

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

CORNELIA WHITNER,	)	C/A No. 2:98-3564-23A
	)	
Petitioner,	)	
	)	
v.	)	
	)	
MICHAEL W. MOORE,	)	
Director, Department of	)	
Corrections, State of	)	
South Carolina	)	
	)	
and	)	
	)	
THE ATTORNEY GENERAL OF THE	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondents.	)	

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BRIEF AMICI CURIAE IN SUPPORT OF  
THE PETITION FOR WRIT OF HABEAS CORPUS  
SUBMITTED BY

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

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## I. INTERESTS OF THE AMICI CURIAE

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

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") is the South Carolina affiliate of the National Association of Alcoholism and Drug Abuse Counselors. SCAADAC's 495 members work as alcohol and drug counselors throughout the state in both the public and private sectors and have special expertise in the substance abuse treatment needs of pregnant women. SCAADAC is troubled by the serious legal

and ethical dilemmas facing its membership in the wake of Whitner. SCAADAC is also in a position to document some of the consequences of the Whitner decision. After the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's decision upholding her conviction and sentence, on July 15, 1996, at least two programs in the Columbia, South Carolina, area that give priority to pregnant women have already reported precipitous drops in admissions for pregnant women. The records of the Women's Community Residence, a halfway house for women substance abusers, show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997. At the Women's Intensive Outpatient program, an intensive day program which provides child care, admissions of pregnant women declined 54% (from 13% to 6% of the total number of women treated at the facility) during roughly the same period. In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution.

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

Amicus Curiae South Carolina Nurses Association ("SCNA"), a constituent member of the American Nurses Association, is a professional organization which represents registered nurses in South Carolina. SCNA's legislative positions speak strongly to support health care for

a number of vulnerable populations and the reproductive rights of women. Essential to effective prenatal care is the ability to seek this care from physicians and other health care providers without fear of harm. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the threat of criminal prosecution is a real deterrent for pregnant women suffering from addictive diseases to seek and obtain prenatal care.

Amicus Curiae American College of Obstetricians and Gynecologists ("ACOG"), founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. The leading group of professionals providing health care to women, ACOG's more than 38,000 members represent over 90 percent of all obstetricians and gynecologists currently practicing in the United States. One of ACOG's many purposes is to educate health care professionals, law and policy makers and the general public about all aspects of women's health care. ACOG undertakes to assure that all women have access to prenatal care and to promote a healthy pregnancy for the benefit of both the fetus and the mother. ACOG is concerned that the threat of prosecution will drive pregnant women away from seeking care at a time when information and treatment could significantly improve maternal health and increase the chances of delivering a healthy baby.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the prosecution of pregnant women as a method for preventing or punishing chemical

dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that punishment for drug abuse will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care. Furthermore, the physicians of AMWA highly value the patient-physician relationship and are concerned that the threat of prosecution will erode this relationship.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors ("NAADAC") is the largest national organization of alcohol and drug counselors, with 17,000 members. Founded in 1972, NAADAC is committed to increasing general awareness regarding the problems associated with alcoholism and substance abuse and to enhancing the care of individual patients through treatment, public education, and outreach programs aimed at prevention. As an organization that certifies alcoholism and drug abuse counselors, NAADAC promotes and monitors adherence to ethical standards throughout the nation. NAADAC promotes quality treatment services for addicted individuals as the cornerstone of an effective

national substance abuse policy. To be effective, however, alcohol and drug treatment requires the trust of the patient, a basic building block of which is the assurance of patient confidentiality. Under the ethical guidelines promulgated by NAADAC for its members, alcohol and drug treatment counselors are required to protect patients' privacy. NAADAC Code of Ethics, Principle 8(a). However, South Carolina alcohol and drug counselors now risk arrest if they fail to report any conduct that may endanger a fetus. The counselors do not know which actions or omissions of their pregnant clients trigger the newly expanded reporting requirements, as the legislature has never enacted a law addressing fetal abuse. The patients also face arrest and prosecution if their treatment provider discloses their identities to authorities. NAADAC is deeply concerned that the confusion and fear that the Whitner decision is causing will undermine the provision and quality of care administered by South Carolina substance abuse professionals to pregnant patients, and the willingness of women to seek these essential services.

