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SUPREME COURT OF FLORIDA

JENNIFER CLARISE JOHNSON,

Petitioner, CASE NO. 77,831

vs.

5TH DISTRICT - NO. 89-1765

STATE OF FLORIDA,

Respondent.

**AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION FOR PERINATAL ADDICTION RESEARCH AND EDUCATION (NAPARE) ON BEHALF OF JENNIFER JOHNSON**

Respectfully submitted,

National Association for Perinatal Addiction Research and Education On Behalf of Jennifer Johnson

MILLER, CANFIELD, PADDOCK AND STONE
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Dated: July 2, 1991

MILLER, CANFIELD, PADDOCK AND STONE

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The National Association for Perinatal Addiction Research and Education (NAPARE) submits this amicus brief on behalf of Jennifer Johnson and in support of her position that the State's prosecution of her for delivery of a drug to a minor is fatally flawed on both legal and policy grounds and that her conviction should be reversed and the charges against her dismissed.

## INTEREST OF THE AMICUS CURIAE

The National Association for Perinatal Addiction Research and Education ("NAPARE") is a national, non-profit organization dedicated to conducting and coordinating research into the problems of perinatal addiction and the long-term outlook for infants; providing continuing education in the field of perinatal addiction; providing a national network for the exchange of ideas regarding prevention and intervention; developing a framework for legal and ethical considerations in the field of perinatal addiction; translating current research in perinatal addiction into public education programs and public health policy, and developing a new constituency of concerned professionals working in the area of maternal and child health. NAPARE is seriously concerned that prosecutions of the type undertaken by the State in this case will deter women from seeking prenatal care, will have an adverse effect on the physician/patient relationship, will discourage pregnant women from being candid with their doctors, and will,

consequently, have an adverse effect on the babies that the prosecutions are intended to protect.

## SUMMARY OF ARGUMENT

In affirming the conviction of Ms. Johnson on two counts of delivery of a drug to a minor, the Court of Appeals ignored the reality of drug addiction and based their opinions upon faulty assumptions. Indeed, the decisions of Judges Dauksch and Cobb reflect a lack of understanding about the nature of substance abuse and addiction and the ability of a pregnant woman to control her actions. Both the state and the lower courts have ignored the fact that these women are addicts before they become pregnant; they are not pregnant women who start using drugs.

This misguided prosecution fails on both public policy grounds and legal grounds. First, on policy grounds, the prosecution is flawed because the threat of criminal prosecution will simply deter pregnant women who are substance abusers from seeking help. It will not deter them from using drugs in the first instance.

For pregnant women who do persevere and seek treatment, it is frequently not available. Or, if it is available, the financial resources to pay for it are not available. The potential for criminal prosecution also puts the health care community in a conflict position which serves no one's interest.

By prosecuting and punishing women who use drugs during pregnancy, the state is effectively creating an adversarial relationship between the mother and her unborn child. Moreover, by criminally prosecuting these women, the state is punishing women who are themselves victims.

Finally, Ms. Johnson is one of at least eight women who have been prosecuted by the State of Florida for prenatal drug use in the past two years, seven of whom, including Ms. Johnson, are African American. Yet, studies show that white women are equally like to use illicit drugs during pregnancy. We are, therefore, seeing selective prosecution on the basis of race.

The prosecution of Ms. Johnson is legally flawed as well. The statute under which the state brought charges, Florida's distribution law, does not make prenatal use of a controlled substance a crime. It was not designed for this purpose, and the Florida legislature has specifically concluded that criminalization of prenatal drug use is inappropriate. The Court of Appeals failed to give deference to the strict construction rule and for this reason alone, its decision must be reversed.

Moreover, the prosecution violates Ms. Johnson's constitutional rights. She was denied the fair warning and notice required by the due process clause. She was not on notice that her prenatal actions constituted a crime. Moreover, the judicial expansion of existing law by both the

circuit court and the appellate court to cover a woman's actions while pregnant operates like an ex post facto law and is, therefore, unconstitutional. The prosecution also violated Ms. Johnson's right to privacy and fails to advance a compelling state interest so as to pass constitutional muster. Finally, the prosecution violated her right to equal protection of the law.

## ARGUMENT

### A. CONVICTION AND SENTENCE VIOLATE PUBLIC POLICY

#### 1. Court of Appeals Decision Based on Faulty Assumptions About Addiction and Pregnant Women

Both of the Court of Appeals judges who voted to affirm the conviction of Ms. Johnson focused most of their attention on the issue of knowledge and intent. Yet, the conclusions they drew regarding a pregnant addict's knowledge and intent vis-a-vis her prenatal actions reflect a fundamental lack of understanding about what addiction is and what it means to be a pregnant addict. Particularly disturbing is Judge Cobb's statement that "[c]ertainly, it is no undue burden upon an expectant mother to avoid cocaine use during the last seven days of her pregnancy." slip op. at 2.

First, both Judge Dauksch and Judge Cobb assumed that all pregnant women know that drugs will cross the placenta to the fetus. This is not a valid assumption. Many women still believe that drugs will not cross the placenta. Therefore, a court of law should not assume that a woman had this knowledge.

Second, and more importantly, Judge Cobb's statement reflects an assumption that a pregnant addict can control her actions. Judge Dauksch echoed this assumption in his opinion. Again, this is an incorrect and unrealistic assumption:

> [T]he life-style of the addicted pregnant woman simply is not comparable to that of the nonaddicted pregnant woman. . .As her addiction worsens, the need to procure larger quantities of the addictive agent and the need for more frequent use overwhelms all other considerations of maternal health and fetal well-being. The financial requirements of a heavy addiction are ruinous regardless of income status of the addict. Behavioral patterns commonly considered unacceptable by society frequently emerge as the addict struggles to support her addiction.[1]

Cocaine is a highly addictive drug. For individuals who use it, their use becomes a compulsion. They lose their sense of reality and develop strong denial mechanisms, denying that they are hurting themselves or others and denying that they will be caught.[2] Pregnant women addicted to cocaine are concerned about the babies they carry but, without help, are unable to overcome their addictions.

