

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**RENNIE T. GIBBS**

**APPELLANT**

**VS.**

**NO. 2010-IA-0819**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: SCOTT STUART  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

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**NATURE OF THE CASE**

This is an interlocutory appeal from an order denying a motion to dismiss an indictment charging depraved heart murder. The case has not been tried before either a jury or a judge sitting alone.

**COURSE AND DISPOSITION IN THE CIRCUIT COURT**

The Grand Jury indicted Rennie Gibbs. Gibbs filed a motion to dismiss asserting the indictment does not apply to defendants in her situation. The Court entered an order which denied Gibbs's motion. Gibbs files a notice of appeal seeking an interlocutory appeal. The Mississippi Supreme court entered an order granting the interlocutory appeal.

**STATEMENT OF THE FACTS**

There are no facts which were properly admitted into evidence by the trial court. There has been no trial. A motion to dismiss was filed in the Circuit Court and denied, but the State finds no transcript containing sworn testimony or other evidence properly admitted by the trial court at the hearing on the motion to dismiss.

The indictment charges that Gibbs was pregnant, smoked crack cocaine, and the baby which she was carrying was stillborn. The motion to dismiss argues that Mississippi law does not allow prosecutions for the crime charged in the indictment.

## SUMMARY OF THE ARGUMENT

Interlocutory appeals are, as a general rule, not available under our law for criminal cases. There are exceptions, but the State is not aware that the instant case falls under one of the exceptions. Any violations of Gibbs's rights can be vindicated on appeal, and granting relief in this interlocutory appeal does not materially advance the termination of litigation and avoid exceptional expense.

The facts in the instant case are not yet known. Mississippi law supports prosecuting for smoking crack cocaine and for acts causing death to a human being, said acts being eminently dangerous to others, evincing a depraved heart, regardless of human life, although without any premeditated design. Mississippi law further holds that the indictment in the instant case charges Gibbs not only with depraved heart murder, but also all lesser included offenses, including manslaughter. The indictment expressly puts Gibbs on notice that she is charged with possession of crack cocaine and that the smoking of same caused the death of her unborn child.

This prosecution is not appropriate for disposition by interlocutory appeal. Even if the court finds that the alleged facts do not constitute murder, the remaining charges of manslaughter, and possibly other charges, will still remain charged under the indictment, and the case should be remanded to the Circuit Court for trial. The first purpose of an interlocutory appeal, *i.e.*, materially advancing the termination of litigation and avoiding expenses, is not met because the case should still be tried and probably appealed back to this Court if the jury finds Gibbs guilty.

There are five amici briefs from interest groups filed in this appeal. They contain primarily policy arguments supporting a finding that pregnant women who smoke crack cocaine should not be prosecuted if their babies are stillborn. Such policy arguments do not apply as

Gibbs has not been convicted, and those concerns are better directed to the Mississippi Legislature. The Legislature has the authority under our Constitution to define crimes and establish punishments. Gibbs mentions the separation of powers in her brief. The Legislature and the Judiciary have different functions under our form of government, and one branch should not encroach upon the functions of the other.

### ARGUMENT

The general rule is that the Mississippi Supreme Court does not grant interlocutory appeals in criminal cases. However, in certain limited circumstances, the court may entertain interlocutory appeals. *Beckwith v. State*, 615 So.2d 1134, 1142 (Miss.1992); M.R.A.P. 5. This honorable Court has held as follows regarding interlocutory appeals.

It is simply carrying **Rule 5** too far to hold that a majority of this Court has the authority to intervene and interpose ourselves into a circuit court criminal trial, stop all proceedings, and order the discharge of a criminal defendant to protect an alleged violation of a right that can be addressed, and if violated, fully vindicated on appeal. We today hold that it is not the intent of this Court under Rule 5 to grant unto ourselves such authority or duty. We decline Beckwith's invitation that we do so; all such rights can be fully addressed if there is an appeal to this Court from a final judgment.

*Beckwith v. State*, 615 So.2d 1134, 1144 (Miss. 1992) (citing Miss.Code Ann. § 99-35-101 (1972)).

