No. 02-

IN THE

Supreme Court of the United States

REGINA D. MCKNIGHT,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State Supreme Court offended the Due Process Clause by construing a statute proscribing "homicide by child abuse" – a felony that carries a twenty-year-to-life sentence – to punish a woman who intended to carry her pregnancy to term, but instead suffered a stillbirth, when (1) the State's legislature classified a woman's intentional termination of a pregnancy after fetal viability as a misdemeanor, carrying a maximum two-year sentence; (b) the legislature that unanimously enacted the homicide statute had rejected proposals that would have punished pregnant women who risked fetal harm; and (c) convicting a woman for homicide based on pregnancy loss is wholly without precedent in Anglo-American law?

2. Whether a statute construed to authorize life imprisonment for women who suffer stillbirths when fetal demise is attributed to acts or inaction "publicly know[n]" to be "potentially fatal" is void for vagueness, in view of the innumerable types of conduct, conditions, and circumstances associated with the stillbirth risks and the likelihood that the statute will be enforced in an arbitrary way?

3. Whether a statute that relies on imposition of criminal punishment in the event of stillbirth to regulate women's lives while pregnant unconstitutionally infringes on fundamental autonomy interests?

4. Whether the South Carolina Supreme Court's affirmance of Petitioner's criminal conviction is consistent with the principles established in *Jackson v. Virginia*, 443 U.S. 307 (1979)?

5. Whether, in view of unbroken common law tradition and the uniform contrary judgment of State courts and legislatures, the Eighth Amendment allows a court to punish a pregnant woman as a murderer based on a finding that her conduct or circumstances contributed to a stillbirth?

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OPINIONS BELOW

The decision of the South Carolina Supreme Court is reported at 576 S.E.2d 168, 352 S.C. 635, and reprinted in the appendix at 1a-22a.

JURISDICTION

The Supreme Court of South Carolina entered judgment on January 27, 2003. Chief Justice Rehnquist entered an order extending the time to file to May 27, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

S.C. Code § 16-3-85

S.C. Code § 44-41-80

U.S. Const. amend. XIV

U.S. Const. amend. VIII

The text of these provisions is set out in the appendix.

STATEMENT OF THE CASE

Petitioner seeks review of a judgment that is wholly unknown to our Nation's legal tradition: a *homicide* conviction – and twenty-year sentence – imposed on a woman for delivering a stillborn child, based on a finding (erroneous, on the facts of this case) that her activity while pregnant contributed to the fetal demise.

Petitioner's conviction was not the result of a State legislature's decision to enact a new or radically different type of penal law. Rather, it was the consequence of the decision, by a bare majority the South Carolina Supreme Court, to expand the sweep of the State's straightforward and uncontroversial "homicide by child abuse" statute, in the face of compelling evidence that the State's legislature could not have meant that statute to punish women who unintentionally heighten the risk of stillbirth, as guilty of "depraved heart" homicide.

The South Carolina Supreme Court's decision cannot be reconciled with the principles laid down in this Court's Due Process cases. First, the Constitution does not permit a conviction that depends, as does Petitioner's, on an unprecedented and indefensible construction of a State's criminal law.

Moreover, the interpretation now imposed on the South Carolina statute – whereby conviction is permitted on any evidence that a pregnant woman engaged in activity "public[ly] know[n]" to be "potentially fatal" to a fetus – offends other fundamental Due Process norms. In view of the vast range of conditions, circumstances, and actions known to heighten fetal risk – and the substantial limitations on even medical experts' understanding of pregnancy loss – pregnant women in South Carolina are left without any reliable basis for determining whether, in the event of stillbirth, they could be punished, with life imprisonment, for "homicide."

This Court's Due Process cases teach that it is no answer that the novel construction *may be* limited in future decisions – or to predict that the statute will not likely be enforced against women who suffer stillbirths traced to conduct no less "potentially fatal" than was Petitioner's – but who are not members of "particular groups" who "merit the displeasure of local prosecuting officials," *Papachristou v. Jacksonville,* 405 U.S. 156, 170 (1972). That an open-ended criminal statute will be enforced selectively, based on criteria unrelated to its stated rationale, is not a *defense* to unconstitutionality, but rather the prime reason for declaring it void.

To conceive of the rule's being enforced even-handedly, meanwhile, *i.e.*, as treating women who suffer stillbirth as "depraved heart" murderers in every case in which fetal demise is attributed to some act or omission "publicly known" (even if not by them) to have heightened that risk, is to see how seriously it breaches the *substantive* limitations that Due Process imposes. The concept of liberty recognized

in this Court's cases does not permit a State to assert broad regulatory authority over pregnant women's life activities – let alone a regime that relies on retrospective imposition of criminal liability. And it is difficult to imagine a more serious infringement on reproductive autonomy than a regime that threatens those women who carry pregnancies to term with life imprisonment, in the event of stillbirth.

Two additional ironies loom over this case. First, the evidence against Petitioner was so weak and doubtful that the South Carolina Supreme Court could not have reached the unprecedented result it did, had it not committed a further Due Process error: failing to review the verdict under the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979).

Finally, as this Court has previously noted, it is the subject of essentially universal agreement that regimes such as the one encouraged by the decision below "harm, rather than advance, the cause of prenatal health," *Ferguson v. City of Charleston,* 532 U.S. 67, 84 n.23 (2001) – a judgment reached not only by scores of leading medical and public health organizations, but by every State Legislature to have seriously considered the matter – *including South Carolina's*.

1. Facts And Trial Proceedings

Regina McKnight is a 26-year-old native of Horry County, South Carolina. She has an IQ that, prior to trial, was measured at 72, *i.e.*, "below average/borderline deficiency,"and attended special education classes in high school. She was unable to obtain a permanent job thereafter.

Until 1998, Petitioner lived with her mother, who helped her with day-to-day needs. In 1998, however, Petitioner's mother was killed by a hit and run driver. Left without the support system on which she had relied, she quickly spiraled downward, becoming homeless, addicted to both cocaine and marijuana – and pregnant. Lacking access to an adequate substance abuse treatment program, she was unable to overcome her drug dependence.

On May 15, 1999, McKnight was transported, in labor, to Conway Hospital, where she delivered a stillborn girl. There had been no prior indication that the fetus was in distress, and it has never been suggested that McKnight intended to harm the fetus. On the contrary, the attending nurse testified at trial to having comforted McKnight, who was grief-stricken by the stillbirth. As is common with distraught parents, Petitioner asked to hold the stillborn baby and requested that photographs of the baby be taken. She told hospital staff of the name – "Mercedes" – that she had picked out for the baby. She asked to be given a "memory certificate" with the baby's footprints and the bracelet that the baby had worn. She also asked to see the hospital's chaplain.

Within minutes of the stillbirth, however, hospital staff assumed a second role. Following a carefully developed "protocol," they obtained a urine sample from McKnight, for drug testing. After that screen indicated that cocaine was present, a nurse, following the protocol, obtained McKnight's signature on a form entitled "Informed Consent for Drug Testing," and collected a second sample for "forensic" testing, with positive results reported to the State Department of Social Services ("DSS").[1]

McKnight was arrested on October 7, 1999, and charged under a statute proscribing "homicide by child abuse," S.C. Code § 16-3-85, which makes it a felony to "cause[] the death of a child under the age of eleven while committing child abuse or neglect," if the death occurs "under circumstances manifesting an extreme indifference to human life." The law provides for a prison sentence of twenty years to life. *Id.* § 16-3-85(C). *See* 24a.[2]

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[1]The hospital had a "chain of custody" form and a set of procedures for handling "forensic" samples, *see* Record on Appeal 455 (cited hereafter as "R._"). The protocol describes the purpose of notifying DSS as discharging the hospital's legal "obligation * * * to report * * * any suspected abuse or neglect involving an unborn, yet viable, fetus or newborn child," R. 452.

[2]Petitioner was also indicted for "distributing drugs" to the fetus The

Prior to trial, Petitioner moved to have the charges dismissed, on grounds: (1) that the homicide statute could not be interpreted as authorizing punishment of women for "causing" stillbirth; (2) that giving the statute that unprecedented interpretation would violate Due Process; and (3) that punishing women who deliver stillborn children with life imprisonment would unconstitutionally infringe liberty interests and constitute cruel and unusual punishment. *See* R. 4-35. Petitioner also sought dismissal on the ground that the prosecution could not establish the causation and intent elements of the offense, because (1) the inference of a causal link between cocaine ingestion and the stillbirth *in her case* was medically untenable and (2) there was no evidentiary basis for accusing her of exhibiting "extreme indifference to human life." The trial court denied each of these motions. R. 70.[3]

At trial, the State made no effort to show that Petitioner intended harm to the fetus; that she was aware of the risk that cocaine use would result in stillbirth; or that that risk is, in fact, a large or substantial one. Rather, in its opening statement, the prosecution defined its burden strictly in terms of causation, telling the jury that if "you in fact find that cocaine killed the child you must return a guilty verdict," and confined its case to (1) evidence that Petitioner's urine had tested positive for cocaine and that cocaine metabolites had been found in a fetal blood sample; and (2) testimony by two pathologists that cocaine had contributed to fetal demise.

These witnesses conceded that children exposed to similar quantities cocaine were born alive, and, that neither placental abruption nor membrane rupture – two conditions found in cocaine-associated pregnancy loss – was present.

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trial court directed a verdict of acquittal on that count, and the State Supreme Court dismissed the State's appeal from that judgment. *See* 353 S.C. 238, 577 S.E.2d 456.

[3] "Petitioner expressly renewed these pretrial motions at later stages of the trial, *see* R. 323 (at close of State's case), R. 368 (at close of evidence).

They also confirmed that other conditions from which Petitioner suffered – hyperthyroidism and syphilis – are strongly linked to stillbirth, as have been tobacco use and poor nutrition. The pathologist who had performed the fetal autopsy acknowledged having listed cocaine as one of three causes of fetal demise and that the other two, chorioamnionitis and funisitis could cause stillbirth, in and of themselves.

After denying Petitioner's directed verdict motion, the case was submitted to the jury. The court's instruction (to which Petitioner's trial counsel did not object) tersely stated that it was the State burden's to prove "extreme indifference to human life" beyond reasonable doubt, but then proceeded with a lengthy explanation of "criminal intent," telling jurors that "intent," which "must be proven" in every case, "may arise from negligence, recklessness, or indifference." R.377. When the jury sent a note seeking further guidance on the mental state element, R.381, the court (without objection) re-read this generic definition, indicating again that the requisite mental state "for a particular crime" could be "purpose, intent, knowledge, recklessness, or criminal negligence," R.382. The jury then returned a guilty verdict, and the court denied Petitioner's motion for judgment notwithstanding the verdict.