Drug addiction is a medical and health care problem. The United States Supreme Court recognized this fact more

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[1]MacGregor, Keith, Chasnoff, Rosner, Chisum, Shaw, Minoque, "Cocaine Use During Pregnancy: Adverse Perinatal Outcome," American Journal of Obstetrics and Gynecology, Vol. 157, No. 3, pp. 686-690, September 1987.

[2]"Punishing Pregnant Addicts: Debate, Dismay, No Solution," The New York Times, September 10, 1989, Section 4, p.5. col. 1.

than sixty years ago, in 1925, when it held that drug addiction is a medical not a criminal matter. See Linder v. United States, 268 U.S. 5, 18; 45 S. Ct. 446, 449 (1925). In 1962, in Robinson v. State of California, 370 U.S. 665, 82 S.Ct. 1417, 1426 (1962), the Supreme Court reiterated this point, stating that "we forget the teachings of the Eighth Amendment if we allow sickness to be made a crime and sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action."

Likewise, we must recognize that most pregnant women do not want to hurt their unborn children. Rather, they are victims of their addictions, unable, without help, to fight them. As James Bopp, General Counsel, National Right to Life Committee, has been quoted as saying, "It's unlikely a woman takes drugs to harm her child. Cocaine addiction is compulsive behavior. It leads people to engage in a variety of crimes. Adding another potential punishment is unlikely to tip the balance for most."[3]

Finally, both Judges assumed that Ms. Johnson knew that she would give birth imminently and that therefore, she knew that she would deliver a controlled substance to a person. Not only did both Judges ignore the question of whether a baby that is still attached to an umbilical cord is a person, both Judges ignored the fact that Ms. Johnson had no control

[3] Id.

over when she delivered her baby. As Judge Sharp eloquently noted in her well-reasoned opinion.

> [T]here was no evidence that Johnson timed her dosage of cocaine so as to be able to transmit some small amount after her child's birth. Predicting the day or hour of a child's birth is difficult to impossible even for experts. Had Johnson given birth one or two days later, the cocaine would have been completely eliminated, and no "crime" would have occurred. But since she went into labor which progressed to birth after taking cocaine when she did, the only way Johnson could have prevented the "delivery" would have been to have severed the cord before the child was born which, of course, would probably have killed both herself and her child. This illustrates the absurdity of applying the delivery-of-a-drug statute to this scenario.

Slip op. at 4-5.

Because they relied on faulty assumptions about the nature of drug addiction and what individual addicts know and/or intend about their drug use, Judges Dauksch and Cobb erred in affirming the conviction of Ms. Johnson. For this reason alone, the Court of Appeals decision must be reversed.

In sum, by criminally prosecuting women who have used drugs during pregnancy, the state is punishing women who are themselves victims -- victims of their addictions. In the long run, criminalization is no solution.

### 2. Threat of Criminal Prosecution Will Drive Women Away From Medical Care

The issue of whether women should be criminally penalized when they have used drugs during pregnancy has been

the subject of great debate in the medical and social services communities as well as in state legislatures. Many experts across a number of different disciplines have concluded that criminal prosecution is counterproductive because it will deter women from seeking the medical care which is essential to the delivery of a healthy baby. The children can best be served if their mothers enter treatment programs. This will not happen if the women are driven underground.

As Dr. Ira Chasnoff, President of NAPARE has stated "What you're going to get is a baby delivered to a woman who not only abused drugs, but also had no prenatal care,. . .We're going to make the problem worse. Your long term goal of making better babies is not going to be reached."[4]

This concern has been echoed by a number of other experts. For instance, Jo Warfield, spokesperson for the Illinois Department of Children and Family Services, expressed the same concern about legislation which would have criminalized prenatal conduct in Illinois: "Our concern is that if women feel they're going to be prosecuted, they may not get the prenatal care they need."[5]

The deterrent effect of state intervention to control a woman's pregnancy has already been documented in the context

[4]United Press International, July 12, 1989.

[5]"Cocaine-baby Debate Legislature-bound," Chicago Tribune, November 23, 1989, Section C, p.14. The Illinois legislation was defeated.

of cesarean sections. Women who have been ordered by a court to submit to cesarean sections for the well-being of the fetus have either left the hospital at which the cesarean was ordered to be done and gone to another facility to deliver or gone home to deliver without any medical assistance.[6]

It has also been documented that women who do not obtain adequate prenatal care are more likely to give birth to lower than average weight babies with greater than average number of complications.[7] Indeed, a 1985 study in Florida revealed that 25 percent of white mothers and nearly 50 percent of black mothers were not receiving adequate prenatal care, and that babies born to these women were 20 times more likely to die within the first year of life.[8]

Clearly, if women who are substance abusers stay away from medical centers they will not be getting the assistance needed to overcome their addictions. There can be no doubt that the deterrent effect of criminal prosecutions of this type will have a serious adverse impact on maternal and neonatal health.



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[6]See Flanigan, "Mom Follows Belief, Gives Birth in Hiding," Detroit Free Press, June 28, 1982, p.3-A; Rhoden, "The Judge in the Delivery Room: The Emergence of Court-ordered Caesareans," 74 California Law Review 1951, 1960 (1986).

[7]Beyond Rhetoric: A New American Agenda for Children and Families, Final Report of the National Commission on Children, (June 1991): p. 42-43.

[8]"Taxpayers Pay for Lack of Prenatal Treatment," St. Petersburg Times, November 3, 1986, p.7B.