“We must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them.” *Beamon v. State*, 9 So.3d 376, 379 (Miss. 2009). The only facts before the court are assertions in the brief. Gibbs is asking this Court to construe numerous statutes in a vacuum. This matter would be more properly adjudicated by allowing the Circuit Court of Lowndes

County to try the case before a jury. If Gibbs is then convicted, the Mississippi Supreme Court could then adjudicate any alleged violations of Gibbs's rights, constitutional or otherwise. The Supreme Court would then have the benefit of having the facts of this case before it when it considers any claims that the Court violated Gibbs's rights. Sending the case back to the Circuit Court for adjudication will allow the Circuit Court to determine if the proof is sufficient to prove any crime. If the case is then given to the jury, they can decide if the proof supports a verdict of guilty.

If Gibbs is correct that the Legislature does not intend that the depraved heart murder statute applies to the facts in her case, the Court should still not dismiss the indictment and discharge the defendant. The indictment also serves notice on Gibbs that “. . . the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.” Miss. Code Ann. §97-3-19(3).

#### **PROPOSITION I.**

The question is whether this Court should stop the prosecution in the circuit court, decide that the depraved heart murder statute does or does not apply, and discharge the defendant. The Mississippi Supreme Court should not do so for several reasons. First, Mississippi law holds that the Supreme Court does not have the authority to intervene and interpose itself into a circuit court criminal trial, “. . . stop all proceedings, and order the discharge of a criminal defendant to protect an alleged violation of a right that can be addressed, and if violated, fully vindicated on appeal.” *Beckwith*, 615 So.2d at 1144. The Court may grant interlocutory appeals only in limited cases, and Gibbs has not demonstrated that this is such a case. A recognized exception is double jeopardy.

Second, much of Gibbs's argument rests upon a statute containing a list of crimes for

which the law defines an unborn child to be a human being. Miss. Code Ann. § 97-3-37. The list does not include depraved heart murder. It should be noticed that the statute does not, however, say that an unborn child is not a human being when depraved heart murder is charged; it merely does not list depraved heart murder. The list does include capital murder and numerous crimes of manslaughter. The manslaughter crimes which define an unborn child as a human being include manslaughter by all other killings through culpable negligence, Miss. Code Ann., § 97-3-47, while in the commission of a felony, Miss. Code Ann., § 97-3-27, and while in the commission of a misdemeanor, Miss. Code Ann., § 97-3-29.

The unborn child is still a “human being” when the killing takes place as a result of culpable negligence, or during the commission of a felony or misdemeanor. Even if Gibbs is correct that the absence of depraved heart murder in the list found in Miss. Code Ann., § 97-3-37, means an unborn child is not a “human being” for the purpose depraved heart murder, the alleged acts still could constitute various forms of manslaughter.

The indictment still also served notice on Gibbs that “. . . the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.” Miss. Code Ann. § 97-3-19(3). Assuming, for purposes of argument only, that the legislature did not intend to charge the mothers of babies born dead with depraved heart murder, because the unborn babies were not expressly defined as human beings, the charge or charges of manslaughter would still survive under the indictment after the discharge of the charge of depraved heart murder . Discharging Gibbs for depraved heart murder would still not resolve the charges of culpable negligence manslaughter or manslaughter in the commission of a felony or misdemeanor . Thus, granting Gibbs the relief she requests would not achieve the first goal of interlocutory appeals found in *Rule 5(a)(1), M.R.A.P.*, which is to “Materially advance the termination of the litigation

and avoid exceptional expense to the parties; . . .”

Third, there are no facts before this Court in the appellate record. The Court has long held that unless proved, placed in the record, and certified by law, the Court cannot know those facts. *Beamon v. State*, 9 So.3d 376, 379 (Miss. 2009); *Mason v. State*, 440 So.2d 318, 319 (Miss. 1983). The Supreme Court is being placed in the unenviable position of being asked to rule upon the intent of the Legislature when it enacted a statute, and then apply the statute to a certain set of facts when the full and complete set of facts are not before the Court, when there are actually no facts which have been admitted and certified by law.

Respectfully, this is not a case which should be ruled upon and adjudicated fully on an interlocutory appeal. It should first be returned to Circuit Court and tried. If, at the close of the State’s case-in-chief at trial, the Circuit Court finds that the State has not proven each element of the charge or charges against Gibbs, the Court can direct a verdict. If the jury finds that the case against Gibbs has not been proven beyond a reasonable doubt, it can return a verdict of not guilty. Finally, if Gibbs is convicted and a right belonging to Gibbs is violated by the process before the Circuit Court, such right can be vindicated by appeal to the Mississippi Supreme Court after the trial.

