IN THE

SUPREME COURT OF INDIANA

Cause No. _____

BEI BEI SHUAI,	)	Appeal from the
	)	Marion Superior Court
Appellant,	)	
	)	Court of Appeals Cause No.:
v.	)	49A02-1106-CR-00486
	)	Trial Court Cause No.:
STATE OF INDIANA,	)	49G03-1103-MR-014478
	)	
Appellee.	)	Hon. Sheila Carlisle, Judge

Petition to Transfer

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Questions Presented on Transfer

I. By inserting the term "fetus" in the murder and feticide statutes, did the Indiana Legislature intend to make pregnant women criminally liable for the outcome of their pregnancies, contrary to over 200 years of Indiana legislative and judicial history?

II. Did the court of appeals contravene settled case law by refusing to address any constitutional claims because it had resolved the case against the defendant based on the plain language of criminal statutes?

III. Does the State's unprecedented prosecution of a pregnant woman for murder and feticide based upon her attempt to commit suicide violate multiple constitutional provisions when she was not provided notice that by being pregnant she would be subject to the homicide laws if her actions or inactions were perceived by law enforcement to potentially harm her fetus?

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Background and Prior Treatment of Issues on Transfer

On December 23, 2010, Petitioner, Bei Bei Shuai ("Shuai"), a thirty-four year old pregnant woman with no criminal history, abandoned and shamed by the father of her expected child, attempted to kill herself by consuming rat poison. (Tr. 459, 473-475, 479.)[1] Because of the persistence of friends, Shuai received medical treatment and doctors believed that Shuai and her fetus would survive. (Tr. 191, 195-197, 388-390.)

On December 31, 2010, Shuai consented to caesarean surgery resulting in the birth of her daughter. Following birth, Shuai did nothing but love and care for her daughter. (Tr. 198-201, 389-390.) On January 3, 2011, Shuai's newborn died in her arms. (Tr. 206-207.)

On March 14, 2011, the State charged Shuai with murder and attempted feticide. According to the Information, on or about January 3, 2011, she committed these crimes by ingesting poison. Shuai voluntarily surrendered and remains imprisoned in the Marion County Jail.

On March 22, 2011, Shuai filed a motion to quash the information on multiple grounds including the failure of the information to advise Shuai whether she was being prosecuted for killing "another human being" pursuant to I.C. § 35-1-1, sub-

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[1] The bail hearing transcript is referred to as "Tr." The first Appendix filed by Shuai on July 28, 2011 is referred to as "App." The Appellant's Brief on the motion to dismiss is referred to as "Dis. Br."

section 1 or a "viable fetus" pursuant to sub-section 4. On March 31, 2011, the State filed an Amended Information alleging that the criminal act, ingesting poison while pregnant, occurred on December 23, 2010. On March 30, 2011, Shuai filed a motion to dismiss both the murder and feticide charges.

On June 20, 2011, the trial court denied her motion to dismiss. Shuai appealed the trial court's denial by filing an interlocutory appeal which was accepted on August 15, 2011. The court of appeals consolidated the interlocutory appeal with Shuai's direct appeal of the trial court's order denying her bail.

On February 8, 2012, the court of appeals issued its decision. It unanimously reversed the trial court's denial of bail finding that Shuai presented sufficient evidence to rebut the presumption that she is guilty. Slip op. at 9.

With respect to the dismissal of the charges, the court issued a split decision wherein the majority affirmed the trial court's denial of Shuai's motion to dismiss. The majority stated incorrectly that Shuai only argued for dismissal of the murder, not the feticide charge, and by doing so wrongly limited its review to a portion of the issues raised by Shuai.[2] The majority failed to consider Shuai's constitutional

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[2] In her Dismissal Appeal, Shuai repeatedly challenged the feticide charge on statutory and constitutional grounds. As Judge Riley noted in her dissent, "it is abundantly clear from Shuai's discussion of the attempted feticide charge in her appellate briefs that she advocates for the dismissal of both charges." Slip op. at 23, n.1." The majority may have only reviewed Shuai's bail briefs which addressed the deficiencies of the murder charge because it was the sole reason why Shuai was not entitled to bail.

challenges to the criminal charges because of its conclusion that the murder and feticide statutes unambiguously applied to pregnant women, including Shuai, and that pregnant women are not entitled to assert the common-law defense of immunity from prosecution. The majority acknowledged that "it is possible the language of the statute could lead to many possibly absurd outcomes." Slip op. at 17, n.15.