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

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in primary care Internal Medicine. The Society, which has nearly 3000 members in the United States (including South Carolina) and 11

other countries, publishes the Journal of General Internal Medicine and is a leader in research and education in the medical care of adults. Many SGIM members have national expertise in issues related to alcoholism and abuse of other substances. SGIM is deeply concerned that the Whitner decision might deprive drug-addicted women in South Carolina of drug-treatment and prenatal services that are essential to the delivery of a healthy child. The change in reporting requirements for physicians will not only discourage women from seeking this vital care but may well interfere with physicians ability to provide it when sought. SGIM believes that effective measures should be instituted to reduce drug and alcohol abuse, especially during pregnancy. However, the application of felony child abuse laws to drug using pregnant women is likely to undermine, not promote, the health of women, fetuses and children.

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

Amicus Curiae Association for Medical Education and Research in Substance Abuse ("AMERSA") is a national organization of three hundred health care and social services professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians,

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

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

physician-patient bond, undermining the trust and confidence essential to the critical relationship between health care professionals and their pregnant patients.

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

Amicus Curiae National Center for Youth Law ("NCYL"), founded in 1970, is a San Francisco-based non-profit organization that works on legal and policy issues affecting poor children and youth nationwide. NCYL provides technical assistance and training, produces publications, and co-counsels major cases in the areas of health care, child welfare, public benefits, child support, and housing discrimination. NCYL has worked extensively on legal issues affecting drug-exposed infants, and in 1990 and 1995 published special issues of its journal, Youth Law News, on these topics. NCYL believes that the goal of child abuse reporting laws is to identify children who have been abused or neglected so that the state can intervene for

their benefit. A system of mandatory child abuse reporting as envisioned by the Whitner decision not only has the potential for driving pregnant women away from prenatal care, but also risks wasting scarce child welfare resources and diverting attention from cases in which children who are at significant risk or have actually suffered abuse or neglect need assistance and protection.

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

Amicus Curiae Institute for Health and Recovery ("IHR"), formerly the Coalition on Addiction, Pregnancy and Parenting, is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol- and drug-dependent women and their families throughout Massachusetts. IHR is committed to establishing collaborative models of service delivery and fostering family-centered services. IHR firmly believes that addiction is an illness requiring treatment, not a crime requiring punishment. IHR members know firsthand the

fears pregnant substance abusing women have regarding prosecution and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Prosecution of pregnant women only serves to keep women out of treatment, thereby endangering the health and well-being of more women and children.

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

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

Amicus Curiae Drug Policy Foundation is a privately funded, tax-exempt, non-profit organization which provides a forum for the development of effective drug policies. The

Foundation was established in 1986 and is made up of over 23,000 supporters from a variety of professions involved with drug issues throughout the United States and around the world. The Foundation's leadership includes individuals who are eminent physicians, including a former U.S. Surgeon General, and individuals who have been leading law enforcement officials including a former Commissioner of Police for New York City, and a large city Mayor. The Foundation is concerned that the Whitner decision will do more harm than good by discouraging pregnant women from seeking prenatal care due to fear of prosecution. The resources spent on such counterproductive criminal law efforts could be better spent on increasing access to prenatal care and drug treatment for pregnant addicted women.

Amicus Curiae The Lindesmith Center ("TLC"), a project of the Open Society Institute, is a policy and research institute with offices in New York and San Francisco that focus on broadening the discussion on drug policy and related issues. TLC produces sound, scholarly work, organizes seminars and symposia, and assists state and local governments with a variety of issues concerning drugs and drug policies. In 1996 TLC issued a peer-reviewed publication entitled "Cocaine and Pregnancy" that analyzes and summarizes more than a decade of scientific research in the field. TLC is dedicated to expanding effective drug treatment programs to traditionally under-served populations. The Center's guiding principle is harm reduction, an alternative approach to drug policy and treatment that aims to reduce the harms of both drug abuse and punitive drug laws for individuals, families and communities.

## II. INTRODUCTION

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

as required by the Constitution, that her conduct violated S.C. Code § 20-7-510. This question has both jurisprudential and scientific dimensions. *Amici curiae* set forth below a careful review of the scientific research regarding prenatal cocaine exposure as it existed at the time of petitioner's conviction. Amici contend that manifest uncertainty in the body of scientific evidence in this area compels the conclusion that Ms. Whitner lacked constitutionally adequate notice to be prosecuted under the state's child abuse and neglect law. From the vantage point of medical science it is not (and was not at the time of prosecution) clear that minimal ingestion of cocaine would harm a fetus, and therefore petitioner was deprived of her due process right to adequate notice that the child abuse statute could be applied to maternal cocaine use.

