that “[f]ull-term cocaine-exposed infants show[] better arousal modulation than their unexposed counterparts.” *Id.* at 1617. In light of these findings, the JAMA researchers condemn as “irrational[]” policies that selectively “demonize” *in utero* cocaine exposure and that target pregnant cocaine users for special criminal sanction. *Id.* at 1621, *see also* A. Addis et al., *Fetal Effects of Cocaine: an Updated Meta Analysis*, 15 *Reproductive Toxicology* 341-369 (2001).

In Ms. McKnight's case, it was crucial to defuse the public misperception surrounding cocaine use, and to confront those claims through the use of facts and evidence-based research. Trial Counsel's failure to submit evidence, or experts who could challenge underlying misperceptions of cocaine's harm in general constituted deficient performance.

immunodeficiency virus (HIV).” *A Systematic Review, supra*, at 1613, 1614.

²² *Id.* at 1621, 1624.

B. Trial Counsel Failed to Investigate and Make Use of Consensus in the Medical Community that Addiction is Not Failure of Will-Power and Alone a Basis for Inferring Criminal Intent.

Trial Counsel failed to present expert testimony and evidence that women, upon becoming pregnant, do not suddenly have greater access to the right kinds of health care, better housing, safer environments, or enhanced capacity to overcome behavioral health problems such as diabetes, obesity, and addiction.

Widely available medical and legal information that Trial Counsel would have found had she conducted even cursory research would show that courts and medical groups have long recognized "that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors." American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting, Board of Trustees Report NNN 236, 241, 247* (June 26-30, 1988). *See also* R. K. Portenoy & R. Payne, *Acute and Chronic Pain*, in *Substance Abuse, A Comprehensive Textbook* 563, 582-84 (J.H. Lowinson et al. eds., 1997) (citing AMA task force); National Academy of Sciences, Institute of Medicine, *Dispelling The Myths About Addiction*, Ch. 8 (1997).

Although there has been extensive debate within the treatment community regarding whether addiction is a "disease," there is no dispute that addiction has biological and genetic dimensions. *See Linder v. United States*, 268 U.S. 5, 18; 45 S.Ct. 446, 449; 69 L.Ed. 2d 819 (1925); *Robinson v. California*, 370 U.S. 660, 667; 82 S.Ct. 1417, 1420; 8 L.Ed. 2d 758 (1962); American Psychiatric Ass'n, *The Diagnostic and Statistical Manual of Mental Disorders - 4th Edition* (2000) ("DSM-IV-TR"), p. 176-181 (specifying diagnostic criteria for "Substance Dependence").

Medical research was widely available to Trial Counsel establishing that, as a matter of law and medical science, addiction is marked by “compulsions not capable of management without outside help.” *Robinson*, 370 U.S. at 671; 82 S.Ct. at 1422; 8 L.Ed. 2d 758 (*Douglas, J., concurring*); *see also* 42 U.S.C. § 201(q) (“drug dependent person” means a person who is using a controlled substance . . . and who is in a state of psychic or physical dependence, or both.”) As described in the DSM-IV-TR, one of the hallmarks of drug dependency is the inability to reduce or control substance abuse despite adverse consequences. *See* DSM-IV-TR, at 179. *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.”) This is why the vast majority of drug-dependent people -- whether they are prominent radio talk show hosts, or low-income women of color cannot simply “decide” to refrain from drug use or achieve long-term abstinence without appropriate treatment and support.

At the second trial, counsel took no steps to challenge popular misinformation about, and prejudice, against drug users. Trial Counsel failed to call an expert on addiction who would have explained Ms. McKnight’s addiction as a condition that requires and responds to treatment. Effective assistance of counsel in this case clearly required attention to the issues and prejudices about addiction.

1. Trial Counsel Failed to Place Ms. McKnight’s Situation In Context, Namely That Low Income, Vulnerable Pregnant Women Face Numerous Obstacles To Accessing Appropriate Drug Treatment and Other Health Care.

In 2006, the United Health Foundation ranked South Carolina number 46, and this year, it has dropped two notches to rank 48th out of the 50 states in health standings.

South Carolina's women with substance use problems and pregnant women in particular remain underserved. *See generally* Drug Strategies, Keeping Score: 1998 at 32 (1998), available at <http://www.drugstrategies.org/KS1998/indexbottom.html> (“Only a small fraction of the estimated nine million women with serious alcohol and other drug problems are able to get treatment, unless they can afford to pay.”); *see also* Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. Health Care L. & Pol’y 72, 78, (1999) (“Government officials have largely ignored the burgeoning need for comprehensive, long-term treatment for women.”).