Judge Riley dissented, concluding that she would dismiss both the murder and feticide charges, stating that, "Now, for the first time in Indiana's history, and without any notice whatsoever, the State decided to prosecute a woman for murder of her child based on her conduct *during* her pregnancy." Slip op. at 27. The dissent also recognized that the majority's decision holding pregnant women criminally liable for alleged or attempted harm to their fetuses would have an unlimited scope, "create an indefinite number of new 'crimes'," and achieve absurd or unreasonable results. Slip op. at 30.

This petition to transfer was timely filed on March 9, 2012.

Reasons for Granting Transfer

The published decision below requires a woman to stand trial for murder and attempted feticide because the State alleges that her attempted suicide while pregnant caused the death of her fetus or newborn. This result is unprecedented in Indiana and contrary to hundreds of years of legislative and judicial history.

Neither the text nor structure of Indiana's homicide chapter supports the court's far-reaching decision to apply the murder and feticide statutes to Shuai. The decision runs afoul of settled canons of statutory construction, including that criminal statutes are to be strictly construed against the State and that statutes in derogation of the common law are likewise to be strictly construed. As the entire panel recognized, if the opinion remains the law in Indiana, absurd results will abound.

The majority opinion ignores that the murder statute requires the death of a viable fetus. A fatal flaw in the State's murder case is that a viable fetus did not die. It was Shuai's newborn daughter who died, days after her birth. The State will never prove the death of any fetus here, yet the court of appeals nevertheless remanded the case for trial on the murder count.

Apart from the statutory infirmities, the State's prosecution also violates Shuai's constitutional rights, including the fundamental due-process right to know, in advance, that the conduct forming the basis of the State's prosecution is unlawful. By their terms, neither the murder nor feticide statutes make pregnant women liable for the outcome of their pregnancies. Yet such express application is necessary to put a woman on notice that her pregnancy may subject her to prosecution for resulting harm to her fetus. This is especially true in light of a woman's common-law immunity from prosecution for injury or death to her fetus. In addition, the Indiana

Code is replete with examples of statutes that apply expressly to pregnant women but, notably, Title 35's homicide chapter is not among them. Although suicide is not illegal in Indiana, Shuai, because of her status as a pregnant woman, faces serious felonies because her desperate attempt to take her own life failed. If our criminal laws are going to extend to tragic suicide attempts by pregnant women, they should do so clearly and unmistakably. At present, they do not.

The majority never reached the merits of Shuai's constitutional arguments because it found the statutes to be unambiguous. Thus, the court fundamentally misunderstood the longstanding admonition to avoid a constitutional claim if the dispute can be resolved on a statutory ground. This prudent rule of judicial restraint applies only when the litigant *succeeds* on the statutory claim yet gratuitously asks the court to decide the constitutional claim, too. Until now, no Indiana court has ever applied this rule where the statutory claim *failed*. The misapplication of this rule alone warrants transfer.

The troubling, far-reaching, and unprecedented decision should not be the last word on these issues. Because the opinion marks a significant departure from the law and practice which profoundly affects women and their families, is inapposite to existing judicial precedent, and is a case of great public importance that has not been, but should be, decided by the Supreme Court, the Court should grant transfer pursuant to Appellate Rule 57(H).

Argument

A. No Murder Occurred as a Matter of Law

The murder charge in the State's Amended Information states that on December 23, 2011, Shuai knowingly killed a viable fetus. (App. 91-92.) It is undisputed that a fetus did not die on December 23 or any other date. The fetus Shuai carried on December 23 was born alive on December 31, 2010. It is undisputed that following delivery, Shuai's daughter was a human being as defined by Indiana law. *See* I.C. § 35-41-1-14 (defining "human being" as "an individual who has been born and is alive.") (App. 501, 515.)

Ignoring the well-established rule of lenity, the majority concluded that "the reference to A.S. as a 'viable fetus' rather than a 'human being' did not render the charging information defective." Slip op. at 13. "[W]e need not decide at this stage of the case whether A.S. was a viable fetus when she allegedly was murdered, as it is the State's burden to prove at trial A.S.'s legal status." *Id.* at 16- 17, n.14. The decision departs from accepted law by treating a question of law – the difference between the legal definitions of a viable fetus and human being – as a factual issue relating to causation that should be decided at trial. The majority violated the clear rule of constructing statutes in favor of a defendant by using the terms interchangeably.

The majority opinion is in stark contrast to the earlier decision in *Herron v. State,* 729 N.E.2d 1008 (Ind. 2000), trans. denied, which held that a legislatively

defined term, such as a dependant, or in this case, another human being, cannot be judicially expanded to include a viable fetus nor should conduct that occurs prior to a child's birth be criminalized. In *Herron*, the court ordered dismissal of the criminal charges prior to trial because a fetus was not a dependent.

