STATE OF INDIANA)
) SS
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CRIMINAL DIVISION - ROOM 3
CAUSE NO.: 49G03-1103-MR-014478

THE STATE OF INDIANA,)
)
Plaintiff,)
)
v.)
)
BEI BEI SHUAI,)
)
Defendant.)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Respectfully submitted,

PENCE HENSEL LLC

By: _____
Linda L. Pence, Atty No.: 13198-98
David J. Hensel, Atty No.: 15455-49
135 N. Pennsylvania St., Suite 1600
Indianapolis, IN 46204
Phone: (317) 833-1111
Facsimile: (317) 833-1199
Email: lpence@pencehensel.com
dhensel@pencehensel.com

NATIONAL ADVOCATES FOR PREGNANT WOMEN

By: _____
Kathrine D. Jack, Atty No.: 26851-49
LAW OFFICE OF KATHRINE JACK
P.O. Box 813
Greenfield, IN 46140
Phone: (317) 318-2017
Facsimile: (317) 318-2017
Email: kathrinejack@gmail.com

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SUMMARY OF THE ARGUMENT

This case involves the Marion County Prosecutor's decision to punish a woman who carried her pregnancy for months and, in a moment of severe depression, attempted suicide, which is not a crime in Indiana. The prosecutor contends that it is appropriate to criminally prosecute for murder and feticide, a woman who was hospitalized in order to save her life and her pregnancy, who agreed to then undergo cesarean surgery in the interest of her baby's life and health, and then grieved as she held the newborn baby she gave birth to but that could not survive.

This Court should dismiss the Information in its entirety for multiple and independent reasons, each supporting dismissal. These include:

- The State's prosecution of a pregnant woman for committing a legal act – suicide – cannot serve as a basis for criminal prosecution. If the legislature wanted to criminalize suicide attempts by pregnant women, it would have done so plainly and clearly;
- Both the feticide and murder statutes were enacted to apply to third parties harming pregnant women, not to prosecute pregnant women but rather to protect them;
- The State cannot provide any support in the plain language of the murder and homicide statutes – indeed if the legislature intended to target pregnant women to be charged with murder or feticide, it would have explicitly so stated;
- There is no legislative history supporting the State's untested legal theory, indeed the Indiana legislature has not enacted, but tabled and sent to a study group, proposed legislation that would have explicitly created special criminal penalties for pregnant women.
- The State's prosecution is an abrogation of common law immunity that protects pregnant women who have conditions, take actions or do not act in ways that may be perceived as harmful to eggs, embryos and fetuses and/or result in pregnancy loss – other courts facing similar cases have dismissed these misguided prosecutions finding that immunity for pregnant women is grounded in the wisdom of experience;
- The State's short-sighted interpretation of the law as it relates to pregnant women is contrary to the near unanimous legal conclusions reached in other states' courts reviewing similar unauthorized criminal prosecutions of women;

- The State's prosecution of a pregnant woman for attempting to commit suicide constitutes unlawful gender discrimination since it would not be a crime for a man to attempt suicide;

- The State's unprecedented and legislatively unauthorized prosecution is contrary to Indiana law and the public health consensus on maternal and child health and suicide that recognizes that these are health, not criminal issues;

- The State has deprived Ms. Shuai of her constitutional due process rights because she had no notice what criminal statutes she could be violating and would violate and because the prosecution itself is contrary to the Constitution's prohibition against ex post facto laws;

- The State's interpretation renders the murder and feticide statutes unconstitutionally vague because, as many courts have recognized, practically every woman could face criminal charges for a limitless number of conditions, actions and inactions during the course of her pregnancy;

- The State's enforcement of criminal laws against pregnant women creates incentives for women to terminate pregnancies and violate their right to privacy; and

- The Marion County Prosecutor's ill-informed decision to prosecute constitutes cruel and unusual punishment.

No woman in Indiana history has ever been charged with murder or feticide based solely upon the allegation that the pregnant woman attempted suicide or that something the woman did or experienced during pregnancy caused the death of her newborn. To do so would discourage pregnant women with mental health issues and other serious health conditions from seeking health care or help of any kind in fear of arrest, would be contrary to the medical and public health consensus, and would seriously interfere with women's constitutional rights. It also pits health providers against the patients they are attempting to heal.

Moreover, if the Court allows these charges to stand, all Indiana pregnant women who seek health care may become suspect for a criminal charge since anything they do or experience could be classified as an attempt to harm or injure their fetus. The General Assembly has not intended this result. Sister state courts have grappled with similar prosecutorial theories for

thirty years and have nearly unanimously rejected these attempts to police pregnancy, refusing to "pit woman against fetus in criminal court." *State v. Ashley*, 701 So.2d 338, 341 (Fl. 1997).[1]

FACTS

On December 23, 2010 Bei Bei Shuai, a thirty-four year-old pregnant woman, suffering from a major depressive episode, isolated and apparently experiencing a complete loss of reasoning powers, attempted to end her own life by consuming poison.

Ms. Shuai believed that she would die immediately. Later that day, Bing and Sui Mak, two individuals who knew her well, observed that she was highly emotional and did not look healthy. Ms. Shuai was persuaded to get into an automobile and was taken to the nearest hospital, St. John's Medical Center, Anderson, Indiana.

On December 24, 2010, she was transferred to Methodist Hospital, Indianapolis, Indiana ("Methodist") where she was admitted for care. The hospital did not perform cesarean surgery upon admittance to the hospital, but decided to monitor her health and wait.

On December 31, 2010, six days after Ms. Shuai's admission to the hospital, Ms. Shuai underwent cesarean surgery resulting in the delivery of a premature infant. On January 2, 2011, medical staff approached Ms. Shuai and discussed discontinuing life support that the newborn was receiving. The newborn died in its mother's arms on January 3, 2011. At the same time Methodist was counseling her to discontinue life support, Methodist was also notifying authorities about the expected death of the premature newborn. The Marion County Coroner and Indianapolis Metropolitan Police Department arrived at the hospital to investigate immediately upon Baby Shuai's death.

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[1] For the Court's convenience, an appendix is being filed which includes the cases, legislative materials and articles referred to in this memorandum.

On January 3, Ms. Shuai was transferred to the Methodist Psychiatric Unit where she remained, under high-risk suicide precautions, for thirty-two days.