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

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

It is important to state at the outset that in submitting this brief *amici curiae* in no way condone the use of cocaine or any other drugs -- including alcohol or nicotine -- during

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

### III. ARGUMENT

#### A. THE PETITION SHOULD BE GRANTED BECAUSE AS A MATTER OF MEDICAL SCIENCE MS. WHITNER COULD NOT HAVE POSSESSED CONSTITUTIONALLY ADEQUATE NOTICE THAT HER ACTIONS CONSTITUTED CRIMINAL CONDUCT

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

In her Memorandum of Law in Support of Petition for Writ of Habeas Corpus, Ms. Whitner explains how the South Carolina Supreme Court's decision in Whitner v. State is contrary to established law, and how legislative history, statutory construction and common law precedent failed to provide her fair warning that her conduct was criminal. As demonstrated below, Ms. Whitner also lacked reasonable factual notice that her conduct violated state law in that medical science does not support the essential premise upon which Ms. Whitner's prosecution, conviction and incarceration rest: that the ingestion of cocaine during the third trimester of pregnancy adversely effects the growth and development of the fetus or child.<sup>1</sup>

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

The extension of South Carolina's child endangerment statute to fetuses invites careful review of relevant scientific data regarding prenatal cocaine exposure. In a typical child endangerment case there are objective indicia of harm (or threats of harm) for all to assess:

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<sup>1</sup> To be precise, petitioner's conviction in fact rests on the more far-reaching premise that ingestion of an undetermined amount of cocaine of uncertain purity or potency over an unknown period of time endangers the health or well-being of a fetus. Indeed, the record in this case leaves open the possibility that petitioner ingested only a small amount of cocaine of unknown origin on single occasion shortly before giving birth -- an exposure pattern that would have the least likelihood of causing harm to a fetus. Indeed, Ms. Whitner's child was born healthy and without any sign of *in utero* harm. At present, science cannot substantiate the claim that cocaine exposure endangers fetal health irrespective of the magnitude and pattern of the exposure.

bruises, malnutrition, cognitive deficits, behavioral or psychological problems, and/or eyewitness or first-hand accounts, for example, help establish an environment of neglect or endangerment. When the health and well-being at issue is that of a fetus, however, the harm or potential harm is not immediately evident to the lay person. Instead, it is both necessary and proper to look to medical science for information about how maternal and paternal conduct affect fetal growth and development. With respect to prenatal exposure to cocaine, science fails to provide due process notice to justify the prosecution of petitioner. Because reliable medical research at the time of Ms. Whitner's conviction failed to show that prenatal cocaine exposure causes fetal harm, petitioner was deprived of the adequate notice required by law.

In April 1992, Ms. Whitner was indicted, convicted and sentenced to eight years in prison for violating § 20-7-50 of South Carolina's Children's Code for using cocaine while pregnant.<sup>2</sup> Four months previously, in January 1992, an article appearing in the prestigious Journal of American Medical Association concluded that:

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

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<sup>2</sup> See Petitioner's Memorandum of Law in Support of Petition for Writ of Habeas Corpus, nn. 1-2. Although the Affidavit in Support of the Arrest Warrant bases Ms. Whitner's arrest on her use of "crack cocaine," *id.* at 3, pharmacologically speaking crack cocaine is virtually identical to powder cocaine and is derived from the latter by adding water and baking soda and cooking the mixture into a smokeable form. See Craig Reinerman and Harry Levine, Crack in Context in Crack in America: Demon Drugs and Social Justice 2 (C. Reinerman & H. G. Levine eds. 1997). Thus, when speaking about intrauterine cocaine exposure, "cocaine" and "crack" cocaine can be used interchangeably.

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

The four authors of this peer-reviewed article -- researchers from Yale University, the National Institute of Child Health and Human Development and the Boston University School of Medicine -- conclude their commentary by recommending "a suspension of judgment about the developmental outcome of cocaine-exposed babies until solid scientific data are available."<sup>4</sup> A standard pediatrics textbook published the following year reaches the same conclusion, observing that "[t]o date no hypothesized or demonstrated effect of in utero cocaine exposure has been found to be specific to that drug. No studies have shown that prenatal cocaine exposure causes unique developmental dysfunction."<sup>5</sup> In 1997, five years after Ms. Whitner's conviction, scientists continued to urge a suspension of judgment, stating that "[k]nowledge concerning the biological effects of cocaine exposure on the newborn is inconclusive at present."<sup>6</sup>

This measured approach to the issue of cocaine and pregnancy stands in marked contrast to the media hype of the late 1980's regarding the so-called "crack baby" epidemic.

