IN THE INDIANA COURT OF APPEALS

CAUSE NO. 71A04-1504-CR-166

PURVI PATEL,	)	
	)	**Appeal from the St. Joseph**
Appellant/Defendant,	)	**Superior Court**
	)	
	)	**Trial No. 71D08-1307-FA-00017**
v.	)	
	)	**The Honorable Elizabeth**
STATE OF INDIANA,	)	**Hurley, Judge**
	)	
Appellee/Plaintiff.	)	

APPELLANT'S BRIEF

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Statement of Issues

I. Was the evidence sufficient to prove the necessary elements of a Neglect of a Dependent Resulting in Death charge?

II. Is reversal of the Feticide conviction required because the Feticide Statute does not govern abortions, because neither the statute nor the Federal nor State Constitutions permit prosecuting a woman for her own abortion, and because the State maintains no fetus was killed?

Statement of Case

This is an appeal from the March 30, 2015 Judgment of Conviction and Sentencing Order, following a jury trial. (App. 338-39) The Court imposed concurrent sentences of thirty years on the Neglect of a Dependent Causing Death count and six years on the Feticide count. (*Id.*)

Statement of Facts

Purvi Patel's conviction involves her pregnancy, which ended on July 13, 2013. Because some issues raised herein relate to the sufficiency of the evidence, an account of the facts is necessary.

A. Texts with Felicia Turnbo

Text messages sent between Purvi and her best friend, Felicia Turnbo ("Fay"), in a context in which Purvi had no reason to be anything but truthful, describe the events leading up to July 13. Fay was one of only two people in whom Purvi had confided about her relationship with a man who worked at the restaurant she

managed. (Tr. A:812-14)[1] This relationship was secret because Purvi's family, with whom she lived and worked, are devout Hindus who oppose pre-marital sexual activity. (Tr. B:214-21) As will be seen, Fay, a Licensed Medical Assistant (Tr. A:811), also took on the role of Purvi's informal medical advisor throughout the relevant period.

On April 15, Purvi wrote Fay, "[M]y cycle is changing completely due to all the stress I been under lately so not sure when my period is coming but still feeling the pain." (Ex. 47 at 4) Four days later, she repeated, "Man I'm cramping again . . . my period been so funny the last two months cuz of my stress." (*Id.*) Again, on May 21 Purvi attributed her cramps and irregular period to stress: "I keep cramping bad but then my period won't start, driving me crazy . . . I think its cuz of all the stress my body been goin thru physically n mentally." (*Id.*) On June 4, after Purvi reported no appetite, Fay raised the possibility of pregnancy. Purvi responded, "I been cramping like crazy tho for weeks now so I'm hoping its cuz of the stress" and "it happens when I'm under serious stress." (*Id.* at 6)

At Fay's insistence, Purvi purchased a pregnancy test on June 10, texting Fay from the store for help choosing a test. (*Id.* at 8) Purvi soon reported a positive result. (*Id.*) She wrote Fay, "I been cramping for a few weeks now that's why I figured it wasn't that," and "I was just late from stress." (*Id.*) On June 16, Purvi texted Fay, "I just realized today I've missed 2." (*Id.* at 11)

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[1] Midway through the trial the court reporters changed and the second reporter restarted numbering at page 1. References to the first part of the transcript are to Tr. A:xx, and references to the second part are Tr. B:xx.

Purvi made clear she did not feel capable of raising a baby (or being pregnant). She told Fay, "My Fam would kill me n him" and explained that given her own chronic physical ailments, "I'm just not ready for it." (*Id.* at 8) The following day, Purvi reported calling doctors' offices and clinics, but "[a]ll the places r closed so I will call tomorrow morning n find one hopefully I can go to." (*Id.* at 10) Purvi did not follow up, though, telling Fay, "I don't have insurance." (*Id.* at 12)

On June 19, Fay told Purvi that she could get pills at Planned Parenthood for between $300 and $400. (*Id.* at 12) Consistent with her belief that she was now about eight to ten weeks pregnant, Purvi responded that Planned Parenthood only administers that abortion medication "within 60 days . . . I *might* be over that." (*Id.* (emphasis added)) Purvi then asked whether Fay could secure a prescription for the drugs, and Fay responded she would try. (*Id.*) Purvi also mentioned that she had learned about medications available "online for 72 that's with shipping" and "[t]hey say up to 12 weeks u can use it." (*Id.*) Fay responded, "Yea I would try that also." (*Id.*) On July 1, Purvi told Fay the pills had arrived. (*Id.*) July 3, consistent with her efforts to conceal the pregnancy from her parents, Purvi decided to take the pills the following week because of a business obligation to Chicago that weekend. (*Id.* at 15)

One week later, on July 10, Purvi wrote she was about to take the drugs and noted, "If this doesn't work then we will have to take a trip" (to Planned Parenthood). (*Id.*) Fay agreed and wrote, "Yes I would say to try it first and then we will go from there." (*Id.*)

Throughout the following day, Fay monitored Purvi's condition as Purvi took the pills. When Purvi reported, "I have the chills like crazy," Fay continued in her role as a medical professional and told Purvi how to push once the urge began, and what she should and should not eat. (*Id.* at 17)

The following day, July 12, Purvi reported painful cramps and bleeding. (*Id.* at 19) She expressed concern that the pills hadn't worked yet and asked whether Planned Parenthood was open on weekends. Fay promised to find out about the clinic's hours and fees. (*Id.*)

Around 8:30 AM on Saturday, July 13, Purvi wrote she was experiencing pressure and pain. (*Id.* at 20) Then, after leaving work early because of her pain, Purvi texted Fay at 5:30 PM and reported "[I] can't really move or stand" but hoped the pain medication she took would kick in soon so she could get to St. Joseph Hospital. (*Id.*) When Fay asked at 7:00 PM and 7:45 PM whether Purvi was going to the hospital, Purvi answered, "Trying to but can't get off the bed to get dressed" and "[w]ant to but can't drive." (*Id.*). At 8:11 PM Purvi sent Fay a text reporting, "Just lost the baby." (*Id.* at 21)

Fay began instructing Purvi on what would happen next: "U may cramp a little for a few hours but then it will stop." (*Id.*) Purvi responded that she was going to clean up the bathroom floor and go to where she worked, telling Fay, "There is a piece of the cord hanging from me." (*Id.*) Fay directed, "Pull it out and push . . . There will b a big clot at the end of it." (*Id.*) Fay then asked, "Was it still a clot or starting to form?," and Purvi responded, "Starting to form a lil . . . More so big clots."

(*Id.*) When Purvi asked about needing a hospital, Fay advised her to monitor things and if she went, to explain that "she had a miscarriage and was not sure how far along she was, but had missed two cycles." (*Id.*)

A few moments later Purvi reported, "I got the rest of the clots out but this thing isn't coming out . . . It stretched longer but can't pull it out." (*Id.*) Fay researched medical texts and directed Purvi to "massage stomach and then peered down push and pull," and also said, "If u can't get it out u will need to go to hospital now." (*Id.*) At 9:16 PM, Purvi reported she was going to the hospital, and at 9:48 PM she texted Fay from the emergency room. (*Id.* at 22) Over the next two hours, Purvi and Fay exchanged more than 50 texts, most involving Fay explaining the various medical steps being taken. (*Id.* at 22-23) These texts stopped at 11:30 PM, when Purvi's surgery began, and recommenced at 1:00 AM. The last substantive text from Fay read, "I don't understand what is going on. You were only a month maybe two months why is ur body having problems with a miscarriage?" (*Id.* at 23)

With that last text, the real-time narrative of the events stopped. The remaining facts come from witnesses at trial.