On March 14, 2011, the State filed the present information charging Ms. Shuai with murder, I.C. 35-42-1-1, and attempted feticide, I.C 35-42-1-6. On March 14, Ms. Shuai voluntarily surrendered to the police and was arrested. She was transferred to the Marion County Jail, where she is currently held without bail.

ARGUMENT

I. Neither the Murder Statute Nor the Feticide Statute Applies to a Woman Who Attempted Suicide While Pregnant

A. Indiana Has Chosen Not to Address Suicide and Attempted Suicide Through Its Criminal Laws

It is undisputed that these charges are a result of a suicide attempt. Indiana, consistent with the overwhelming majority of other states, has chosen not to address attempted suicide through the criminal law. *See Prudential v. Rice*, 52 N.E. 2d 624, 626 (1944) (recognizing that Indiana does not have a statute making an attempt to commit suicide a public offense.) *See also* R. Litman, *Medical-Legal Aspects of Suicide*, 6 Washburn L.J. 395, 1966-1967.

Consistent with the recommendations of leading medical and public health authorities, Indiana has addressed the issue of suicide and attempted suicide as a public health issue, not a criminal one. Specifically, the Indiana Department of Health defines suicide as a public health problem and clarifies that "[t]aking a public health approach to suicide involves defining the problem, identifying the causes and protective factors, developing and testing interventions, and implementing interventions to discover what makes an impact in reducing suicide attempts and deaths." Indiana Department of Health, Suicide in Indiana 2001-2005, pg. 7, (2007), *available at* www.in.gov/isdh/files/SuicidePaper_9-5-07.pdf. The Indiana Department of Health also funds

the Indiana Suicide Prevention Coalition (ISPC), a group that developed a state plan of action to prevent suicide. Indiana Department of Health, Suicide in Indiana 2001-2005, Injury Prevention Program, Sept. 2007, available at www.in.gov/isdh/files/SuicidePaper_9-5-07.pdf. The Department of Health identifies, in addition to ISPC, eleven local suicide prevention councils working in communities across the state to prevent suicide. *Id.* at 37.

In this case, the prosecution is asking this Court to rewrite the state's murder and feticide laws to create a gender specific law permitting prosecution of pregnant women who become so depressed and hopeless that they attempt to end their own lives.[2] There is no statute and there is no legislative history of any kind to indicate that the General Assembly intended to treat suicide attempts as a public health issue for everyone except pregnant women.

B. Neither the Murder nor the Feticide Statute Makes Pregnant Women Criminally Liable for the Outcome of Their Pregnancies

As a preliminary matter, the State has failed to identify which prong of the murder statute it alleges Ms. Shuai violated.[3] Regardless of which prong of the murder statute the prosecution alleges Ms. Shuai violated, the murder and feticide laws do not by their plain language make pregnant women criminally liable for attempting to end their lives or for the outcomes of their

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[2] Between 2001 and 2005 suicide was identified as the eleventh leading cause of death in Indiana. Indiana Department of Health, Suicide in Indiana 2001-2005, pg. 3, (2007), *available at* www.in.gov/isdh/files/SuicidePaper_9-5-07.pdf. Indiana females died from suicide by poisoning more frequently than by firearms or by suffocation. *Id.* at 14. In 2003-2005 Indiana females accounted for the majority of patients seen inpatient and in the emergency room for suicide attempts. Id at 19-23. 93% of the inpatients seen for suicide attempts involved poisoning. Id. at 19.

[3] *See* Motion to Quash Information (filed March 21, 2011 and hereby incorporated by reference) ("The Information does not specify which of the four prongs the State alleges Ms. Shuai violated. In the language of the charges, however, the State alleges that on January 3, 2011 (the baby's date of death), the Defendant did "knowingly kill a fetus that had attained viability." Thus, it appears that the State is relying upon prong 4. However, the Information is confusing because the State claims the date of the offense to be January 3, approximately three days after the premature birth by cesarean surgery and the date Angel Shuai died. Thus, it is possible that the State is instead relying upon IC 35-42-1-1(1) (the knowing and intentional act of killing a human being). ... The Information is not clear as to whether the State is prosecuting Ms. Shuai for killing a human being or a viable fetus.").

pregnancies. Rather, by their plain language and legislative history, it is clear that these laws were intended to punish **third parties** who cause injury to or attack a pregnant woman and cause a pregnancy loss.

Statutory interpretation is purely a question of law. The Indiana Supreme Court recently stated the rules for statutory interpretation:

> The first step in interpreting a statute is to determine whether the Legislature has spoken clearly and unambiguously on the point in question. When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense. Clear and unambiguous statutes leave no room for judicial construction. However when a statute is susceptible to more than one interpretation it is deemed ambiguous and thus open to judicial construction. And when faced with an ambiguous statute, other well-established rules of statutory construction are applicable. One such rule is that our primary goal of statutory construction is to determine, give effect to, and implement the intent of the Legislature. To effectuate legislative intent, we read the sections of an act together in order that no part is rendered meaningless if it can be harmonized with the remainder of the statute. We also examine the statute as a whole. And we do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.

City of Carmel v. Steele, 865 N.E.2d 612, 618 (Ind. 2007)

Applying these rules to this case makes it clear that the murder and feticide statutes do not criminalize the facts alleged by the prosecution.

1. The Plain Language of the Murder and Feticide Statutes Does Not Include Pregnant Women

Neither the murder nor the feticide statute applies to pregnant women who attempt suicide or to pregnant women who experience any other health problem, circumstance, action or inaction that may make them unable to guarantee a healthy birth outcome. Consistent with the common law and legislative history of these statutes, neither the murder nor feticide statute mentions pregnant women or pregnant women in relationship to the fetuses they carry and sustain as best they can. Nor do the statutes mention suicide or attempted suicide. The criminal

statutes do not suggest, with any other words, that they apply to pregnant women or may be used as tools for punishing a woman who risks her life and health by becoming pregnant and giving birth but is, for whatever reason, unable to ensure a healthy pregnancy outcome.

While the murder and feticide statutes do mention fetuses, the plain language and legislative history of the laws confirm that this language was used to ensure that the State could take criminal action against **third parties** who injure or attack pregnant women causing fetal loss. This language alone, however, does not make these statutes applicable to the pregnant woman herself, since a pregnant woman, biologically, medically, and constitutionally is so substantially differently situated to the embryo and fetus she carries and sustains than is a third party.