**A.**

Gibbs argues that Mississippi law does not punish the mother of an unborn child for non-capital murder. Gibbs argues that the State is asking the Court to “radically re-write state law to prosecute and punish women who become pregnant and suffer an unintended stillbirth or miscarriage that allegedly is due to their own actions or inactions.” With all due respect, the State in this appeal is not asking the Court to re-write the law; the State is asking the Court to apply the law as it exists and to send the case back to the trial Court for litigation. If Gibbs is



correct in saying that the depraved heart murder statute does not apply to pregnant women who smoke crack while carrying an unborn child and the child then dies before birth, the trial court can make a finding that the evidence is not sufficient to prove the charge, or the jury can make a finding that the state has not proven its case and acquit the defendant. The law will not have been re-written, radically or otherwise.

The State understands that Gibbs is requesting the review based upon her allegation that the existing statute does not apply to what she believes the facts will show at trial. The difficulty with trying to evaluate this issue on appeal, however, is that no facts are yet known to this Court. The Court has long held that, "Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them." *Beamon v. State*, 9 So.3d 376, 379 (Miss. 2009); *Mason v. State*, 440 So.2d 318, 319 (Miss.1983). To do so is to decide whether or not Gibbs is guilty without knowing the facts of the case beyond the allegations that Gibbs was pregnant, smoked crack cocaine, and the baby she was carrying was born dead.

Gibbs is asking the Court to pre-judge the case before the facts are properly before this court. This court has held that facts not in the appellate record cannot be known by the court. Her logic supporting the argument is as follows: Miss. Code Ann., § 97-3-19(1), does not prohibit the depraved heart killing of an unborn child, only the deliberate design killing of an unborn child. Gibbs is charged by the indictment with depraved heart murder. Therefore, the statute listed in the indictment was not intended to charge a person with murder if they did not intend the death of the unborn child. Gibbs claims that Mississippi law does not authorize prosecution under that circumstance. Brief of Appellant, pages 5-8. One flaw in Gibbs's argument is that the indictment not only serves notice on Gibbs that she is charged with depraved

heart murder , but it also serves notice on her that she is charged with any lesser included crimes, including, but not limited to, manslaughter. Miss. Code Ann. § 97-3-19(3). Such charges of manslaughter will survive if the depraved heart murder charge is dismissed.

In summary, the acts alleged in the indictment charge Gibbs not only with depraved heart murder, but also with numerous charges of manslaughter. The case should be returned to the Circuit Court for litigation and trial.

**B.**

Gibbs argues that depraved heart murder does not encompass the death of an unborn child in the set of facts alleged herein. Gibbs claims this is so because the only time the term “human being” includes an “unborn child” is if the charge is assault, capital murder, and various types of manslaughter. She argues that an “unborn child” is not a “human being” for the purposes of non-capital murder. This argument was addressed in subsection “A” above, and the arguments are renewed in this subsection and included as if fully copied in words and figures.

Briefly summarizing that argument, the statute defining “human being” does not express that an unborn child is not a human being for the purpose of the depraved heart murder statute. Even if depraved heart murder did not apply to the facts of Gibbs’s situation, the indictment in the case *sub judice* still charges Gibbs with lesser included offenses, including manslaughters. Miss. Code Ann., § 97-3-19(3).

**C.**

Gibbs then argues that the Mississippi Legislature has authorized the prosecution of third persons who cause the death of unborn children, but not the mother of the unborn child who suffers a miscarriage or stillbirth as a result of the use of illegal drugs. She cites numerous bills which were introduced but never passed into law in order to support her argument.

The failure of the Mississippi Legislature to pass other bills which would allow the

prosecution of mothers for this type of death does not support a finding that the Supreme Court should dismiss the indictment and discharge the defendant. It does not negate the existence of sections of the *Mississippi Code of 1972*, including §§ *97-3-19(1) and (3), 97-3-27, 97-3-29, 97-3-37, and 97-3-47*, all of which support a finding that the Legislature did not intend to prohibit prosecutions of this kind.

**D.**

Gibbs argues that any ambiguity in the statute must result in favor of dismissing the indictment.