After hearing argument from McKnight's trial counsel concerning Petitioner's lack of prior criminal record, her developmental disability, her homelessness and inability to obtain treatment for her drug dependency, the court sentenced McKnight to twenty years imprisonment, with the final eight years suspended – telling her that "at least with [twelve] years hopefully you can get beyond this substance problem that you have and no other [sic] be a threat to yourself or to any children that you might carry," R.391-92.

2. The South Carolina Supreme Court Decision

A sharply divided State Supreme Court affirmed McKnight's conviction and sentence. Rejecting arguments that the unprecedented interpretation of the homicide

statute had denied her Due Process, the majority opinion explained that "[t]he plain language of the statute" – including a section that enumerates "failing to supply the child with adequate health care" as a basis for filing homicide charges – "did not preclude" applying it in McKnight's case, 9a. The opinion noted prior decisions interpreting the statutory terms "person" and "child" as including a viable fetus, *see* 13a (citing *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984)), placing special emphasis on the decision in *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), in which a similarly divided court had denied post-conviction relief to a defendant who had pleaded guilty to misdemeanor child endangerment, based on cocaine use while pregnant.

After alluding to the intense criticism to which the *Whitner* decision has been subjected (and noting that McKnight had been granted leave to argue against it), the majority announced that it had decided to adhere to *Whitner*. *See* 10a n.5. The court held that, like the defendant in that case, McKnight "'had all the notice the Constitution requires,'"13a – because, as in *Whitner*, (1) "'the plain meaning of 'child' * * * includes a viable fetus'" and (2) "'it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child,'" 7a (quoting *Whitner*, 328 S.C. at 16). While the majority opinion acknowledged that South Carolina has a penal statute that expressly addresses a woman's intentional termination of pregnancy after fetal viability – which is classified as a misdemeanor punishable by a maximum two-year sentence, *see* S.C. Code § 44-41-80 – it did not see that provision as bearing on whether Petitioner had fair notice that she could be convicted under the homicide statute for conduct that unintentionally resulted in fetal demise.[4]

[4]Although Petitioner had argued to the trial court that her prosecution under § 16-3-85 could not be reconciled with the legislative judgments reflected in § 44-41-80, *see, e.g.*, R. 30, 64, the decision below saw the abortion statute as only relevant to claims (1) that Petitioner *should have been prosecuted* under that statute and (2) her punishment

The court then stated that there was no need to decide whether construing § 16-3-85, to authorize punishment based on women's actions or inactions while pregnant would render it void for vagueness. While it might be "unclear what conduct by a pregnant woman is likely to result in the stillbirth of her fetus," the majority reasoned, "the statute clearly applies to a stillbirth caused by ingestion of cocaine," 13a n.6.

The decision also addressed the element of "extreme indifference to human life." Rejecting arguments that the Prosecution was required to establish that McKnight "knew the risk that her use of cocaine could result in the stillbirth of her child," 6a, – or at least to present evidence concerning "how likely cocaine is to cause stillbirth," *id.* – the court, quoting a recent lower court decision, reasoned that "'in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death,'" 6a.(quoting *State v. Jarrell*, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002)). In view of this definition – and a review standard it described as limited to determining whether "the State present[ed] any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced," 8a – the majority concluded that evidence that Petitioner had ingested cocaine knowing she was pregnant was sufficient, in light of "public knowledge," 7a, that cocaine is "potentially fatal," *id.*[5]

The court then rejected Petitioner's arguments that its construction of the statute would violate substantive limits on State power imposed by the Due Process Clause and the Eighth Amendment. The majority first quoted *Whitner*, to

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violated Equal Protection, and held *these arguments* to have been "waived" by McKnight's not having presented them to the trial court. *See* 9a, 16a.

[5]The court applied the same standard in rejecting Petitioner's contention that the evidence did not support a finding of causation, despite arguments that the medical evidence actually "*contraindicated*" cocaine as a cause of this stillbirth. Br. *Amici Curiae*, of S.C. Medical Association, *et al.* at 9.

the effect:

> If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

14a (quoting 328 S.C. at 18). As for the Eighth Amendment, the majority held that that Petitioner's punishment was not "grossly out of proportion with the severity of the crime," as her sentence was "no harsher than that imposed upon any other individual charged with murder," nor was it more severe than sentences other jurisdictions impose "on those who are guilty of the murder or neglect of a child." 15a.[6]

In a dissenting opinion for himself and Justice Pleicones, Justice Moore faulted the majority for "expand[ing] the application of a criminal statute to conduct not clearly within its ambit," emphasizing that the homicide statute "could not have been intended" to prosecute a woman for causing fetal demise. By "imposing a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother," Justice Moore underscored, *see* 21a, the State's legislature had "recognized the unique situation of a feticide by the mother," *id.* and the majority's readiness to impose far greater punishment for undeniably less blameworthy conduct was in plain defiance of that legislative judgment.[7]

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[6]The majority also rejected McKnight's Fourth Amendment claims, distinguishing *Ferguson*, and ruled that any Fourth Amendment error was harmless, in any event.

[7]Justice Moore also referenced his dissent in *Whitner*, which had warned that by "construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful," 328 S.C. at 22; highlighted the legislature's consideration of numerous "proposed bills addressing the problem of drug use during pregnancy," *id.* at 22; and faulted the majority for ignoring "[t]he only [South Carolina] law, * ** that specifically regulates the conduct of a mother toward her unborn child," *i.e*, the "abortion statute[,] under which a viable fetus is in

REASONS FOR GRANTING THE PETITION

The South Carolina Supreme Court stands alone in the Nation for having sustained a criminal conviction of a woman who experienced a stillbirth and for treating a drug dependency that co-occurred with pregnancy as equivalent to "depraved heart" homicide. Although numerous prosecutions have been attempted under similar circumstances, no court in the Nation, apart from the one below, has sustained a conviction of a pregnant woman under *any* general criminal statute, on the premise that her conduct or circumstances risked or caused harm to the fetus she was carrying. Similarly, every legislature in the Nation to have considered the issues, as many have, has rejected a criminal law approach, and every leading medical, public health and substance abuse treatment organization has condemned such prosecutions in strong terms. *See Ferguson*, 532 U.S. at 84 n.23.

What distinguishes this case from these other judicial decisions is not the content of the South Carolina statute, which, read fairly, *precludes* prosecution under these circumstances – nor the "wishes" of the State's Legislature. Like bodies throughout the Nation, the South Carolina Legislature has, for reasons of public health and respect for individual liberty, rejected approaches far less draconian than the one imposed, through "statutory construction," by the Justices in the majority below.

Under this Court's precedents this application of a"novel construction of a criminal statute" to circumstances not "fairly disclosed to be within its scope," *United States v. Lanier,* 520 U.S. 259, 266 (1997), is itself a denial of Due Process of Law.

But as now authoritatively construed, the statute has so blurred the line separating stillbirth as personal and family tragedy from the felony of "depraved heart" homicide, punishable by life imprisonment – as to require invalidation under void-for-vagueness case law. Like other statutes

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fact treated differently from a child in being," *id.* at 22.

struck down for vagueness, the South Carolina homicide law, as now construed, leaves "prosecutors[] and juries" – and health care providers, who are called upon to report their patients to State authorities – to pursue their "personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), concerning whether any woman or class of women should or should not be subjected to criminal punishment for stillbirth.

Moreover, this Court's *substantive* Due Process precedents do not permit what the statute has been construed to authorize: pervasive State regulation of pregnant women, for the benefit of "future children," through the imposition of onerous criminal penalties in the event of stillbirth. By threatening incarceration for those women who, like Petitioner, seek to carry pregnancies to term, the newly interpreted statute impermissibly infringes on that constitutional right.

Finally, the consequences of the decision ramify beyond the pregnant women and families most directly affected. Doctors, nurses, and substance abuse treatment providers in South Carolina are now also subject to mandates, themselves backed by criminal penalties, which require, in an ill-defined class of cases, that they violate patient confidentiality and turn over to the State "inculpatory" information about their pregnant patients and clients.

Both the gravity of these constitutional errors and their far-reaching effects necessitate this Court's intervention.

I. The State Supreme Court's Decision Is Irreconcilable With This Court's Due Process Precedents

A. Petitioner's Conviction under the Homicide Law Was Neither Expected Nor Defensible

The Due Process Clause forbids States from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier,* 520 U.S. at 266; *Bouie v. City of Columbia*, 378 U.S. 347, 361 (1964). Like

vaguely-worded statutes, such decisions deny those punished fair notice, *see* 378 U.S. at 352 (when "uncertainty as to the statute's meaning is * * * not revealed until the court's decision," the violation can be "that much greater"), and they contravene basic rule-of-law norms, *see* Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

The decision to construe § 16-3-85 as authorizing Petitioner's conviction was "unexpected and indefensible," *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (internal quotation omitted). Neither South Carolina nor any other State with a similar statute has ever convicted a woman who delivers a stillborn child of "homicide by child abuse" for having contributed to fetal demise. Indeed, there appears to be no antecedent in Anglo-American law for punishing a woman for homicide of any sort, on account of conduct during pregnancy that "culminates in" unintended fetal harm. *See Wyoming v. Osmus,* 276 P.2d 469 (1954); *Florida v. Ashley*, 701 So. 2d 338 (1997); *Bouie*, 378 U.S. at 361 (noting that South Carolina Supreme Court's enlargement of trespassing statute was "inconsistent" with "'traditional American law").

As the dissenting Justices of the State Supreme Court emphasized, South Carolina does have a statute that specifically addresses conduct by pregnant women resulting in the demise of a fetus during the third trimester of pregnancy. *See Bouie*, 378 U.S. at 359 n.7 (existence of other statute "dealing specifically" with conduct at issue made construction "all the more untenable"). In relevant part, S.C. Code § 44-41-80(b) provides: "any woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself * * * with intent to produce an abortion, unless it is necessary to preserve her life, shall be deemed guilty of a misdemeanor."[8]

[8] "Abortion" is defined as "the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant* * * *" S.C. Code § 44-41-10(a); *see also id.* § 44-41-20 (specifying circumstances under which abortion is "legal").