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

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<sup>4</sup> Id. at 408.

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

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

<sup>7</sup> D. A. Frank, et al., Maternal Cocaine Use: Impact on Child Health and Development, in 40 Advances in Pediatrics 65 (1993). See also J. Morgan & L. Zimmer, The Social Pharmacology of Smokeable Cocaine: Not All It's Cracked Up to Be, in Crack in America: Demon Drugs and Social Justice 149-154 (C. Reinerman & H. G. Levine eds. 1997) (virtually all adverse outcomes found in fetal studies involving cocaine were reported in the mass media as evidence that crack causes damage in babies even though no study has convincingly shown that to be so); L. E. Gomez, Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure 11-26 (1997) (same).

Indeed, a number of studies have found no detectable increase in the rate or severity of birth defects associated with cocaine use during pregnancy.<sup>8</sup> From the perspective of science, the “hysteria and poorly considered reactions of . . . the public have made the ‘crack baby’ for years an embarrassing episode.”<sup>9</sup> The Medical University of South Carolina (“MUSC”) was not immune to this hysteria. In October, 1989, the obstetric service of MUSC adopted a protocol wherein pregnant women who were deemed at risk for drug use were required to consent to urine drug screens in return for medical services. Women with positive drug screens were subjected to random drug testing throughout their pregnancies. Missed medical appointments or further positive screens led to their arrest. In 1994, the Division of Human Subject Protections of the National Institutes of Health, determined that the MUSC policy was tantamount to unethical

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

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

human experimentation which “raise[d] serious concerns about the adequacy of MUSC’s institutional system of protections for human subjects. . . .”<sup>10</sup>

Future research may demonstrate with a reasonable level of confidence whether various levels of cocaine exposure at different points of gestation affect fetal development. Until then, the inconclusiveness of science on these points should check, not hasten, an urge to impose criminal liability. The fact remains that at the time of Ms. Whitner’s pregnancy, medical science could not demonstrate that in utero exposure to cocaine caused adverse health effects for the fetus or child. As a result, petitioner could not and did not have fair warning that her conduct exposed her to criminal sanctions. To hold otherwise flouts reason. Accordingly, the court should grant the petition for habeas corpus.<sup>11</sup>

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

The State of South Carolina has opened the door to prosecutions of women for any range of actions that could adversely affect fetuses. The majority opinion in Whitner, 492 S.E.2d at 781-82 (“parent can be prosecuted [for child abuse] . . . without regard to whether the action is illegal in itself”), and the pending prosecution for child abuse of a South Carolina woman for

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

<sup>11</sup> The lack of scientific evidence regarding the effects of cocaine on fetuses at the time of Ms. Whitner’s prosecution is information that her trial counsel would readily have uncovered had counsel conducted even minimal research. Trial counsel’s failure to investigate this critical issue and present material evidence to the court constitutes ineffective assistance of counsel prejudicial to the defense. Trial counsel’s constitutionally deficient performance under Strickland v. Washington, 466 U.S. 668 (1984), and the Sixth Amendment provides an additional ground for granting the petition for writ of habeas corpus.

ingesting alcohol while pregnant<sup>12</sup> make clear that the underlying legality of the woman's conduct is not a factor which narrows the scope of conduct subject to prosecution under the child abuse statute. The conviction of Ms. Whitner makes equally clear that a woman's conduct is prosecutable despite the lack of scientific evidence showing that her actions were likely to endanger her fetus.

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

The reporting statute provides in relevant part:

A physician, nurse, dentist, optometrist, medical examiner or . . . any other medical, emergency medical services, mental health, or allied health professional or . . . school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or child care worker in any day care center or foster care facility, police or law enforcement officer . . . or persons responsible for processing of films or any judge shall report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect.