B. The Events at St. Joseph's Hospital

When Purvi arrived at the hospital, Dr. George Drew observed a "substantial amount of blood flowing from her" and "what appeared to be the umbilical cord hanging out of the vaginal area." (Tr. A:315-16) Dr. Drew testified that Purvi reported that she had missed two periods but did not know how far along the pregnancy was. (Tr. A:334-46) He said Purvi described having passed "clots," never

mentioning a "baby." (Tr. A:328-31, 338) Dr. Drew was surprised by Purvi's flat affect and her using a smartphone (which he did not realize involved her texting with Fay, who was walking her through the process). (Tr. A:318, 339)

An hour later, an obstetrical nurse examined Purvi, who reported having missed two periods and being 10- to 12-weeks pregnant. (Tr. A:353) Purvi said she learned she was pregnant from a home test two weeks earlier. (Tr. A:427, 490) Laboratory tests showed Purvi had by this time lost about 20% of her total blood volume. (Tr. A:434-35)

When Dr. Tracy Byrne, an obstetrician, conducted her examination, Purvi said her last period was in late April (placing her at 10- to 12-weeks) and that she had passed blood and clots. (Tr. A:452-53) Dr. Byrne believed that the 12-inch section of the umbilical cord, palpations of the uterus and the size of the placenta were all inconsistent with a 10- to 12-week pregnancy. (Tr. A:454, 466-67, 397-98) Dr. Byrne also thought the cord "appeared to be cut," because she had never seen a cord break naturally and because of its edges. (Tr. A:455-56, 482-83, 399) Dr. Byrne called in Dr. Kelly McGuire (a partner in her practice group) for a second opinion, and he ratified her conclusions. (Tr. A:520-22)

As Dr. Byrne prepared Purvi for surgery to remove the placenta stuck to her uterine wall, Dr. McGuire contacted the police. (Tr. A:524, 530) When Purvi questioned why police would be there, Dr. Byrne continued to press that "there should be a baby." (Tr. A:472) Purvi then admitted she left the remains in a bag behind Target. (Tr. A:472-73) Purvi described how it "all came out" in her bathroom.

When Dr. Byrne asked if the infant had been moving, Purvi answered, "No." (Tr. A:405, 473-74)

C. The Target Parking Lot

A large team of police, along with Dr. McGuire, hurried to the Target parking lot. (Tr. A:535-36) When they found nothing, Dr. McGuire called the hospital, requesting that Purvi provide more specific details. When pushed for more specigics on her way to the operating room, Purvi responded that "the baby was in a plastic bag and to the left of the Target if you're looking at it over by the Dollar Tree side." (Tr. A:366)

As the group was searching near Dollar Tree, the authorities learned Purvi worked at Moe's restaurant, located on the Dollar Tree side, left of Target. (Tr. A:538-40, 606) The search moved to that location and a bag that appeared bloody was located. (Tr. A:640-41) Dr. McGuire opened the bag and found the body of a dead infant. (Tr. A:541) He found no signs of trauma or that the infant had been dead *in utero* "for any prolonged period of time." (Tr. A:544-46, 548)

D. Search of the Patel Home

While that group was searching the parking lot, other officers proceeded to the Patel home. (Tr. A:604-05) They found red drippings and bloody towels and underwear in the bathroom. (Tr. A:610, 617-18)

E. Questioning of Ms. Patel

Detective Galen Pelletier questioned Purvi at 3:30 AM when she awoke from anesthesia. A videotape of that questioning was introduced as State's Exhibit 62.

Purvi told the detective that she had done a home pregnancy test two to three weeks earlier "because I was late for two months." (Exh. 62 at 8:30-8:56) She explained that from when she was young, she had irregular periods and would often miss a period, so it did not worry her to miss a cycle. (*Id.* at 9:30) She reported not having experienced any cravings, morning sickness, or noticeable weight gain. (*Id.* at 9:52-10:20)

Purvi was evasive about who impregnated her. At first, she claimed not to know, but she later stated, "I just don't want to tell you. I just don't want my parents finding out." (*Id.* at 10:22-11:50, 12:04) Purvi also omitted her taking pills, saying instead she had been looking forward to having a child but had started cramping a day before the miscarriage. (*Id.* at 17:40, 19:50-21:00)

Purvi described being in pain in her bedroom when she felt the strong urge to urinate, and "as I'm making it to the bathroom, the next thing I know there's just everything on the floor. . . . Everything came out like I had no control over it." (*Id.* at 24:06-24:50)

Purvi stated the infant was not moving or crying. (*Id.* at 27:20-27:50) Describing her attempt to open an airway she said, "I was trying to open the baby's mouth and move it . . . [it] was just a small little limpless body." (*Id.* at 27:50-29:00) She said she never attempted CPR because "the baby wasn't moving." (*Id.* at 27:19) As for calling 911 (for her own bleeding, given that the infant was dead), Purvi reported, "I was just so in shock didn't even know . . . There was just so much blood coming out of me . . . I couldn't function for like 10, 15 minutes afterwards. I

couldn't move and more and more just kept coming out of me. I was trying to get it to stop so I could come to the hospital." (*Id.* at 29:12-29:50)

Purvi then recounted washing off blood and placing the body in a plastic bag. (*Id.* at 37:20-39:20) She described leaving her house about 9:15 PM en route to the hospital but stopping at Moe's to change pads because she was bleeding heavily. (*Id.* at 40:15) She parked in back and placed the bag on top of some items in the dumpster. (*Id.* at 41:00-41:30) After changing pads in the bathroom, she went immediately to the hospital, arriving drenched in blood. (*Id.* at 41:49-42:25) Purvi stated she had not planned to place the bag with the body in the dumpster but "it just all kind of happened." (*Id.* at 46:03) She made it clear that, based on what she had seen in the bathroom, "the baby was dead. There was nothing they could do to save my baby afterward." (*Id.* at 45:56-46:40) Purvi reported that she was "still in shock when she arrived at the hospital," and acknowledged that when she got there, "I didn't tell them about the actual baby." (*Id.* at 42:50-44:20, 52:50-53:00)

F. The Autopsy

Dr. Joseph Prahlow performed an autopsy and concluded the infant had taken at least one breath. The factors leading to this conclusion included body and organ measurements suggesting a gestational age of 25 weeks—past the 24-week threshold of viability, which is the age an infant can potentially survive with immediate and intensive medical intervention. (Tr. A:912-913, 949-53) Specifically, the body weighed 1.45 pounds and measured 12.2 inches. (Tr. A:912-13) In addition, Dr. Prahlow's visual examination of the pleural cavity led him to believe the lungs

had expanded with air, showing a breath was taken. (Tr. A:938-39) Dr. Prahlow then conducted the "flotation test"—which he conceded was inherently unreliable (Tr. A:947)—whereby he put the lungs in water assuming they would float only if air had entered the lungs. In this case, the lungs floated. (Tr. A:944-46)

In reaching his conclusion, Dr. Prahlow attributed great significance to the complete absence of blood in the body at the autopsy. (Tr. A:928-32) This highly unusual fact, Dr. Prahlow explained, proved there had been a beating heart. Had this been a stillborn, he reasoned, there would have been only minimal blood loss from seepage through the severed cord. But a beating heart would have pumped the blood out completely, as he concluded had happened here. (Tr. A:933-35).