A woman convicted for violating that provision "shall be punished by imprisonment for a term of not more than two years or fined not more than one thousand dollars, or both." *Id.*; *compare id.* § 44-41-80(a) (mandating 2-5 year punishment on "any person" *other than the woman*).

To conclude that a conviction under the general homicide by child abuse statute would be "[]expected and defensible[]" therefore requires assuming that the South Carolina Legislature enacted *two* statutes regulating the ingestion of drugs that lead to late-pregnancy fetal demise: one, § 44-41-80, which expressly addresses a woman's doing so with the *specific intent* of causing fetal demise – and classifies such conduct as a misdemeanor punishable by a two-year sentence – and a second, § 16-3-85, that (without mentioning pregnancy, viable fetuses or ingestion of drugs) treats similar conduct, when leading to *unintended* fetal harm, as a felony punishable by life imprisonment.[9]

While the majority opinion below asserted that a State that "wishe[d] to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect * * * on [a] viable fetus," could do so, 14a (quoting *Whitner*, 328 S.C. at 18), it is patently clear that the South Carolina Legislature *did not* so intend when it enacted the Homicide by Child Abuse statute in 1992. Nothing in the statutory text hints at a distinction between "already illegal conduct," and harm-causing activity not forbidden by some other statutory provision, *see infra*, let alone indicates that the legislature viewed this statute as one authorizing "additional penalties" for existing crimes based on "the effect * * * on the viable fetus." *Compare, e.g.* U.S.S.G. § 2.D.1.3 (sentence enhancement for offender who sells drugs to pregnant woman).

[9]Indeed, the South Carolina Reports attest that the State has taken the extraordinary position (one not inconsistent with the construction in this case) that the Legislature's provision for criminal penalties under the State's abortion statute would not preclude a prosecutor's pursuing a conviction for third-trimester abortion under the *capital murder* statute. *See Ard,* 332 S.C. at 370 (Moore, J. dissenting).

On the contrary, in the very same session at which § 16-3-85 was enacted, the State Legislature vigorously debated – but did not enact – a series of proposed measures that would have expanded the State's laws so as to more closely regulate drug use by pregnant women. *See* S. 75 (1991) (modifying definition of "neglect" in child abuse statute to include infants testing positive for controlled substances); S.79 (1991) (requiring reporting to Department of Social Services of any pregnant woman believed to have used a controlled substance); S. 986 (1991) (requiring drug testing of newborn infants and sterilization or implantation of birth control until the mother of child testing positive had completed drug treatment). It is not merely that these measures failed to pass, but that the Homicide by Child Abuse statute was enacted, by the same legislature that rejected them, with *no dissenting votes. See* Senate Journal, May 6-7 & 19, 1992; House Journal, April 2-3, May 20, 1992.

Nor can enlargement of the homicide statute be defended as necessary to avoid the "absurd[ity]," *Whitner*, 328 S.C. at 7, or "inconsisten[cy]," *id.* at 8, of treating viable fetuses as "children" for some statutory purposes, but not others. There is nothing unusual, let alone "absurd," about interpreting the word "child" differently in different statutes. *See United States v. X-Citement Video, Inc*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (absurdity avoidance canon is reserved for cases when it is "absolutely clear," that the legislature "genuinely intended [some result] but inadequately expressed" its intention in statutory language). This Court has observed that ordinarily, "the word 'child * * * refer[s] to an individual already born, with an existence separate from its mother," *Burns v. Alcala*, 420 U.S. 575, 580 (1975), and every State's laws – including South Carolina's – classify fetuses differently depending on the legal context. *See Whitner*, 328 S.C. at 6 ("The question for this Court, therefore, is whether a viable fetus is a 'person' for purposes of the Children's Code"); *id.* at 21 (Finney, C.J., dissenting) (noting 1995 decision interpreting "child" to mean "child in being and not a fetus"); *see also In*

re Starks,18 P.3d 342 (Okl. 2001) (prior case sustaining homicide prosecution for third party offense against viable fetus does not necessitate recognizing fetus as "child" for purposes of State children's code); *Florida v. Ashley*, 701 So. 2d 338 (1997) (precedent upholding third-party's conviction based on gunshot to child *in utero* did not support conviction of pregnant woman who shot herself); *Collins v. Texas,* 890 S.W.2d 893 (App. 1994) (rejecting argument that precedent considering fetuses persons in civil cases gave mother fair notice that she could be prosecuted for criminal child abuse), *Stallman v. Youngquist,* 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a tort of maternal prenatal negligence, notwithstanding case law allowing tort recovery against third parties for fetal harm).[10]

But there is a more specific point: although there is substantial diversity among the laws of the States concerning the legal status of a fetus for particular purposes, no State has ever punished a woman for homicide based on her own experience of a stillbirth. Indeed, at the time the statute was enacted in 1992, *no* State Legislature had defined the term "child" in *any* criminal statute as applying to conduct by a pregnant woman that caused fetal harm, nor had *any* State court of last resort upheld a conviction obtained on that premise. *See Ashley*, 701 So. 2d at 342 (noting "thirty-six cases in twenty-one states" rejecting prosecutions); *cf. Osmus*, 276 P.2d at 475 (finding no precedent at English law for manslaughter conviction based on pregnant woman's failure to obtain medical assistance). And (with the exception of South Carolina) no State has done so since.

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[10]Indeed, one of the principal decisions cited by the decision below, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), *reversed* a defendant's manslaughter conviction for causing the demise of a nine-month fetus, on the ground that "at the time" defendant stabbed his wife, "no South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide" – and cited *Bouie* for the proposition that Due Process would not allow "the criminal law * * * declared by the courts [to] be applied retroactively." *Id.*

The reasons given in the many judicial decisions refusing to countenance prosecutions of women for conduct while pregnant are directly applicable to this case – and several were presented to the South Carolina Legislature when it rejected the various proposed measures discussed above. Such constructions present intolerable vagueness problems, *see, e.g.*, *Kentucky v. Welch,* 864 S.W.2d 280, 283 (1993) (if "applied to women's conduct during pregnancy, [child abuse statutes] could have an unlimited scope and create an indefinite number of new 'crimes,' * * * render[ing] the statutes void for vagueness"). They threaten women's liberty interests, *see Stallman*, 531 N.E.2d at 359 ("[s]ince anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child"), as well as tragic health consequences. *See Johnson v. Florida*, 602 So. 2d 1288, 1295 (1992) (noting danger that "pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected"); *Georgia v. Luster*, 419 S.E.2d 32, 35 (App. 1992) (rejecting prosecution is "overwhelmingly in accord with the opinions of local and national medical experts").

These other courts have underscored, as did the Justices dissenting below, that drastic changes in long-established rules must originate with the legislative branch:

> This Court cannot abrogate willy-nilly a centuries-old principle of the common law – which is grounded in the wisdom of experience and has been adopted by the legislature – and install in its place a contrary rule bristling with red flags and followed by no other court in the nation.

Ashley, 701 So.2d at 343; *accord Michigan v. Hardy*, 469 N.W.2d 50, 53 (1991); *Ohio v. Gray*, 584 N.E.2d 710, 712 (1992); *Sheriff, Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994).

Nor, as the decision below asserted, does *Whitner*

provide the answer to Petitioner's Due Process claim. First, while that decision might have made it less unexpected – though no more defensible, *see infra*, – that Petitioner could be prosecuted for *child endangerment*, it surely did not settle that the State's *homicide* law would be interpreted to punish women who "cause" unintended fetal demise with life imprisonment – especially given that those who do so with specific intent are punished as misdemeanants. *See Bouie* 378 U.S. at 358 (petitioners' notice that they were committing *civil* trespass was constitutionally adequate for criminal conviction); *Douglas v. Buder*, 412 U.S. 430 (1973) (*per curiam*); *see also BMW of N. Am., Inc. v. Gor*e, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose").[11]

Moreover, as the Justices dissenting in *Whitner* forcefully argued, the statutory interpretation in that case introduced vagueness problems of the most serious sort, *see infra*. An already vague decision can not provide fair notice. *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion) (limiting punishment to those disobeying dispersal order did not cure Due Process problem where "police [were] able to decide arbitrarily which members of the public [to] order to disperse"); *accord id.* at 70 (Kennedy, J. concurring).

There is a further, important reason why *Whitner* could not provide Petitioner with Due Process. Sustaining Petitioner's conviction *also* required the majority below to impose a construction on "extreme indifference to human

[11] Indeed, before Petitioner's trial, the homicide by child abuse statute was amended, so as *to delete* a cross-reference to the statutory provisions that had been at issue in *Whitner*. While acknowledging this deletion, the majority opinion below characterized the Legislature's "fail[ure]" to have more explicitly "omitted viable fetus from the statute's applicability," as "persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation." 11a.

life" (a term not part of the *Whitner* statute) that was itself wholly unforeseeable. Indeed, while statutory *mens rea* requirements ordinarily mitigate vagueness problems, see *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499 (1982), the South Carolina Supreme Court's unprecedented and indefensible interpretation of the mental state element "compound[ed] the inadequacy of the notice afforded," *Morales*, 527 U.S. at 59, here.

It is uncontested that Petitioner did not *intend* fetal harm, and there was no evidence that, in experiencing a drug dependency and ingesting cocaine, she was aware of, but consciously disregarded, a substantial risk that a stillbirth would result. Indeed, no evidence was presented concerning the magnitude of the risk of stillbirth that cocaine ingestion poses, let alone that it is, in any objective sense, exceptionally high.

In rejecting Petitioner's arguments that she therefore could not have manifested "extreme indifference to human life," the decision below quoted *State v. Jarrell,* which had described an Arkansas decision, *Davis v. State,* 925 S.W.2d 768 (1996), as interpreting "a similar statute," in holding that "'a person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person,'" *Jarrell*, 350 S.C. at 97, 564 S.E.2d at 366 (quoting *Davis*, 925 S.W.2d at 773). The court then held that evidence that Petitioner had ingested cocaine, despite the "public knowledge," 7a, that doing so is "potentially fatal," *id.*, sufficed.