The majority's solution of having a legal issue resolved by a jury has been rejected by other jurisdictions. In *Hillman v. State*, 503 S.E.2d 610, 744 (Ct. App. Ga. 1998), a court was faced with a prosecution of an 8-month pregnant woman who shot herself in the abdomen. As the court stated "Clearly, the legal truism 'hard cases make bad law' applies here," and,

> To compound the problem, the State argues that the issue of whether a woman who has participated in this risky behavior *intended* to cause her subsequent miscarriage would be a jury question. In other words, a pregnant woman who suffers a late term miscarriage could be subjected to criminal investigation, indictment, and prosecution long before a jury is asked to determine whether she intentionally did anything to cause the miscarriage. This is a patently unjust approach.

Id, at 613.

B. The Legislature Never Intended that Pregnant Women Would Be Prosecuted for Murder and Feticide

While acknowledging that criminal statutes are not to be "enlarged by construction, implication, or intendment" beyond their fair meaning, slip op. at 14, the majority held for the first time in Indiana history that the murder and feticide statutes unambiguously apply to pregnant women in relationship to the outcomes of their pregnancies. The majority wrongly concluded that the plain language of these

statutes applied to Shuai because she was a person and she allegedly intended to kill either "another human being" or a "viable fetus." *Id.* Apparently, the majority concluded that the legislature, by adding the term "fetus," automatically intended for those laws to apply to pregnant women who experience poor pregnancy outcomes.

The majority did not follow Indiana law which makes it clear that the objective in statutory construction is to determine and effectuate the intent of the legislature. *Matter of Lawrance*, 579 N.E.2d 32 (Ind. 1991). In doing so, courts review statutory background, other related statutes, common law, and legislative history. *Id. Ind. Dept. of Public Welfare v. Payne*, 622 N.E.2d 461 (Ind. 1993). Even when a statute appears to be clear and unambiguous, courts will not find it clear when a strict interpretation would produce absurd results. *City of North Vernon v. Jennings Northern Regional Utility*, 829 N.E.2d 1 (Ind. 2005).

The plain language of the murder and feticide statutes does not apply to pregnant women. Significantly, neither statute says "terminate *her own* pregnancy" or cause "*her own*" fetus to die. Because a pregnant woman's relationship to the fetus she carries is so fundamentally and profoundly unique, it is clear that, in order to make the homicide laws applicable to pregnant women in relationship to the eggs, embryos, and fetuses that they sustain and deliver, the murder and feticide statutes would have to explicitly include pregnant women. (*See* Dis. Br. 5-18.)

The Legislature does not simply add the term "fetus" when it intends to specifically legislate in regard to the pregnant woman but rather explicitly refers to pregnant women, fully recognizing the unique relationship between a pregnant woman and her fetus. *See e.g.,* I.C. § 31-34-1-11 (the definition of a "child in need of services" as including a child whose injury "arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy"); I.C. § 16-41-6-7 (affirming a pregnant woman's right to refuse HIV testing).

In reaching its decision, the majority ignored the past two hundred years of legislative history. Indiana has never enacted any felony statutes making a woman criminally liable for the outcome of her pregnancy and has repeatedly considered, but never enacted, proposed legislation directed at actions of a pregnant woman. (Dis. Br. 26-30) The only statute ever enacted by the Indiana legislature directed at a pregnant woman's actions was passed in 1881 and was a misdemeanor. (Dis. Br. 27.) Despite the existence of that misdemeanor law, no pregnant woman was ever prosecuted and the misdemeanor was ultimately repealed. (Dis. Br. 28-29.)

The fetal murder amendment was part of a package of criminal law revisions enacted because of a vicious attack upon a pregnant woman that caused her to suffer a pregnancy loss. (Dis. Br. 24-25.) Manslaughter and involuntary manslaughter were

amended to include the killing of a "viable fetus" and aggravated battery was amended to include the "loss of a fetus." *Id.*

Other homicide laws were not amended. The assisting and causing suicide statutes were not amended to include the death of a fetus nor did the legislature enact a new statute prohibiting a pregnant woman from committing suicide.

In 2009, the feticide statute was enhanced from a C to a B felony as the result of a third-party attack on a pregnant bank teller resulting in the loss of her twin fetuses. *Kendrick v. State,* 947 N.E.2d 509 (Ind. Ct. App. 2011) All of these amendments were consistent with the Legislature's clear intent to extend the homicide laws to protect pregnant women from third parties who attack them causing harm to their fetuses.