According to the 2005 National Survey of Substance Abuse Treatment Services (N-SSATS), only 16% of drug treatment facilities in South Carolina have programs geared towards treating pregnant or postpartum women. South Carolina State Profile, N-SSATS 2005 Report, at http://www.dasis.samhsa.gov/webt/state_data/SC05.pdf. Horry County in particular, to date, does not have any treatment center that accepts pregnant women. In a rural state such as South Carolina, the fact that only 28% of treatment facilities offer transportation assistance to treatment, poses a significant barrier to women in rural areas. Furthermore, the lack of child care at treatment centers poses another tremendous barrier to accessing treatment. Only 12% of the treatment facilities in South Carolina offer child care, and even less, 6%, offer residential beds for client's children. *Id.* And those percentages do not even tell the whole story, because they do not reflect whether there is a cap on number of children, or age of children that are allowed into such scarce facilities that do provide child care or beds.

Other impediments to treatment include cost, cultural norms, stigma, and long waiting-lists, all of which are present in South Carolina. Moreover, the lack of unskilled

manufacturing jobs, affordable housing, health insurance, paid parental leave, and adequate childcare for low income people are structural, societal problems that conspire to make it impossible for them to support their families financially and enable them to access necessary support services. See Barbara Ehrenreich, *Nickled and Dimed: On (Not) Getting by in America* (2001); David K. Shipler, *The Working Poor: Invisible in America* (2004) (describing conditions of poverty for those who are employed full-time in low-paying jobs); Families USA, *One in Three: Non Elderly Americans Without Health Insurance 2002-2003* (2004) (finding that approximately 81.8 million people—one out of three (32.2 percent) of those under the age of 65—were without health insurance for all or part of 2002 and 2003, and of those, two-thirds (65.3 percent) were uninsured for six months or more.).²³

It is in this context that the State tried to convince the jury that Ms. McKnight showed reckless indifference because she used cocaine and experienced a stillbirth.²⁴ Trial Counsel not only failed to challenge causation, she failed to call her own experts -- who could have addressed such issues as addiction, access to and funding for drug treatment in particular and health care in general, and the fact that while no woman can guarantee a healthy pregnancy outcome, low-income, rural women like Ms. McKnight face particular barriers to the kind of care that could improve these outcomes. The failure

²³ Furthermore, it appears that South Carolina is cutting already minimal funding for drug treatment and applying stricter limitations on approval for Medicaid reimbursement for treatment. According to the State Department of Alcohol and Other Drug Abuse Services, total expenditures for alcohol and drug abuse programming declined steadily from 2002-2003 from \$34.4 million to \$26.9 million. See <http://www.whitehousedrugpolicy.gov/publications/inventory/sc.pdf>. In the past year, the rate of uninsured population increased from 14.7 percent to 17.7 percent. See http://www.dasis.samhsa.gov/webt/state_data/SC05.pdf.

²⁴ The State repeatedly emphasized the social worker's statement, that upon interviewing Ms. McKnight, she admitted that she would use cocaine as often as she could get it, as if that alone, which is evidence of an addiction, rather than an intent to harm, was enough for the State to meet its burden.

of Trial Counsel to illustrate the barriers that women like Ms. McKnight experience to a jury, to counteract the State's demonization of her situation, constituted ineffective assistance of counsel and resulted in Regina McKnight's baseless conviction.

IV. IF THIS COURT ALLOWS THE CONVICTION TO STAND DESPITE TRIAL COUNSEL'S DEFICIENT PERFORMANCE, THE HEALTH OF MOTHERS AND BABIES IN SOUTH CAROLINA WILL BE JEOPARDIZED BY DETERRING THEM FROM ACCESS TO CARE.

State and national medical and public health organizations and experts strongly oppose making the state's criminal law applicable to the context of pregnancy, and are unanimous in condemning punitive state interventions in a woman's pregnancy because, as one public health expert observed two decades ago in the *New England Journal of Medicine*:

[M]arriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether during pregnancy if failure to follow medical advice can result in . . . involuntary confinement, or criminal charges. By protecting . . . the integrity of a voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses.

G. Annas, *Protecting the Liberty of Pregnant Patients*, 316 *New Eng. J. Med.* 1213, 1214 (1987). This sentiment is echoed today in the recent American College of Obstetricians & Gynecologists ethics statement on this issue, which provides:

[P]regnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.

American College of Obstetricians and Gynecologists Committee Opinion 321 (Nov. 2005).

The American Medical Association has stated “pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician’s knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.” Report of American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990). See also American Medical Association, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990) (resolving “that the AMA oppose[s] legislation which criminalizes maternal drug addiction”).

These leading professional institutions and professional organizations are concerned that women will be deterred from seeking care, whether it is prenatal care,²⁵ drug treatment,²⁶ or other general health care, all of which can help improve (but not guarantee) pregnancy outcomes where there is the threat or likelihood of state intervention.