G. The Information

On July 17, 2013, the St. Joseph County Prosecuting Attorney filed an Information charging Purvi with Neglect of a Dependent, Class A Felony. (App. 24) On August 26, 2014, the trial court granted the prosecution leave to file an Amended Information, adding a Feticide charge. (App. 95-97) On December 8, 2014, the prosecution filed a Second Amended Information with more specificity regarding the Feticide charge. (App. 201-02)

H. The Trial: The Prosecution's Case-in-Chief

At trial, prosecution witnesses testified to the pre-arrest facts described above and to the following.

1. Serological Evidence

The prosecution presented evidence that DNA analysis of blood from the bag in which the body was found and from the bathroom of Purvi's home matched Purvi's DNA. Blood in the bag and the bathroom also contained a second DNA profile, consistent with that extracted from the body. (Tr. A:864-81)

2. Purchase of Online Medications

Sergeant Thomas Cameron replicated the steps Purvi's texts indicated she had taken to purchase the medications. Based on Purvi's e-mail receipt from InternationalDrugMart.com, Sergeant Cameron ordered the medications Purvi appeared to have ordered. (Tr. B:44) He later received a package in the mail containing what was labeled as Mifepristone (RU-486) and Misoprostol. (Tr. B:47)

3. Forensic Pathologist

Dr. Prahlow's trial testimony touched on two important points beyond those discussed in his autopsy report, which was discussed above. *See supra* 9-10.

With regard to the lungs, Dr. Prahlow's observation of the lungs led him to conclude the infant had taken *at least one breath*, but he acknowledged on cross-examination that he could say no more than that:

> Q. Is there a way of determining how many breaths a premature child would have taken?
>
> A. No.

(Tr. A:1017)

Concerning blood loss, Dr. Prahlow explained that the entire blood volume in an infant this weight is 25 to 50 milliliters (mL), equivalent to between .8 and 1.7

liquid ounces. (Tr. A:975) He compared this to a "shot glass," which is 45 mL (1.5 ounces). (*Id.*) Dr. Prahlow accepted the proposition that at 20 weeks a fetus's heart circulates blood through the cord at a rate of about 35 milliliters a minute, and an infant a few weeks older would circulate more blood per minute. (*Id.*) Dr. Prahlow further explained that an infant would die before losing all blood. (Tr. A:991-92) Thus, Dr. Prahlow testified *"it would take a minute or less before a substantial amount of that blood volume would be lost" which alone would "potentially and probably" be fatal.* (Tr. A:995) Even if the cord were "kinked off" or "up against something," Dr. Prahlow testified that bleeding out would take only "a little longer." (Tr. A:1011, 1020-21)

I. The Trial: The Defense Case

Purvi's father testified about the family's religious practice—including how the family prays together an hour each morning and evening—and explained that the Hindu religion forbids pre-marital sex. (Tr. B:214-21) He also testified he had no idea Purvi had been pregnant, having never noticed anything such as weight gain or changes in clothing. (Tr. B:217) Purvi's mother likewise testified she never observed that Purvi gained weight, experienced nausea, or exhibited any other sign of pregnancy. (Tr. B:236)

The primary defense witness was forensic pathologist Dr. Shaku Teas, who had served for 15 years in the Cook County Illinois Medical Examiner's Office. Based on her review of the autopsy report, photographs, medical records, crime scene photos, police reports, and histological slides, Dr. Teas concluded there was no

evidence of a live birth. (Tr. B:251-55) Disagreeing with many of Dr. Prahlow's conclusions, Dr. Teas testified, "These lungs show no evidence of breathing and they actually are probably not capable of breathing at this stage of development." (Tr. B:284) Dr. Teas explained that the flotation test upon which Dr. Prahlow relied in part "has been attacked to the point that some of the very prominent pathologists have said it's a worthless test." (Tr. B:256) Dr. Teas was willing to accept Dr. Prahlow's conclusion about a 25-week gestational age (Tr. B:274), but she focused on whether the histological and physical evidence indicated there had been a live birth in *this* case.

Dr. Teas agreed with Dr. Prahlow that, had there been a live birth, a beating heart would rapidly expel blood from the body through the umbilical cord—estimating it would take a minute or two. (Tr. B:305) But bleeding or not, she testified a live baby at this developmental stage and weight who was born at home could never have survived. (Tr. B:306)

J. The Prosecution's Rebuttal Case

Recalled as a rebuttal witness, Dr. Prahlow testified that, having again reviewed the measurement charts and his own notes, he maintained the approximate gestational age was 25 weeks and that there was a live birth. (Tr. B:380-406)

K. The Verdict

The jury returned verdicts of guilty on both Count I, Neglect of a Dependent, Class A Felony, and Count II, Feticide, a Class B Felony. (Tr. B:500)

L. Sentencing

Following a sentencing hearing, the trial court entered a Judgment of Conviction and Sentencing Order on March 30, 2015. *See supra* 1.

Summary of the Argument

This case has sparked extensive attention by those who see it as a bellwether for issues of great significance to advocates across ideological spectra. In truth, though, resolution of this appeal does not necessitate delving into any contentious issues. It requires nothing more than straightforward application of well-accepted neutral principles of law such as those this Court addresses every day.

With regard to the Neglect charge, there are powerful reasons to challenge the conclusion that there was a live birth. But even without such a challenge, the evidence—viewed in the light most favorable to the prosecution—failed to prove three essential elements of the offense: (1) that Purvi ever knew there was a live birth; (2) that there was anything Purvi possibly could have done—or known to do—to save the baby within the less than a minute it could have lived; and (3) that any omission resulted in the death of the baby. Any one of these deficiencies of proof compels reversal.

Moreover, multiple errors in interpreting the Feticide Statute require reversal. To begin with, the Feticide Statute has no role in criminalizing unlawful abortions, which are dealt with through a separate statute. And even if the Feticide Statute does deal with abortions, it certainly does not expose a woman to prosecution for her own abortion. Additionally, were the Court to interpret the Feticide Statute as the prosecution seeks, that statute would violate both the

United States and Indiana Constitutions by placing an "undue burden" on a woman's right to choose an abortion. Finally, the Feticide conviction depended on the plainly wrong position that one can be guilty of Feticide (*i.e.*, the killing of a fetus) even if no fetus is ever killed (as the State adamantly maintains was true here).

Argument

I. The Evidence Was Insufficient to Prove the Necessary Elements of Neglect of a Dependent Resulting in Death.

In considering the Neglect charge, it is critical to isolate the key issues in this case.