The "extreme indifference to human life" language, widely associated with § 210.2(1) of the Model Penal Code, has been described as a "statutory formulation of the common-law concept of nondeliberate murder committed with a depraved heart," *Validity and Construction of "Extreme Indifference" Murder Statute,* 7 A.L.R. 5th 758, 772 (1992). And while States adopting the language have imposed different glosses on its meaning, every jurisdiction

that has done so – including South Carolina – punishes homicides committed with "extreme indifference" more harshly than those committed with recklessness or negligence, S.C. Code § 16-3-60 (five-year maximum for manslaughter with "criminal negligence"); *id.* § 56-5-2910 (10-year maximum for reckless homicide), and under no recognized interpretation could (imputed) "public knowledge" that conduct was "potentially fatal" suffice. *See* M.P.C. § 210.2, Comment 4 (defining extreme recklessness as "the *disregard of such a high degree of risk* created by the actor's conduct" that it "cannot fairly be distinguished * * * from homicides committed purposely or knowingly") (emphasis added).

Many jurisdictions have interpreted "extreme indifference" as requiring proof both (1) that the defendant's actions had a high probability of causing death *and* (2) that he or she was aware of and consciously disregarded this risk, *see.*, *e.g.*, *Simmons v. Alabama*, 649 So.2d 1282, 1284 (1994) ("the actor perceives a substantial and unjustified risk, but consciously disregards the risk of death"); *Kansas v. Robinson*, 934 P.2d 38, 48 (1997); *Alaska v. Johnson*, 720 P.2d 37 (1986), and others, while defining the mental state purely in terms of objective risk, have set that standard very high. *See, e.g.*, *New Jersey v. Jenkins*, 812 A.2d 1143 (2003) ("if *the risk of death* is *a probability*, the crime is ["extreme indifference"] manslaughter, if the risk of death is *a possibility*, the crime is [ordinary] manslaughter") (emphasis added); *New York v. Sanchez*, 777 N.E.2d 204, 207 (2002) ("objective circumstances of exceptionally high, unjustified risk of death constitute the primary means" for distinguishing between ordinary recklessness and "extreme indifference").

The cases that the South Carolina Supreme Court cited as relieving the State of the burden of proving either conscious disregard or exceptionally high degree of risk did no such thing. The Arkansas statute applied in *Davis* requires the prosecution to prove (*in addition* to "indifference") that the defendant "knowingly" caused a

child's death, Ark. Code § 5-10-101(a)(9), and *Jarrell* addressed the claim of a defendant – who had *planned* to kill her child – that intent and indifference were logically irreconcilable, by answering that *extreme* indifference is conceptually so "akin to intent," as to defeat that objection. 350 S.C. at 98.

This re-interpretation looms large in this case. First, as emphasized below, that cocaine ingestion may be "potentially fatal," (*i.e.*, increases the risk of stillbirth), does not distinguish it from many other behaviors engaged in and conditions experienced by women while pregnant. And there is no evidence that the prosecution *could have* put on that cocaine is especially likely to bring about stillbirth, let alone that such a link is particularly well known. *See* M. Sims & K. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 AM. J. FORENSIC MED. & PATH. 261, 264 (2001) (noting that "the direct toxic effect of cocaine on the fetus is not well known," and that in 42 fetal autopsies performed at Medical University of South Carolina, only one case had the cause of death described even as secondary to cocaine toxicity); *cf. UAW v. Johnson Controls*, 499 U.S. 187, 220 (1991) (White, J., concurring in part) (legality of employer's "fetal-protection policy" should depend whether it "insists on a risk-avoidance level substantially higher than other risk levels tolerated"). Indeed, as *Amici* had explained to the South Carolina Supreme Court, the medical evidence strongly indicates that *in utero* exposure to cocaine *did not* cause the stillbirth in this case. *See* n.5 *supra*.

Even worse, "public knowledge" – which the decision below imputed to Petitioner – has proved a notoriously unreliable substitute for actual evidence where the links between cocaine and fetal harm are concerned. As the most careful and comprehensive study to consider the medical evidence concluded:

> [T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae

of many other risk factors.

D. Frank, *et al.*, *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001); *see id.* at 1621 (condemning as "irrational[]" policies that selectively "demonize" *in utero* cocaine exposure and target pregnant cocaine users for special criminal sanction); *cf. Johnson Controls*, 886 F.2d 871, 912 (7th Cir. 1989) (*en banc*), *rev'd*, 499 U.S. 187 (1991) (Easterbrook, J., dissenting) (noting earlier wisdom concerning adverse effect of work on women's 'maternal functions' "turned out to be the triumph of imagination over data").[12]

B. As Construed, The Statute Is Void For Vagueness

By construing § 16-3-85 to authorize punishment of a woman suffering stillbirth based on pregnancy activity "public[ly] know[n]" to be "potentially fatal," the South Carolina Supreme Court rendered the statute void for vagueness. *See Kolender v. Lawson,* 461 U.S. 352, 355 n.4 (1983) ("[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it") (citations omitted); *Morales*, 527 U.S. at 68 (O'Connor, J., concurring). As construed, the law suffers from the two cardinal defects identified in this Court's vagueness case law: it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Morales*, at 56; *see Kolender*, 461 U.S. at 457.

The "line" separating stillbirth as personal and family

[12]The JAMA study noted that the oldest group of children studied to date registered *no* effect from *in utero* cocaine exposure on any IQ scales or on academic achievement, *id.* at 1616 (citing G. Richardson, *et al.*, *Prenatal Cocaine Exposure: Effect on the Development of School Age Children* 18 NEUROTOXICOL TERATOLOGY 627 (1996)).

tragedy from stillbirth as "depraved heart" homicide is now wholly obscure to women in South Carolina – with the classification decision delegated to prosecutors (and, indirectly, to health care providers, who decide whether to develop "protocols" to inculpate patients and select which patients to apply them to).[13] *See Reinesto v Superior Court*, 894 P.2d 733 (Ariz. App. 1995) (given variety of "prenatal conduct [that] can harm a fetus," if statute were extended "to prenatal conduct that affects a fetus in a manner apparent after birth – conduct that would be defined solely in terms of its impact on the victim – the boundaries of proscribed conduct would become impermissibly broad and ill-defined").

To take an important example, there is no way of determining whether cigarette smoking – conduct that the Centers for Disease Control estimates 15.1% of pregnant women in South Carolina engage in, *see* http://www.cdc.gov/nccdphp/drh/PrenatalSmkbk – and that is "publicly known," *see* 15 U.S.C. § 1333(a)(1), to be "potential fatal," *see, e.g.*, K. Wisborg, *et al.*, *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 AM. J. EPIDEMIOLOGY 322 (2001), can give rise to a homicide conviction.[14]

The grave adverse effects of alcohol are similarly extensively documented and publicly known – as are those of numerous prescription drugs, including anticonvulsants, mood-stabilizers, benzodiazepines (class which includes Valium, Librium and Xanax), some antibacterials (especially

[13]The "protocol" in this case centered narrowly around the performance of *drug testing*. No similar policies address the collection of inculpatory evidence – or "chain of custody" precautions necessary for prosecution – in the event of a stillbirth where any prenatal activity other than drug use is suspected.

[14]Although the CDC data specifically attributes 7 South Carolina infant deaths annually to parental smoking, it appears no prosecution has ever been brought. *See also* J. DiFranza & R. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Infant Death Syndrome*, 40 J. FAM. PRAC. 385 (1995) ("Each year the use of tobacco products by women results in the deaths of 19,000 – 141,000 fetuses").

tetracyclines), anticoagulants, and antihypertensive drugs. *See* Br. *Amici Curiae* of South Carolina Med. Ass'n, *et al.* at 16-17 (summarizing studies). Accutane, a popular anti-acne medication has been called "the most widely prescribed birth-defect causing medicine in the United States."[15] Women who take fertility drugs and choose to carry three or more embryos to term often experience pregnancy loss and risk severe, lifelong harm to the children who survive.[16]

"Women ages 35 and older who bear children are at a significantly increased risk of giving birth to low birthweight babies * * * and may have increased risk of stillbirth."[17] So do those – like Petitioner – who suffer from hyperthyroidism and other diseases, and women who work with chemicals or solvents, *See Johnson Controls*, 497 U.S. at 205 ("[e]mployment late in pregnancy often imposes risks on the unborn child"); *see also* 887 F.2d at 914 (Easterbrook, J., dissenting) (an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk). Indeed, while a South Carolina employer would violate federal law if it sought to change a female employee's job assignment to

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[15] E. Rafshoon, *What Price Beauty?, Boston Globe Magazine* (April 27, 2003), p. 15. Describing confirmed reports of 160 drug-affected births, the article explains that "[s]ome of these children died before they reached their first birthdays because of major organ system failures. The most seriously affected babies have been institutionalized. The rest live with a variety of severe defects, ranging from heart and central nervous system abnormalities to missing or malformed ears, asymmetrical facial features, and mental retardation." *Id.*

[16] B. Steinbock, *The McCaughey Septuplets: Medical Miracle or Gambling with Fertility Drugs?*, in ETHICAL ISSUES IN MODERN MEDICINE 375, 376 (5th ed., J. Arras & B. Steinbock, eds. 1999) ("Even if they are born alive, 'super-twins' (triplets, quadruplets and quintuplets) are 12 times more likely than other babies to die within a year * * * * Many will suffer from respiratory and digestive problems. They are also prone to a range of neurological disorders, including blindness, cerebral palsy and mental retardation").

[17] S. Tough, *et al.*, *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399-403 (March 2002); March of Dimes, Medical References: Stillbirth, *available at* http://www.marchofdimes.com.

prevent prenatal lead exposure, *see Johnson Controls* – because "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them," 499 U.S. at 206 – were the employee to suffer a stillbirth, she could be indicted for homicide for having remained on the job.

Indeed, given that the South Carolina statute is broadly addressed to any "act or omission" that causes "harm to the child's physical health or welfare," including "fail[ure] to supply the child with adequate food, clothing, shelter, or health care" – language the majority opinion below indicated "clearly applied" to pregnant women, *see* 9a – it could be invoked to punish a woman for not taking some affirmative step, such as taking vitamins, following a physician's "orders," or accepting medical treatment, such as a blood transfusion or cesarean section. *See, e.g.*, *Reinesto*, 894 P.2d at 736 (noting importance of vitamin intake to fetal development).

To the extent that the statute literally reaches acts or omissions with known "*potential*" to result in stillbirth, the range of activity affected would be essentially limitless. But even if some objective threshold of risk – not to mention one of "public knowledge" – was required, the variables involved are so "numerous" and "imprecise" that leading medical experts would likely not agree in many particular cases. *See Coalutti v. Franklin*, 439 U.S. 379, 396 (1979), Like the statute invalidated on vagueness grounds in *Coalutti*, the South Carolina law imposes "criminal liability for an erroneous determination," *id.*, but it imposes the punishment – for homicide – on a woman who suffered stillbirth.