²⁵ Prenatal care has been found to be strongly associated with improved outcomes for children exposed to drugs in utero. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-85 (1993); Edward F. Funai et al., *Compliance with Prenatal Care in Substance Abusers*, 14(5) J. Maternal Fetal Neonatal Med. 329, 329 (2003); Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19(4) Seminars in Perinatology 293, 293 (1995).

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

²⁶ The research also shows that drug treatment can be effective for pregnant women and can itself produce beneficial pregnancy outcomes. See Patrick J. Sweeney et al., *The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes*, 20(4) J. Perinatology 219, 219 (2000) (finding that neonatal outcome “is significantly improved for infants born to substance abusers who receive[d] drug treatment concurrent with prenatal care compared with those who received [prenatal care but] . . . treatment postpartum”).

To allow Ms. McKnight's conviction to stand in spite of egregiously ineffective assistance of counsel would send the even more dangerous message that not only can pregnant women who seek help be arrested, to the detriment of maternal and fetal health - they cannot even count on the guarantee of adequate representation or a fair trial.

CONCLUSION

In this case, "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). But for Trial Counsel's deficient performance, it would have been clear that there was no admissible scientific evidence to prove beyond a reasonable doubt that Ms. McKnight committed homicide by child abuse. All the scientific evidence goes *against* the State. *Amici* posit that there is more than a reasonable probability, rather, there is certainty, that if Trial Counsel had investigated medical evidence regarding the causes of stillbirths and challenged the medical conjecture and misinformation presented by the State, then Ms. McKnight would not have been convicted.

For the foregoing reasons, *amici* respectfully request that the Court reverse the Court of Common Pleas, and order that Ms. McKnight's conviction be reversed.

Respectfully Submitted,

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APPENDIX

DESCRIPTION OF AMICI CURIAE

Amicus Curiae **South Carolina Medical Association (“SCMA”)** is the primary professional association for individuals licensed to practice medicine in South Carolina. The SCMA has over 5500 members representing all medical specialties that provide medical services to the citizens of the state. The SCMA’s primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina.

Amicus Curiae **South Carolina Nurses Association (“SCNA”)** is a professional organization which represents registered nurses in South Carolina. SCNA strongly supports health care for a number of vulnerable populations and believes patients must be secure in the knowledge that their treatment providers are wholly devoted to treatment and are not doubling as the agents of law enforcement. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the breaching of patient confidentiality and the threat of criminal prosecution deters pregnant women who suffer from chemical dependence from seeking and obtaining prenatal care.

Amicus Curiae **South Carolina Association of Alcoholism and Drug Abuse Counselors (“SCAADAC”)** is a statewide association of addiction counselors and other persons interested in addiction counseling expressly concerned with the welfare of persons who are chemically dependent or who are abusing chemicals, providing public education concerning addictive illnesses and the treatment and prevention thereof, and promoting high standards in continuing education for professionals who provide addiction counseling. They seek to promote a response to the general public and state leaders to the diseases of alcoholism and drug abuse; to cooperate with official and voluntary health, welfare, educational and rehabilitation agencies concerned with the prevention and treatment of individuals affected with the physical, emotional or mental problems of alcohol or drug abuse; and to better serve those who are affected and their families.

Amicus Curiae **South Carolina Coalition for Healthy Families (“SCCHF”)** is an alliance of statewide organizations and individuals interested in promoting reproductive health policies that will increase access to family planning and reproductive health services; provide South Carolina citizens with medically accurate reproductive health education in communities and schools; and encourage a private and confidential patient-provider relationship.

Amicus Curiae **Carolina Health Centers, Inc (“CHC”)** is a private, non-profit community health center organization whose purpose is to provide comprehensive health care services to people within a seven county area in West-Central South Carolina. These counties are Greenwood, Laurens, McCormick, Abbeville, Saluda, Edgefield, and Newberry. CHC (formerly MEGALS Rural Health Association) was formed by a group of interested citizens and became chartered in South Carolina in June of 1977 in order to

provide quality healthcare to all residents of the area, with emphasis on the uninsured and underinsured. CHC currently operates seven family practice centers, a large pediatric practice, a dental practice, and a school-based practice. CHC also owns and operates a well-equipped mobile medical unit which is used at health fairs, industrial sites, churches, schools and many other community functions, as well as a pharmacy that provides Carolina Health Center patients with medications at reduced prices and acquired an OBGYN practice in January, 2007.

Amicus Curiae **National Association of Social Workers, Inc., South Carolina Chapter (“NASW-SC”)** has 1,043 members and is particularly interested in this case due to its significant local impact.