The interpretation of a statute “is a question of law subject to de novo review.” Furthermore, “[i]t is well settled that when a court considers a statute passed by the Legislature, the first question before the Court is whether the statute is ambiguous. If the statute is not ambiguous, the court should interpret and apply the statute according to its plain meaning without the aid of principles of statutory construction.” *Tipton v. State*, 41 So.3d 679, 682 (¶10) (Miss. 2010). The first question, then, is whether Miss. Code Ann., § *97-3-19(1)*, is ambiguous.

Unfortunately, Gibbs does not tell the Court what she believes is ambiguous about the statute. In fact, she merely argues that, if the Court finds the statute to be ambiguous, it should resolve any ambiguity in favor of the defendant.

In the absence of Gibbs asserting and telling us which part of the statute is ambiguous and why it is ambiguous, it is difficult to know if the statute is ambiguous.

Miss. Code Ann., § *97-3-19(1)*, combined with the other statutes listed above is not ambiguous regarding the intent of the Legislature to define an unborn child as a “human being” for numerous crimes of manslaughter. Whether Miss. Code Ann., § *97-3-19(1)* is ambiguous as applied to the prosecution of a mother of a stillborn who smoked crack cocaine during her

pregnancy for depraved heart murder is an issue that should ultimately be resolved by the Court along with other issues raised at trial.

**E.**

Gibbs claims that, because the crime carries a sentence of life, the Court must construe any ambiguity in the statute in favor of the defendant.

Gibbs claims that construing the statute to apply to pregnant women would lead to absurd results. She argues that allowing this type of prosecution would result in undermining the health of Mississippi unborn children, would discourage the mother from seeking treatment for her drug addiction, would discourage the mother from receiving pre-natal care, could lead to prosecutions for smoking cigarettes, and would lead some women to choose abortion. This argument ignores another option that the mother could choose; she could choose not to smoke crack cocaine while pregnant.

The State adopts its argument made in the preceding subsection. The only possibility of ambiguity is found in the reading of Miss. Code Ann., § 97-3-19, and the State does not concede that it is ambiguous.

**F.**

Gibbs argues that most other states have refused to charge criminally those pregnant women who use drugs during their pregnancies.

Our concern for the purpose of this interlocutory appeal is whether existing Mississippi law allows prosecuting pregnant women whose babies are stillborn as a result of intentionally smoking crack cocaine during their pregnancies. The question to be decided is whether the alleged facts of the instant case give rise to prosecution under Mississippi state law for depraved heart murder, felony murder(non-capital), or manslaughter. With all due respect, the interpretation by other states of their state laws does not assist in determining how Mississippi

construes its murder and manslaughter statutes.

## PROPOSITION II.

### PROSECUTING GIBBS AS INDICTED WOULD NOT VIOLATE THE UNITED STATES OR MISSISSIPPI CONSTITUTIONS.

#### A.

Gibbs argues that the statutory language does not give any notice that she could be indicted under the depraved heart murder statute after experiencing a stillbirth. Therefore, she was denied her right to notice under the due process clause that she could be charged.

A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *U.S. v. Williams*, 553 U.S. 285, 286 (2008); *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Miss. Code Ann., § 97-3-19, puts persons on notice that they are prohibited from engaging in the “. . . commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.” Additionally, Mississippi law serves notice on anyone indicted charged for murder that their indictment includes all lesser included offenses, including, but not limited to, manslaughter. § 97-3-19(3).

Gibbs also argues that, if the court interprets Miss. Code Ann., § 97-3-19(b) to apply to the facts of her circumstance, that the Court should not apply the statute to her because it would be a retroactive application. Regarding the claim of retroactive application, the issue cannot be resolved without first knowing the facts. It is only retroactive if it is assumed that § 97-3-19(1)(b) did not already charge depraved heart murder for a circumstance, as in Gibbs’s situation,

when smoking crack cocaine while pregnant caused the death of the unborn child she was carrying. Whether or not the statute applies to the facts in the instant case is one of the issues yet to be decided by this litigation along with the application of the various manslaughter statutes.

**B.**

Gibbs argues that applying Miss. Code Ann., § 97-3-19(1)(b) to pregnancy and birth would render the statute unconstitutionally vague. She claims that pregnant women would not know which of life's activities and circumstances would subject them to prosecution. This situation would invite arbitrary and capricious decisions by prosecutors to bring criminal charges against women after stillbirths or miscarriages.