Thus, prosecution is likely not to promote but rather to undermine the state's interest in the health and well-being of mothers and babies. Moreover, while criminal prosecution is likely to deter women from seeking prenatal care, it is not likely to have the deterrent effect the State envisions. Experts in the field do not believe that criminal prosecution will deter women in most instances from using drugs during pregnancy. Most of these women do not want or intend to hurt their unborn children by using drugs. As Wendy Chavkin, a physician and Rockefeller Foundation fellow, has reported, at a drug treatment program in New York City, thirty addicted women told her that they felt so guilty about using drugs during pregnancy that they used more drugs to escape the feelings of self-loathing.[9] These women are victims of their addictions and are frequently helpless to overcome their addictions without drug treatment. Yet, the vast majority of these women, because of the lack of drug treatment centers, have no where to go for help.

### 3. Criminalization Violates Policy of Fostering Family Unity

"The relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." Lehr v. Robertson, 463 U.S. 248, 258 (1983). Thus, the courts have recognized that there does exists a "private realm of family life which the state cannot

[9]The New York Times, July 18, 1989, Sect. A, p. 21, col. 2.

enter," which must be granted both substantive and procedural protection. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

> It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Id. To protect family integrity, the state must adopt the least restrictive practice that will most respect the constitutionally protected right to familial relationships. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977).

In this case, the state would disrupt the parent-child relationship without any basis whatsoever. There is no evidence that Ms. Johnson's children have suffered any injury as a consequence of her prenatal use of cocaine. There is no evidence that the state' action will advance a legitimate state goal. And, there is no evidence that Ms. Johnson is not fit to parent.

Criminalization of a mother's prenatal conduct necessarily creates an adversarial relationship between the mother and her baby. The state is effectively saying to the mother, "you are going to be held responsible for any action or inaction which may cause harm to a subsequently born child, and we are going to monitor your behavior and punish you if you engage in that conduct." The woman is effectively

made the guarantor of the subsequently born child's health and welfare.

In a decision involving maternal liability for prenatal conduct, the Illinois Supreme Court recognized the danger inherent in such an approach. The court held that a subsequently born child did not have a cause of action against his or her mother for prenatal conduct which resulted in injury to the child. Stallman v. Youngquist, 125 Ill.2d 267 (1988). In so holding, the court emphasized first, that to create such a cause of action would be to impose a legal duty on the part of the mother "to effectuate the best prenatal environment possible." This would mean that every action the mother took or failed to take, which could have an adverse effect on the fetus could render her liable to the subsequently born child, and every decision made by the woman during her pregnancy would be subject to state scrutiny. This, the court held, would "infringe on her right to privacy and bodily autonomy." Id. Moreover, "[m]other and child would be legal adversaries from the moment of conception." Id. Likewise, criminal prosecution will effectively pit the mother against the fetus when what we want to do is help them both.

**4. Doctors -- Medical Cops**

With the criminalization of prenatal conduct, doctors and nurses will effectively become "cops," obligated to monitor the behavior of their patients and report it to law

enforcement authorities. This will seriously threaten, if not destroy, doctor-patient relationships.

The common law physician-patient privilege was developed to protect the confidentiality of that relationship in order to further the physician's ability to diagnose and treat the patient effectively. Only by ensuring confidentiality can a doctor obtain the full and complete disclosure from a patient necessary to make a diagnosis and to treat the patient.

If doctors are forced to become medical cops, their ability to diagnose and treat will be seriously undermined. If, for instance, a pregnant woman is not deterred from seeking the doctor's care in the first place, she still may not admit to drug use if she knows that the doctor will have to report her. The doctor may then not have all of the information he or she needs to treat the woman and her subsequently born child.

As a result of the potential for criminal penalties against a mother and because they do not want to assume the role of medical cops, many health care practitioners are simply not reporting drug dependency at birth. Gregory L. Coler, then Secretary, Florida Department of Health and Rehabilitative Serves and Chair, American Public Welfare Association Commission on Child Welfare and Family Preservation, testified before a Senate Committee that, in Florida, health care practitioners have become reluctant to

identify women as substance abusers because of the threat of criminal prosecution.[10]

But, if women who use drugs during pregnancy are not identified, the women are even less likely to get the assistance they and their babies need. Not only will there be no criminal prosecution but also there will no civil intervention through social services to provide the support and assistance that is needed.

In sum, criminal prosecution places the medical community in an intolerable conflict position, the result of which will only be to further disadvantage a group that needs the medical community's help.

### 5. Prenatal Drug Rehabilitation Virtually Non-Existent

It is unreasonable to punish women who need society's help when, to date, society has done little to help them. Very few drug rehabilitation programs will accept pregnant women who have substance abuse problems. Their reasons for turning away women who are pregnant are twofold. First, many centers are concerned about the potential legal liability to the subsequently born child who may be born with injuries resulting from their mother's prenatal drug use; some also cite the potential for harm to fetuses resulting from the detoxifying drugs used during rehabilitation. Second, the

[10]Testimony of Gregory L. Coler, Before the Senate Governmental Affairs Committee, July 31, 1989.

cost of drug rehabilitation deters many from offering help to pregnant addicts.[11]

One study completed in New York City demonstrates how serious a problem this is. Of seventy-eight drug rehabilitation programs surveyed, 54 percent would not accept pregnant women as patients. Sixty-seven percent would not accept pregnant women on Medicaid. Eighty-seven percent would not accept pregnant women on Medicaid who use crack.[12] Another survey conducted by the Select Committee on Children, Youth and Families, revealed that two-thirds of the hospitals which responded to the survey reported having no place to which they could refer substance-abusing pregnant women for treatment.[13]

In his testimony before the Senate Governmental Affairs Committee in 1989, the year Ms. Johnson was charged and convicted, Gregory Coler noted that in Florida, there were over 2000 people waiting for treatment at any given point in time. For pregnant women, treatment facilities are virtually non-existent. "Florida's alcohol and drug treatment programs face limited resources and severe overcrowding, causing



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[11] See "Closed Door; Open It and Save the Children," Newsday, December 14, 1989.

[12] "Keeping Babies Free of Drugs," The National Law Journal, October 16, 1989.