First, the Neglect charge here did not involve anything Purvi allegedly did or did not do pre-delivery. Any such allegation would have been foreclosed by *Herron v. State*, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000), *trans. denied*, holding that the Neglect statute does "not criminalize conduct that occurs prior to a child's birth." Thus, the jury was properly instructed that "[t]o be found guilty of Neglect of a Dependent the conduct alleged must be based on acts committed by the Defendant that occurred after the birth of the child." (App. 287)

Second, the Neglect allegations focused exclusively on Purvi's alleged *omission*. The Information specifies that on July 13, 2013, she endangered the dependent "*by failing to provide any medical care for that dependent immediately after the dependent's birth resulting in the death of that dependent.*" (App. 219 (emphasis added)) Hence, despite factual disputes on side topics—such as whether the umbilical cord broke naturally or was cut—those issues have no bearing on

whether Purvi is guilty of failing to provide medical care following the birth. *See Taylor v. State*, 28 N.E.3d 304, 308 (Ind. Ct. App. 2015), *trans. denied* (A defendant charged with failing to provide medical care for a child cannot be convicted for having left the child in a dangerous person's care because "[w]here the State charges a specific offense, the defendant cannot lawfully be convicted by proof that he or she committed a different offense.").

What this case does turn on are the elements of the Neglect statute, which in July 2013 read as follows:

> (a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
>
> > (1) places the dependent in a situation that endangers the dependent's life or health . . . commits neglect of a dependent, a Class D felony.
>
> (b) However, the offense is . . .
>
> > (3) a Class A felony if it is committed under subsection (a)(1) . . . by a person at least eighteen (18) years of age and results in the death of a dependent who is less than fourteen (14) years of age . . .

Ind. Code § 35-46-1-4.

Thus, the required contested elements the prosecution had to prove at trial were:

(1) That there was, in fact, a dependent (*i.e.*, a live infant);

(2) That, assuming that proposition, Purvi actually realized it was alive;

(3) That, assuming those propositions, the failure to provide medical care post-birth endangered the infant's health and, if so, Purvi was actually aware she could do something but chose not to take that action; and

(4) Assuming the above propositions, that Purvi's omissions were the cause-in-fact of death.

If the evidence was insufficient on any one of these propositions, the conviction cannot stand. *See Grace v. State*, 731 N.E.2d 442, 445 (Ind. 2000) ("[T]here must be sufficient evidence on each material element.").

Throughout the trial it was debated whether proof of the first listed element—live birth—was satisfied. The experts disagreed about a range of issues, including the validity of the dubious flotation test. The defendant strongly maintains that the evidence does not support a finding of live birth. Nonetheless, the defendant accepts that this Court is not a thirteenth juror and does not weigh credibility of competing experts. *See Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). Hence, with heartbroken resignation to that deferential standard of review, the defendant is not asking this Court to review what she knows to be the profoundly mistaken finding of live birth.

The defendant is equally cognizant, though, of this Court's duty to reverse a conviction in which the evidence on any element was insufficient. As this Court has explained, "While we seldom reverse for insufficient evidence, in every case where that issue is raised on appeal we have an affirmative duty to make certain that the proof at trial was, in fact, sufficient to support the judgment beyond a reasonable doubt." *C.A. Bean v. State*, 818 N.E.2d 148, 150 (Ind. Ct. App. 2004). And as the Indiana Supreme Court has written, review cannot "merely 'rubber stamp' the fact

finder's determinations." *Galloway v. State*, 938 N.E.2d 699, 709-10 (Ind. 2010).[2] As will be seen, the prosecution's proof of several essential elements was virtually (and, in some instances, actually) non-existent. Even with the utmost deference to the verdict, and even if a live birth is assumed, the conviction must be reversed.

A. The Evidence Was Insufficient to Show Purvi Had Actual Knowledge of a Live Birth.

In *Armour v. State*, 479 N.E.2d 1294 (Ind. 1985), the Court rejected the objective (reasonable person) standard in Neglect cases and held the State must prove the defendant was "*subjectively* aware of a high probability that he placed the dependent in a dangerous situation." *Id.* at 1297 (emphasis added). The first question, then, is what evidence was presented to support a finding (even by inference) that Purvi had actual awareness there was a live infant.

The main evidence on this element was Dr. Prahlow's testimony that there had been a live birth. Critically, though, Dr. Prahlow testified there was no way he could determine how many breaths had been taken—all he could say was that the infant took *at least one breath* and that bleeding from the umbilical cord showed there was a beating heart *for a minute or less*.[3] (Tr. A:933, 935, 1017) Dr. Teas (in

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[2] In what is perhaps testament to the ways these tragic cases can interfere with juries' capacity for neutral factfinding, this Court has reversed (on sufficiency grounds) many convictions under the Neglect statute. For a sampling, see *Taylor v. State,* 28 N.E.3d 304 (Ind. Ct. App. 2015), *trans. denied*; *Villagrana v. State*, 954 N.E.2d 466 (Ind. Ct. App. 2011); and *Scruggs v. State*, 883 N.E.2d 189 (Ind. Ct. App. 2008).

[3] Dr. Prahlow's conclusion that the infant lived a minute or less tracks the accepted data about the rate of blood flow to the cord. At 660 grams (this baby's weight), the

unchallenged testimony) agreed that, even assuming a live birth, a respirator would have been needed *immediately* for breathing to continue. (Tr. B:277)

There was absolutely no evidence that an infant born at this gestational age and size would have, during its minute of life, breathed in a discernible way or moved or cried or shown any other sign of life detectable to the naked eye—particularly the hazy eye of a profusely bleeding woman in the minute following her delivery (a delivery with serious complications necessitating surgery). And even if one infers Purvi might have seen the umbilical cord bleeding during that fleeting minute or less, it defies experience to suggest a layperson would necessarily gauge the intensity of the flow (in an infant with only a "shot glass" of blood, no less) and determine that the bleeding signifies a beating heart.[4]

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literature provides that the heart pumps between 65-80 mL per minute through the umbilical vein. *See* L. Poston, *Control of Vascular Resistance in the Maternal and Feto-Placenta Arterial Beds*, 65 PHARMACOLOGY & THERAPEUTICS 215, 225 (1995); T. Kiserud & G. Acharya, *The Fetal Circulation*, 24 PRENATAL DIAGNOSIS 1049, 1056 (2004).); T. Kiserud & G. Acharya, *The Fetal Circulation*, 24 PRENATAL DIAGNOSIS 1049, 1056 (2004). This means that (using Dr. Prahlow's highest estimate that the infant had 50 mL of blood) total blood drainage would have happened within 38-46 seconds. And, as Dr. Prahlow explained, death occurs well before all blood is lost—40% blood loss in an infant is rapidly fatal. *See* Gary Fleisher & Stephen Ludwig, TEXTBOOK OF PEDIATRIC EMERGENCY MEDICINE 1247-50 (6th ed. 2010).2010). Indeed, Dr. Prahlow spoke of 20%. Using the more conservative 40% figure this would put death at 15-18 seconds. So while "less than a minute" is accurate, the figure is actually far shorter than that. The arguments advanced throughout this brief are based solely on Dr. Prahlow's and Dr. Teas's testimony on this subject, but it bears noting that their estimates were actually quite conservative.

[4] The fact that the heart was beating for some period (a "minute or less") did not lead Dr. Prahlow to conclude that breathing continued during that period. This is because a heart, of course, continues to beat for a considerable period after breathing stops (or after a an infant stops getting oxygenated blood through the umbilical cord). This is why when one dives under water the heart continues to

The need for meaningful evidence to prove conscious awareness of a live birth is especially acute given what Purvi actually understood as she staggered into the bathroom. The evidence shows that Purvi knew she had taken abortion pills, which had worked. And there is no doubt (given the texts with Fay evincing her concern in mid-June that she *might* be past 60 days, her purchasing the pills on the internet precisely because they were held out as effective through week 12, her having taken a pregnancy test just a few weeks earlier, and her plans to go to Planned Parenthood that very weekend) that Purvi believed she was only 10- to 12-weeks pregnant. The last thing she would imagine delivering is a live infant, and there is no reason to assume that she would have immediately inspected—or even had the physical capacity to inspect—what she was sure was a 10- to 12-week-old undeveloped fetus.