A person of ordinary intelligence is on notice that smoking crack cocaine by itself subjects pregnant women to prosecution for possession of cocaine. A person of ordinary intelligence knows that smoking crack cocaine could be an act imminently dangerous to human life and is prohibited by law. *U.S. v. Williams*, 553 U.S. 285, at 286.

**C.**

Gibbs claims applying the statute would violate her right to privacy. She argues that Mississippi recognizes that reproductive rights, including the right to carry a pregnancy to term, are included in the right to privacy. She further claims that applying the statute at issue does not rationally advance any legitimate state interest. The State responds that reproductive rights and privacy rights in general do not include the right to smoke crack cocaine without sanction.

**D.**

Gibbs argues the following: Applying the statute to pregnancy and birth would violate the right to equal protection. State action that burdens women because of pregnancy is gender discrimination. Singling out women for special penalties because they become pregnant is

discrimination because of gender and must be supported by an “exceptionally persuasive justification.” Criminalizing drug-using females who are pregnant while not penalizing the father who consumed equal amounts of the illegal drug without an exceedingly persuasive justification would burden the women more harshly than men. Amici also suggests that prosecuting Gibbs for murder is an Equal Protection Clause violation because “although men's actions may contribute to pregnancy outcomes . . . a man's drug use would not be punishable at all” under the statute in question.

Even criminal statutes applicable only to a particular class will be upheld so long as "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469, (1981). In upholding a California statutory rape law under which only males could be prosecuted, the United States Supreme Court noted that "the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact ... to be treated in law as though they were the same. *Id.* (internal quotations omitted). Clearly, Mississippi's murder statute is neutral on its face as it does not target a particular class. The State's theory of prosecution in this case is not based on invidious discrimination: It is simply a theory that cannot be applicable to men or non-pregnant women because those classes of persons are different in fact and cannot be treated in law as though they were the same under this particular prosecution theory of murder.

**E.**

Regarding PROPOSITION 2(E), that prosecution under the indictment would violate the prohibition against cruel and unusual punishment, Gibbs has not yet been found guilty of any crime or ordered to be punished for any crime. The claim of cruel and unusual punishment

cannot be evaluated because the Court has not yet ordered any punishment. Both *Amendment VIII of the United States Constitution* and § 28 of the *Mississippi Constitution* say that cruel and unusual punishment shall not be inflicted.

### **RESPONSE TO AMICI BRIEFS**

Five amici briefs were filed in this case. Each of these briefs assert various policy arguments and authorities in support thereof; however, these arguments and authorities are not applicable to the issue before the Court at this time. As noted above, the only issues raised on interlocutory appeal are simply whether the depraved heart murder statute applies to the limited facts we know at this time and whether prosecuting Gibbs as indicted would violate the Mississippi or United States Constitutions. Thus, the only applicable arguments and authorities concern the statutes at issue, case law regarding said statutes, and Mississippi law regarding statutory interpretation. The policy arguments and various authorities cited in support of these arguments may or may not be applicable to this case on direct appeal, if a direct appeal is necessary after Gibbs's trial. At this point, however, they are simply not applicable. Nonetheless, the State will briefly address the legal arguments raised in the amici briefs which are relevant to the procedural posture of this case.

#### **Brief for Amici Curiae Interested Human Rights Organizations and Academics**

In the Brief for Amici Curiae Interested Human Rights Organizations and Academics, it is argued first that “the Supreme Court of the State of Mississippi regularly engages in comparative legal analysis to interpret state law and should consider human rights law in this instance as a source of comparative analysis.” (Amici’s brief at 1). As stated above, the ONLY legal authority applicable at this time are the statutes at issue, Mississippi case law regarding said statutes, and Mississippi law regarding statutory interpretation.



The second argument made is that “prosecuting Ms. Gibbs for murder contravenes Mississippi’s fundamental constitutional commitments to respect human dignity, the prohibition on cruel and unusual punishment, non-discrimination, and the ban on ex post facto laws.” (Amici’s brief at 6). The State would respond, first, by noting that there is no authority to support the assertion that indicting Gibbs for violating a Mississippi statute contravenes Mississippi’s fundamental constitutional commitments to respect human dignity. Second, any arguments regarding cruel and unusual punishment are premature as Gibbs has not been convicted of any crime and, therefore, has not been sentenced. Additionally, the argument that “the mere act of prosecuting Ms. Gibbs . . . constitutes cruel, inhuman, or degrading treatment” is without legal foundation. Finally, the indictment does not violate the ban on ex post facto laws as the statute under which Gibbs was indicted has been in effect for many years prior to the act at issue. Simply because this is the first prosecution under this particular theory does not make it a violation of the ban against ex post facto laws.