In *Stallman v. Youngquist*, where a plaintiff only sought to impose civil liability for an unintended injury allegedly caused by a pregnant woman, the Supreme Court of Illinois recognized that imposing legal liability on pregnant women is very different from imposing it on third parties because of the "serious ramifications for all women and their families, and for the way society views women and women's reproductive abilities." 521 N.E.2d 355, 357 (Ill. 1988). As the court explained:

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

Id. Given this fact of life, it is clear that if the Indiana General Assembly had meant these criminal statutes to apply to pregnant women, they would have said so explicitly. Because the statutes relied upon, by their plain language, do not mention suicide or attempted suicide and because they do not include "pregnant women" or pregnant women in relation to the fetuses they have carried, no further analysis is necessary for the Court to conclude that the Information fails to state facts that allege murder or feticide.

2. The General Assembly Has Not Abrogated the Common Law "Immunity" that ensures that Pregnant Women will not be punished for the outcomes of their pregnancies

"[T]here is a presumption that the legislature does not intend to make any change in the common law beyond those declared in either express terms or by unmistakable implication." *Caesar's Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120 (Ind. 2010). Indiana courts "presume that the legislature did not intend to make any change in the common law beyond those declared either in express terms or by unmistakable implication." *South Bend Community School Corp. v. Widawski*, 622 N.E.2d 160 (Ind. 1993).

At common law, pregnant women were not subjected to criminal prosecution relating to the death of the pregnant woman's fetus, despite abortion laws that criminalized a third party's termination of her pregnancy. The common law did not treat the fetus as a separate person in relation to the pregnant woman herself. The Connecticut Supreme Court explained:

> At common law an operation of the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender in the physical performance of the operation did not make her an accomplice in his crime. ... It was in truth a crime which, in the nature of things, she could not commit.

State v. Carey, 56 A. 632, 636 (Conn. 1904)

In 1997, the Florida Supreme Court squarely addressed whether a woman who shot herself in the stomach could be charged with homicide and concluded that "[a]t common law, while a third party could be held criminally liable for causing injury or death to a fetus, the pregnant woman could not be[.]" *State v. Ashley*, 701 So.2d 338 (Fl. 1997). In *Ashley,* a pregnant woman became so distraught that she shot herself in the stomach. She survived but her child was born alive and then died shortly after birth. *Ashley*, 701 So.2d 338 (Fl. 1997). Ms. Ashley was arrested and charged with murder and manslaughter. The Court directly answered the question, "May an expectant mother be criminally charged with the death of her born alive child resulting from self-inflicted injuries during the third trimester of pregnancy?" The Court answered "No." *Id.*, 339. As the Court explained, "At common law, while a third party could be held criminally liable for causing injury or death to a fetus, the pregnant woman could not be." The court further explained: immunity from prosecution for the pregnant woman was grounded in the "wisdom of experience."

> While it may seem illogical to hold that a pregnant woman who solicits the commission of an abortion and willingly submits to its commission upon her own person is not an accomplice in the commission of the crime, yet many courts in the United States have adopted this rule, asserting that its exception from the general rule is justified by the wisdom of experience.
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> *Basoff v. State*, 208 Md. 643, 119 A.2d 917, 923 (1956). The woman was viewed as the victim of the crime. *See, e.g., Richmond v. Commonwealth*, 370 S.W.2d 399, 400 (Ky. 1963) ("[S]he is a victim rather than an offender.") The criminal laws were intended to protect, not punish her. *See, e.g., Gaines v. Wolcott*, 119 Ga.App. 313, 167 S.E.2d 366, 370 (1969) (noting that the criminal laws were designed for the "protection of . . . pregnant females").

Thus, the Florida Supreme Court declined "the State Attorney's invitation to jump into the fray" where there was no novel legislative intent to target pregnant women and reminded the prosecution that "the making of social policy is a matter within the purview of the legislature -

not this Court." The Court concluded that there was "no novel legislative intent to trump the common law and pit woman against fetus in criminal court." *Id.* at 341.

Similarly, the Court of Appeals of Georgia quashed an indictment charging a pregnant woman who shot herself in the stomach with a violation of Georgia's criminal abortion law. *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998) (the "statute does not apply to the defendant's conduct").

The common law doctrine, recognizing the biological fact that pregnant women are not in the same relationship to the fetuses they carry as third parties who attack pregnant women, must remain in effect until the General Assembly has clearly and unequivocally spoken otherwise. Since the Indiana legislature has not unequivocally revoked the common law's respect for pregnant women and their unique situation, this Court must conclude that the legislature did not intend to abrogate the common law.

3. The Legislative History of the Fetal Murder and Feticide Statutes Confirms That These Laws Were Intended to Punish Third Parties Who Harm Pregnant Women and Cause Fetal Loss, Not Pregnant Women Themselves

The legislative history of these laws makes clear that the General Assembly never intended them to be used as a mechanism for punishing attempted suicide or for punishing pregnant women who can not guarantee healthy birth outcomes.

Indiana's feticide law was adopted in 1979, making it a class C felony for a person to "knowingly or intentionally terminate[] a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus[.]" Terminations of human pregnancies that comply with Indiana's abortion laws are exempt. This law was passed to punish those who perform illegal abortions. *See* Jennifer E. Smith, *Grieving Families Seek Law Change*, Indianapolis Star, June 28, 1995, at E1 ("The law, adopted in 1979, was aimed at punishing those

who performed illegal abortions, according to Richard Good, executive director at the Indiana Prosecuting Attorneys Council."). The feticide law was not substantively changed until 2009, when feticide was upgraded from a class C felony to a class B felony.

Consistent with the application of similar laws in virtually all other states, Indiana has applied its feticide laws to **third parties** who cause a fetal loss to pregnant women and the fetuses they carry and sustain. *See, e.g.*, *Shane v. State*, 716 N.E.2d 391, 396 (Ind. 1999) (man who participated in the shooting death of a pregnant woman convicted of murder for the pregnant woman's death and feticide for the death of her twenty-nine week fetus); *Baird v. State*, 604 N.E.2d 1170 (Ind. 1992) (man who stabbed pregnant woman to death was convicted of murder of the pregnant woman and feticide for the death of her fetus). Consistent with the legislative history of this law as a mechanism for punishing certain abortion providers and other third parties who cause a pregnant woman to suffer a fetal loss, in its thirty-one year history, there is no case in Indiana where a woman has been charged with feticide based on the death of the fetus she herself carried.