Although proof of subjective knowledge often depends on inferences, courts insist that a "reasonable inference of guilt must be more than a mere suspicion, conjecture, conclusion, guess, opportunity or scintilla." *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015) (quotations omitted). In this vein, Indiana law is clear that non-obvious scientific matters must be proved by expert testimony; a jury is not permitted to venture guesses on issues they are plainly unequipped to resolve. *See White v. State*, 25 N.E.3d 103, 106 (Ind. Ct. App. 2014). The prosecution called

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pump—it is working off of blood oxygenated before breathing stopped. Thus, the testimony that the heart was beating for less than a minute says nothing about whether there was breathing (much less discernible breathing) during that period.

several physicians as witnesses and had any of them maintained it would have been obvious there was a live infant, the prosecution would have presented that testimony.[5] It did not, and the admitted testimony cut exactly the opposite way.

In *Taylor v. State*, 28 N.E.3d 304 (Ind. Ct. App. 2015), *trans. denied*, a mother had left her 13-month-old son in her boyfriend's care. She reported coming home around 10:00 PM, looking in the crib, and determining her son was fine. The child was found the next morning dead in his crib from a skull fracture, leading to the boyfriend being convicted of murder and Taylor being convicted of Neglect. In defending the conviction, the State argued the jury was entitled to infer that upon checking the child that evening, Taylor necessarily saw his injuries yet did nothing. Rejecting that argument, the Court explained, "When the allegation of neglect is the failure to provide medical care, the state must show that the need for medical care was actual and apparent and the accused was actually and subjectively aware of that need." *Id.* at 307 (*citing Fout v. State*, 619 N.E.2d 311, 313 (Ind. Ct. App. 1993)). Hence the Court held that "the fact-finder could only reach that conclusion by means of pyramiding inferences." *Id.* at 308. That conclusion applies with at least equal force here and compels reversal.

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[5] As Dr. McGuire (an obstetrician) testified, only neonatologists have the expertise to testify about these first moments following birth of a severely premature infant. (Tr. A:510, 564) Despite that, the prosecution never called one.

B. The Evidence Failed to Show Actual Endangerment or That Defendant Was Consciously Aware There Were Things She Could Do to Enhance the Chances of the Infant's Survival.

The central element of any Neglect charge is that the defendant knowingly or intentionally "place[d] the dependent in a situation that endangers the dependent's life or health." I.C. § 35-46-1-4(a)(1). "To endanger is *to bring into* danger," meaning that the "*placement must itself expose the dependent to a danger* that is actual and appreciable." *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985) (emphasis added). In relation to this case, the prosecution needed to prove, as an objective matter, the Information's allegation that by not "providing medical care immediately following the birth of the dependent," Purvi exposed the baby to danger—*i.e.*, enhanced the risk the baby would die. And it had to prove, as a subjective matter, that Purvi had actual awareness of that risk.

1. The Objective Element

The prosecution presented no evidence that any alleged omission enhanced the risks to the infant's life. The most relevant testimony was Dr. Prahlow's explanation that it would take *a minute or less* for the infant's blood to be expelled and that death would happen even quicker because one dies *well before* losing all blood. (Tr. A:995, 991-92) Obviously, a 911 call would not result in paramedics arriving in a minute or less (or anything close to that). Failure to take a futile act does not constitute endangerment.

The testimony about the infant's incapacity for sustained breathing confirmed that nothing could have made any difference. Dr. Teas testified

(unchallenged) that, given the undeveloped lung capacity, it would be impossible to get the child to a hospital alive, even had an ambulance arrived immediately. (Tr. B:305)

Undoubtedly recognizing this problem, the prosecution suggested that putting pressure on the umbilical cord might have been beneficial. But when asked about that, Dr. Prahlow testified that "kinking off" the cord or putting something against it would only mean the bleeding "could take a little longer." (Tr. A:1011) And, in any event, slowing the bleeding would not have affected the undeveloped lungs incapable of sustaining breathing. In sum, no witness came close to testifying that doing anything to the cord (or doing anything else) could possibly have kept the baby alive until an ambulance arrived.[6] There was, moreover, no evidence that paramedics carry the specialized equipment, medications, and trained personnel necessary to provide neonatal emergency intervention for severely premature infants in desperate need of Neonatal Intensive Care Units ("NICU").

Insisting the prosecution carry its burden of proving endangerment does not impose an impossible burden. Had the facts and experts supported the allegation, the prosecution could (and would) have readily asked the experts whether omissions endangered the dependent. This is exactly what the prosecution did, for example, in *Bergmann v. State*, 486 N.E.2d 653, 657 (Ind. Ct. App. 1985), when it asked the

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[6] The phrase "tying off the cord" is somewhat of a misnomer as it suggests that one can make a knot in the cord as one might do with a shoelace. In fact, that is not possible, and the process typically involves surgical clamps. *See generally* RICHARD BEEBE & JEFFREY MYERS, II MEDICAL EMERGENCIES, MATERNAL HEALTH & PEDIATRICS 729 (2010).).

pathologist whether the decedent "would have died had she been treated in a timely fashion." The doctor responded that with timely treatment, the decedent "would have had a very good chance of surviving." *Id.* Similarly, in *Brown v. State*, 770 N.E.2d 275, 281 (Ind. 2002), the "State presented testimony" from an expert that the decedent's "chances for survival were good had she received prompt medical treatment."

By contrast, the prosecution in its closing argument fundamentally distorted the issue:

> Did she place that dependent in a situation that endangered his life or health? Well, out of 1,000 babies that are born to a mother who leaves them on a floor, puts them in a bag, puts that bag in the garbage can and puts that garbage can in the dumpster without telling anyone, how many do you think make it?

(Tr. B:470)

This sleight of hand diverted focus from the *relevant question* of whether the baby would have *had a chance had Purvi done something* to the *irrelevant question* of whether the baby *had a chance with Purvi doing nothing*. One can (accurately) assume that no baby described by the prosecution would ever survive without medical intervention, but that point is meaningless without evidence that a baby in that condition could have survived had Purvi reacted differently post-birth.

Similarly, the prosecution argued—without evidentiary basis—that had Purvi called 911, the dispatcher and Purvi "might have [had] some discussion about whether the umbilical cord was attached." (Tr. B:492-93) Tellingly, though, the prosecutor immediately continued, *"I don't know. I'm not going to speculate about*

what 911 may have said." (Tr. B:493) In other words, the prosecutor was telling the jury, "I'm not going to speculate, I want you to be the ones who speculate." Save such wild speculation, no evidence supported the objective element of endangerment by omission.

2. The Subjective Component

Even were the Court to conclude a jury could reasonably find objective endangerment, the case would still fail because the prosecution presented no evidence capable of supporting a reasonable inference that Purvi had *subjective awareness* there was something she could do yet decided not to take that action. Put another way, no evidence showed she "*must* have been subjectively aware of a high probability that [s]he placed the dependent in a dangerous situation." *Armour*, 479 N.E.2d at 1297 (emphasis added).