Amicus Curiae **LRADAC, The Behavioral Health Center of The Midlands (“LRADAC”)** is a private, non-profit agency that cares for the needs of the citizens of Lexington and Richland Counties of South Carolina by offering a wide array of prevention, intervention and treatment programs in locations convenient to residents of both counties. LRADAC takes a proactive approach to fighting addiction and drug abuse in our schools, businesses and neighborhoods. LRADAC strongly believes that substance abuse and addiction are preventable and treatable and tailors its programs to meet the many needs of the communities it serves. LRADAC is one of 33 county alcohol and drug abuse authorities recognized by the state of South Carolina. This network of direct service agencies provides prevention, intervention and treatment programs to citizens in all 46 counties of the state. Each year, more than 50,000 South Carolinians receive direct intervention and/or treatment services through the county authorities. Last year, LRADAC alone served more than 5,000 clients.

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

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

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

Amicus Curiae **Association of Reproductive Health Professionals (“ARHP”)** is a national non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, other clinicians, pharmacists, and researchers, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, legislators, other professionals, and the public at large. ARHP is concerned that the prosecution of Regina McKnight threatens to undermine the quality of care provided by physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women in South Carolina by threatening the prosecution, conviction, and incarceration - rather than treatment for their substance use during pregnancy.

Amicus Curiae **Association of Women Psychiatrists (“AWP”)** is an independent, non-profit professional organization representing women psychiatrists in the U.S. and abroad. The AWP was founded in 1983 to promote the health and mental health of all persons, particularly women. AWP’s aims include collecting and disseminating information on improving women’s mental health, supporting research in women’s mental health issues, and advocating just legislation for women. AWP strongly encourages and supports efforts to decriminalize substance abuse and addiction in pregnant women.

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

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

Amicus Curiae **Doctors of the World-USA** (“DOW-USA) was founded in 1990 by a group of volunteer physicians and is an international health and human rights organization working where health is diminished or endangered by violations of human rights and civil liberties. Reaching out to the most vulnerable and marginalized populations, in concert with local partners around the globe, Doctors of the World-USA’s projects build long-term solutions addressing urgent health issues, with particular focus on women’s health and vulnerable children.

Amicus Curiae **The Freeman Institute for Cognitive Therapy** offers specialized training in Behavioral Health Topics, Psychology, Psychiatric Nursing, Addiction Treatment and certification Preparation in Cognitive Behavior Therapy for a variety of behavioral health disorders, including personality disorders; substance misuse disorders; OCD (obsessive compulsive disorder); PTSD (stress disorders); ADHD (attention deficit hyperactivity disorder); panic disorder (and other anxiety disorders); bipolar disorder; pain management; chronic pain; eating disorders; crisis or trauma response; depression; coping skills training; counseling skill education and training; parenting help; treatment motivation; individual and group psychotherapy; therapy for children and adolescents; and relationship, couple or marriage and family problems.

Amicus Curiae **Family Justice** is an organization that draws on the unique strengths of families and neighborhoods to break cycles of involvement with the criminal justice system. It works on engaging families in support of those released under community supervision and demonstrates the positive effect that families have on the reentry and rehabilitation process. In pursuing its mission, Family Justice assists government and communities by providing direct services, testing methodologies that promote change, delivering training and consulting to encourage use of its methods, and serving as a resource for both the criminal justice field and the general public.

Amicus Curiae **Global Lawyers and Physicians (“GLP”)** is a non-profit non-governmental organization that focuses on health issues and human rights. Founded in 1996, GLP was formed to reinvigorate the collaboration of the legal, medical and public health professions in protecting the human rights and dignity of all persons. GLP’s mission is to implement the health-related provisions of the Universal Declaration of Human Rights and the Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, with a focus on health and human rights, patient rights, and human experimentation.

Amicus Curiae **Institute for Health and Recovery (“IHR”)** is a nonprofit organization dedicated to developing a comprehensive continuum of care for families affected by substance abuse, especially women and their children. IHR focuses on the development of prevention, intervention, treatment services and the integration of gender-specific services within substance abuse prevention and treatment. IHR serves individual women and men, and families, with a continuing emphasis on pregnant and parenting women and their children. IHR members know firsthand the fears pregnant substances abusing women have regarding prosecution, causing them to be reluctant to seek prenatal care and substance abuse treatment. With over 10 years of experience in working with

pregnant women who use drugs, IHR rejects policies such as those under which Regina McKnight was prosecuted.

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

Amicus Curiae **National Association of Social Workers ("NASW")** is the world's largest association of professional social workers with nearly 150,000 members in fifty-six chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. NASW believes that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict. NASW's policy statement, Alcohol, Tobacco, and Other Drugs, supports "an approach to ATOD [alcohol, tobacco and other drug] problems that emphasizes prevention and treatment" and efforts to "eliminate health disparities that accrue from ATOD problems and discriminatory practices from the criminal justice system." (NASW, Social Work Speaks, 7th ed., 2006).