[13] Statement by Elaine Johnson, Director, Office of Substance Abuse Prevention; Alcohol, Drug Abuse, and Mental Health Administration; Public Health Service; Department of Health and Human Services; Before the Committee on Governmental Affairs, July 31, 1989.

specialized needs of women, especially pregnant women, to largely go unmet."[14] Indeed, although there were nearly 4,500 reported pregnant addicts in Florida in fiscal year 1989-1990, there were only 135 residential beds available for pregnant addicts in all of Florida.[15]

The consequence is that women who are motivated to overcome their abuse problems when they learn they are pregnant have no place to go. Melanie Green is such an example. Two years ago, an Illinois prosecutor sought to charge Ms. Green with involuntary manslaughter after her newborn died as a result of complications caused by exposure to cocaine in utero. Ultimately, the grand jury refused to indict Ms. Green. One of the facts that undoubtedly affected the grand jury was that Ms. Green had sought professional help to overcome her cocaine addiction during her pregnancy. She was unable to obtain it. She was told she would have to wait six months because of the limited number of slots for pregnant women in existing programs.

Ms. Johnson also sought treatment, but she was unable to obtain it. She attempted to offer evidence at trial through the testimony of Montye Kelly regarding the lack of treatment centers in Seminole County where she lived to establish that

[14]Coler Testimony, p. 10.

[15]Groves, Williams & Peterson, Alcohol, Drug Abuse & Mental Health Program Office, Florida Department of Health & Rehabilitative Services, Alcohol and Drug Abuse Program (January 1991).

help was not available to her. Tr. 308.[16] The prosecutor objected on the grounds that the evidence was not relevant. The trial court sustained the objection. Tr. 308-9.

The Court of Appeal's focus on the issue of knowledge and intent demonstrates why this ruling was in error. Such evidence was clearly relevant to the issue of Ms. Johnson's intent and her ability to obtain help. Its exclusion constitutes reversible error.

In sum, the state should not be in the business of criminally prosecuting women who need help but are unable to get it because the state is not providing it.

### 6. Key Medical Associations Oppose Criminal Prosecution

In the past eight months, at least five national medical and health care associations have issued statements opposing criminal prosecution of women who have used illicit drugs during pregnancy on the grounds that prosecution does not make good health policy.

NAPARE issued its policy statement in July 1990, concluding that from a health care perspective, criminal prosecution of women who use drugs during pregnancy will be counter-productive.[17] Not only will the threat of criminal prosecution be likely to deter women from seeking prenatal

[16]Excerpts from the trial transcript are attached hereto as Exhibit 1.

[17]A copy of NAPARE's policy statement is provided for the Court as Exhibit 2.

care, but also it will seriously interfere with the physician/patient relationship for those women who do seek care, which will only serve to impede the long-term goal of ensuring the health and well-being of mothers and babies.

In September 1990, the American College of Obstetricians and Gynecologists issued a statement that it opposes legislation imposing criminal sanctions on women who abuse substances during pregnancy, and supports efforts to increase resources devoted to perinatal care, drug treatment, and rehabilitation.[18]

In October 1990, the American Academy of Pediatrics issued its statement on drug-exposed infants, wherein it also concluded that punitive measures, such as criminal prosecution, did not make good health policy.[19] "The American Academy of Pediatrics is concerned that such involuntary measures may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment." The Academy, therefore, included in its recommendations that the public be assured of nonpunitive access to comprehensive care.

On November 28, 1990, the American Medical Association ("AMA") issued its Board of Trustees Report wherein it concluded that "criminal sanctions or civil liability for

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[18] See Exhibit 3.

[19] A copy of the Academy's statement as it appeared in the October 1990 issue of Pediatrics, Vol. 86, No. 4, p. 639 is provided here as Exhibit 4.

harmful behavior by the pregnant woman toward her fetus are inappropriate."[20] In making its recommendations, the AMA questioned the efficacy of criminal sanctions, noting that "[p]unishing a person for substance abuse is generally ineffective because it ignores the impaired capacity of substance-abusing individuals to make decisions for themselves." Id. at 2687. Moreover, because criminal penalties are likely to deter women from seeking prenatal care or medical help, "criminal penalties may be ultimately detrimental, rather than beneficial, to fetal health." Id. at 2659. Instead, "counseling, psychiatric treatment, or other support services would probably be a more appropriate response than criminal punishment."

Finally in early December 1990, the March of Dimes issued a statement that provides that the March of Dimes opposes criminal sanctions for the reason that they will serve as a significant barrier and disincentive to pregnant women to seek care.[21]

7. **Selective Reporting Yields Selective Prosecution**

Generally, the only way that a state prosecutor learns that a woman has used drugs during pregnancy is if the medical facility to which she goes for treatment or delivery

[20] See "Legal Intervention Drug Pregnancy," Law and Medicine/Board of Trustees Report, Journal of the American Medical Association, Vol. 264, No. 20, November 28, 1990, at p. 2670, a copy of which is provided here as Exhibit 5.

[21] A copy of March of Dimes statement is attached hereto as Exhibit 6.

reports that fact to the state. In Florida, health care practitioners are required by law to report physical dependency of a newborn on a controlled substance. See Fla. Stat. Ann. §415.503(8)(a)1. If the health care practitioner selectively chooses whom to report, the women identified for prosecution will reflect the reporting bias.