There is no basis, even if one assumes a live birth and assumes Purvi's knowledge of that live birth, to infer that (despite her own physical condition and belief she had aborted a 10- to 12-week-old fetus) Purvi "must" have evaluated the situation within the brief moment the baby was alive, then "must" have realized calling 911 might save the baby, but then "must" have affirmatively decided to do nothing. And it defies common experience to suggest the evidence proved Purvi "must" have affirmatively decided not to constrict the umbilical cord, despite knowing that might slow the bleeding a little. Purvi works in a restaurant, not a hospital, and nothing in the average person's life experience imparts medical knowledge about constricting umbilical cords—which most people have never even

seen. *See Vaughan v. Commonwealth*, 376 S.E.2d 801, 807 (Va. Ct. App. 1989) (finding no evidence that defendant, who had never before been pregnant, knew failure to constrict the umbilical cord could cause death).

In *Fout,* a baby, Lela, was home-birthed with a bacterial infection that killed her within 24 hours. Her mother, Karrie, was convicted of Neglect for failure to secure medical care. This Court reversed, holding that even though "the evidence showed that Lela died of the infection, and that there was a substantial chance that she would have survived if Karrie had obtained proper care for her," it did not support a finding she had subjective awareness she was endangering her child. *Fout*, 619 N.E.2d at 313; *see also Taylor*, 28 N.E.3d at 309 (Although defendant "conceivably or hypothetically" might have realized "that immediate medical care would be warranted, there is no evidence that she did so."). The evidence of conscious awareness here is far weaker than in *Fout* or *Taylor*— another reason the conviction must be reversed.

C. The Evidence Does Not Support a Finding That Any Neglect Resulted in the Death of the Dependent.

The Neglect conviction here was elevated from Class D to Class A based on the finding that the neglect resulted in the death of a dependent. I.C. § 35-46-1-4(b)(3). This element requires finding cause-in-fact, *i.e.*, proof beyond a reasonable doubt that, but for the alleged omissions, death would not have occurred. *See Mallory v. State*, 563 N.E.2d 640, 643 (Ind. Ct. App. 1990) ("results in" term in I.C. § 35-46-1-4(b)(3) is a "causative one;" outcome must be "consequence of the conduct of the accused"). The evidence cannot possibly support any such finding.

Many of the points discussed above control here and will not be repeated. Dr. Prahlow's testimony that the infant could not have lived more than a minute because of the bleeding belies finding Purvi's omissions caused the death. *Supra* 11-12. So, too, Dr. Teas's unrebutted testimony that the lung development of an infant of this age means it could never have lived long enough to get to the hospital negates any claim of causation. *Supra* 13.

Dr. McGuire's testimony that an infant this age "might" have been able to survive if born in a hospital with intensive intervention (Tr. A:507, 576) does not remotely support a beyond-a-reasonable-doubt finding that the infant *would likely have survived after a home birth* without immediate care by neonatologists in a NICU. *See Commonwealth v. Pugh*, 969 N.E.2d 672, 688 (Mass. 2012) ("Speculation that the baby might have survived if the defendant had summoned medical help" is inadequate "because that the baby 'might have survived with proper care . . . engender[s] considerable doubt as to what actually happened.'") (quotation omitted).

Critically, the prosecution never asked any expert the straightforward question: "Is it your opinion that death resulted from defendant's failure to secure medical care after the birth?" This was plainly not oversight—the defense raised the issue throughout trial. In *Taylor*, although the Court did not rule on the issue because it reversed on other grounds, the Court expressed doubts about the sufficiency of the "resulted in" element because the State's expert "was never specifically asked whether the failure to obtain medical care . . . was a factor contributing to [the infant's] death." *Taylor*, 28 N.E.3d at 309 n.9.

In *State v. Muro*, 695 N.W.2d 425 (Neb. 2005), a mother was convicted of abuse "resulting in death" because she failed to take her eight-year-old daughter, Viviana, to the hospital during a four-hour period in which she knew Viviana was limp and unresponsive. At trial, one State expert testified that had immediate treatment been sought, Viviana "might have survived." *Id.* at 431. Another prosecution expert testified "there was a reasonable likelihood" the child could have survived with earlier treatment, which he described as "more than 5 percent but less than 95 percent." *Id.* The court held, "The State proved only the *possibility* of survival with earlier treatment. Such proof is insufficient to satisfy even the lesser civil burden of proof by a preponderance of the evidence. *Id.* at 432 (citations omitted). *See also State v. Bennett*, 146 P.3d 63, 68 (Ariz. 2006) (holding that causation cannot rest on testimony the victim "may or may not have benefited from earlier medical treatment"); *People v. Dunaway*, 88 P.3d 619 (Colo. 2004) (finding no evidence that delay in securing medical care rendered injuries worse than had defendant taken immediate action).

The evidence here was far weaker than in *Muro* or these other cases. Dr. Byrne's testimony in the abstract that a premature infant of at least 24 weeks "would have a better chance of survival with medical intervention," (Tr. A:492), says nothing about the actual likelihood of survival of a severely premature delivery

outside of a hospital.[7] An increase from a 1% chance to a 5% chance is a "better chance," but is lightyears away from proof of causation. Although the entire Neglect conviction should be reversed, if the Neglect conviction were affirmed, the "resulting in death" enhancement would have to be reversed.

II. The Feticide Conviction Must Be Reversed Because the Feticide Statute Does Not Govern Unlawful Abortion, Because Neither the Statute nor the Federal nor State Constitutions Permit Prosecuting a Woman for Her Own Abortion, and Because the State Maintains No Fetus Was Killed.

There are multiple legal flaws with the Feticide conviction here, any of which independently compels reversal. These pure legal questions are subject to *de novo* review. *See Russell v. State*, 34 N.E.3d 1223, 1227 (Ind. 2015). In considering these issues it is essential to recognize that Purvi was never charged with any crime (such as Ind. Code § 35-42-1-1(4)) that involves her having known she was carrying a potentially viable fetus, or a fetus of any particular gestational age. This is

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[7] There was extensive talk at trial about gestational ages, with references to the current "viability" presumption, whereby prior to 24 weeks hospitals will not generally engage in intensive medical intervention the way they might for a baby born in the 24th week or later who has some chance of survival under the right conditions. But no one questions that this presumption is based on statistics involving births in hospitals that have NICUs prepared to intervene immediately upon birth, including placing non-breathing infants on respirators. It is profoundly mistaken, then, to think that the 24-week figure has anything to do with assessing whether an infant born at home would have any meaningful chance of survival in the long or short term. *See generally* Gregor Breborowicz, *Limits of Fetal Viability and Its Enhancement*, EARLY PREGNANCY, Jan. 2001 at 49-50 ("Viability is not an intrinsic property of the fetus because viability should be understood in terms of both biological and technological factors. It is only in virtue of both factors that a viable fetus can exist *ex utero*.").

understandable given the compelling evidence that she honestly believed (erroneously, it turns out) that she was about 10- to 12-weeks pregnant. Rather, Purvi was charged under the Feticide Statute, which applies to any "human pregnancy," without limitation. The issues before the Court, then, are about how the Feticide Statute applies to abortions starting with the very moment of fertilization.