**Brief for Amici Curiae Jackson Area National Organization for Women et al**

The majority of the brief for Amici Curiae Jackson Area National Organization for Women et al recites this country’s unsavory history of discrimination against women and cites to a melange of cases that are wholly unrelated to the issue presently before this Court, that is, whether a pregnant woman may be prosecuted for murder in this State for killing her unborn child by intentionally ingesting an illegal substance. The legal arguments in Amici’s brief are that such a prosecution would violate Gibbs’s right to equal protection under the law and substantive due process rights.

Amici suggests that prosecuting Gibbs for murder is an Equal Protection Clause violation because “although men’s actions may contribute to pregnancy outcomes . . . a man’s drug use

would not be punishable at all” under the statute in question. (Amici’s brief at 9). The State has already addressed this argument in responding to the same claim raised in the Appellant’s Brief. The State’s theory of prosecution in this case is not based on invidious discrimination: It is simply a theory that cannot be applicable to men or non-pregnant women because those classes of persons are different in fact and cannot be treated in law as though they were the same under this particular prosecution theory of murder. *Michael M.*, 450 U.S. at 469.

Amici also suggests that prosecuting Gibbs for murder is a due process violation because allowing such a prosecution “leaves women with the unconstitutional choice of either having an abortion or facing prosecution.” Amici’s brief at 10. Amici’s argument is based on the fallacies that Gibbs was making a medical decision about her pregnancy and that she is being prosecuted for having a “coincidental stillbirth.” A plain reading of the indictment shows that the State is neither attempting to interfere with a pregnant woman’s right to make medical decisions or prosecuting her for having a “coincidental stillbirth.” The State seeks to prosecute Gibbs for intentionally committing an illegal act which resulted in the death of her unborn child.

The remainder of Amici’s brief is simply a slippery slope argument which expresses a concern that if the State is allowed to proceed with a murder prosecution in the present case, pregnant women may thereafter be prosecuted for miscarriages which are unrelated to illegal drug use. Again, the Court should not be concerned with such a claim because the only issue before the Court at this time is whether a pregnant woman can be prosecuted for murder under the laws of this State for intentionally ingesting an illegal substance which results in the death of an unborn child.

#### **Brief for Amicus Curiae Mississippi Psychological Association**

In the brief of the amicus curiae Mississippi Psychological Association (hereinafter “the

Association”) it is argued that fear of prosecution will deter pregnant drug abusers from seeking health and substance abuse treatment. These arguments are merely policy arguments and are, as stated above, not applicable to the limited legal issues before the Court at this time.

The Association is also concerned that if the State is allowed to proceed with a murder prosecution in the present case then psychologists and other mental health professionals will face the ethical and legal dilemma of disclosing patient confidences related to illegal drug use. The State would submit that mental health professionals already face legal and ethical dilemmas in their practices today; the prosecution of Gibbs for murdering her unborn child in no way expands those dilemmas.

The Association advances the argument that Gibbs should not be prosecuted for murder because she is a drug addict and could not help ingesting narcotics while pregnant. In citing *Clayton v. State*, 652 So.2d 720 (Miss. 1995) for support, the Association basically argues that a woman addicted to drugs should not be held to a standard to which she is incapable of meeting, that is, cessation of drug use while pregnant. The State would respond that if the Court accepts the Association’s argument as a defense then every drug addict who robs or steals to obtain money for drugs should not be held accountable for their actions.

**Brief of Amici Curiae of the American College of Obstetricians and Gynecologists, et al**

In the Brief for Amici Curiae of the American College of Obstetricians and Gynecologists et al, it is argued first that Gibbs’s prosecution is not substantiated by science. This argument is premature. There is very little in the record about the facts of this particular case and nothing at all about the evidence the State intends to use to establish the cause of Gibbs’s stillbirth. In support of this assertion the amici argues that “cocaine has not been found to cause stillbirths” and that “the pathologist’s conclusions are not supported by science.” (Amici’s brief at 5 and 7). These issues

would be more properly raised during trial before or during the State's expert witness testimony regarding the cause of Gibbs's stillbirth. The pathologist's findings and the basis for those findings could be fleshed out before the trial court and this Court would have a record to rely on in deciding the issue. At this time, the record is simply not capable of supporting true analysis of these issues.