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

The Whitner decision radically expands the concept of child abuse, requiring health and social services professionals to report an ill-defined yet vast array of conduct that might adversely

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<sup>12</sup> See Melissa Manware, Infant born drunk: Intoxicated mom is facing charges, The State, Sept. 24, 1998 (reporting arrest of pregnant woman for drinking alcohol).

affect a fetus. As petitioner's conviction underscores, the reporting obligations of health care and social services providers are triggered even where scientific evidence fails to show that the parental conduct "is likely to endanger" the fetus. Whitner, 492 S.E.2d at 781-782. This standardless extension of child abuse law has caused substantial confusion and fear not only among pregnant women but also within the professional communities that serve them. South Carolina practitioners must now divine, upon threat of imprisonment, what conduct by a pregnant woman may adversely affect her fetus's "physical or mental health or welfare." S.C. Code § 20-7-510 (A). They must then report all women with viable pregnancies whom they have reason to believe engage in such conduct to state authorities for possible prosecution.

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

On the other hand, the facts and reasoning of the Whitner decision also give rise to a "reverse slippery slope" situation. If petitioner can be convicted of conduct that has yet to be proven dangerous, then conduct that is known to endanger fetal health but which has heretofore not been punished saddles South Carolina medical and social services providers and other professionals with previously unimaginable reporting obligations. For example, there is

longstanding scientific consensus that various licit substances, including alcohol<sup>13</sup> and tobacco,<sup>14</sup> can cause serious, irreversible harm to the developing fetus. The same is also true of a wide range of commonly prescribed medications. These include psychiatric medications, such as anticonvulsants,<sup>15</sup> Lithium and other mood-stabilizers,<sup>16</sup> antipsychotics, and benzodiazepines (the class of medications which includes Valium, Librium and Xanax),<sup>17</sup> as well as some

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<sup>13</sup> Fetal Alcohol Syndrome is the leading cause of mental retardation in the United States. L. P. Finnegan & S. R. Kandall, Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse, A Comprehensive Textbook 513, 529 (J.H. Lowinson et al. eds., 1997) [hereinafter "Comprehensive Textbook"].

<sup>14</sup> Low birth weight, sudden infant death syndrome, spontaneous abortion, premature rupture of the membranes, and abnormal placentation are associated with maternal tobacco use. See, e.g., L.C. Castro et al., Maternal Tobacco Use and Substance Abuse: Reported Prevalence Rates and Associations with the Delivery of Small for Gestational Age Neonates, 81 Obstetrics and Gynecology 396 (1993); Office on Smoking and Health, The Health Consequences of Smoking: Nicotine Addiction 602 (1988). The teratogenic effects of tobacco and alcohol are particularly relevant because women who ingest cocaine during pregnancy are more likely to use tobacco and alcohol than are non cocaine-users. M. Bendersky et al., Characteristics of Pregnant Substance Abusers in Two Cities in the Northeast, 22 Am. J. Drug & Alcohol Abuse 349, 353 (1996).

<sup>15</sup> A leading scientific text notes that the teratogenic affects of anticonvulsants were identified in the 1960's, especially those caused by the drug Dilantin, commonly prescribed for epileptics and that "[n]o dose response curve has been demonstrated, nor has a "safe" dose been found below which there is no increased teratogenic risk." K.L. Jones, Smith's Recognizable Patterns of Human Malformation 495 (5<sup>th</sup> ed. 1997) [hereafter "Smith's Recognizable Patterns of Human Malformation"]. Other anticonvulsants associated with facial malformations, mental deficiencies, speech disorders, and cardiovascular defects include trimethadione, paramethadione, valproic acid, and warfarin. Id. at 495-505. With respect to trimethadione in particular, it warns that "the frequency and severity of defects associated with maternal use of these drugs during pregnancy are high enough to warrant consideration of early elective termination of pregnancy." Id. at 500 (citing G.L. Feldman et al., The Fetal Trimethadione Syndrome, 131 Am. J. Dis. Child 1389 (1977)). Another standard medical text notes: "An association of fetal abnormalities with anticonvulsants is strengthened by increasing reports of cleft palate, cardiac abnormalities, craniofacial anomalies, nail and digit hypoplasia, visceral defects, and mental subnormality in children of epileptic mothers taking anticonvulsant drugs." The Merck Manual of Diagnosis and Therapy 1859 (R. Berkow ed., 16<sup>th</sup> ed. 1992) [hereafter "Merck Manual"].