The legislative history of the fetal murder provision of Indiana's murder law similarly makes clear that this law was intended to address and reach **third parties**, not the pregnant woman herself. The fetal murder provision of the law was added to Indiana's murder law in 1998 as part of a package of criminal law revisions addressing criminal liability for attacks on a pregnant woman that cause her to suffer a pregnancy loss. *See* Indiana Public Law 261-1997: (vetoed by Governor O'Bannon in 1997, the General Assembly overrode the veto in 1998). In addition to creating the fetal murder provision, the 1998 law also amended the definition of "serious bodily injury" to include "loss of a fetus" (I.C. 35-41-1-25), added "kills a fetus that has attained viability" to the definition of manslaughter (I.C. 35-42-1-3) and involuntary

manslaughter (I.C. 35-42-1-4), amended "aggravated battery" to include a battery causing "the loss of a fetus" (I.C. 35-42-2-1.5(c)), and added "The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability" as an aggravating circumstance for the purposes of the death penalty (I.C. 35-50-2-9(b)(16)). *See* Indiana Public Law 261-1997.

This legislative package was proposed by the legislature in reaction to an incident where a pregnant woman and her husband were shot, allegedly by two brothers, during an argument. *See* Stuart A. Hirsch, *Senate's Override Turns Bill on Killing Fetus Into Law*, Indianapolis Star, Jan. 23, 1998, at C1; Robert N. Bell, *Fatal Shooting Prompts Call to Up Penalty If Fetus Dies*, Indianapolis Star, Dec. 15, 1995, at E3; Jennifer E. Smith, *Grieving Families Seek Law Change*, Indianapolis Star, June 28, 1995, at E1. The woman's fetus was gravely injured by the shooting and was later stillborn. Under Indiana's 1995 criminal laws, the defendants could not be charged with murder for the death of the fetus, so they were charged with feticide, which was only a C felony at the time. The case became the driving force for the passage of these criminal laws with the aim of increasing criminal penalties when a pregnant woman was the victim of a crime that caused her to lose the pregnancy. It appears that at no time during the debate over this bill did anyone discuss or even mention that the new law was intended to or could be used to charge women with murder or any other crime in relationship to their own pregnancies. The only discussion regarding pregnant women centered on the effect the law might have on legal abortions in Indiana. Governor O'Bannon vetoed the bill, stating concern that the law could be used against *doctors* who perform abortions. *See* Stuart A. Hirsch, *Senate's Override Turns Bill on Killing Fetus Into Law*, Indianapolis Star, Jan. 23, 1998, at C1.

The legislative history is very clear. By enacting the fetal murder provision, the General Assembly sought to criminalize as murder a **third party's** attack on a pregnant woman that causes her fetus to die in utero. The General Assembly did not intend to create a mechanism for the criminal courts to police and punish pregnant women. "Judicial scrutiny into the day-to-day lives of pregnant women would involve unprecedented intrusion in to the privacy and autonomy of the citizens of this State.... [and] must come from the legislature only after thorough investigation, study and debate." *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

More recent legislative history confirms that the murder and feticide statutes were intended to address **third-party** attacks on pregnant women that cause fetal loss and not to create a mechanism through the criminal law for policing and punishing women for the outcomes of their pregnancies. In 2009, the legislature considered the feticide and fetal murder statutes again and amended the feticide law to increase it from a class C felony to a class B felony. This change was enacted in response to a case in which a pregnant woman was shot in the stomach during a bank robbery. The woman, who was about five months pregnant with twins, lost both babies as a result of injuries sustained during the shooting. At five months of gestation, these extremely premature newborns were not viable, and therefore the crime was deemed a feticide, rather than murder. Marion County Prosecutor Carl Brizzi responded by calling on legislators to change the murder law to include any fetal death, not just the death of a viable fetus. Jon Murray, *Brizzi Aims to Expand Fetal Homicide Laws*, Indianapolis Star, Apr. 30, 2008, at A1. Following Prosecutor Brizzi's proposal, legislators proposed a bill to amend the fetal homicide statute to strike the viability requirement. Ultimately, however, the General Assembly responded by upgrading the feticide crime to a class B felony, effectively enhancing the sentence for the crime.

Since the most recent amendments to the fetal murder and feticide statutes, the legislature has considered and failed to pass several bills that would have created criminal liability for a pregnant woman in relation to the fetus she carries. Most recently in the 2011 legislative session, the Indiana House is considering House Bill 1502, which as originally submitted would create a new class D felony for "a person who knows or should reasonably know that the person is pregnant and knowingly or intentionally ingests or otherwise places into the person's body an illegal drug." Ind. H.B. 1502 (2011) (original version). In committee, the bill was first amended to apply only when the ingestion of a controlled substance allegedly results in a stillbirth. The committee hearing focused on the facts that such a law could create perverse incentives for pregnant women with drug issues, such as avoiding prenatal care or seeking abortion to avoid arrest, and the significant public health and constitutional implications such a law would have. After hearings, the committee further amended the bill to request a study committee for the issue.

It is thus clear both as a matter of plain language and legislative intent that neither Indiana's feticide nor fetal murder law applies or was intended to apply to a pregnant woman who experiences a miscarriage, stillbirth or who otherwise cannot ensure the health or life of a child she attempts to carry to term and then undergoes labor, and surgery in some cases, to deliver and give birth.

4. Criminal Statutes Must Be Strictly Construed Against the State and Must Be Interpreted to Avoid Illogical, Absurd, and Unconstitutional Results

"Criminal statutes cannot be enlarged by construction, implication, or intendment beyond the fair meaning of the language used." *Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000), *trans. denied* (citation omitted). In the *Herron* case, the St. Joseph County Prosecutor charged a woman with neglect of a dependent based on the allegation that she ingested cocaine

while pregnant. The Indiana Court of Appeals refused to extend the neglect of a dependent statute beyond the plain meaning of the statute.

The Indiana Supreme Court stated "we do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result." *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind. 2007). The prosecution's interpretation of the feticide and fetal murder laws would lead to illogical, unjust and absurd results as recognized by the courts of other states as well as by medical and public health experts. Under the prosecution's interpretation of the feticide and fetal murder laws, any woman who suffers a miscarriage, stillbirth, or infant death may be arrested if it is alleged that something she did or did not do or a condition she experienced may have caused the death of her fetus.