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

Amicus Curiae **National Latina Institute for Reproductive Health ("NLIRH")** wants to ensure the fundamental human right to reproductive health care for Latinas, their families and their communities through education, policy advocacy, and community mobilization. Through advocacy, community mobilization, and public education, NLIRH is shaping public policy, cultivating new Latina leadership, and broadening the reproductive health and rights movement to reflect the unique needs of Latinas. NLIRH

believes that coercive, discriminatory and/or punitive policies and practices (such as the criminalization of pregnant substance users) are differentially impacting Latinas and other women of color.

Amicus Curiae **National Stillbirth Society** is an organization devoted to advocating on behalf of the more than 26,000 American mothers who suffer a stillbirth each year. As a misunderstood, under-discussed and under-researched medical condition, its mission is to promote greater stillbirth awareness, research and reform. The National Stillbirth Society supports this brief because it believes that contrary to popular theories, stillbirth is a random event that strikes all categories of mothers and is generally never caused by something the mother did or did not do. Although the National Stillbirth Society does not condone illicit drug use by any person at any time, it believes that the circumstances of Ms. McKnight's situation do not suggest a crime, but rather that her baby was one of the 15,000 stillbirths each year for which no cause can be attributed.

Amicus Curiae **National Women's Health Network ("NWHN")** improves the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. The Network aspires to a health care system that is guided by social justice and reflects the needs of diverse women. The National Women's Health Network was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN has established core values to guide us in our work as advocates for women's health: (1) We value women's descriptions of their own experiences and believe that health policy should reflect the diversity of women's experiences, (2) we believe that evidence rather than profit should drive the services offered and information that is made available to women to inform their health decision making and practices, (3) we value analysis of science that takes into consideration systems of power and oppression, (4) we believe that the government has an obligation to safeguard the health of all people, (5) all women should have access to excellent health care and (6) women's normal physiological changes over the lifespan should not be unduly medicalized.

Amicus Curiae **Physicians and Lawyers for National Drug Policy ("PLNDP")** is a non-partisan group of the nation's leading physicians and attorneys, whose goal is to promote and support public policy and treatment options that are scientifically-based, evidence-driven, and cost-effective. The initiative, funded by the JEHT and Robert Wood Johnson, and building on the earlier work of Physician Leadership on National Drug Policy, is organized around the belief that effective policies for alcohol and other drugs must be grounded in data, not politics. PLNDP will advocate for evidence-based policy decisions and will encourage local innovation by establishing stable professional partnerships in every state and by supporting community coalitions. For the first time, physicians and lawyers, often viewed as squaring off in policy debates, have joined forces to make a concerted effort to move the national conversation beyond the often misleading and polarizing policy debates of the past.

Amicus Curiae **American College of Nurse Midwives ("ACNM")**, with roots

dating back to 1929, is the oldest women's health care organization in the U.S. ACNM sets standards for the education, certification and practice of certified nurse-midwives and certified midwives, supports research, administers and promotes continuing education programs, creates liaisons with state and federal agencies and members of Congress and advocates for programs and policies that improve the health status of women and their families. The mission of ACNM is to promote the health and well-being of women and newborns within their families and communities through the development and support of the profession of midwifery practiced by certified nurse-midwives, and certified midwives. The philosophy inherent in the profession states that the midwives believe every individual to have the right to safe, satisfying health care with respect for human dignity and cultural variations.

ACNM acknowledges that addiction is medically recognized condition that affects more than 20 percent of all pregnant women per year. Addiction is the persistent compulsive use of a substance known to be physically, psychologically or socially harmful and includes addiction to substances such as tobacco, alcohol, prescription medications, and illicit drugs. In pregnancy, addiction to one or more of these substances constitutes a significant health problem. ACNM supports a health care system where women with addictions in pregnancy are treated with compassion, not punishment. This care should occur within a multidisciplinary environment that provides holistic care for pregnant women in the context of her social environment and where consideration of the health risks is paramount. Recognizing that substance use in pregnancy is a disease that requires a team approach to treatment, the American College of Nurse-Midwives supports legislation that: 1. Protects the rights of women with addictions to seek health care without fear of criminal retribution; 2. Encourages the development of public health programs to address innovative interventions to treat addictions in pregnancy; 3. Promotes education and research into this significant public health issue.

Amicus Curiae **Baron Edward de Rothschild Chemical Dependency Institute** ("the Institute") has over 35 years of leadership in the field of addiction treatment, first at Beth Israel Medical Center proper, then in 1988 under the name of the Chemical Dependency Institute, and now under its new name. The Institute comprises a variety of clinical programs that care for some 13,000 individuals annually; these programs are provided on an inpatient as well as ambulatory basis, and include both long-term rehabilitation as well as acute intervention. They have served as models for clinicians from around the world for over three decades.