A study completed in Pinellas County, Florida documents that African American women are being singled out to be reported after they give birth to a baby with an illicit substance in its system. The study revealed that African American women who used a controlled substance during pregnancy are ten times more likely than white women to be reported even though the white women were slightly more likely to have used drugs at the time of their first prenatal visit.[22]

Based on a sample of 715 pregnant women, 380 from public health clinics and 335 in private care, the study conducted by NAPARE, in conjunction with Operation PAR, found that 14.8 percent of all women tested positive for alcohol, marijuana, cocaine, and/or opiates. The rate of positive tests among white women was 15.4 percent while the rate for African American women was 14.1 percent. But, only 1 percent of the

[22]See Chasnoff, et al, "Illicit-Drug or Alcohol Use During Pregnancy," The New England Journal of Medicine, Vol. 322, No. 17, April 26, 1990; "Keeping Babies Free of Drugs," The National Law Journal, October 16, 1989; "Black Cocaine Mothers More Likely to be Turned In," The Orlando Sentinel, November 21, 1989.

white mothers were reported while 11 percent of the African American mothers were reported.[23] As Dr. Chasnoff, President of NAPARE, stated in announcing the results of the Pinellas County study, "[b]ecause of the county's demographics, it could represent a microcosm of many other communities across the United States."[24]

The selective prosecution by race of women who use drugs during pregnancy violates the constitutional right to equal protection. Courts have repeatedly held that selective prosecution or selective enforcement of a statute violates the constitution. See Yick Wo v. Hopkins, 118 U.S. 356 (1886); U.S. v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987), vacated on other grounds 836 F.2d 1312 (1988); U.S. v. Alleyne, 454 F. Supp. 1164 (S.D.N.Y. 1978). See also State of Minnesota v. Russell et al, slip op., Nos. 89067067 (District Court, Fourth Judicial District, December 27, 1990)(Court held that a state law providing for a four year prison sentence for first time crack users and probation for first-time users of powdered cocaine is racially biased and thus unconstitutional).

One consequence of permitting a prosecutor to broaden the interpretation of a statute without legislative input is

[23]"Protecting Baby from Mom; Tot Welfare At Issue in Drug Cases," Newsday, November 6, 1989, p.8; "Women are Killing or Stunting Their Babies with Cocaine," Chicago Tribune, October 26, 1989, section C, p.25.

[24]National Law Journal, October 16, 1989.

that it gives the prosecutor much more discretion in deciding when to pursue a claim and against whom. "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Ms. Johnson is African American. She is one of at least eight women who have been charged in Florida in the last two years with a crime based on their prenatal use of drugs, seven of whom have been African American.[25] This evidence alone suggests that the State of Florida is discriminating on the basis of race in selecting women for criminal prosecution.

**8. No Judicial Resources to Handle Flood of Prosecutions**

Our society does not presently have the judicial resources to handle the flood of prosecutions which will follow if the conviction of Ms. Johnson is upheld. It is estimated that upwards of 375,000 babies are born each year having been exposed to drugs in utero.[26] If even a fraction of the mothers who use drugs during pregnancy each year are

[25] See State of Florida v. Black, No. 89-5325 (Cir. Ct for Escambia County); State of Florida v. Jerez, No. K89-16257 (Cir. Ct. for Monroe County); State of Florida v. Gethers, No. 89-4454 (Cir. Ct. for Broward County); State of Florida v. Hudson, No. K88-3435-CFA (Fla. Cir. Ct.); State of Florida v. Johnson, No. E89-890-CFA (Fla. Cir. Ct.); State of Florida v. Anita Banks, (Orange County).

[26] "A First: National Hospital Incidence Survey," NAPARE Update, October 1988; The New York Times, August 30, 1988, Section A, p.1, col. 1.

prosecuted for their prenatal drug use, the courts and support services will be swamped.[27]

Health care practitioners will become full-time witnesses. Their testimony is essential to establish the mother's use of drugs and the presence of a drug in the baby's system as well as the effects, if any, on the newborn. In Jennifer Johnson's case alone, nine health care practitioners were called to testify, taking them away from their already full schedules. Multiplying this number by the number of prosecutions which we could reasonably expect, demonstrates the substantial burden that will be imposed on the health care community.

Our already overloaded criminal courts will not be able to handle this additional flood of cases. And, there are not the jail cells or treatment centers available to handle the women who will be sentenced if the prosecutions proceed. Society's time and money can be better spent in developing treatment centers for these women before and during their pregnancies.

**B. THE STATUTE UNDER WHICH MS. JOHNSON WAS CHARGED DOES NOT, AND WAS NEVER INTENDED BY THE LEGISLATURE, TO REGULATE PRENATAL CONDUCT**

Criminal statutes are to be strictly construed. Fla. Stat. Ann. §775.021(1). And, when the language of a criminal statute is susceptible of differing constructions, it must be

[27]Since Ms. Johnson was convicted in July 1989, criminal charges have been brought against at least sixty other women nationwide, based on their use of drugs during pregnancy.

construed in the manner most favorable to the defendant. Id. Thus, an individual cannot be convicted under a statute unless her acts are clearly encompassed by its terms.

The Court of Appeals ignored this rule of strict construction. As Judge Sharp concluded in her dissenting opinion, Florida's statute prohibiting the delivery of a controlled to a minor does not encompass a woman's use of drugs during pregnancy or the transmission of bodily fluids through the umbilical cord.

**1. Delivery Statute Does Not Apply**

**a. Statute Does Not Encompass Prenatal Conduct**

The delivery of a controlled substance statute under which Ms. Johnson was convicted does not apply to the acts which she was charged with having committed. Fla. Stat. Ann. §893.13(1)(c) provides that a person shall not deliver "a controlled substance. . . person under the age of 18 years. . ." Delivery is defined by the statute to mean "the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Fla. Stat. Ann. §893.02(4). The Act does not define person, but there is absolutely no evidence that the Legislature intended to include prenatal conduct or to protect the unborn.