C. The Majority Opinion Will Lead to Absurd Results

If the opinion is allowed to stand, absurd results will abound. The majority's precedent will subject every pregnant woman who "engage[s] in virtually any injury-prone activity" to criminal investigation including use of legal or illegal drugs that are contraindicated during pregnancy, alcohol use, smoking, avoiding proper prenatal medical care, failing to wear a seat belt, exercising too much or too little, eating to excess, not following a regimen for diabetes, seeking cancer treatment, or engaging in a high risk occupation. *Kilmon v. State,* 905 A.2d 306, 311-12 (Md. Ct. App. 2006).

The majority's statutory interpretation will apply to other homicide and battery laws as well. For example, a pregnant woman can be charged with involuntary manslaughter by simply committing an A misdemeanor if a prosecutor deems the conduct had the potential to harm her fetus. I.C. § 35-42-1-4(d).

The feticide statute applies to a fetus at any stage of its development. Thus, if Shuai had been only two months pregnant when she attempted to commit suicide, under the majority's analysis, she would be guilty of feticide even though she had the constitutional right to submit to an abortion. Further, if Shuai had known she would have been charged with murder and feticide, she may have never sought medical treatment.

D. A Pregnant Woman Has a Common-Law Immunity Defense

At common law, while a third party could be criminally liable for causing an injury or death to a fetus, the pregnant woman could not. A pregnant woman's immunity from prosecution was grounded in the "wisdom of experience." *State v. Ashley*, 701 S.2d 338, 340 (Fla. 1997) ("It was in truth a crime which, in the nature of things, she could not commit."). Thus, in order to abrogate the common-law immunity belonging to pregnant women, the Indiana Legislature would have had to do more than add the word fetus to its statutes. *See Toops v. State*, 643 N.E.2d 387 (Ind. Ct. App. 1994).

With an incorrect reference to the timing of Lord Coke's writings[3] and relying upon selective portions of two law review articles, the majority rejected Shuai's immunity defense. A full reading of these articles makes clear that common and early American law treated the pregnant woman's relationship to her fetus differently than a third party. Ashley Gorski, *The Author of her Trouble: Abortion in the Nineteenth-and early Twentieth-Century Judicial Discourses*, 32 Harv. J.L. and Gender 431, 443-44 (2009) (noting "America's first anti-abortion statute was carefully drafted to retain the woman's own immunity from prosecution."); Staci Visser, *Prosecuting for Participating in Illegal Abortions: Undermining Gender Equality and the Effectiveness of State Police Power*, 13 J. Law & Family Studies, 171, 173 (2011) ("Overall, fetal homicide liability has evolved from no liability, to near nationwide third-party liability, and finally to recent efforts to impose liability on pregnant women" and "the prosecutor's attempts to circumvent the common law immunity defense have been largely unsuccessful."). *See also* Clarke D. Forsyth, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U. L. Rev. 563, 618, 622-23 (1987) (noting that criminal and civil remedies for prenatal injuries were historically applied to third parties who attack pregnant women, not pregnant women

[3] Lord Coke's writings were published after 1607, "the fourth year of the reign of James the First" which is the reference point for the common law provided by I.C. § 1-1-2-1.

themselves). Transfer is, therefore, appropriate to address the court of appeals' departure from common law.

E. The Court of Appeals Was Required to Address Shuai's Constitutional Challenges

The majority refused to consider the significant constitutional issues raised by Shuai, stating: "As we may resolve the issue based on the plain language of the statute, we need not address her constitutional arguments." Slip op. at 17, n.15. In reaching its conclusion, the majority cited a civil case, *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999) in which this Court narrowly construed the language of a statute when it was clear that a broader meaning could render a statute unconstitutional.

If the majority opinion is allowed to stand, no statute found to be plain and unambiguous would ever be unconstitutional. The majority could have avoided the constitutional issues *only* if it found in Shuai's favor and dismissed the charges on statutory or other grounds. *See State v. Aiwohi*, 123 P.3d 1210, 1225 (Haw. 2005) (where the court found no need to address the multiple constitutional questions because the manslaughter charge against the pregnant woman was unsupported by the plain statutory language). Instead, the majority determined the statute applied to Shuai and then refused to consider the constitutional rights violated by judicially rewriting the murder and feticide laws to make them applicable to pregnant women who attempt suicide.