Because pregnancy occurs inside of a woman's body, there will be, at a minimum, circumstantial evidence in every single case that that the woman herself caused or contributed to that loss. As the Maryland Court of Appeals noted in refusing to interpret Maryland's criminal child endangerment statute to apply to the context of pregnancy, pregnant women could otherwise be subjected to criminal investigation and liability for "engaging in virtually any injury-prone activity" such as:

> continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little[.]

Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006). Under a construction of the murder and feticide laws offered by the prosecutor, "any woman who suffers a post-viability miscarriage could be subject to scrutiny regarding whether or not she intentionally acted to cause the miscarriage." *Hillman v. State*, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998). See also *People v.*

Stewart, No. M5008197 (Cal. Mun. Ct. Feb. 26, 1987) (describing prosecution of defendant for criminal neglect in part because she failed to follow her doctor's orders to stay off her feet and refrain from sexual intercourse while she was pregnant); *Reinesto v. Superior Court*, 894 P.2d 733, 736-38 (Ariz. Ct. App. 1995) (dismissing child abuse charges against a pregnant woman who allegedly used heroin and finding that expansion of the statute to include fetuses would offend due process notions of notice because it would make everything a pregnant woman did subject to state scrutiny); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming the reversal of a child abuse conviction of a pregnant woman who used illegal drugs and concluding that applying the statute would deprive the woman of constitutionally-mandated notice).

The application of the fetal murder and feticide laws to a pregnant woman in relation to the fetus she carries would not only have a reach clearly unintended by the legislature but also serious public health consequences that are illogical, absurd and similarly not within the legislature's intent.

Indeed, such an application of the criminal laws is recognized as counter-productive to maternal, fetal, and child health. Public health and medical experts have cautioned that taking a punitive, criminal punishment approach to health conditions that women experience during pregnancy leads to worse public health outcomes. It has long been recognized, for example, that the threat of arrest leads to worse health outcomes because it deters pregnant women from seeking help and admitting their problems for fear of arrest. See, e.g., American College of Obstetrics and Gynecology Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, No. 321, Nov. 5, 2005, at 8 ("Various studies have suggested that attempts to criminalize pregnant women's behavior discourages women from seeking prenatal care."). *See also Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (noting, in the course of rejecting

Fourth Amendment exception for prosecutorial drug-testing of pregnant women, *amicus* submissions "claiming a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health"). The American Medical Association has stated "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate." Am. Med. Ass'n, Legal Intervention During Pregnancy, 264 JAMA 2663, 2667 (1990). The American College of Obstetrics and Gynecology Committee on Ethics has similarly concluded, "Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses." American College of Obstetrics and Gynecology Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, No. 321, Nov. 5, 2005, at 8.

According to leading public health authorities, "Depression is common during pregnancy—between 14 percent and 23 percent of pregnant women will experience depressive symptoms while pregnant." American Psychiatric Association & American College of Obstetrics and Gynecology, *Depression During Pregnancy: Treatment Recommendations*, Aug. 21, 2009, *available at* http://www.acog.org/from_home/publications/press_releases/nr08-21-09-1.cfm. The American College of Obstetrics and Gynecology has issued treatment recommendations for pregnant woman suffering from depression recommending that pregnant women with "suicidal or psychotic symptoms should immediately see a psychiatrist for treatment." American Psychiatric Association & American College of Obstetrics and Gynecology, *Depression During Pregnancy: Treatment Recommendations*, Aug. 21, 2009, *available at* http://www.acog.org/

from_home/publications/press_releases/nr08-21-09-1.cfm. Major depression, the leading cause of disease-related disability among women worldwide has a median age of onset during the childbearing years. See Jennifer L. Melville, MD, MPH, et al., Depressive Disorders During Pregnancy: Prevalence and Risk Factors in a Large Urban Sample, 116 Am. J. OBSTET & GYNECOL. 5 (2010). Major depressive disorders are unlikely to remit without treatment. *See id.*

An interpretation of the murder and feticide statutes that subjects pregnant women who are depressed and attempt, or perhaps even contemplate, suicide to criminal liability would surely discourage pregnant women suffering from depression from seeking mental health care or from telling anyone including health professionals, family, or friends of their condition. It would be an absurd and unjust interpretation of the murder and feticide statutes to conclude that the General Assembly intended to deter women like Ms. Shuai from telling her friends about the steps she had taken to try and end her life, and instead return home to die alone. This would be true for any other condition, circumstance, action or inaction that could be construed as risking harm to fertilized eggs, embryos or fetuses.

Such an interpretation of these laws would effectively mandate that women, upon becoming pregnant, lose their rights to informational privacy and provider-patient confidentiality, since their health conditions – from depression to addiction to unaddressed obesity and diabetes – could now be treated as reportable criminal behavior. It would eliminate confidentiality in pregnant women's mental health care treatment as well. Clearly the legislature did not intend such illogical, absurd and dangerous results.

C. The Courts of Sister States Have Refused to Expand Criminal Laws to Make Pregnant Women Criminally Liable for the Outcome of Their Pregnancies

The courts of sister states have properly refused to expand the reach of murder and manslaughter crimes to the context of pregnant woman. The Supreme Court of Hawaii noted "An overwhelming majority of the jurisdictions confronted with the prosecution of a mother for her own prenatal conduct, causing harm to a subsequently born child, refuse to permit such prosecutions[.]" *State v. Aiwohi*, 123 P.2d 1210, 1214 (Haw. 2005). In the *Aiwohi* case, a woman's baby was born alive but died a few days later. The prosecutor alleged the death was a result of the mother's alleged use of methamphetamine during her pregnancy. The Supreme Court of Hawaii concluded that "a mother's prosecution for her own prenatal conduct, which causes the death of the baby subsequently born alive, is not within the plain meaning of the [the state's manslaughter statute]." *Id.* at 1214. The Wisconsin Court of Appeals also refused to permit prosecutors to use the State's homicide laws as a mechanism for charging a woman who drank alcohol while pregnant with attempted first-degree murder. *State v. Deborah J.Z.*, 596 N.W. 2d 490 (Wis. Ct. App. 1999) (noting that under the prosecution's construction, "a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child.").

