

Darcy M. Goddard (No. 13426)
Legal Director
American Civil Liberties Union of Utah Foundation, Inc.
355 North 300 West
Salt Lake City, Utah 84103
Telephone: 801.521.9862 x. 108
Facsimile: 801.532.2850

Applicant as Amicus Curiae

IN THE SUPREME COURT OF THE STATE OF UTAH

State of Utah, in the interest
of J.M.S.

STATE OF UTAH,

Appellant,

vs.

J.M.S.,

Appellee.

Case No. 20091015-SC

**AFFIDAVIT OF DARCY M. GODDARD IN SUPPORT OF THE ACLU OF UTAH'S
REQUEST FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN
SUPPORT OF APPELLEE J.M.S.**

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

DARCY M. GODDARD, after being duly sworn, states from first hand knowledge of the facts and circumstances that:

1. I am the Legal Director for the American Civil Liberties Union of Utah Foundation, Inc. (“ACLU of Utah”). The proposed brief will be filed in support of Appellee, J.M.S., a person under 18 years of age.

2. I submit this affidavit in support of the ACLU of Utah’s motion for leave to file an amicus curiae brief in this proceeding. Counsel for both parties have been served with a copy of this motion. Mr. King consented to the filing. An e-mail message was sent to Mr. Ballard but we have not received a response.

3. The ACLU of Utah is a non-profit, non-partisan membership organization founded in 1958. The ACLU of Utah is the state affiliate of the American Civil Liberties Union (“ACLU”), which was founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Utah has more than 2,200 members and supporters. Both the ACLU of Utah and the ACLU are dedicated to defending the guarantees of liberty and equality found in the federal and state Constitutions.

4. Counsel for Appellee requested late last week that the ACLU of Utah consider submitting a brief of amicus curiae in this matter. We promptly obtained a copy of the record on appeal and the brief submitted by Appellant, the State of Utah, to the Utah Court of Appeals, on which the State also will rely before this Court. A true and correct copy of the ACLU of Utah’s letter requesting a copy of the record on appeal is attached hereto as Exhibit A.

5. On Friday, February 18, 2011, Appellee's counsel confirmed that he, too, would rely on his brief to the Utah Court of Appeals rather than submit a new brief here.

6. The ACLU of Utah has reviewed the briefing submitted in this matter by counsel for both parties, and believes it can provide important context, both legal and factual, for the arguments raised by the parties, which will substantially assist the Court in reaching a fair and just resolution in this case.

7. The ACLU of Utah and the ACLU have long histories of vigorously defending the right to privacy, including reproductive rights, through litigation and advocacy. Indeed, for more than thirty years, the ACLU has been involved with virtually every reproductive rights case to reach the Supreme Court of the United States.

8. The ACLU of Utah was co-counsel in the case of *Jane L. v. Bangerter*, 61 F.3d 1505 (10th Cir. 1995), which followed on the landmark holding of the United States District Court for the District of Utah in *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992), that under Utah State law "a woman who seeks or obtains an abortion does not risk criminal prosecution." *Id.* at 1547-48 (citing Utah Code Ann. 76-7-314 (Supp. 1991)).

9. The ACLU of Utah has also been involved in, and has advocated or testified at, every stage in the development of Utah's laws concerning reproductive freedom since at least 2003. True and correct copies of selected ACLU of Utah correspondence and advocacy materials in the area of reproductive freedom are attached hereto as Exhibit B.

10. In particular regard to the 2010 amendments to Utah's abortion statutes, on which both parties rely (*see, e.g.*, Appellant's Br. at 7-8 & nn. 1-2; Appellee's Br. at 9-12), the ACLU of Utah was actively engaged in lobbying against and educating the public about HB 462 (and the related HB 12). The amendments contained in HB 462 were proposed in direct response to

the facts of this case. ACLU of Utah Legislative and Policy Counsel Marina Baginsky Lowe extensively researched the relevant law in Utah and elsewhere, testified in multiple committee hearings, gave news media interviews, and lobbied individual legislators, warning them of the consequences of passing that legislation.

11. The ACLU of Utah's familiarity and expertise with regard to Utah's abortion statutes and related case law, and especially in regard to the 2010 revisions that followed the acts at issue here, could greatly assist the Court in evaluating the parties' arguments and reaching a just resolution in this case.