To the extent that the decision below held that Petitioner's lacked "standing" to raise a vagueness challenge, 13a n.6, because the statute "clearly applie[d]" to her, *id.* – presumably because cocaine was "already illegal,"– it seriously mistook this Court's precedents. Petitioner obviously *has been* aggrieved by what the Court has

identified as the most "important aspect of vagueness doctrine": "the requirement that a legislature establish minimal guidelines to govern law enforcement," *Kolender*, 461 U.S. at 358.

Moreover, in no sense was Petitioner "clearly" violating the homicide by child abuse statute. Although that description might apply in a case where the defendant is charged with physically beating a child to death, even the majority below – which asserted that Petitioner's conviction was "*not preclude[d]*" by the statute – could not fairly claim that a pregnant woman's unintended (and unforeseen) harm to a fetus is at the core of § 16-3-85's prohibitory sweep. *See supra*.

Even more important, the operative terms of the statute, "extreme indifference" and "child abuse" (further defined as "harm to a child's health or welfare") give no indication of applying differently with respect to action legal or illegal under some other statute – just as guilt under the criminal abortion or "killing by poison," statutes, *see* S.C. Code § 16-3-30, does not depend on whether the defendant accomplished his end through use of a substance prohibited under some other law.

Indeed, the facts of Petitioner's case are surely far weaker than in many prosecutions that could be brought under the law, as judicially enlarged. There is no evidence of intent or awareness of risk – which is itself subject to medical uncertainty; and evidence of a causal link, was, at best, scientifically doubtful. Indeed, "deliberate conduct," 6a, is an inapt description for Petitioner's cocaine use, given the court's emphasis on the drug's "highly addictive" properties, 7a.[18]

[18] As *Amici* in the court below explained, statistics place South Carolina "last among the states in spending on programs that address the effects of alcohol and drug abuse," and, though an estimated "49,735 women of child-bearing age may need drug or alcohol treatment each year," the State's long-term residential treatment programs can accommodate only about 100 of them. *See* Br. of S.C. Med. Ass'n, *et al.* at 35. The hospital "Protocol for the Management of Drug Abuse During

And while the decision below at points described § 16-3-85 as if it were a law "impos[ing] additional criminal penalties on pregnant women who engage in * * *already illegal conduct," it did not *construe the statute* as excluding from its reach activities not "already illegal." Rather, as in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939):

> The descriptions and illustrations used by the court to indicate the meaning of [the statutory term were] not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it [did] not purport to give any interpretation generally applicable.

Id. at 457; *see also Whitner*, 328 S.C. at 22 (Moore, J., dissenting) (when construing a statute, court may not ignore "down-the-road" consequences); Jeffries, 71 VA. L. REV. at 233 (when court is "construing a statute rather than merely deciding a particular case," it should endeavor to "resolve uncertainty [rather than] extend[] it").

Indeed, although cocaine is a controlled substance – and tobacco and alcohol, for example, are not – that cannot be a constitutionally legitimate basis for determining whether homicide liability will attach. First, as a matter of State law, other harm-causing acts *may be* "already illegal" – under the open-ended *Whitner* decision. Moreover, if the burden of the opinion below is that "harm" and "indifference," apply equally to fetuses and children born alive, it cannot be that "legal" conduct, which raises a greater risk of stillbirth, engaged in with more "indifference" than Petitioner was accused of, is beyond punishment.[19]

Thus, commenting about Petitioner's case, the Chief Prosecutor for Horry County declared that "The fact that it

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Pregnancy," here, R. 450, is tellingly silent with respect to treatment.

[19]Under such a limitation, a woman whose stillbirth could be linked to not wearing a seatbelt could be prosecuted for homicide, *see Atwater v. Lago Vista*, 532 U.S. 318 (2001), while one who took Accutane, knowing that it is terotogenic, could not.

happened to be an illegal substance" was *not decisive:* "Even if a legal substance is used, if we determine you are medically responsible for a child's demise, we will file [homicide] charges." E. Gaston, *Conway Homicide Case Sets Precedent*, *The Sun News* A1 (May 19, 2001).

But if the decision's language is understood as recognizing an empirical reality, *i.e.*, that stillbirths resulting from activity *more* strongly associated with pregnancy loss than was Petitioner's will not be prosecuted as homicides, *see* n.13, *supra*, it is essentially an admission why the statute, as construed, must not stand. Such a regime is an affront to the core concern of vagueness doctrine: that a law not "permit * * * policemen, prosecutors, and juries to pursue their personal predilections," *Smith*, 415 U.S. at 756, or furnish a tool for "'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made * * * an invidious discrimination").

C. As Judicially Expanded, The Statute Violates Substantive Due Process Limitations

As construed below, the statute is also in patent violation of the substantive limitations on State power imposed by the Due Process Clause. This Court's cases stand against the notion of broad State authority to regulate women for the benefit of "future children," *Johnson Controls,* 499 U.S. at 211; *Planned Parenthood, Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Opinion of O'Connor, Kennedy & Souter, JJ.), and as the Illinois Supreme Court stressed in *Stallman*, the connections between a woman's life activities while pregnant and fetal outcomes are such that a rule of *civil liability* for maternal prenatal negligence would, intolerably, place her every "act or omission" under State tort law. 531 N.E.2d at 359. The South Carolina

Supreme Court's regime relies on far more draconian means to accomplish that same impermissible end: imposing *criminal* liability, for *homicide*, on the subset of women who suffer stillbirths (and whom prosecutors single out to charge).[20]

A statute that punishes women for homicide after stillbirth is plainly unconstitutional in a second way: as a violation of the fundamental right to procreate. As *Casey* recognized, the freedom protected in *Roe v. Wade* includes the right to determine to carry a pregnancy to term. 505 U.S. at 859 (citing *Arnold v. Bd. of Educ.*, 880 F.2d 305, 311 (11th Cir. 1989)); *see also Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974) (striking down school district's policy of requiring teachers to take unpaid leave while pregnant). That freedom is incompatible with a regime in which women must do so under the threat of life imprisonment in the event of stillbirth. *Cf.* 505 U.S. at 852 (noting that a woman "who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear").

Indeed, given the breadth of medical consensus that a regime where pregnant women avoid prenatal care, do not confide in their doctors, refrain from seeking substance abuse treatment, or avoid hospital delivery – lest they be subjected to "protocols" of the sort seen here – "harm[s], rather than advance[s], the cause of prenatal health," *Ferguson*, 532 U.S. at 81 n.23, such a rule could not be said even to rationally advance any legitimate State interest.[21]

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[20] Although the opinion in *Whitner* pointed to *Casey* as the font of authority to regulate activity affecting "viable fetuses," that decision identified viability as the point at which States' interest in potential life suffices to support proscribing *abortion* – a power that is itself not unlimited, *see Stenberg v. Carhart*, 530 U.S. 914 (2000). The lesser power to outlaw abortion in no way establishes the far greater power to regulate all pregnant women's life activities, in the interest of "fetal welfare." *See Johnson Controls*, 887 F.2d at 914 (Easterbrook, J., dissenting) (employer's policy was "redolent of" laws enacted pursuant to ostensible State interest in women's "maternal functions").

[21] Indeed, the prime rationales for judicial deference – dangers of interfering with a legislative policy judgment – do not apply here: the South Carolina Legislature did not conceive of the rule, and it rejected far

D. The South Carolina Supreme Court's Decision Conflicts With *Jackson v. Virginia*

The decision below departs from Due Process in a further way: by failing to assure that Petitioner was accorded the protection of the requirement that guilt be proved beyond reasonable doubt, *In re Winship*, 397 U.S. 358 (1970).

Affirming Petitioner's conviction, the decision below reasoned that when "the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced," the jury's verdict of conviction must stand.

But in *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court made clear that "the critical inquiry" in such circumstances is whether, with respect to each offense element, "the record evidence could reasonably support a finding of guilt *beyond a reasonable doubt*," *id.* at 318 (emphasis added). In so holding, *Jackson* underscored that merely requiring any evidence of guilt – a standard then applied by many State appellate courts – would be "inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Id.* at 320.

While other States have conformed their review standards to this teaching, the South Carolina Supreme Court has failed to implement the "workable[,] * * * predictable standard," announced in *Jackson*. *See Wisconsin v. Hauk*, 652 N.W.2d 393 (App. 2002) ("A conviction cannot be sustained on the sole basis that there is 'some evidence' supporting a guilty verdict; rather, there must be sufficient evidence to enable a reasonable jury to find guilt beyond a reasonable doubt"); *Young v. Georgia*, 530 S.E.2d 758 (App. 2000); *Short v. Indiana*, 564 N.E.2d 553 (App. 1991); *Butler*

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less sweeping measures when proposed. Indeed, if some South Carolina women, finding themselves unable to overcome drug dependency late in pregnancy, opt to risk misdemeanor punishment under the abortion statute, rather than life imprisonment for homicide, in the event of stillbirth, the law the Legislature actually enacted will have been defeated by the rule the State Supreme Court majority in this case imposed.

v. South Carolina, 459 U.S. 932, 936 (1982) (Marshall, J., dissenting from denial of certiorari) (use of "[a]ny evidence direct or circumstantial reasonably tending to prove the guilt of the accused" standard was inconsistent with this *Jackson*). In view of the conflict that persists on this federal question – and because proper application of *Jackson* would have resulted in reversal of Petitioner's conviction, this error supplies additional reason for granting certiorari.

II. Petitioner's Punishment Is Cruel And Unusual

Petitioner's lengthy prison sentence – for an unprecedented "crime" (that she likely did not "commit") – also violates the Eighth Amendment. Although the decision below reasoned that Petitioner's punishment was not out of proportion to sentences elsewhere imposed for "murder," 15a, that is not an appropriate answer when *every other jurisdiction to have considered the question* would not treat Petitioner's conduct as a *criminal offense*. *See Robinson v. California,* 370 U.S. 660, 667 (1962) ("questions of [cruel and unusual punishment] cannot be considered in the abstract"); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"). Indeed, *South Carolina*'s laws maintain longstanding distinctions between intentionally killing a born person, S.C. Code § 16-3-10, and intentionally terminating a pregnancy after a fetus has attained viability, *id.* § 44-41-80(b).

For similar reasons, Petitioner's punishment cannot be defended with reference to the "harm caused." South Carolina has specified that *intentionally* causing the *same harm* merits a maximum sentence one-sixth that imposed on Petitioner, who was convicted (wrongly, *see supra*) of "indifference." *Cf. Enmund v. Florida*, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical to the degree of [his] criminal culpability").