State courts have rejected similar attempts to judicially expand child endangerment, drug delivery, and a variety of other criminal laws to reach pregnant women in relation to the fetuses they carry. *See, e.g., State v. Geiser*, 763 N.W.2d 469 (N.D. 2009) (reversing conviction for endangerment of a child based upon suffering a stillbirth after allegedly overdosing on prescription pills); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007) (affirming the dismissal

of child endangerment charge based on allegation that child tested positive for methamphetamine and marijuana at birth and stating "[t]he plain language of the child endangerment statute does not proscribe conduct harmful to fetuses, and Section 1.205.4 clearly prohibits any cause of action against a mother for improper prenatal care."); *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007); *Kilmon v. State*, 905 A.2d 306 (Md. 2006) (noting the near universal view of other state courts ruling against prosecution of women who choose to carry a pregnancy to term in spite of a drug problem and holding " that it was not the legislature's intent that the [child abuse statute] apply to prenatal drug ingestion by a pregnant women."); *Ward v. Texas*, 188 S.W.3d 874 (Tex. App. 2006) (reversing the convictions of Tracy Ward and Rhonda Smith, who had both been convicted of delivery of a controlled substance to a "child" for their alleged *in utero* transfer of drug metabolites to their fetuses and holding that the plain language of the statute made clear that the state legislature did not intend the drug delivery statute to apply to the context of pregnancy); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (reversing the conviction of a woman who used cocaine during pregnancy for "delivering drugs to a minor"); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992) (finding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women in relation to their fetuses and to interpret the law otherwise would deprive pregnant women of fair notice).

These courts have recognized the significant due process implications of adopting such a judicial interpretation and the extent to which such an interpretation contradicts public health interests in advancing both maternal and fetal health. *See, e.g.*, *Collins v. State*, 890 S.W.2d 893, 898 (Tx. App. 1994) (dismissing charges against a pregnant woman who continued to term despite a drug problem, on state and federal due process grounds); *People v Hardy*, 469 N.W.2d 50, 55 (Mich. Ct. App. 1991) (holding that application of the state's drug delivery statute to a

pregnant woman who allegedly "delivered" cocaine to her child through the umbilical cord violates legislative intent and due process); *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (holding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women in relation to their fetuses, that to interpret the law otherwise would deprive pregnant women of fair notice, and noting that viewing addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution was the approach "overwhelmingly in accord with the opinions of local and national medical experts"); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1997) (dismissing child abuse charges filed against a woman who was pregnant and addicted to heroin, finding that the statute was not intended to include a pregnant woman in relationship to the fetus she carries and that to conclude otherwise would offend due process notions of fairness and render the statute impermissibly vague); *Sheriff, Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994) (holding that application of a child endangerment statute to a pregnant woman who uses an illegal substance would violate the plain meaning of the statute, deprive the woman of notice guaranteed by constitutional requirements of due process, and render the statute unconstitutionally vague); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (ruling that a child neglect statute could not be used to prosecute a woman who continued to term in spite of a drug problem because neither the statutory language nor the legislative history indicated its applicability to a pregnant woman in relationship to her fetus.).[4]

This Court should reach the same result that all but one of its sister state courts have reached and should reject the prosecutor's ill-conceived attempt to re-write the murder and feticide laws

[4] Only one state supreme court has held that the state's homicide crime could reach a pregnant woman who suffered a stillbirth allegedly as a result of using cocaine while pregnant. *State v. McKnight*, 576 S.E. 2d 168 (S.C. 2003). The same court, however, later overturned the conviction on post-conviction relief. *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

to apply to the facts of this case. According to the plain meaning and the General Assembly's intent in passing the murder and feticide laws, the alleged facts in this case do not constitute a crime.

II. Expanding the Murder and Feticide Statutes to Apply to This Case Would Be Unconstitutional

In addition to the fact that the legislature clearly never intended the murder and feticide statutes to apply to the context of a pregnant woman and the fetus she carried, the prosecution's proposed expansion of the murder and homicide laws would violate numerous rights and protections provided by the state and federal constitutions, including rights of due process, privacy, equal protection, and the prohibition against cruel and unusual punishment.

A. Applying the Fetal Murder and Feticide Statutes to Ms. Shuai Violates Her Constitutional Rights to Due Process Notice and the Prohibition Against Ex Post Facto Laws

A judicial construction that is new and unforeseen violates Due Process, in much the same way that *ex post facto* application of a newly enacted statute would. *Bouie v. Columbia*, 378 U.S. 347, 353-54 (1964). In *Cramp v. Board of Public Instruction*, the Supreme Court said, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute . . . . All are entitled to be informed as to what the State commands or forbids." 368 U.S. 278, 287 (1961) *(quoting Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (citation omitted)). *See also Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) ("Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.").

First, there is no way Ms. Shuai could have been aware that attempting suicide could subject her to criminal liability. It is undisputed that attempted suicide is not a criminal offense in Indiana. Second, although hundreds of Indiana newborns die within the first 28 days of life, and

although some of those losses may be attributed to things pregnant women did or did not do during the course of her pregnancy, we are not aware of a single case in which a woman was charged with or convicted of murder or feticide based solely on allegations that she did or did not do something during pregnancy. Nor has the murder or feticide laws ever been applied to the hundreds of Indiana pregnant woman who experience a stillbirth or miscarriage each year.

This novel interpretation of the fetal murder and feticide laws cannot be retroactively applied to Ms. Shuai. A retrospective application would not only violate the due process requirement of prior notice, but also the constitutional proscription against *ex post facto* laws. "No Bill or Attainder or ex post facto law shall be passed." U.S. Const., art I, § 9, cl. 3. Article 1, Section 24 of the Bill of Rights of the Indiana Constitution provides that "*No ex post facto* law, or law impairing the obligation of contracts, shall ever be passed." Therefore, this Court must dismiss this prosecution as a violation of Ms. Shuai's right to Due Process.

B. Applying the Murder and Feticide Statutes to Ms. Shuai Would Render the Statutes Unconstitutionally Void For Vagueness

The guarantee of due process also ensures that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961). A statute is void for vagueness if, as judicially construed, it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). See also *Jackson v. State*, 634 N.E.2d 532, 535 (Ind. App. 1994) ("state and federal vagueness analysis is the same").