A. The Feticide Statute Is Not the Statute That Governs Unlawful Abortions.

The Feticide Statute provides that "[a] person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide." I.C. § 35-42-1-6. This statute is simply not the law that governs unlawful abortions; rather, unlawful abortions are governed by the Unlawful Abortion Statute, Ind. Code § 16-34-2-7, which defines various offenses and sentences for abortions proscribed by law.

This very matter was resolved in *Baird v. State*, 604 N.E.2d 1170 (Ind. 1992), wherein the Court held:

> *The chapter which contains the provisions regulating abortion is I.C. 35–1–58.5.* Section 4 of that chapter makes it a Class C felony to knowingly or intentionally perform an abortion not expressly provided for in that chapter (or a Class A misdemeanor for a physician who performs an abortion intentionally or knowingly in violation of section 2(1)(C) or section 2.5 of that chapter). *A proper construction of the Feticide Statute, therefore, requires that it be viewed not as an illegal abortion statute, but as an extension of the laws of homicide* to cover the situation in which the victim is not a "human being" as defined by I.C. 35–41–1–14 (an individual who has been born and is alive), but a fetus.

Baird, 604 N.E.2d at 1189 (emphasis added).

Baird's holding that these are parallel statutes dealing with different subjects was inevitable, for, as *Baird* noted, there is a carefully gradated list of offenses and sentences in the Unlawful Abortion Statute. For example, under the statute in effect in July 2013:

- A general violation of the Unlawful Abortion Statute was a **Class C felony**, punishable by **2-8 years imprisonment**.
- A violation of § 1(a)(1)(c) or § 4 of the Unlawful Abortion Statute (failure to secure proper parental consent for abortion) was a **Class A misdemeanor** punishable by **up to 1 year imprisonment**.
- A violation of § 1.1 (failure to adhere to required waiting periods and disclosures) was punishable as a **non-criminal infraction**.

If the Feticide Statute were to apply to unlawful abortions, *each and every* one of these would automatically constitute Feticide, a **Class B felony, punishable by 6-20 years imprisonment**. This is because any participant would have (a) knowingly and intentionally terminated a pregnancy, (b) with an intent other than to produce a live birth or to remove a dead fetus, and (c) the abortion *would not qualify for the exception available to an abortion "performed in compliance with" the abortion statutes*. Ind. Code § 35-42-1-6. Thus, a prosecutor would have absolute discretion to bring a Feticide charge and secure a sentence of up to 20 years, as compared to an infraction, misdemeanor, or lesser-class felony as set forth in the Unlawful Abortion Statute. This is exactly the outcome *Baird* rejected.

The absurdity does not end there. The Indiana Code permits an abortion of a post-viable fetus when deemed "necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman." Ind. Code. § 16-

34-2-1(a)(3)(C). At the same time, the Indiana Murder Statute provides that one who "knowingly or intentionally kills a fetus that has attained viability" commits murder unless the abortion is "performed in compliance with" the abortion laws. Ind. Code § 35-42-1-1(4); Ind. Code § 35-42-1-0.5. Under the State's reading, then, a woman undergoing an otherwise lawful post-viability abortion would be guilty of *murder* if the procedure were in any way noncompliant with the abortion statutes, as it would be, for example, if the woman were not informed orally and in writing by medical personnel "[t]hat human physical life begins when a human ovum is fertilized by a human sperm." Ind. Code § 16-34-2-1.1(a)(1)(E). The Unlawful Abortion Statute punishes that violation as an infraction. The prosecution's approach, instead, punishes it as a felony with a sentence of 45-65 years in prison.

It could not be clearer that the legislature never intended to have the Feticide Statute govern all aspects of lawful and unlawful abortion. To the extent the legislature's use of the "in compliance with" language suggests otherwise, it must be treated as some mistakenly inserted language (a type of scrivener's error) that cannot possibly reflect legislative intent. As this Court has noted, "We construe a statute to prevent absurdity and avoid an illogical result the legislature, as a reasonable body, could not have intended." *Koester Contracting v. Bd. of Comm'rs*, 619 N.E.2d 587, 589 (Ind. Ct. App. 1993) (citation omitted); *see also T.M. v. State*, 804 N.E.2d 773, 775 (Ind. Ct. App. 2004) (a phrase in the statute "was in the nature of an oversight or scrivener's error and could not be reflective of a legislative intent").

Just as alarming, the prosecution's position would render many defendants guilty of Feticide (or Murder) based on unlawful abortions even when they could not be found guilty at all under the Unlawful Abortion Statute itself. Take, for example, an abortion-clinic nurse assisting a physician who (unbeknownst to her) lacks the statutorily-required written hospital-admitting privileges. If charged under the Unlawful Abortion Statute, the nurse would have an airtight "reasonable mistake of fact" defense. *See* Ind. Code § 35-41-3-7. But that defense would mean nothing in a prosecution under the Feticide Statute, where it would only matter that the abortion did not qualify under the Feticide Statute's exception for those "performed in compliance" with the abortion statutes. This exception is plainly an objective inquiry that does not even focus on any person, much less any person's state of mind. It asks only whether the abortion was or was not "in compliance with" the abortion laws.[8] Indeed, it is not even an *element* of the Feticide offense, as demonstrated by the jury instructions here, which told the jury to convict if it found "[1] The Defendant, Purvi Patel [2] knowingly [3] terminated a pregnancy [4] with an intention other than to produce a live birth or to remove a dead fetus." (App. 283)

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[8] In *Tyson v. State*, 619 N.E.2d 276, 293 n.19 (Ind. Ct. App. 1993), the court explained that Ind. Code § 35-41-2-2(d), which applies a statute's culpability requirement to other parts of a statute, applies only to the elements of the statute that speak to the "prohibited conduct" itself, not to "attendant circumstances." *Id.* *See also Rosenbaum v. State*, 930 N.E.2d 72, 74 (Ind. Ct. App. 2010) (When the statute provided that a person knowingly doing an act was guilty *unless* other conditions existed, the use of the word "unless" to separate the two sections of the statute indicated that the *mens rea* listed earlier did not apply to the latter clause.). It remains clear, therefore, that the Feticide Statute's exception for abortions that comply with the abortion laws does not involve any inquiry into anyone's scienter regarding non-compliance.

Thus, no mistake of fact about the facts or circumstances surrounding the abortion or its legality would matter because state of mind does not matter. Rather, under the prosecution's reading, Feticide in an unlawful abortion context is a strict liability offense.

There is a simple distinction between the Unlawful Abortion Statute and the Feticide Statute—which *Baird* held is not "an illegal abortion statute." *Baird*, 604 N.E.2d at 1189. Fetal protection statutes, such as Feticide, deal with violent attacks on women and their fetuses to *which the woman has not consented.* By contrast, abortion statutes deal with terminations of a pregnancy *with the consent of the woman.* In the words of one commentator, "[C]ourts have recognized that the consent of the mother is the crucial element that distinguishes feticide from abortion." Douglas Curran, Note, *Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107, 1134 (2009).