The Institute also has an active, highly respected research staff that has published scores of seminal findings in peer-reviewed professional journals. Institute staff members are active participants in international conferences and have played a very strong advocacy role, in America and abroad, for humane policy reform and expansion as well as enhancement of treatment services. The Institute brings its expertise to this Court to explain that punitive government interventions will only deter pregnant substance abusers from obtaining prenatal care and drug treatment and undermine health outcomes for mother and child.

Amicus Curiae **Child Welfare Organizing Project (“CWOP”)** is a 10-year-old organization of New York City parents and professionals who seek reform of New York City child welfare practices through increased, meaningful parent / client involvement in child welfare decision-making at all levels, from case-planning to policy, budgets and legislation. CWOP has approximately 1,500 parent members. Most of CWOP's staff, and about half of CWOP's Board of Directors, are parents who have had direct, personal involvement with the Administration for Children's Services (“ACS”). A significant percentage of CWOP members are mothers in recovery. A large part of CWOP's work involves debunking prevailing stereotypes about ACS-involved parents and families, putting a human face on parents who are often unfairly and inaccurately demonized and bringing CWOP's unique insights into policy discussions. CWOP hopes this will result in more enlightened public policy that effectively identifies and addresses real problems and challenges to successful family life in New York City, ultimately protecting children by helping and strengthening their families and communities.

Amicus Curiae **The Center for Children of Incarcerated Parents (“CCIP”)** was founded in 1989 to prevent intergenerational crime and incarceration. CCIP produces high quality documentation on, and the development of model services for, children of criminal offenders and their families. CCIP offers educational curricula that includes: parent education for prisoners; parent empowerment; parent education for substance-dependent parents in treatment; parent education for elementary school children; family life education; health education for incarcerated mothers; women's issues; the effects of trauma and violence on children; mentor training; and parent advocacy for prisoners. In addition, CCIP provides therapeutic services for children, children's caregivers, and teachers, as well as a range of family reunification services.

Amicus Curiae **The National Institute for Reproductive Health (“the Institute”)** is an innovation institute for state and local organizations working on reproductive health issues. The Institute offers strategic guidance, hands-on support and funding to help state and local leaders remove barriers to health care and change public policies and to help women in communities all across America gain access to the full range of reproductive health care options and the opportunity to have healthy pregnancies.

Amicus Curiae **The Rebecca Project for Human Rights** is a legal and advocacy organization for poor and low-income families struggling with the intersecting issues of economic marginality, substance abuse, access to family-oriented treatment, and the criminal justice system. The organization is rooted in the lived experiences of the parents, who are mostly single mothers in recovery, and works to create openings and forums for their agency, voice, and leadership on the national level regarding issues that affect the lives of similar families battling with substance abuse. The Rebecca Project is particularly concerned that because substance abusing mothers are often denied access to treatment or incarcerated for their addiction, they are denied the opportunity to raise their children with dignity or even at all.

Amicus Curiae **Native American Women's Health Education Resource Center (“the Resource Center”)** is the first resource center located on a reservation in the US.

The Resource Center was formed in 1988 as a project of the Native American Community Board on the Yankton Sioux Reservation in South Dakota to address pertinent issues of health, education, and economic development of Native American people. The Resource Center has expanded to include many programs benefiting people locally, nationally, and internationally. Some examples are the Domestic Violence Program; AIDS Prevention Program; Youth Services, which include the Child Development Program and the Youth Wellness Program; Adult Learning Program; Environmental Awareness and Action Project; Cancer Prevention; Fetal Alcohol Syndrome Awareness Program; Clearinghouse of Educational Materials; Food Pantry; Wicozanni Wowapi Newsletter; Diabetic Nutrition Program; Scholarships for Native American Women; Reproductive Health and Rights; "Green Thumb" Project; and Community Health Fairs.

Amicus Curiae **Elizabeth M. Armstrong, Ph.D.** holds a joint appointment in the Department of Sociology and the Woodrow Wilson School at Princeton University and is a faculty associate at both the Office of Population Research and the Center for Health and Wellbeing. She has published articles in the scholarly literature on substance use during pregnancy, family planning, adolescent motherhood, and the sociology of pregnancy and birth. She is the author of *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder* (Johns Hopkins University Press, 2003), the first book to challenge conventional wisdom about drinking during pregnancy. Her current research includes a longitudinal study of agenda setting around disease in the U.S. and a study of fetal personhood and obstetrical ethics. She has an M.P.A. from Princeton University and a Ph.D. from the University of Pennsylvania.

Amicus Curiae **Jeffrey Blustein, PhD** is Professor of Bioethics and Family and Social Medicine, Albert Einstein College of Medicine, and adjunct Associate Professor of Philosophy, Barnard College. His main areas of scholarly work include bioethics, normative ethics, and moral psychology.

Amicus Curiae **Susan Boyd, PhD**, is Associate Professor in the Studies in Policy and Practice Program at University of Victoria, and a Senior Research Fellow in the Centre for Addictions Research of British Columbia. Her research is on gender and maternal drug use, women in conflict with the law, drug law and policy, and research methodology. She is a community activist who works with harm reduction and drug user groups.