The interpretation the prosecution urges would render these statutes void for vagueness because pregnant women of ordinary intelligence would not be on notice of which conditions, actions, inactions or circumstances during pregnancy would subject them to investigation, arrest, and prosecution if they suffered a perinatal loss. As the American College of Obstetrics and Gynecology has stated:

> [P]unitive and coercive policies may have even broader implications for justice for women. Because many maternal behaviors are associated with adverse pregnancy outcome, these policies could result in a society in which simply being a woman of reproductive potential could put an individual at risk from criminal prosecution. For instance, poorly controlled diabetes is associated with numerous congenital malformations and an excessive rate for fetal death. Periconceptional folic acid deficiency is associated with an increased risk of neural tube defects. Obesity has been associated in recent studies with adverse pregnancy outcomes, including preeclampsia, shoulder dystocia, and antepartum stillbirth. Prenatal exposure to certain medications that may be essential to maintaining a pregnant woman's health status is associated with congenital abnormalities. If states were to consistently adopt policies of punishing women whose behavior (ranging from substance abuse to poor nutrition to informed decisions about prescription drugs) has the potential to lead to adverse perinatal outcomes, at what point would they draw the line?

American College of Obstetrics and Gynecology Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, No. 321, Nov. 5, 2005, at 9.

Courts have also noted vagueness problems in similar attempts to use the criminal law to hold pregnant women criminally liable for the outcome of their pregnancies. In *Cochran v. Commonwealth*, the Kentucky Supreme Court recognized that rewriting the state's wanton endangerment statute to reach pregnant women in relationship to fetuses they carry would have an unlimited scope and create an indefinite number of new crimes because the law could be construed as covering the full range of habits, conditions, addictions, actions, and inactions that have been shown to or are believed to risk harm to the developing child – a plainly unconstitutional result that would render the statute void for vagueness. *Cochran v.*

Commonwealth, 315 S.W.3d 325 (Ky. 2010). *See also State v. Wade*, 232 S.W.3d 663, 666 (Mo. 2007) ("the logic of allowing such prosecutions would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother's unborn child. It is a difficult line to draw and, as such, our legislature has chosen to handle the problems of pregnant mothers through social service programs instead of the court system."); *Reinesto v. Superior Court*, 894 P.2d 733, 736-37 (Ariz. App. 1995) ("Poor nutrition can cause a variety of birth defects: insufficient prenatal intake of vitamin A can cause eye abnormalities and impaired vision; 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 medical reality is that 5.3 of every 1000 Indiana newborns die within the first 28 days of life,[5] and as many as 15 to 21 percent of all pregnancies will end in miscarriage or stillbirth. That reality combined with the fact that anything a pregnant woman does or does not do may have an impact, positive or negative on her developing child, means that almost any act or omission during pregnancy could render her criminally liable as attempts at murder, feticide, manslaughter, involuntary manslaughter, or assault under the prosecution's theory in this case.

The decisions about what actions, inactions, or circumstances would be deemed hazardous enough and which of the hundreds women who suffer a neonatal loss or stillbirth in Indiana each year should be prosecuted, would be delegated to Indiana police, prosecutors, medical staff, and others who might disagree with a woman's decisions, actions or inactions regarding her pregnancy. *See, e.g.*, Richard L. Berkowitz, *Should Refusal to Undergo A*

[5] Nat'l Center for Health Statistics, U.S. Dep't Health & Human Serv., Health United States 2010 129 (2011), available at http://www.cdc.gov/nchs/data/hus/hus10.pdf (newborn defined as within the first 28 days of life).

Cesarean Section Be A Criminal Offense? 140 AM. J. OBSTET. & GYNECOL. 1220 (2004). This case-by-case approach is so arbitrary that if the murder and feticide laws are construed to support it, the murder and feticide statutes would transgress reasonably identifiable limits and violate due process prohibitions against statutory vagueness.

C. Expansion of the Murder and Feticide Statutes to Make Them Applicable to Pregnant Women Who Attempt Suicide Violates the Guarantee of Equal Protection of the Law

It is well established that under the federal Equal Protection Clause, sex-based discrimination is subject to "heightened scrutiny" meaning that a state must proffer an "exceedingly persuasive justification" for its unequal treatment of women. *E.g.*, *United States v. Virginia,* 518 U.S. 515, 555-56 (1996). A state may only meet this burden by showing that its discriminatory actions are substantially related to an important governmental interest. *Id.* at 533. The Indiana Constitution also guarantees that the "General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. art. I, § 23. There is no exception to these guarantees for women who become pregnant. Moreover, equal protection principles require that laws be applied equally. *See Romer v. Evans*, 517 U.S. 620 (1996) (laws may not be applied unequally because a person is a member of a certain class).

As discussed above, Indiana does not make it a crime for any person to attempt suicide or to experience mental illness, depression or despair so profound that they seek to end his or her life. Expansion of the murder and feticide statutes to create a gender-specific crime that makes only pregnant women subject to prosecution for attempting to end their lives is a clear violation of the guarantees of equal protection of the laws.

Rewriting the state's murder and feticide laws to make pregnant women criminally liable for the outcome of their pregnancies also constitutes gender discrimination. Such an interpretation would require all pregnant women to prioritize their pregnancies over every other aspect of their lives – including jobs that may pose hazards to fetal health, caring for other children or relatives who may have diseases that could harm the pregnancy, and receiving health care for themselves that might create risks to the fertilized, eggs, embryos and fetuses they carry. A pregnant woman who failed to prioritize her pregnancy over everything else and suffers a pregnancy loss,[6] would be subject to investigation, arrest and prosecution under the prosecution's interpretation of the murder and feticide laws.

State action that burdens women because of pregnancy is gender discrimination. *See AT&T v. Hulteen*, 129 S. Ct. 1962, 1970 n. 4 (2009) (reaffirming holding of *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), that policies that "burden" women "because of their different role" in pregnancy are gender discrimination subject to heightened scrutiny). Because there is no "exceedingly persuasive justification" for a policy of selective criminalization that actually creates greater risks for maternal, fetal and child health, the prosecution's proposed application of the murder and feticide statutes is unlawful sex discrimination.