Florida courts have repeatedly held that the term "child" as used in various statutes does not include the unborn. They have also recognized that any enlargement of existing statutes to encompass the unborn must come from the

legislature and not the courts. Thus, in Love v. State of Florida, 450 So.2d 1191 (Fla. App. 4 Dist. 1984), the court held that the state's battery statute does not protect an unborn fetus. The court noted that in construing this statute and its application to an unborn fetus, it was bound by §775.021 to interpret the battery statute "most favorably to the accused." Based on the omission of a "fetus" from the battery statute and from the definition statute, the court concluded that the legislature did not intend to include a fetus within the statutory protection. See also State of Florida v. McCall, 458 So.2d 875 (Fla. App. 2 Dist. 1984) (affirming dismissal of criminal charges of vehicular homicide and DWI manslaughter of a viable but unborn child and noting that penal statutes must be strictly construed, court held that the homicide statutes applied only to a "human being," that is one who has been born alive; any change in that law would be left to the legislature.);Stern v. Miller, 348 So.2d 303 (Fla. 1977) (Florida Supreme Court refused to extend liability under the Wrongful Death Act to a viable fetus).

Similarly, the scope of Florida's drug delivery laws, and specifically, whether, they govern prenatal conduct, raises important social policy issues with broad-ranging implications. Therefore, a decision to broaden the reach of the existing laws to include prenatal conduct should be left to the legislature and not state prosecutors.

The state's attempt to focus attention on the thirty to ninety second interval between the passage of the baby through the birth canal and the severing of the umbilical cord does not save the government's case. The fallacy of the state's position manifest. The only action taken by Ms. Johnson upon which the charges against her could be based was her prenatal use of drugs. Once she ingested the cocaine, she no longer had control over what happened, and particularly, over whether it passed to the baby she was carrying. Thus, it is disingenuous to even suggest that the state is not seeking to regulate prenatal conduct through prosecutions such as this one.

**b. "Delivery" Does Not Encompass Transfer Through Umbilical Cord**

There is no basis under existing Florida law for the conviction of Ms. Johnson on charges of delivery of a drug to a minor. There is absolutely no evidence that when enacting §893.13(1)(c), the Florida Legislature contemplated its application to prenatal drug use or delivery of a controlled substance to a fetus during the pregnancy or labor. The delivery statute was designed to impede drug trafficking, that is the sale and distribution of drugs to children and adults. This means the hand to hand transfer of drugs, or the delivery by injection or ingestion of a drug to a minor. Passage through the umbilical cord was clearly not contemplated by the legislature.

In sum, it must be left to the legislature to decide whether the scope of the existing drug laws should be extended to govern prenatal drugs use. This is particularly true in this context because important social, economic and political issues are implicated by criminalization of prenatal conduct, issues which the legislature, not the courts, must address. And, the Florida legislature has already addressed these issues and decided against the criminalization of prenatal drug use.

**2. Florida Legislature Has Already Balanced Interests and Decided Against Criminalization**

As Judge Sharp noted, in 1987, the Florida legislature amended the state's child abuse and neglect reporting requirements to encompass children born drug dependent. The statute provides for the mandatory reporting of "physical dependency of a newborn upon any drug controlled [by statute...]" Fla. Stat. Ann §415.503(8)(a)1. As originally introduced, the amendment also contained a provision which would have authorized criminal prosecution of a mother who gives birth to a drug dependent child. This provision was rejected. It was replaced with another provision which explicitly precludes criminal prosecution in the case of a drug dependent newborn; the statute now states that reports shall be made "provided that no parent shall be subject to criminal investigation solely on the basis of such infant's drug dependency." Id.

When considering criminalization of prenatal drug use, the legislature recognized that prosecution under chapter 893 by virtue of a child being born drug dependent was likely if it adopted the amendment as originally drafted. See House of Representatives Committee on Health & Rehabilitative Services Staff Analysis, April 14, 1987. Therefore, by rejecting the criminalization provision, the legislature specifically precluded criminal charges against a mother who used drugs during pregnancy under chapter 893.

The legislature weighed the interests both in favor and against criminalization and decided against it. As Representative Lippman explained in Subcommittee, "there was a well-founded anxiety that we were looking to arrest moms. We are not looking to do that," but rather "to intervene. . .[to] try to bring the family back together." Fla. H.R. Comm. on HRS, Subcommittee Tape of proceedings (April 15, 1987), as quoted in Spitzer, 15 Florida State University Law Review 865.

The state may not be allowed to circumvent the explicit intent of the legislature and substitute its judgment for the legislature's through this action. This court should give effect to the legislature's intent by reversing the lower court's decision and the conviction of Ms. Johnson and ordering the dismissal of the delivery charge against Ms. Johnson.

### 3. Other Courts Have Dismissed Similar Charges

At least seven other courts have dismissed criminal charges based on prenatal conduct, on the grounds that the statutes on which the charges were based did not apply.

Thus, in People of the State of Michigan v. Kimberly Hardy, slip op., No. 128458 (Mich. Ct. App., April 1, 1991), the Michigan Court of Appeals, in a unanimous decision, ordered the delivery charge brought against Ms. Hardy on the basis of her prenatal cocaine use dismissed.[28] Emphasizing that in Michigan, as in Florida, penal statutes are to be strictly construed, the Court of Appeals stated that the application of the delivery statute to the facts presented in the Hardy case "to prosecute defendant for delivery of cocaine is so tenuous that we cannot reasonably infer that the Legislature intended this application, absent unmistakable evidence of legislative intent." The Court then concluded that the transfer of cocaine metabolites through the umbilical cord was not the "type of conduct that the Legislature intended to be prosecuted under the delivery of cocaine statute." Slip op. at 2-3.

Even before the Hardy decision, two trial courts in Michigan had dismissed similar delivery charges. In People of the State of Michigan v. Cox, unpublished opinion of the Michigan State Circuit Court for the County of Jackson

[28]A copy of the Hardy decision is attached hereto as Exhibit 7.

decided July 9, 1990 (Docket No. 90-53545 FH), Judge Alexander Perlos granted defendant Cheryl Cox's Motion to Quash Information.[29] Like Ms. Hardy and Ms. Johnson, Ms. Cox was originally charged with delivery of a drug through the umbilical cord. Judge Perlos dismissed this charge.