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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MAY 2003

APPENDIX

(Cite as: 352 S.C. 635, 576 S.E.2d 168)

Supreme Court of South Carolina.

The STATE, Respondent,

v.

Regina D. McKNIGHT, Appellant.

No. 25585.

Heard Nov. 6, 2002.

Decided Jan. 27, 2003.

C. Rauch Wise, of Greenwood, Jodie L. Kelley, Matthew Hersh, Oliver A. Sylvain, all of Washington, and Lynn M. Paltrow, of New York, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and John Gregory Hembree, of Conway, for respondent.

Joseph M. McCulloch, Jr., of Columbia, Judith K. Appel and Daniel N. Abrahamson, of Oakland, Susan King Dunn, of Charleston, and William S. Bernstein, of New York, for amicus curiae.

JUSTICE WALLER:

Appellant, Regina McKnight was convicted of homicide by child abuse; she was sentenced to twenty years, suspended upon service of twelve years. We affirm.

FACTS

On May 15, 1999, McKnight gave birth to a stillborn five-pound baby girl. The baby's gestational age was estimated to be between 34-37 weeks old. An autopsy revealed the presence of benzoylecgonine, a substance which is metabolized by cocaine. The pathologist, Dr. Proctor,

testified that the only way for the infant to have the substance present was through cocaine, and that the cocaine had to have come from the mother.[1] Dr. Proctor testified that the baby died one to three days prior to delivery. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis.[2] and cocaine consumption. He ruled the death a homicide. McKnight was indicted for homicide by child abuse. A first trial held Jan. 8- 12, 2002 resulted in a mistrial.[3] At the second trial held May 14-16, 2001, the jury returned a guilty verdict. McKnight was sentenced to twenty years, suspended to service of twelve years.

ISSUES

1. Did the Court err in refusing to direct a verdict on the grounds that a) there was insufficient evidence of the cause of death, b) there was no evidence of criminal intent, and c) there was no evidence the baby was viable when McKnight ingested cocaine?
2. Did the Court err in refusing to dismiss the homicide by child abuse indictment on the grounds that a) the more specific criminal abortion statute governs, b) the statute does not apply to the facts of this case, and c) the legislature did not intend the statute to apply to fetuses?
3. Does application of the homicide by child abuse statute to McKnight violate her due process right of adequate notice?

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[1]He testified that because of the rapid breakdown of pure cocaine, a baby would always have benzoylecgonine in its system, rather than pure cocaine.

[2]He testified that chorioamnionitis and funisitis is the medical term given to the placenta and umbilical cord when they are inflamed, which can be caused by an underlying infection, but that most children with these conditions have live births.

[3]McKnight was also indicted for distribution of cocaine. The court dismissed the distribution charge. A separate appeal from that ruling remains pending in this Court.

4. Does application of the homicide by child abuse statute to McKnight violate her constitutional right to privacy?
5. Did the trial court err in refusing to dismiss the indictment on eighth amendment cruel and unusual punishment grounds?
6. Does application of the homicide by child abuse statute to McKnight violate equal protection?
7. Did the trial court err in refusing to exclude evidence of the results of a urine specimen taken from McKnight shortly after the stillbirth, on grounds that the specimen was obtained in violation of her fourth amendment rights?

1. DIRECTED VERDICT

McKnight asserts the trial court erred in refusing to direct a verdict for her on the grounds that a) there was insufficient evidence of the cause of death, b) there was no evidence of criminal intent, and c) there was no evidence the baby was viable when McKnight ingested the cocaine. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney,* 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Burdette,* 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. *State v. Pinckney,* 339 S.C.

346, 529 S.E.2d 526 (2000).

a. Cause of Death

McKnight asserts the state failed to introduce sufficient evidence demonstrating that cocaine caused the stillbirth. We disagree.

Dr. Proctor, who performed the autopsy and who was qualified as an expert in criminal pathology, testified that the only way for the infant to have benzoylecgonine present was through cocaine, and that the cocaine had to have come from the mother. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis and cocaine consumption. Dr. Proctor ruled the death a homicide.

Another pathologist, Dr. Woodward, who was qualified as an expert in pediatric pathology testified that the gestational age of the infant was between 35-37 weeks, and that it was viable. He then described how one determines the cause of death of a viable fetus, by looking for abnormalities, placental defects, infections, and the chemical constituency of the child. He explained the effect that cocaine would have on both an adult and a child. He testified that the placenta was the major heart-lung machine while the baby was in utero and that cocaine usage can produce degeneration of the small blood vessels in the placenta. He stated that he found areas of pinkish red degeneration of the blood vessels which were consistent with cocaine exposure. He testified that he did not see any other indications of the cause of death, and found a lack of evidence of other infections, lack of other abnormalities, otherwise normal development of the child, it's size, weight, and lung development. Although Dr. Woodward agreed with Dr. Proctor that chorioamnionitis and mild funisitis were present, he testified that to a reasonable degree of medical certainty, those conditions had not caused the death of the infant. He also opined that neither syphilis, nor placental

abruption killed the infant. He concluded that, to a reasonable degree of medical certainty, the cause of death was intrauterine cocaine exposure. Although Woodward could not say the exact mechanism by which the cocaine had killed the infant, he testified the mechanisms through cardiac function, placental functions, are seen as most probable. On cross-exam, Woodward testified that he believed the death was caused solely by the cocaine effect, and that the drugs could have caused the baby's heart to stop, or to have caused the baby's heart to rise precipitously putting the baby in congestive heart failure. He explained the lack of abnormalities in the heart found by Dr. Proctor's autopsy, stating, I wouldn't expect to see specific indices in the heart if the heart just stopped or if the heart went into congestive heart failure. Finally, Woodward testified he had seen both children and adults dead with less benzoylecgonine in their systems than McKnight's baby.

Although McKnight's expert, Dr. Conradi, would not testify that cocaine had caused the stillbirth, she did testify that cocaine had been in the baby at one point. She also ruled out the possibility of chorioamnionitis, funisitis or syphilis as the cause of death.

Viewing the expert testimony in the light most favorable to the state, we find sufficient evidence to withstand a directed verdict. *McHoney, supra.* Any defect in the expert testimony went to its weight, a defect McKnight was free to challenge with her own evidence.

b. Criminal Intent

McKnight next asserts she was entitled to a directed verdict as the state failed to prove she had the requisite criminal intent to commit homicide by child abuse. We disagree.

Under S.C. Code § 16-3-85(A), a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse

or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. McKnight claims there is no evidence she acted with extreme indifference to human life as there was no evidence of how likely cocaine is to cause stillbirth, or that she knew the risk that her use of cocaine could result in the stillbirth of her child.

Recently, in *State v. Jarrell,* 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct.App.2002), the Court of Appeals defined extreme indifference, as used in the homicide by child abuse statute, stating:

> In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. See *State v. Rowell,* 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); *see generally Hooper v. Rockwell,* 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as willful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). At least one other jurisdiction with a similar statute has found that "[a] person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person." *Davis v. State,* 325 Ark. 96, 925 S.W.2d 768, 773 (1996). Therefore, we ... hold that in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.

Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a

conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof. *See State v. Tucker,* 273 S.C. 736, 259 S.E.2d 414 (1979).

In *Whitner v. State,* 328 S.C. 1, 10, 492 S.E.2d 777, 782 (1997), *cert. denied* 523 U.S. 1145, 118 S.Ct. 1857, 140 L.Ed.2d 1104 (1998), this Court noted that although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. Given this common knowledge, Whitner was on notice that her conduct in utilizing cocaine during pregnancy constituted child endangerment. *Id.* at 16, 492 S.E.2d at 785. Indeed, more than twelve years ago, Justice Toal wrote:

> The drug "cocaine" has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, entire governments have been undermined by the cocaine industry.

State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990).

Here, it is undisputed that McKnight took cocaine on numerous occasions while she was pregnant, that the urine sample taken immediately after she gave birth had very high concentrations of cocaine, and that the baby had benzoylecgonine in its system. The DSS investigator who interviewed McKnight shortly after the birth testified that McKnight admitted she knew she was pregnant and that she had been using cocaine when she could get it, primarily on weekends. Given the fact that it is public knowledge that

usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life. Accordingly, the trial court correctly refused a directed verdict. *State v. Pinckney, supra* (if the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, case must go to the jury).

c. Viability

Finally, McKnight asserts she was entitled to a directed verdict as there was no evidence the baby was viable at the time she ingested cocaine. This argument was not raised in McKnight's motions to dismiss. Nor was it ruled on by the trial court. Accordingly, this argument is unpreserved. *State v. Hicks,* 330 S.C. 207, 499 S.E.2d 209, *cert. denied,* 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review).

2. DISMISSAL OF HOMICIDE INDICTMENT

McKnight next asserts the trial court erred in refusing to dismiss the homicide by child abuse indictment on the grounds that a) the more specific criminal abortion statute governs, b) the homicide by child abuse statute does not apply to the facts of this case, and c) the legislature did not intend the statute to apply to fetuses. We disagree.

a. Criminal Abortion Statute

Initially, McKnight asserts the criminal abortion statute, S.C. Code § 44-41-80, is a more specific statute which controls under the circumstances of this case. McKnight did not raise this contention to the trial court. Contrary to the assertions in her reply brief, although McKnight did argue that the statute was inapplicable to the circumstances of this case, at no time did she assert that the

criminal abortion statute was the more specific, controlling statute. Accordingly, this issue is unpreserved. *State v. Hicks, supra* (issue must be raised to and ruled upon by trial court to be preserved for review).

b. Application of Homicide by Abuse Statute in This Case

McKnight next asserts the Legislature did not intend the homicide by child abuse statute apply to the stillbirth of a fetus. We disagree.

McKnight asserts the term child, as used in the statute, is most naturally read as including only children already born. *See* S.C. Code § 16-3- 85(B). In several cases this Court has specifically held that the Legislature' use of the term child includes a viable fetus. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998); *Whitner v. State,* 328 S.C. 1, 492 S.E.2d 777 (1997); *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984). McKnight cites to portions of the statute defining harm as relating to corporal punishment and/or abandonment; she asserts this demonstrates that the statute was clearly intended to apply only to children already born. However, section 16-3-85(B) also defines harm as inflicting or allowing to be inflicted on the child physical injury ... and failing to supply the child with adequate health care ... Either of these provisions may clearly be applied to an unborn child. Accordingly, given the language of the statute, and this Court's prior opinions defining a child to include a viable fetus, we find the plain language of the statute does not preclude its application to the present case.

c. Legislative History

McKnight lastly asserts that the legislative history of section 16- 3-85 conclusively demonstrates that it does not apply to unborn children. We find this contention unpersuasive.