F. The Prosecution of a Pregnant Woman for the Outcome of Her Pregnancy Is Unconstitutional

If the majority's decision stands, Shuai's federal and state constitutional rights of due process as a matter of notice and vagueness, privacy, equal protection, and the prohibition against cruel and unusual punishment will be violated. (*See* Dis. Br. 31-45.) This case raises serious due process concerns. The charges against Shuai are a new and unforeseen judicial construction that violates the notice requirement of Due Process. (Dis. Br. at 31, citing *Bouie v. Columbia*, 378 U.S. 347, 353-54 (1964); *Armstrong v. State*, 848 N.E.2d 1088, 1093 (Ind. 2006) *cert. denied* 549 U.S. 996 (2006) (". . . protects offenders from judicial decisions that retroactively alter the import of a law to negatively affect the offender's rights without providing fair warning of that alteration."). No woman in Indiana history has ever been convicted of murder or feticide based on harm she allegedly caused the fetus she carried. Shuai could not have been aware that attempting suicide could subject her to criminal liability.

Moreover, expansion of the murder and feticide laws to pregnant women in relation to their own fetuses renders the law void for vagueness because, for pregnant women, it blurs the line between legal and illegal actions. (*See* Dis. Br. at 33-38.) Shuai did not know that her attempt at suicide, while legal for all others, would be illegal. There is nothing in the murder or feticide statute, or in the court of appeals' opinion, that indicates what conduct is criminal. The opinion renders the statute vague because it can criminalize conduct that "is clearly not criminal in

nature" such as attempting suicide, which conflicts with *Brown v. State,* 868 N.E.2d 464, 468 (Ind. 2007).

The court establishes a precedent that invites arbitrary and capricious application of the penal law by the police and prosecutors. As the *Brown* opinion quotes, "[i]t cannot be left to juries, judges, and prosecutors to draw such lines." 868 N.E.2d at 467 (internal citation omitted). *See also Cochran v. Commonwealth,* 315 S.W. 3d 325, 328 (Ky. 2010) (in a child engenderment prosecution where a woman was accused of taking cocaine during pregnancy, "The 'case-by-case' approach suggested by the Commonwealth is so arbitrary that ... [it would] transgress reasonably identifiable limits; they lack fair notice and violate constitutional due process limits against statutory vagueness." (quoting *Welch v. State,* 864 S.W.2d. 280, 282 (Ky. 1993)). The absence of any line drawn between legal and illegal conduct by pregnant women by either the statutes or the majority opinion creates a violation of Shuai's Due Process rights.

G. The Majority Has Usurped the Legislature's Role By Determining that the Homicide Laws Apply to a Pregnant Woman's Relationship With Her Fetus

The majority has judicially expanded the homicide laws to include actions of a pregnant woman in relationship to her fetus. This judicial activism is a departure from Indiana law and practice. As the dissent recognized, the question of "whether to impose a legal duty or obligation on a pregnant woman to her unborn child and

the extent of that obligation is a matter only for the legislature and is to be made after thorough investigative study and debate of all the implications of its decision." Slip op. at 31.

The dissent is consistent with opinions issued by other state courts. *See Reinesto v. State*, 894 P.2d 733, 737 (Ariz. Ct. App. 1995) ("The legislature is in a better position than this court to determine whether a woman's prenatal conduct is more appropriately addressed through education, medical and rehabilitative treatment, social welfare, criminal statutes, or some combination of these approaches."); *Johnson v. State*, 602 So.2d 1288, 1294 (Fl. 1992) ("Neither judges nor prosecutors can make criminal laws. This is the purview of the Legislature."); *Ashley v. State*, 701 So.2d 338, 343 (Fla. 1997) ("Of the three branches of government, the judiciary is least capable of receiving public input and resolving broad public policy questions based on a societal consensus.").

Conclusion

For the foregoing reasons, Shuai respectfully requests this Court grant her petition for transfer, affirm Shuai's right to bail, and dismiss the murder and attempted feticide charges filed against her.

Word Count Certificate

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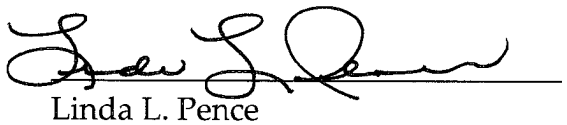

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The undersigned hereby certifies that a copy of the foregoing has been served upon the following by hand delivery, this 9th day of March, 2012:

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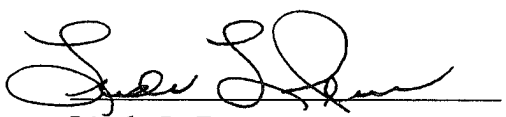

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