12. The ACLU has for years sought to protect the rights of indigent criminal defendants, including assisting in the successful appeal to the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

13. Moreover, for the last several years, the ACLU of Utah has been investigating the quality of indigent criminal defense in the State of Utah. These efforts have coincided with national efforts to examine the continuing problems and constitutional inadequacies relating to indigent criminal defense throughout the United States (*id.*), including a draft report issued in January 2008 by the National Legal Aid and Defender Association ("NLADA"), which ranked the State of Utah last amongst all states in compliance (or lack thereof) with the constitutional obligations set forth in the Supreme Court's decision in *Gideon*. See NLADA, *Gideon's Unfulfilled Promise: The Right to Counsel in America* at 7, 9 (January 31, 2008) (draft report). True and correct excerpts of this report are attached hereto as Exhibit C.

14. In reaching that conclusion, the NLADA examined, among other things, the extent to which each state's system for providing indigent criminal defense complies (or not) with the American Bar Association's "10 Principles of a Public Defense System," (*see* Ex. C

hereto at 7 (sidebar on left)), and whether the state provides any funding for the provision of indigent defense (*id.* at 9). Utah as measured on a statewide basis does not comply fully with any of the “10 Principles” and is one of only two states (Pennsylvania is the other) that receive no state funding for indigent defense. *See id.*; *see also* National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* at 54 (April 2009). True and correct excerpts of this report are attached hereto as Exhibit D.

15. Utah is thus ranked in NLADA’s lowest category: “Gideon Ignored.” *See* Ex. C hereto at 6. Additionally, Utah ranks 48 out of 50 states in per capita spending for indigent defendants, spending just \$5.22 per Utahn as compared to the national average of \$11.86. *See* NLADA, *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis*, at 7 (June 2008) [hereinafter, “*Race to the Bottom*”]. True and correct excerpts of this report are attached hereto as Exhibit E.

16. The criminal prosecution of Appellee commenced in Uintah County. Uintah County, like all Utah counties, receives no state funding for indigent defense and has no public defender office. In 2009, Uintah County spent approximately \$4.16 per capita on indigent defense, which is far below the national average (\$11.86) and even below the Utah average (\$5.22). *See Indigent Defense Financing Information*, STATE ACCOUNTING OFFICE, http://www.sao.utah.gov/lgr/2010countybudgets_1.html (last visited Jan. 25, 2011); *Race to the Bottom*, Ex. E hereto at 7. Population data for Uintah County was obtained at www.census.gov (last visited Jan. 25, 2011).

17. Because there is no public defender office, public defenders in Uintah County, as in most Utah counties, must grapple with county attorneys and commissioners to negotiate

individual contracts, which often do not include appropriate compensation or support services, and which provide no oversight of attorney qualifications, workload, or work product.

18. As in many Utah counties, the Uintah County Commission hires public defenders on the direct recommendation of the Uintah County Attorney. *See Uintah County Commission Minutes* (Oct. 29, 2009) (<http://www.co.uintah.ut.us/comm/minutes/2009/oct/10-26minutes.pdf>). Uintah County awards public defender contracts on the basis of the lowest bid submitted. *See Uintah County Commission Minutes* (Oct. 4, 2010) (<http://www.co.uintah.ut.us/comm/minutes/2010/Oct/10-04-2010.pdf>). Uintah County does not maintain records to indicate what the contract caseload is for public defenders generally, or for specific public defenders.

19. Of particular relevance here, Uintah County has no written policies or procedures for identifying conflicts of interest in indigent defense cases, and instead relies only on presiding judges to disqualify attorneys for conflicts of interest that, presumably, would first have to be raised by the attorney himself or the clients whom he represents.

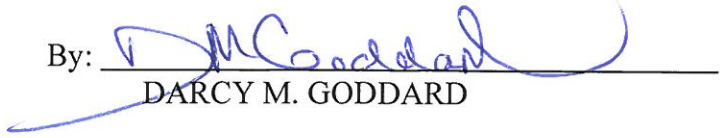
20. Given the ACLU of Utah's long-standing efforts to research and evaluate the provision of indigent criminal defense services throughout the State of Utah, including in Uintah County, we can provide the Court with additional context both for Appellee's claim of ineffective assistance of counsel and as to whether the juvenile court correctly allowed her to withdraw her plea of "no contest."

21. The irregular, and almost entirely unregulated, county-by-county indigent defense "system" that results from the lack of state oversight and the disparate funding, training, and access to resources experienced by public defenders is constitutionally inadequate and ripe for judicial challenge. Various ACLU affiliates have brought such cases nationwide. *See, e.g., Duncan v. Michigan*, Case No. 07-242-CZ (filed Feb. 2007) (Michigan); *Best v. Grant County*,

Case No. 04-2-00189-0 (filed Dec. 2004) (Washington); *White v. Martz*, Case No. C-DV-2002-133 (filed April 2002) (Montana).

DATED this 22 day of February, 2011.

By:


DARCY M. GODDARD

SUBSCRIBED AND SWORN to before me, this 22 day of February, 2011.


Notary Public