<sup>16</sup> "Among psychotropic drugs, lithium has been more strongly associated with congenital anomalies than have other agents . . . . [N]umerous publications indicate an increased incidence of cardiovascular abnormalities, particularly an increase in Ebstein's anomaly in infants born of lithium-treated mothers." J.G. Bernstein, Handbook of Drug Therapy in Psychiatry 415 (2d ed. 1988) (citing G.E. Robinson et al., The Rational Use of Psychotropic Drugs in Pregnancy and Postpartum 31 Can J. Psychiatry 183 (1986)).

<sup>17</sup> Id. at 407 ("Lithium presents a significant risk to fetal development if taken during the first trimester . . . . Benzodiazepines and meprobamate have a significant risk of teratogenic effects. . . ."). The specific birth defects (or "anomalies") associated with these and other psychiatric medications taken during pregnancy include: growth retardation and oral clefts (barbiturates); cleft palates, neurologic depression and low Apgar scores (benzodiazepines); "severe anomalies in 12% of newborns" (meprobamate); respiratory distress (antidepressants); chromosomal gaps and breaks, congenital heart anomalies; reduced thyroid function; and external ear malformations (lithium carbonate and the other mood-stabilizing drugs). Id. at 407-421 (citing W.S. Barry and S.M. St. Clair,

antibacterials (especially Tetracyclines),<sup>18</sup> anticoagulants,<sup>19</sup> thyroid medications,<sup>20</sup> and antihypertensive drugs.<sup>21</sup> Even “[l]arge doses of aspirin may result in delayed onset of labor, premature closure of the fetal ductus arteriosus . . . or neonatal bleeding.”<sup>22</sup> Additionally, prenatal exposure to adverse environmental factors such as poor nutrition, substandard housing and a lack of social supports and services (all of which are associated with poverty) can also profoundly affect infant health.<sup>23</sup> After Whitner, medical and social services professionals who encounter a pregnant or parenting woman in one of these scenarios are duty-bound to report her to state authorities.

As these examples illustrate, the reporting obligations of South Carolina professionals vis-a-vis pregnant women are potentially limitless. Courts in other states that have struck down similar prosecutions make this very point. In Arizona, for example, the court faced the

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Exposure to Benzodiazepines in Utero 1 Lancet 1436 (1987)); M.J. Whittle and K.P. Hanretty, Prescribing in Pregnancy: Identifying Abnormalities, 293 Br. Med. J. 1485 (1986).

<sup>18</sup> Tetracycline has been associated with permanent discoloration of the teeth, enamel hypoplasia, and a lowered resistance to caries, as well as retarded bone growth, especially when taken during the latter part of the pregnancy. Merck Manual at 41.

<sup>19</sup> Certain anticoagulants can cause nasal abnormalities, bone stippling, bilateral optic atrophy, varying degrees of mental retardation, microcephaly, and occasionally fetal and maternal hemorrhage. Smith's Recognizable Patterns of Human Malformation at 504.

<sup>20</sup> Some thyroid medications taken during pregnancy can cause severe hypothyroidism, fetal goiter, or scalp defects. Merck Manual at 1859.

<sup>21</sup> These drugs may cause fetal respiratory depression, hypotension, paralytic ileus, bradycardia, hypoglycemia, and varying degrees of intrauterine growth retardation. Id. at 1861.

<sup>22</sup> Id. at 1859; see also L.J. Van Marter et al., Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy, 97 Pediatrics 658 (1996) (maternal consumption of aspirin during pregnancy found to be consistently associated with pulmonary hypertension of the newborn, an important cause of respiratory failure in neonates).

<sup>23</sup> N.S. Gustavsson & A.E. MacEachron, Criminalizing Women's Behavior, 27 J. of Drug Issues 673, 675-76 (1997).

prosecution for child abuse of a woman who used heroin while pregnant. The court observed that:

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

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

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

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

The resulting confusion and uncertainty about the scope of South Carolina's child neglect and abuse law after Whitner become intolerable when compounded by the criminal sanctions, including imprisonment, that befall those pregnant women and professionals who fail first to divine and then to comply with the newly expanded state law.<sup>24</sup> For these reasons, the Whitner

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<sup>24</sup> As the discussion of medical privacy in the next section underscores, the Whitner decision also places treatment providers in a double bind by pitting fetal health against maternal well-being, forcing providers to choose which

decision renders the state statute unconstitutionally vague. Accordingly, the petition for writ of habeas corpus should be granted.