In so doing, Judge Perlos held that the action with which Ms. Cox was charged, that is the delivery of cocaine through the umbilical cord during the sixty to ninety second interval between the time the baby passed through the birth canal and before the umbilical cord was cut, is not encompassed by Michigan's delivery charge. Noting that criminal statutes are to be strictly construed, he concluded that it was unlikely that the state legislature had ever intended or even considered that the delivery statute would be applied in the manner proposed by the State.

As in the instant case, the State had argued that the prosecution was valid because existing legal principles can be applied to new factual situations. Judge Perlos rejected this reasoning: "[a]lthough our criminal justice system does allow for the application of new factual situations to existing law, the statute must be read with the Legislature's goals in mind and regulating prenatal conduct was not one of them." Slip op. at 4. On this basis, the court ordered the charge against Ms. Cox dismissed.

Similarly, in People v. Lynn Bremer, unpublished opinion of the Circuit Court for the County of Muskegon, decided

[29]A copy of Judge Perlos' decision is provided here as Exhibit 8.

January 13, 1991 (Docket No. 90-32227-FH), Judge Eveland granted defendant Lynn Bremer's Motion to Dismiss.[30] The court held not only that "it was never the intent of the legislature to include the actions of the Defendant" under the drug delivery statute but also that the application of the delivery statute in Ms. Bremer's case would violate her constitutional right to due process.

In Massachusetts, Josephine Pellegrini was charged with the crime of distributing cocaine to a person under eighteen on the grounds that she allegedly ingested cocaine while pregnant with her son. On October 15, 1990, the Superior Court for the Commonwealth of Massachusetts granted Ms. Pellegrini's Motion to Dismiss the Indictment. See Commonwealth v. Pellegrini, unpublished opinion of the Superior Court for the Commonwealth of Massachusetts decided October 15, 1990 (Docket Criminal Action No. 87970).[31] In ordering the charge against Ms. Pellegrini dismissed, the court held that the statute under which Ms. Pellegrini was charged does not encompass the prenatal conduct upon which the charge was based and that the prosecution constituted an unconstitutional intrusion on Ms. Pellegrini's right to privacy and denied her due process.

Noting that the interpretation of the distribution statute in the manner proposed by the Commonwealth

[30]A copy of this decision is attached hereto as Exhibit 9.

[31]A copy of this decision is provided here as Exhibit 10.

constituted a "'drastic and radical incursion' upon existing law," the court held that judicial intervention was inappropriate and would violate Ms. Pellegrini's due process rights. Slip op. at 14. Furthermore, because the prosecution implicated important public policy considerations, the issue of prosecution should be decided in the first instance by the state legislature. Slip op. at 15.

Similarly, in this case Ms. Johnson could not have had, and did not have, notice of the unprecedented interpretation that the state prosecutor would give to the drug delivery statute. The language of the statute does not give her fair warning of the specific consequences of her alleged conduct or the increased punishment to which she might be subject. The continued prosecution, therefore, is not only unfounded under state statute but also constitutes a violation of Ms. Johnson's right to due process.

On August 31, 1990, the Ohio Court of Appeals issued an opinion affirming the lower court's dismissal of child endangerment charges brought against a woman based on her prenatal use of cocaine. See State of Ohio v. Tammy Gray, ___Ohio App 3d___ (August 31, 1990).[32] On appeal, the State had argued that the transfer of blood, in which cocaine was allegedly present, through the umbilical cord between the time the baby passed through the birth canal and the

[32]A copy of this decision is provided here as Exhibit 11.

umbilical cord was cut, constituted child endangerment and that it was incumbent upon the court to permit such an interpretation of the state statute. The Gray court rejected this argument and held that the interpretation proposed by the State was never intended by the General Assembly:

> However, we are not persuaded that the General Assembly intended to make a criminal act the passage of harmful substances from mother to her child in the brief moments from birth to the severance of the umbilical cord. To construe the statute in this manner would mean that every expectant woman who ingested a substance with a potential harm to her child, e.g., alcohol or nicotine, would be criminally liable under R.C. 2919.22(A).

Slip. op. at 3.

In State of Florida v. Cassandra Gethers, No. 89-4454CF10A (Broward County, Florida, 1989), Judge Robert B. Carney dismissed criminal charges based on the defendant's prenatal use of drugs on the grounds that the state's child abuse laws were not designed or intended to regulate prenatal conduct.[33]

In Reyes v. Superior Court, 75 Cal. App. 3d 214; 141 Cal. Rptr. 912 (1977), the court dismissed charges of felony child endangering against a woman who had given birth to twins addicted to heroin. Noting that it was the policy of the state to construe a penal statute as favorably to the defendant as possible, the court held that there was no evidence that the state legislature intended the term "child"

[33]A copy of this decision is provided here as Exhibit 12.

as used in the statute to include the unborn. Similarly, in People v. Stewart, No. M508097, slip op (San Diego County Ct., February 23, 1987), the court dismissed charges against a woman who had used drugs during pregnancy and whose newborn died shortly after birth, on the grounds that the statute on which the charges were based was not designed to punish women for their prenatal conduct.

Likewise, there can be no question but that the Florida legislature never contemplated the application of the drug delivery statute in the manner proposed by the prosecution in this case. Following the lead of the Hardy, Cox, Bremer, Pellegrini, Gray, Reyes, and Stewart courts, this Court should overturn Ms. Johnson's conviction and order the dismissal of the charges against Ms. Johnson.

## C. APPLICATION OF §893 TO MS. JOHNSON'S PRENATAL USE OF COCAINE VIOLATES HER CONSTITUTIONAL RIGHTS

### 1. Prosecution Violated Due Process Of Law

#### a. No Notice of Novel Interpretation

The due process clause of the 14th Amendment to the U.S. Constitution requires that individuals be given fair warning that the conduct in which they engage may be considered criminal. As the U.S. Supreme Court held in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1971), criminal laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. Two important principles underlie the fair warning rule. First,

no individual should be held liable for conduct which he or she could not reasonably anticipate would be proscribed. U.S. v. Harriss, 347 U.S. 6 L.Ed.2d 989 (1953). Second, vague laws which do not put everyone on notice as to what is or is not legal "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned, 408 U.S. at 108-09. See also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971) (ordinance is void for vagueness both in the sense that "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute . . . and because it encourages arbitrary and erratic arrests and convictions.").