Section 16-3-85 was amended by 2000 Acts No. 261, § 1. The prior statute read that a person is guilty of homicide by child abuse who causes the death of a child under the age of eleven while committing child abuse or neglect as defined in *Section 20-7-490*,[4] and the death occurs under circumstances manifesting an extreme indifference to human life. (Emphasis supplied). The effect of the 2000 amendment was the deletion of the reference to the definitions of abuse and neglect contained in section 20-7-490, and the addition of subsection (B), defining those terms as follows:

> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
>
> (2) "harm" to a child's health or welfare occurs when a person:
>
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
>
> (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
>
> (c) abandons the child resulting in the child's death.

There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *State v. Corey D.,* 339 S.C. 107, 529 S.E.2d 20 (2000); *Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993). The homicide by child abuse statute was amended in May 2000, some three years after this Court, in *Whitner,* had specifically held that the term

[4]Section 20-7-490 is contained in the Children's Code and defines child as a person under the age of eighteen and also defines abused or neglected child, and harm.

child includes a viable fetus.[5] The fact that the legislature was well aware of this Court's opinion in *Whitner,* yet failed to omit viable fetus from the statute's applicability, is persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation. Contrary to McKnight's assertion, we do not find the legislature's decision to define the terms abuse and neglect within the

[5]We granted McKnight's motion to argue against the precedent of *Whitner v. State, supra.* We adhere to our opinion in *Whitner.* As did Whitner, McKnight forebodes a parade of horribles and points to commentators who object to the prosecution of pregnant women as being contrary to public policy and deterring women from seeking appropriate medical care and/or creating incentives for women to seek abortions to avoid prosecution. *See e.g.* Tolliver, *Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina's Interpretation of the Word Child,* 24 S.Ill.U.L.J. 383 (Winter 2000); DeLouth, *Pregnant Drug Addicts As Child Abusers: A South Carolina Ruling,* 14 Berkeley Women's L.J. 96 (1999).

However, not all of the commentaries concerning *Whitner* have been critical. *See* Miller, *Fetal Neglect and State Intervention: Preventing Another Attleboro Cult Baby Death,* 8 Cardozo Women's L.J. 71 (2001)(suggesting that the state's interest in protecting the life of the fetus takes precedence over any rights the mother may have and that the fetus has the right to be protected by the State as soon as the fetus is viable or when a woman can no longer obtain a legal abortion); Janssen, *Fetal Rights and the Prosecution of Women For Using Drugs During Pregnancy,* 48 Drake L.Rev. 741 (2000); Schueller, *The Use of Cocaine by Pregnant Women: Child Abuse or Choice* ? 25 J. Legisl. 163 (1999). As noted by Janssen, although the threat of abortion or lack of prenatal care is real, the burden placed on pregnant substance abusers is not the burden to get an abortion. Rather the burden is on the woman to stop using illegal drugs once she has exercised her constitutional decision not to have an abortion.... Once the mother has made the choice to have a child, she must accept the consequences of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child. As one judge aptly pointed out, there is simply 'no reason to treat a child in utero any differently from a child ex utero where the mother has decided not to destroy the fetus or where the time allowed for such destruction is past.' 48 Drake L.Rev. at 762-763 (Internal citation omitted).

confines of section 16-3-85, deleting the reference to section 20-7-490 of the Children's Code, in any way evinces a retraction from our opinion in *Whitner*. Although *Whitner* did examine the policy and purpose of the Children's Code, that discussion was not central to our holding. More fundamentally, *Whitner* found no basis upon which to grant a viable fetus the status of a person for purposes of homicide and wrongful death laws, while denying such status in the context of child abuse. Indeed, if the legislature had intended to remove a fetus from the operation of the statute, it could have plainly said so. *Stardancer Casino v. Stewart,* 347 S.C. 377, 556 S.E.2d 357 (2001); *Tilley v. Pacesetter,* 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so).

3. DUE PROCESS/NOTICE

McKnight next asserts application of the homicide by child abuse statute to her violates due process; she contends she had no notice the statute could be applied to a woman whose fetus is stillborn. We disagree.

In numerous cases dating since 1960, we have held that a viable fetus is a person. *Hall v. Murphy,* 236 S.C. 257, 113 S.E.2d 790 (1960); *Fowler v. Woodward,* 244 S.C. 608, 138 S.E.2d 42 (1964); *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984). In *Whitner, supra,* we reiterated the fact that a viable fetus is a child within the meaning of the child abuse and endangerment statute. Most recently, we held that a viable fetus is both "person" and "child" as used in statutory aggravating circumstances which provide for death penalty eligibility. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998).

A penal statute offends due process only when it fails to give fair notice of the conduct it proscribes. *State v. Edwards,* 302 S.C. 492, 397 S.E.2d 88 (1990); *State v. Smith,* 275 S.C. 164, 268 S.E.2d 276 (1980). The statute must give sufficient notice to enable a reasonable person to

comprehend what is prohibited. *State v. Crenshaw,* 274 S.C. 475, 266 S.E.2d 61, *cert. denied,* 449 U.S. 883, 101 S.Ct. 236, 66 L.Ed.2d 108 (1980). In *Whitner,* we rejected the claim that application of the child endangerment and neglect statute did not give the defendant fair notice of the conduct proscribed, stating:

> The statute forbids any person having legal custody of a child from refusing or neglecting to provide proper care and attention to the child so that the life, health, or comfort of the child is endangered or is likely to be endangered. As we have found above, the plain meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20-7-50. Whitner had all the notice the Constitution requires.

328 S.C. at 16, 492 S.E.2d at 784-785.

Similarly, a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. Under *Whitner,* taking cocaine while pregnant constitutes neglect and, as discussed in Issue 1 above, it was a jury question whether McKnight acted with extreme indifference to human life. Given the ample authority in this state finding a viable fetus to be a person, we find McKnight was on notice that her conduct in ingesting cocaine would be proscribed.[6]

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[6]McKnight also asserts the statute as interpreted to apply to pregnant women is void for vagueness as it is unclear what conduct by a pregnant woman is likely to result in the stillbirth of her fetus. As recently recognized by the Court in *Curtis v. State,* 345 S.C. 557, 549 S.E.2d 591 (2001), however, one to whose conduct the law clearly applies does not have standing to challenge it for vagueness. Given that the statute clearly applies to a stillbirth caused by ingestion of cocaine, McKnight lacks

4. RIGHT TO PRIVACY

McKnight next asserts application of the homicide by child abuse statute to women for conduct during pregnancy violates the constitutional rights of privacy and autonomy.

McKnight asserts several policy reasons why women should not be placed in the position of fearing prosecution for conduct engaged in while pregnant (e.g., choosing abortion over pregnancy, foregoing medical care, etc.). While she raises a number of legitimate concerns, she is in reality attempting to assert the privacy rights of other pregnant women, something she does not have standing to do. *Curtis v. State, supra* (one cannot obtain a decision as to the invalidity of an act on the ground that it impairs the rights of others).

As to her own right to privacy, this Court specifically rejected the claim that prosecution for abuse and neglect of a viable fetus due to the mother's ingestion of cocaine violates any fundamental right. *Whitner, supra.* In *Whitner* we stated,

> It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

328 S.C. at 18, 492 S.E.2d at 786. Accordingly, we find

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standing to raise a void for vagueness contention.

McKnight's right of privacy was not violated.

5. EIGHTH AMENDMENT

McKnight next asserts the trial court erred in refusing to dismiss the indictment on Eighth Amendment grounds. We disagree.

The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime. *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Pursuant to *Solem,* this Court reviews three factors in assessing proportionality: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. *State v. Jones,* 344 S.C. 48, 543 S.E.2d 541 (2001).[7]

Here, the gravity of the offense is severe; McKnight is charged with homicide.[8] The sentence for homicide by child abuse under S.C. Code § 16-3-85(C)(1) is twenty years to life, and McKnight received a twenty year sentence, suspended upon service of twelve years. The penalty is no harsher than that imposed upon any other individual charged with murder. *See* S.C. Code § 16-3-20 (persons guilty of murder must be punished by death, life imprisonment, or mandatory minimum term of thirty years); *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975) (holding sentence of life imprisonment resulting

[7]It is questionable, in light of the United States Supreme Court's opinion in *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), whether the stringent three-factor *Solem* inquiry remains mandated in "cruel and unusual punishment" cases. *See State v. Brannon,* 341 S.C. 271, 533 S.E.2d 345 (Ct.App.2000) (finding 3 prong inquiry no longer applicable and requiring only a threshold comparison of the gravity of the offenses against the severity of the sentence).

[8]To the extent McKnight attempts to compare the gravity of the offense with criminal abortion, she is, in reality, raising an equal protection claim. *See* Issue 6 below.

from a wrongful killing caused by the use of an automobile is not cruel and unusual punishment).

Finally, although other states have not defined a viable fetus as a child for purposes of criminal prosecution of a pregnant mother, other states impose severe sentences on those who are guilty of the murder or neglect of a child. *See e.g.,* Az. St. § 13-604.1(B)(person convicted of attempted murder of a minor under twelve years of age may be sentenced to life imprisonment); Or. St. § 163.115(1)(c)(when a person by abuse, recklessly under circumstances manifesting extreme indifference to the value of human life, causes the death of a child under 14 years of age, it is murder requiring mandatory life sentence); W.Va. Code § 61-8D-2 (parent who maliciously and intentionally fails to supply child with necessary food, clothing, shelter or medical care resulting in child's death is guilty of murder in first degree and penalized accordingly). We find no Eighth Amendment violation.

6. EQUAL PROTECTION

McKnight next asserts that application of the homicide by child abuse statute to her violates equal protection inasmuch as a person charged under the criminal abortion statute is subjected to a maximum of two years imprisonment, while one prosecuted under the homicide by child abuse statute is subjected to the possibility of life imprisonment.

This issue is procedurally barred from review. While McKnight did file a pre-trial motion to dismiss based upon equal protection, and renewed that motion at trial, her arguments at trial were premised upon the statute's applicability only to women and its disparate impact upon women. At no time did she raise the contention she now raises concerning the disproportionality of the criminal

abortion statute. Accordingly, this argument is unpreserved and we therefore decline to address it. *State v. Dickman,* 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal); *In re McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001) (constitutional claim must be raised and ruled upon to be preserved for appellate review).