C. THE PETITION SHOULD BE GRANTED BECAUSE THE SOUTH CAROLINA SUPREME COURT'S DECISION EVISCERATES PRIVACY RIGHTS OF PREGNANT PATIENTS AND IF LEFT UNDISTURBED THREATENS TO CAUSE WIDESPREAD AND SERIOUS HARM TO PREGNANT WOMEN.

Communication and trust between treatment provider and patient are crucial for preventing or reducing harm to drug-exposed infants. By expanding South Carolina's child abuse reporting requirement to include cocaine use by pregnant women, the Whitner opinion compels medical providers to breach patient privacy in a particularly vulnerable context. Adequate prenatal care requires patients to provide accurate information to their health care professionals about their habits and medical histories. Yet, after Whitner, patients in South Carolina have every incentive to hide critical information since any admission of drug use or other potentially risky activity must be reported to state authorities. By casting treatment providers as *quasi* law enforcement agents, with interests adverse to the patients they are sworn to care for, the Whitner decision makes doctors, nurses, substance abuse counselors and other treatment providers accessories to a public health tragedy.

At bottom, child abuse and neglect law is about the best interests of the child. A child in harm's way can be removed from an abusive parent if interventions do not work. The child and its parents can then, and often do, form their own, separate therapeutic relationships with health care providers, among others. Because removal from an abusive home is possible and because

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patient to treat. In light of Whitner, South Carolina physicians might feel legally constrained from recommending or prescribing therapies to their pregnant patients that could, but might not, result in fetal harm -- be it chemotherapy or radiation treatment for cancer, or even the administration of drugs commonly used during labor and delivery which can themselves cause fetal central nervous system depression, anoxia, hypothermia, low Apgar scores, impaired metabolic responses, and neurological depression. Merck Manual at 1861.

both the child and its parents can re-establish healing bonds with treatment professionals if the child is removed from the home, these professionals have the duty to report suspected child abuse or neglect. In contrast, with respect to so-called "fetal abuse," removing the fetus from the mother is not an option. Indeed, it makes no sense to speak about the best interests of the fetus apart from the health of the mother. In this regard, the solid weight of evidence makes absolutely clear that the threat or imposition of criminal sanctions against pregnant women undermines rather than promotes maternal well-being and the willingness to engage in prenatal care.<sup>25</sup> In other words, the best interests of the fetus are inseparable from the those of its mother and those interests include the opportunity to establish and maintain a trusting relationship with one or more health care providers.

Maintaining the privacy of the identities and communications of pregnant patients can improve the health of women and their children in several ways. Drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine<sup>26</sup>: in most cases, a patient's drug use is not apparent if the patient does not disclose it. Thus, important medical benefits accrue when treatment providers permit patients to feel sufficiently comfortable to divulge highly personal, often stigmatizing, sometimes incriminating information.<sup>27</sup> Even if the pregnant

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<sup>25</sup> See e.g., American Soc'y of Addiction Med., Bd. of Directors, Public Policy Statement on Chemically Dependent Women and Pregnancy (Sept. 25, 1989) ("[t]he 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."); Southern Regional Project on Infant Mortality, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women 21 (1993) (same); Southern Legis. Summit on Healthy Infants and Families, High Risk Pregnancies/Substance Abuse (Oct. 4-7, 1990) (same).

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

<sup>27</sup> See R. Arnold, et al., Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research 345 (M. Lipkin, Jr., et al. eds., 1995); A. Lazare, Shame, Humiliation, and Stigma in the Medical Interview, in *id.* at 333.

patient does not discontinue her drug use, the negative health effects associated with prenatal drug exposure can be significantly reduced through adequate prenatal care and counseling if the patient embraces the therapeutic relationship.<sup>28</sup> In addition, open communication with physicians regarding drug use is necessary to insure safe deliveries.<sup>29</sup> Furthermore, adequate parenting skills and a supportive environment may compensate for prenatal risk factors created by prenatal drug exposure.<sup>30</sup> These skills and this environment, in turn, can be cultivated through a positive alliance with health care and social services providers. In sum, a climate of confidentiality is essential if patients are to disclose drug use and/or seek continued care and counseling from health professionals in order to reduce the potential harms caused by substance use during pregnancy.