Similarly, the novel prosecution pursued in this case violates Ms. Johnson's right to due process. An average citizen of ordinary intelligence could not possibly know that the existing drug delivery laws render illegal, prenatal conduct, that is actions taken before the child was even born.

**b. Application of Fla. Stat. Ann. §893.13(1)(c) To The Defendant Operates Like An Ex Post Facto Law Thereby Denying Defendant Due Process**

A statute need not be vague or overbroad for it to fail to provide fair warning and, therefore, due process. Judicial enlargement of the scope of a criminal statute which may be plain and unambiguous on its face also deprives

a defendant of the notice required by due process. Indeed, the Supreme Court has held that a court's broader construction of a statute would produce "a potentially greater deprivation of the right to fair notice" than would occur in the "typical 'void for vagueness' situation." Bouie v. City of Columbia, 378 U.S. 347, 352 (1963).

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.

In Bouie, the Court held that a judicial construction of a criminal trespass statute broadening the scope of the conduct prohibited by the statute denied the defendant fair warning and thus, due process. Moreover, "[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates like an ex post facto law, such as Art. I, Section 10, of the Constitution forbids." Id. See also Douglas v. Buder, 412 U.S. 430, 432, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) ("unforeseeable application of [statutory] interpretation in the case before us deprived petitioner of due process.") Cohen v. Katsaris, 530 F. Supp. 1092, 1097 (N.D. Fla. 1982) ("unexpected and unforeseeable fine-tuning of the language in the trespass statute at the expense of the

petitioners' criminal liability contravenes the principles laid out in the Bouie case.")

Application of Fla. Stat. Ann. §893.13(1)(c) to Ms. Carter's prenatal use of cocaine violates the constitutional proscription on ex post facto laws. The statute has ever been interpreted in the manner it has been applied in this case. The broadening of the statute in this case constitutes the retroactive application of a new law which the ex post facto clause is designed to preclude.

**2. Prosecution Violated Ms. Johnson's Liberty And Privacy Rights**

The focus of the prosecution is on Ms. Johnson's prenatal conduct. This prosecution and the sentence which was imposed by the trial court intrudes on Ms. Johnson's right to privacy as guaranteed by both the 14th Amendment to the U.S. Constitution and Article V, section 23 of the Florida constitution. Both the prosecution and the sentence intrude on her right to autonomy and bodily integrity.

The United States Supreme Court has held that the "right to be left alone" is "the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928). This is particularly true when at issue is the right of an individual to control his or her own body: "No right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person." Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891), quoted in

Terry v. Ohio, 392 U.S. 1, 19 (1968). The right of privacy guaranteed by the Florida constitution is even broader than that guaranteed by the federal constitution. See Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation, 477 So.2d 544 (Fla. 1985).

The prosecution in this case effectively intrudes on a woman's right to control her body during pregnancy. Courts have held unconstitutional even isolated instances of the type of intrusions to which pregnancy women would be subjected. For instance, in Rochin v. California, 342 U.S. 165, 172 (1952), the Supreme Court refused to compel a criminal suspect to submit to stomach pumping even though two police officers had witnessed the defendant swallow several pills in an attempt to hide them.

Under the strict scrutiny standard of review, which must be applied in such cases, it is clear that this prosecution unconstitutionally intrudes on Ms. Johnson's right to privacy. The state cannot show that criminally punishing these women serves a compelling state interest that outweighs the woman's privacy interest. Indeed, by deterring women from seeking medical care, such prosecutions are likely not to promote but rather to undermine the state's interest in healthy mothers and babies.

If the state prosecutor is permitted to prevail in this matter, it would effectively subject to state scrutiny every action taken by a pregnant women that may potentially cause harm to her subsequently born child. We could anticipate

that the state would charge a woman with a child abuse who drinks alcohol during pregnancy or smokes, or who fails to follow an appropriate diet, all of which are actions which can cause harm to the unborn.

As the Illinois Supreme Court stated in Stallman v. Youngquist, 125 Ill.2d 267 (1988), such strict scrutiny of the mother's prenatal conduct would "infringe on her right to privacy and bodily autonomy." Id. Moreover, "[m]other and child would be legal adversaries from the moment of conception." Id.

Similarly, if we start prosecuting pregnant women for actions taken during pregnancy, we will be intruding on their right to privacy and effectively pitting mother against fetus. What we should be doing is providing the resources so that pregnant women can find help to overcome their substance problems.

This was the conclusion reached by the court in the Pellegrini case in which the court concluded that the state had failed to demonstrate that it had a compelling interest that outweighed the defendant's right to privacy under the facts of the case. The court further concluded, however, that even if the state did have a compelling interest, the means employed by the commonwealth to achieve its asserted purpose were not sufficiently "narrowly tailored" to survive the strict scrutiny test required in such cases. Slip op. at 7-8. Less restrictive alternatives such as education and the provision of medical care and drug treatment for pregnant

women would protect the state's interest without intruding on the woman's right to privacy. Clearly, this reasoning is equally applicable in Ms. Johnson's case.

## CONCLUSION

The criminal charges against Ms. Johnson should have been dismissed. There is no basis for this prosecution under existing Florida law. Moreover, from a policy perspective alone, the prosecution is fundamentally misguided and fatally flawed.

The significance and potentially broad-ranging effects of this prosecution are reflected in the tremendous publicity this case alone has received. Because the issues are so important and have such great social policy implications, they must be addressed first by the state legislature. Accordingly, this Court should overturn Ms. Johnson's conviction and dismiss the charges against her.

Respectfully submitted,

National Association for Perinatal
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