D. Expansion of the Murder and Feticide Statutes to Apply to Pregnant Women Violates their Right to Privacy

The right to procreational privacy includes the right to carry a pregnancy to term. Judicially rewriting Indiana's murder and feticide statutes to include pregnant women in relationship to the fertilized eggs, embryos and fetuses they carry would make that right

[6] Approximately 15 to 20 percent of all pregnancies result in unintentional early pregnancy loss. Raj Rai & Lesley Regan, *Recurrent Miscarriage*, 368 LANCET 601, 601 (2006). An additional one percent of pregnancies—approximately 26,000 per year—end in stillbirth; another 19,000 per year end in neonatal death. Ruth C. Fretts, *Etiology and Prevention of Stillbirth*, 193 AMERICAN JOURNAL OF OBSTETRICS & GYNECOLOGY 1923, 1924 (March 2005).

contingent on producing a child who is healthy. Women with histories of mental health problems, depression, and other health conditions that may prevent them from being able to ensure a healthy birth outcome, as well as women who cannot afford comprehensive prenatal care, drug treatment and mental health services if they need them would be forced to consider terminating wanted pregnancies to avoid the possibility of life sentences in jail if they experienced a miscarriage, stillbirth or neonatal death. See *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) (noting that its decision in *Roe v. Wade*, 410 U.S. 113 (1973), "had been sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry to term); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of the right to privacy."). *See also Clinic for Women v. Brizzi*, 837 N.E.2d 973, 987 (Ind. 2005) (adopting *Casey*'s "undue burden" standard in deciding whether an Indiana abortion restriction violated Indiana's constitutional right to privacy,); Amnesty Int'l, Deadly Delivery: The Maternal Health Care Crisis in the United States 19 – 47 (2010), *available at* http://www.amnestyusa.org/dignity/pdf/DeadlyDelivery.pdf. (describing numerous barriers to prenatal and other health care for pregnant women in America).

Indiana's public policy is that "[c]hildbirth is preferred, encouraged, and supported over abortion." I.C. 15-34-1-1. Courts have recognized that prosecutions against women for allegedly endangering fetal health can lead women to terminate pregnancies when they would otherwise not chosen to have done so. *See Johnson v. State*, 602 So.2d 1288, 1296 ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.").[7]

[7] In a North Dakota case, Martina Greywind, approximately twelve weeks pregnant, was arrested and was charged with reckless endangerment based on the claim that by inhaling paint fumes, she was creating a

If Ms. Shuai had terminated her pregnancy, she would not be subject to this prosecution. If the prosecution's expansion of the murder and feticide laws is accepted, pregnant women who have concerns about their ability to guarantee a healthy birth outcome will face the choice of subjecting themselves to possible incarceration if they continue their pregnancy. An interpretation of the murder and feticide laws that would create pressure on women to terminate pregnancies would violate the right to privacy and would run afoul with Indiana's public policy preference for childbirth.

Furthermore, if the Court accepts the prosecution's interpretation of the murder and feticide laws, such an interpretation would deprive women of their right to informational privacy in the medical context, since any action, inaction, or circumstances perceived by outsiders to threaten the fertilized eggs, embryos and fetuses would constitute a crime. Pregnant women would automatically become suspects under the law and could be investigated in relation to their pregnancy and pregnancy outcomes. Women, would in effect lose their right privacy, include privacy in highly sensitive medical and psychiatric information upon becoming pregnant.

E. Expanding the Murder and Feticide Statutes to Apply to Pregnant Women Violates the Constitutional Prohibition Against Cruel and Unusual Punishment

The United States Constitution prohibits cruel and unusual punishment. U.S. Const. Amend VIII. Criminal punishment is cruel and unusual if it is disproportionate to the offense. *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982). Article 1, Section 16 of the Bill of Rights of

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substantial risk of serious bodily injury or death to a "person" -- her "unborn child." Ms. Greywind then obtained an abortion. As a result, the prosecutor dropped the charges citing the fact that she had "terminated her pregnancy." *See* Motion to Dismiss With Prejudice, *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (in seeking dismissal of reckless endangerment charge based upon inhaling paint fumes during pregnancy, the prosecutor stated that "[d]efendant has made it known to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation").

the Indiana Constitution provides that "Cruel and unusual punishments shall not be inflicted. All penalties shall be proportional to the nature of the offense."

The prosecution in this case is an extreme example of disproportionality – subjecting Ms. Shuai to arrest and punishment with a possible sentence of incarceration for a minimum of forty-five years for murder (I.C. 35-50-2-1(c)(1)) or six years for attempted feticide, a B felony (I.C. 35-50-2-1(c)(3)), for her attempt to commit suicide, when such a desperate act is not even recognized as a crime for other people. This Court should refuse the prosecution's invitation to interpret the law to permit the cruel and unusual punishment of a pregnant woman who has attempted suicide in a moment of severe depression, then consented to cesarean surgery in the interest of her baby's life and health. The Constitution prohibits using her status[8] as a pregnant person as a basis for punishing her and doing so disproportionately.

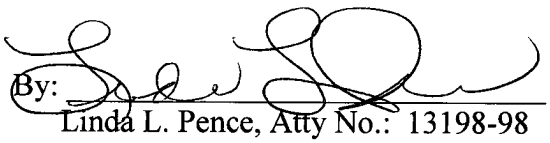
[8] *Cf. Linder v. United States*, 268 U.S. 5 (1925); *Robinson v. California*, 370 U.S. 660, 667 (1962) (finding punishment based on the *status* of being addicted to a drug a violation of the prohibition on cruel and unusual punishment).

CONCLUSION

WHEREFORE, the Defendant respectfully requests this Court to dismiss the charges filed in this cause.

Respectfully submitted,

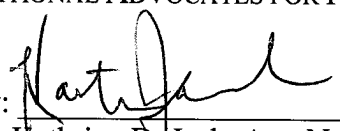
PENCE HENSEL LLC



By: _____

Linda L. Pence, Atty No.: 13198-98
David J. Hensel, Atty No.: 15455-49
135 N. Pennsylvania St., Suite 1600
Indianapolis, IN 46204
Phone: (317) 833-1111
Facsimile: (317) 833-1199
Email: lpence@pencehensel.com
dhensel@pencehensel.com

NATIONAL ADVOCATES FOR PREGNANT WOMEN



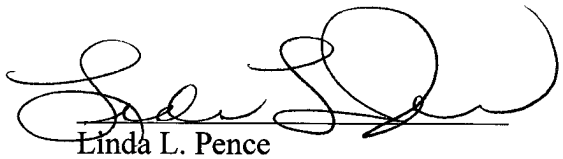
By: _____

Kathrine D. Jack, Atty No.: 26851-49
LAW OFFICE OF KATHRINE JACK
P.O. Box 813
Greenfield, IN 46140
Phone: (317) 318-2017
Facsimile: (317) 318-2017
Email: kathrinejack@gmail.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by United States first class mail, postage prepaid, upon the following counsel of record this 30th day of March, 2011.

Thomas K. Morris
Lindsay Gedig
Marion County Prosecutor's Office
251 E. Ohio Street, Room 160
Indianapolis, IN 46204



Linda L. Pence