It is also argued that Gibbs's prosecution will harm the health of mothers and children in that it will "deter drug-dependent women and girls from seeking health care," "will deter pregnant women and girls from sharing vital information with their doctors," and will "discourage women and girls from carrying pregnancies to term." (Amici's brief at 8 and 10). These arguments are merely policy arguments and are, as stated above, not applicable to the limited legal issues before the Court at this time.

Finally, it is argued that this prosecution "reflects a misunderstanding of the nature of addiction." (Amici's brief at 12). As noted in response to a similar argument made by the Association, if the Court accepts this argument, like the argument of the Association, as a defense then every drug addict who robs or steals to obtain money for drugs should not be held accountable for their actions because of their addiction.

#### **Brief of Amici Curiae Legal Voice et al**

The brief for Amici Curiae Legal Voice et al focuses on the fact that women who experience stillbirths grieve, and numerous factors can contribute stillbirths. Amici also claims that there is no scientific evidence to prove a causal connection with a pregnant woman's cocaine consumption and a subsequent stillbirth. This amici brief further highlights the fact that a majority of the issues presented by defense counsel and amici are not ripe for review. Obviously, the State would have to prove that Gibbs's cocaine consumption contributed the death of her unborn child before a jury could return a verdict for either murder or manslaughter. The State would necessarily employ expert

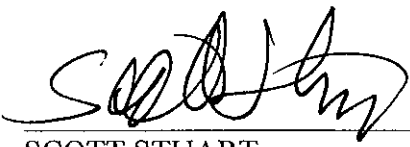
testimony, and Gibbs will be free to present her own experts to make the claims presented in amici's brief. However, at this time, the Court need only determine whether the State can proceed with the prosecution.

**CONCLUSION**

The State asks the Court to enter an order returning jurisdiction to the Circuit Court of Lowndes County for further litigation. Sending the case back to the Circuit Court for adjudication will allow the Circuit Court to determine if the proof is sufficient to prove any crime. If the case is then given to the jury, they can decide if the proof supports a verdict of guilty.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:   
SCOTT STUART  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

I, Scott Stuart, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable James T. Kitchens  
Circuit Court Judge  
P. O. Box 1387  
Columbus, MS 39703-1387

Honorable Forrest Allgood  
District Attorney  
P. O. Box 1044  
Columbus, MS 39703

Robert B. McDuff, Esquire  
Attorney At Law  
767 North Congress Street  
Jackson, MS 39202

Carrie A. Jourdan, Esquire  
Attorney At Law  
P. O. Box 1108  
Columbus, MS 39703-1108

Lynn Paltrow, Esquire  
Attorney At Law  
National Advocates for Pregnant Women  
15 West 36 Street, Suite 901  
New York, NY 10018

James L. Robertson, Esquire  
D. Jason Childress, Esquire  
Attorneys At Law  
Wise Carter Child & Caraway, P.A.  
P. O. Box 651  
Jackson, Mississippi 39205

Cliff Johnson, Esquire  
Attorney At Law  
Pigott Reeves Johnson  
A Professional Association of Lawyers  
775 North Congress Street  
Jackson, Mississippi 39202

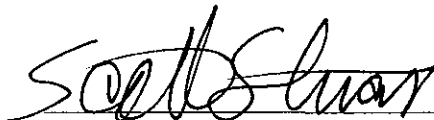
Poonam Juneja, Esquire  
Attorney At Law  
Mississippi Youth Justice Project  
Southern Poverty Law Center  
921 N. President Street, Suite B  
Jackson, MS 39202

James W. Craig, Esquire  
Attorney At Law  
Phelps Dunbar LLP  
4270 I-55 North  
Jackson, MS 39211-6391

Sara L. Ainsworth, Esquire  
Attorney At Law  
Legal Voice  
907 Pine Street, Suite 500  
Seattle, WA 98101

James M. Priest, Jr., Esquire  
Attorney At Law  
Gill, Ladner & Priest, PLLC  
403 South State Street  
Jackson, MS 39201

This the 21st day of January, 2011.



SCOTT STUART  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205-0220  
TELEPHONE: (601) 359-3680