Amicus Curiae **Nancy Day, M.P.H.** is Professor of Psychiatry and Epidemiology. She has studied the effects of prenatal exposures to alcohol, marijuana, cocaine, and tobacco for over 20 years. She has published prolifically and has received grants from the NIH in support of her work. She is currently the Director of the Maternal Health Practices and Child Development Project centered on identifying long-term effects of prenatal substance abuse.

Amicus Curiae **Leslie Hartley Gise, M.D.**, is a Clinical Professor at the John A. Burns School of Medicine at the University of Hawai'i in Honolulu. She is also the

Chief of the Department of Psychiatry of the Maui Memorial Medical Center in Wailuku. She has pioneered protocols and teaching curricula for screening of medical patients for psychological dysfunction. Dr. Gise has devoted particular attention to cognitive screening of elderly patients and screening for depression in women. She was an investigator on three National Institute of Mental Health contracts on mental health in primary care. Dr. Gise is on the editorial board of five journals, taught in board review courses and examined for the American Board of Psychiatry and Neurology. She has consulted at the Malama Family Recovery Center treating substance use disorders in pregnant and parenting women. Dr. Gise belongs to many professional organizations, and has assumed active committee and leadership roles, including presidency of the North American Society for Psychosocial Obstetrics and Gynecology and the Society for Liaison Psychiatry. Dr. Gise was appointed by the Academic Council to be Women's Liaison Officer to the American Association of Medical Colleges. Dr. Gise has been active in the American Psychiatric Association, President-Elect of the Hawai'i State Psychiatric Society, on the Council on Minority and Under-Represented Groups, the Committee on Women, the Area 7 Council, the Committee on Public Affairs, the Committee on Public and Community Psychiatry and the Assembly. She is the Chair of the Disaster Preparedness Committee of the Hawai'i Psychiatric Medical Society, an American Red Cross mental health volunteer, a member of the federal Disaster Medical Assistance Team (DMAT) under FEMA and Homeland Security where she is the Public Information Officer, a member of Disaster Psychiatry Outreach (DPO), Maui Memorial Medical Center Disaster Committee and Maui Voluntary Organizations Active in Disaster (VOAD). Finally, Dr. Gise has published voluminously and lectured around the world on addiction in women, post partum depression, outpatient commitment and other topics.

Amicus Curiae **Nancy D. Campbell** is the author of *Using Women: Gender, Drug Policy, and Social Justice* (Routledge 2000), a history of how pregnant women are used to call for drug policies that are unjustifiably harsh and ill considered in terms of their social consequences.

Amicus Curiae **Katherine Irwin** is a professor at the University of Hawaii at Manoa, teaching courses in: Survey of Criminology, Introduction to Juvenile Delinquency, Survey of Drugs and Society, Analysis in Field Research Methods, Analysis in Criminology/Juvenile Delinquency, Methods of Research in Criminal Justice, Seminar in Criminology. Dr. Irwin's research areas include juvenile delinquency, deviance, drug use, violence, youth culture, adolescent development, gender and crime, research methods, and delinquency prevention.

Amicus Curiae **Stephen Kandall, M.D.** is a pediatrician who has cared for over a thousand babies exposed to drugs. He is also chief of neonatology at Beth Israel Medical Center in New York and has written a book (*Substance and Shadow: Women and Addiction in the United States* Cambridge: Harvard University Press, 1996.) outlining the horrors of prosecuting women who need drug treatment.

Amicus Curiae **F. David Schneider**, M.D., M.S.P.H. is a family physician and an Associate Professor of Family and Community Medicine at the University of Texas Health Science Center and is a recognized expert on issues of health care and domestic violence. Dr. Schneider is the president of the newly established Academy on Violence and Abuse, a member of the AMA Advisory Council on Violence and Abuse, and the Chair of the American Academy of Family Physicians Commission on Public Health.

Amicus Curiae **Linda Worley**, MD is an Associate Professor in the College of Medicine at the University of Arkansas for Medical Sciences (UAMS) and directs the campus wide Student Mental Health Service. Dr. Worley is a board certified Psychiatrist with sub-specialization in Addiction Psychiatry. Dr. Worley was recruited to join the UAMS, Department of Psychiatry Faculty in 1992 and was promoted with tenure in 1998 in the clinician educator track. She has strong interests in psychosomatic medicine and in the well-being of health care providers.