7. SUPPRESSION OF URINE SAMPLE

Finally, McKnight asserts the trial court erred in refusing to suppress the results of a urine sample taken at the hospital after the stillbirth, contending the sample was taken in violation of her fourth amendment rights. We disagree.

Pursuant to a Conway Hospital Protocol for the Management of Drug Abuse during Pregnancy, a medical urine drug screening *may* be ordered at the discretion of the attending physician if an obstetrical patient meets one of several criteria, including lack of prenatal care or unexplained fetal demise. If such a drug screening test turns up positive from the hospital's lab, then hospital personnel are to request consent from the patient for forensic (medical-legal) testing. If consent is obtained, the sample is sent to the hospital's reference lab and the nursery is notified. The Department of Social Services is to be notified of positive medical urine drug screening and the criteria causing the drug screen to be done, and whether forensic testing is being done on the mother or newborn. The protocol states that As mandated by law, it is the obligation of every medical facility, as well as each individual, to report to DSS any suspected abuse or neglect involving an unborn, yet viable, fetus or newborn child. The hospital also has a Chain of Custody form and procedure for handling forensic samples.

Here, an initial drug screen was ordered by the obstetrician, Dr. Niles, due to McKnight's lack of prenatal

care. When the initial screen tested positive for cocaine, Mary McBride, a labor and delivery nurse, was instructed to obtain a forensic urine sample from McKnight. Before doing so, McBride read an Informed Consent to Drug Testing form to McKnight. McBride testified she read the form to McKnight, and advised her that it could be used for legal purposes; she did not, however, specifically advise McKnight that police would possibly arrest her. The form states that McKnight acknowledges she has testified positive for cocaine, and is being requested to give consent for a medical-legal (forensic) test which will confirm or deny the initial report. The form further states that It has been explained to me that I may refuse consent for this test. It has been explained to me that this test may be used for legal purposes. McKnight signed the form indicating her consent. The second sample also tested positive for cocaine.

McKnight asserts the forensic/legal sample was taken in violation of her fourth amendment rights, contrary to the United States Supreme Court's opinion in *Ferguson v. City of Charleston,* 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). We disagree. The issue in *Ferguson,* as framed by the Court, was as follows:

> In this case, we must decide whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.

532 U.S. at 69-70, 121 S.Ct. 1281.

In *Ferguson,* staff members of MUSC developed a written policy, in conjunction with the solicitor and police,

for obtaining evidence to prosecute women who bore children who tested positive for drugs at birth. These procedures provided a plan to identify and test pregnant patients suspected of drug use *without their knowledge or consent*. The plan (1) required that a chain of custody be followed when obtaining and testing patients' urine samples, (2) contained police procedures and criteria for arresting patients who tested positive, and (3) encouraged prosecution for drug offenses and child neglect, and specifically set forth the offenses with which the women could be charged, as well as procedures for police to follow upon arresting the women. *Id.* at 70-73, 121 S.Ct. 1281.

The Supreme Court held MUSC's performance of diagnostic tests to obtain evidence of the women's criminal conduct for law enforcement purposes was an unreasonable search if the patient had not consented to the procedure. *Id.* at 84-85, 121 S.Ct. 1281. The Court held that [g]iven the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage, the policy did not fit with the closely guarded special needs category which would justify a warrantless, non-consensual search. *Id.*

Ferguson is distinguishable in several respects. First, there is no evidence that Conway Hospital's policy was in any way developed or implemented in conjunction with police, the solicitor, the Attorney General, or any other law enforcement personnel. Second, unlike the policy at issue in *Ferguson,* Conway Hospital's policy did not require hospital staff to turn drug screening results over to law enforcement personnel. On the contrary, the hospital's protocol merely requires that its department of social work services be notified and that a telephone referral be made to DSS when an assessment reveals suspicion of illegal drug use or reason to believe the unborn or newborn child is at risk. A DSS

caseworker is not a law enforcement officer. *State v. Sprouse,* 325 S.C. 275, 478 S.E.2d 871 (Ct.App.1996).

Third, unlike *Ferguson,* Conway Hospital's testing was not done surreptitiously, but was done with McKnight's knowledge and consent. The labor and delivery nurse specifically testified that she obtained a written consent form from McKnight to perform the second urine specimen; the consent form indicated to McKnight that she had the right to refuse the test, and that it could be used for legal purposes.

We find the state sufficiently demonstrated, through the testimony of Nurse McBride, that McKnight consented to the search. The only evidence in the record on this point is the testimony of McBride, who testified that she read the form to McKnight, and told her that the sample could be used for legal purposes. The form which was read to McKnight specifically advised that she may refuse consent, and that the test may be used for legal purposes. This is sufficient evidence upon which to find the consent was voluntary. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Wallace,* 269 S.C. 547, 238 S.E.2d 675 (1977) (whether a consent to search was voluntary is a question of fact to be determined from the "totality of the circumstances").

Finally, even assuming *arguendo* that McKnight did not consent to the urine specimen, and that it was illegally obtained, we find any error in its admission was harmless. The DSS caseworker testified, without objection, that McKnight told her she knew she was pregnant and that she had been using crack cocaine when she could get it. Further, the defenses' own expert, Dr. Conradi, testified that cocaine was in the baby at some point. Both of the state's expert pathologists testified that the only way for the infant to have the benzoylecgonine present was through cocaine, and that the cocaine had to have come from the mother. Given this

evidence, even assuming the urine sample was erroneously admitted, it could not have impacted the jury's verdict. *Arnold v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied,* 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993) (error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained).
McKnight's conviction and sentence are affirmed.

AFFIRMED.

TOAL, C.J., and BURNETT, J., concur.

JUSTICE MOORE:

I respectfully dissent. Once again, I must part company with the majority for condoning the prosecution of a pregnant woman under a statute that could not have been intended for such a purpose. Our abortion statute, S.C. Code § 44-41-80(b) (2002), carries a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother. In penalizing this conduct, the legislature recognized the unique situation of a feticide by the mother. I do not believe the legislature intended to allow the prosecution of a pregnant woman for homicide by child abuse under S.C.Code § 16-3-85(A)(1) (Supp.2001) which provides a disproportionately greater punishment of twenty years to life.

As expressed in my dissent in *Whitner v. State,* 328 S.C. 1, 492 S.E.2d 777 (1997),[9] it is for the legislature to determine whether to penalize a pregnant woman's abuse of her own body because of the potential harm to her fetus. It is not the business of this Court to expand the application of a criminal statute to conduct not clearly within its ambit. To the contrary, we are constrained to strictly construe penal statutes in the defendant's favor. *State v. Blackmon,*

[9] *See also State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998) (Moore, J. dissenting).

304 S.C. 270, 403 S.E.2d 660 (1991).

Because I disagree that § 16-3-85 applies in this case, I dissent.

PLEICONES, J., concurs.

Constitutional And Statutory Provisions

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

S.C. Code § 16-3-85 Homicide by child abuse; definitions; penalty; sentencing

[as amended, 2000 Act No. 261, § 1]

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;

(b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or

(c) abandons the child resulting in the child's death.

(C) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:

(1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or

(2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.

(D) In sentencing a person under this section, the judge must consider any aggravating circumstances including, but not limited to, a defendant's past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.

S.C. Code § 16-3-85 Homicide by child abuse; definitions; penalty; sentencing.

[As enacted, 1992 Act No. 412, § 1]

(A) A person is guilty of homicide by child abuse who:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect as defined in Section 20-7-490 and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect as defined in Section 20-7-490 and the child abuse or neglect results in the death of a child under the age of eleven.

(B) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:

(1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or

(2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.

(C) In sentencing a person under this section the judge shall consider any aggravating circumstances, including, but not limited to, a defendant's past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.

§ 44-41-10. Definitions.

As used in this chapter:

(a) *"Abortion"* means the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

* * * *

(f) *"Pregnancy"* means the condition of a woman carrying a fetus or embryo within her body as the result of conception.

* * * *

(i) *"First trimester of pregnancy"* means the first twelve weeks of pregnancy commencing with conception rather than computed on the basis of the menstrual cycle.

(j) *"Second trimester of pregnancy"* means that portion of a pregnancy following the twelfth week and extending through the twenty-fourth week of gestation.

(k) *"Third trimester of pregnancy"* means that portion of a pregnancy beginning with the twenty-fifth week of gestation.

(l) *"Viability"* means that stage of human development

when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty- fourth week of pregnancy.

§ 44-41-20. Legal Abortions.

Abortion shall be a criminal act except when performed under the following circumstances:

(a) During the first trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician pursuant to his professional medical judgment.

(b) During the second trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician in a hospital or clinic certified by the Department.

(c) During the third trimester of pregnancy, the abortion is performed with the pregnant woman's consent, and if married and living with her husband the consent of her husband, in a certified hospital, and only if the attending physician and one additional consulting physician, who shall not be related to or engaged in private practice with the attending physician, certify in writing to the hospital in which the abortion is to be performed that the abortion is necessary based upon their best medical judgment to preserve the life or health of the woman.

§ 44-41-80. Performing or soliciting unlawful abortion; testimony of woman may be compelled.

(a) Any person, except as permitted by this chapter, who

provides, supplies, prescribes or administers any drug, medicine, prescription or substance to any woman or uses or employs any device, instrument or other means upon any woman, with the intent to produce an abortion shall be deemed guilty of a felony and, upon conviction, shall be punished by imprisonment for a term of not less than two nor more than five years or fined not more than five thousand dollars, or both. *Provided,* that the provisions of this item shall not apply to any woman upon whom an abortion has been attempted or performed.

(b) Except as otherwise permitted by this chapter, any woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself or who submits to any operation or procedure or who uses or employs any device or instrument or other means with intent to produce an abortion, unless it is necessary to preserve her life, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for a term of not more than two years or fined not more than one thousand dollars, or both.

(c) Any woman upon whom an abortion has been performed or attempted in violation of the provisions of this chapter may be compelled to testify in any criminal prosecution initiated pursuant to subsection (a) of this section; *provided, however,* that such testimony shall not be admissible in any civil or criminal action against such woman and she shall be forever immune from any prosecution for having solicited or otherwise procured the performance of the abortion or the attempted performance of the abortion upon her.