For competent care of any patient, it is undisputed that patient privacy must be protected:

To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people. Violation of confidentiality also shows disrespect to the patient as a human being . . . .<sup>31</sup>

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<sup>28</sup> See, e.g., A. Racine *et al.*, The Ass'n Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 JAMA 1581, 1585-86 (1993).

<sup>29</sup> Patients using cocaine "may have untoward responses to anesthesia," yet identification of such patients prior to the initiation of anesthesia "has proven difficult," as many of these patients deny illicit drug use. D. J. Birnbach *et al.*, Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay, 84 Anesthesia Analg. 76 (1997). See also D. Campbell *et al.*, Unrecognized "Crack" Cocaine Abuse in Pregnancy, 77 British J. Anaesthesiology 553, 555 (1996) (Eliciting information from obstetric patients about cocaine use is important because the "interaction of cocaine with other local anaesthetics makes the calculation of a safe maximum dose difficult.").

<sup>30</sup> See, e.g., Finnegan & Kandall, *supra* note 8, at 523.

<sup>31</sup> Arnold, *et al.*, *supra* note 22, at 365 (citation omitted).

The exceptional importance of patient confidentiality becomes all the more critical in the context of substance abuse treatment:

It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery . . . . Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.<sup>32</sup>

The Whitner decision directly undermines the ethical obligations, professional training, and standard of practice applicable to physicians and other health care providers.<sup>33</sup> Indeed, the Whitner decision forces treatment professionals into a painful and cruel dilemma -- whether to breach the patient confidentiality so essential to medical care and drug treatment services, or violate state law and be subject to imprisonment. This conflict presents an untenable situation for South Carolina's health care providers who seek to adhere to the basic tenets of medical practice while providing quality care for their patients. Quality care in conformity with ethical standards forbids any treatment provider from violating the creed that is as old as the medical profession itself: Above all else a healer must do no harm.

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<sup>32</sup> M.J. Kreek & M. Reisinger, The Addict as a Patient, in Comprehensive Textbook 822, 830; see also R. Elk et al., Behavioral Interventions: Effective and Adaptable for the Treatment of Pregnant Cocaine-Dependent Women, 27 J. of Drug Issues 625, 630, 632 (1997) ("[C]onfidentiality must be rigidly adhered to and a trust in the staff established" to attract to and retain in treatment pregnant drug-dependent women.); National Council on Alcoholism and Drug Dep., Policy Statement, Women, Alcohol, Other Drugs and Pregnancy 5 (1990) ("States should resist efforts to weaken confidentiality protections for pregnant alcoholic and other drug-dependent women seeking prenatal care or alcoholism and/or drug treatment services.").

<sup>33</sup> The Whitner decision may also require some providers to act in conflict with federal law. Title 42 U.S.C. § 290dd-2 (also known as the Federal Drug Treatment Confidentiality Statute) prohibits federally assisted drug-abuse treatment programs from divulging patient identities and records. Although this confidentiality provision "do[es] not apply to the reporting under State law of incidents of suspected child abuse and neglect," id. 290dd-2(e)(2), it is not at all clear whether the South Carolina Supreme Court's expansion of the term "child abuse" to cover maternal prenatal actions falls within the narrow exception envisioned and intended by Congress. This legal uncertainty, and the demands of seemingly conflicting legal mandates, further exacerbates the confusion, fear and frustration faced by South Carolina's physicians and other health care professionals.

## CONCLUSION

For the foregoing reasons, amici curiae respectfully request this court to grant the petition for habeas corpus.

Respectfully submitted

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# CERTIFICATE OF SERVICE

I, Lynn A. Cleckler, an employee of the McNair Law Firm, P.A., attorneys for the Amici Curiae, do hereby certify that I served a copy of the following: Motion for Leave to File Brief as Amici Curiae in Support of the Petition for Writ of Habeas Corpus and Brief Amici Curiae in Support of The Petition for Writ of Habeas Corpus, upon counsel of record by depositing the same in the United States mail, postage prepaid, and return address clearly indicated, addressed to counsel as follows, this 20th day of January, 1999.

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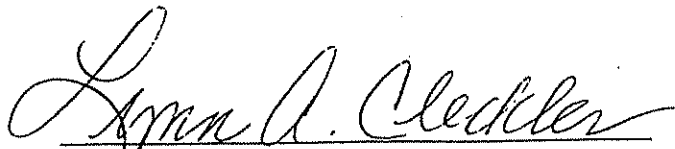
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