Amicus Curiae **Virginia Delaney-Black**, M.D., M.P.H., is Professor of Pediatrics at Wayne State University and Associate Director of the Children's Research Center of Michigan at Children's Hospital of Michigan. Dr. Delaney-Black is board certified in Pediatrics and Neonatal-Perinatal Medicine. She is the principal investigator for a NIDA-funded study "Prenatal Cocaine Exposure and School Age Outcomes" and a Department of Education grant "Learning and Community Violence Exposure." Under her direction, these two multi-disciplinary research projects have assessed the same cohort of children evaluating behavior and cognition. She is the Chairman of one of the four WSU Institutional Review Boards. Her clinical activities include attending in the Neonatal Intensive Care Units and assessing follow-up of high risk NICU graduates for the NICHD-funded MFM Network Studies.

Amicus Curiae **Dr. Ernest Drucker** is a Professor of Epidemiology and Social Medicine and a Professor of Psychiatry at Montefiore Medical Center/Albert Einstein College of Medicine in New York City. His research examines AIDS, drug use, and drug policy in the US and abroad. He is a licensed Clinical Psychologist in New York State and active in drug law reform and human rights. Dr. Drucker was founding Director of a 1000 patient drug treatment program in the Bronx, and has been an NIH funded researcher of AIDS and drug addiction for 15 years. He is author of over 100 scientific articles and book chapters and is Editor in Chief of the international journals Addiction Research and Theory and the new on-line Harm Reduction Journal.com. Dr. Drucker was a founder of the International Harm Reduction Association and Chairman of Doctors of the World / USA (1993- 1997). Dr. Drucker currently serves as a senior Soros Justice Fellow.

Amicus Curiae **Fonda Davis Eyler**, Ph.D. is a Professor in the Department of Pediatrics of the University of Florida College of Medicine and is also a licensed Developmental Psychologist. Dr. Eyler is Developmental Director of Early Steps, an early intervention program for children from birth to three years of age, who live in the surrounding sixteen counties and have developmental delays and disabilities. She is a Principle Investigator on a prospective, longitudinal research study that has been

following a cohort of the children born to women who used cocaine during their pregnancy and a matched comparison group of pregnant women who were not addicted to cocaine and their children. Dr. Eyler brings a wealth of knowledge concerning the impact on children of drug abuse during pregnancy.

Amicus Curiae **Dr. Sharon Morgillo Freeman**, PhD, MSN, APRN-CS, ACT, is the Director of The Center for Brief Therapy in Fort Wayne, Indiana and Vice-President of the Freeman Institute for Cognitive Therapy. She is Past-President of the National Association of Addiction Professionals (NAADAC), Member of the Board of Directors of The International Association of Cognitive Psychotherapy, Member of the Board of Directors of The Alcohol Abuse Deterrent Programs and Past-President of the Pennsylvania Association for Addiction Professionals (PAADAC). Dr. Sharon Freeman is board certified by the Academy of Cognitive Therapy in addition to certification as an Advanced Practice Psychiatric Clinical Nurse Specialist, and senior level certification as an addiction professional (MAC) through NAADAC. She has a Ph.D in Sociology and her two master's degrees were awarded in Psychology through the Adler School of Professional Psychology and Advanced Practice Psychiatric nursing at the University of Pennsylvania.

Amicus Curiae **Howard Minkoff, M.D.**, is the Chair of the Department of Obstetrics and Gynecology at Maimonides Medical Center, and a distinguished Professor of Obstetrics and Gynecology at the State University of New York Health Science Center at Brooklyn. He is a member of the Ethics Committee of the American College of Obstetricians and Gynecologists and he sits on the editorial board or is an editorial consultant to almost all of the most prominent medical journal, including JAMA, New England Journal of Medicine, Lancet, and hundreds of articles, and is internationally recognized expert on HIV disease and high risk pregnancy. Professor Minkoff has conducted years of grand scale research, supported by millions of dollars of grants, concerning the reproductive behaviors of low-income women, many with drug abuse problems. Through his work with these women, he has developed widely adopted treatment protocols and ethical guidelines. Professor Minkoff brings his wealth of knowledge to this Court to ensure that it understands that punitive measures, including criminal prosecutions, of pregnant women with drug abuse problems will harm both maternal and child health.

Amicus Curiae **Barbara T. O'Brien, RN, BSN**, is Senior Coordinator of the Office of Continuing Perinatal Education at the University of Oklahoma Health Sciences Center, where she coordinates and instructs extended coursework for registered nurses around fetal and perinatal health, including fetal monitoring regarding alcohol and other drug use.

Amicus Curiae **Robert G. Newman, M.D.**, is President Emeritus of Continuum Health Partners, Inc, comprising four hospitals and with the largest chemical dependency treatment services of any health care system in the United States. He is a Professor of Epidemiology and Population Health and Professor of Psychiatry at the Albert Einstein College of Medicine, and a former member of the Board of Commissioners of the Joint

Commission of Accreditation of Health Care Organizations. Dr. Newman has very extensive experience with addiction treatment over the course of more than three decades and has played a major role in the development of addiction treatment in the U.S., Australia, Asia and Europe.