To equate these very different acts and suggest they all are subject to the same harsh penalties defies any sense of proportionality. And it would fly in the face of the assurances of those behind the 2009 amendment to the Feticide Statute, which raised feticide to a Class B felony. That measure came in response to the awful shooting of a pregnant bank teller. The promoter of the bill, Marion County Prosecutor Carl Brizzi, stated emphatically, "This has nothing to do with reproductive rights." Jon Murray, *Legislators Seek Longer Sentence for Killing Fetus*, INDIANAPOLIS STAR, Feb. 1, 2009 at 1A. Moreover, Senator James Merritt, who

introduced the bill, proudly announced that "Planned Parenthood and Right to Life worked with us and signed off on this . . . Everyone worked toward the same goal." Bill Ruthhart, *Tougher Feticide Law Near Reality*, INDIANAPOLIS STAR, April 22, 2009 at 1A. It goes without saying that Planned Parenthood would never work to help pass a measure enhancing penalties for any form of abortion.

Courts in other jurisdictions have come to the identical conclusion about the difference between fetal protection statutes and abortion statutes. *See, e.g.*, *State v. Holcomb*, 956 S.W.2d 286, 291-92 (Mo. Ct. App. 1997) (holding that abortion statutes deal with situations involving "the actual or apparent consent of the mother" while fetal homicide statutes deal with "the unconsented (by the mother) killing of a pre-born infant in the context of a physical assault on the mother"); *People v. Shum*, 512 N.E.2d 1183, 1199-1200 (Ill. 1987) (noting that the Feticide Statute does not deal with abortion but "seeks to protect a pregnant mother and her unborn child from the intentional wrongdoing of a third party"). This is in keeping with the position the State took in *Kendrick*, where the Court noted, "[T]he State makes clear that the victim of feticide is the mother (the one whose pregnancy has been terminated)." *Kendrick*, 947 N.E.2d at 514 n.7.

If further support is needed to demonstrate the Feticide Statute's inapplicability to abortions, statutory construction rules forcefully provide that support. First, "[w]hen faced with a general statute and a specific statute on the same subject, the more specific one should be applied." *Ross v. State*, 729 N.E.2d 113, 116 (Ind. 2000) (citation omitted). This rule mandates application of the highly

specific Unlawful Abortion Statute. Second, courts repeatedly hold, "[W]e do not presume that the legislature intended language used in the statute to be applied illogically or to bring about an unjust or absurd result[.]" *Riley v. State*, 711 N.E.2d 489, 495 (Ind. 1999) (citation omitted). Here, holding that the Feticide Statute renders anyone who violates the abortion laws (no matter how minor a violation, no matter the state of mind, and no matter how mild a punishment the Unlawful Abortion Statute imposes) guilty of Feticide is most certainly "an unjust [and] absurd result." That absurd result is avoided by recognizing what *Baird* already has: the statutes regulate different subjects without overlap. The Feticide conviction must, therefore, be reversed.

B. The Feticide Statute Does Not Permit Prosecution of Women for Their Own Abortions.

Even if held to cover some abortions, the Feticide Statute does not permit prosecution of women for their own abortions.

Although Indiana's first abortion statute in 1835 did not punish women who had abortions, Ind. Acts (Ch. XLVII, § 3), the legislature enacted a misdemeanor statute in 1881 that did punish those women (1894 Ind. Acts, ch. 651, § 1997).[9] This misdemeanor statute remained in effect through the 1970s, but no woman was ever prosecuted under it for her own abortion. *See Shuai*, 966 N.E.2d at 634-35 (Riley, J.,

[9] Plainly, the legislature understood that women who had unlawful abortions were not subsumed within the general statute and, were they to be prosecuted, a separate statute was needed.

concurring in part and dissenting in part) (recounting the history of prosecutions under the 1881 statute).

Shortly after *Roe v. Wade*, 410 U.S. 113 (1973), the legislature revamped the primary abortion statute to provide:

> It shall be a felony for any person or persons knowingly to perform or otherwise aid or abet the performance of an abortion not expressly provided for herein . . .

Public Law 322, S. 334, Ch. 58.5. The legislature did not at that time repeal the longstanding (but unused) statute making it a misdemeanor for a woman to procure an abortion for herself. Ind. Code § 35-1-58-2 (1973).

Four years later, though, the legislature took action of great significance. First, *the legislature affirmatively repealed the statute making it a crime for a woman to procure an abortion for herself.* 1977 Ind. Acts, Ch. 335, § 21. Second, the legislature amended the Unlawful Abortion Statute as follows (deletions indicated by strikethroughs; additions in italics):

> It ~~shall be~~ *is a Class C felony for* ~~any~~ a person ~~or persons~~ knowingly *or intentionally* to perform ~~or otherwise aid or abet the performance of~~ an abortion not expressly provided for ~~herein~~ *in this chapter.*

Id. Critically, the legislature deleted the phrase "aid or abet"—a phrase that might (even after repeal of the procurement statute) conceivably have been misused to subject women to prosecution in connection with their own abortions. These two actions evince an unmistakable legislative decision not to prosecute a woman under the abortion laws based on her own abortion.

More evidence of the legislature's intent comes from the 1995 amendment banning "partial birth abortion," a procedure reviled by many as the most heinous

form of abortion imaginable. If there *ever were* a category of abortion for which the legislature might opt to allow prosecution of women who agree to undergo the procedure, that category would be partial birth abortions. If there *ever was* a category of abortion for which the legislature might opt to allow prosecution of women for their own abortions, that category would be partial birth abortions. Yet, the statute provides, "A woman upon whom a partial birth abortion is performed *may not be prosecuted* for violating or conspiring to violate the prohibition on "partial birth abortion." I.C. 16-34-2-7(d) (emphasis added).[10] In understanding the significance of the 1995 amendment, the "absurdity" doctrine again comes into play. *See supra* 32, 36. It would truly be "absurd" to believe the legislature banned prosecution for the most loathed form of abortion but allowed prosecution for all other types of unlawful abortion.

The fact that the legislature has taken repeated action to guard against women being charged criminally for their own abortions is not at all surprising. Many other states, including many known for being particularly aggressive in seeking to reduce abortions—such as Arkansas, Louisiana, Missouri, Pennsylvania, Texas and Utah—take the same approach. *See* Ark. Code Ann. §§ 5-61-101(c), 5-61-102(c); La. Rev. Stat. Ann. § 14:87(A)(2); Mo. Ann. Stat. § 188.030(7); 18 Pa. Cons.

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[10] For an example of a state following this pattern, see Ga. Code. Ann. § 16-12-144(d), a statute the Georgia legislature enacted banning the prosecution of women upon whom partial birth abortions were performed. That statute was passed even though, as explained in *Wolcott v. Gaines*, 169 S.E.2d 165, 165-66 (Ga. 1969), state law was already clear that women could not be prosecuted for *any* abortion upon themselves.

Stat. Ann. § 2608(a)(3); Tex. Penal Code Ann. § 19.06(1); Utah Code Ann. § 76-7-314.5(2). For many, the driving philosophy behind these enactments appears to be the view as expressed in 1988 on behalf of Vice President George H.W. Bush: "A woman in a situation like that would be more properly considered an additional victim, perhaps the second victim. That she would need help and love and not punishment." *See* Samuel W. Buell, *Criminal Abortion Revisited,* 66 N.Y.U. L. REV. 1774, 1774 (1991) (citation omitted).

Because the Unlawful Abortion Statute does not support prosecuting women for their own abortions, it is clear that the Feticide Statute does not either (even assuming it applies to any abortions). To conclude the Feticide Statute extends to such women, one would have to first conclude that, in passing a 1979 statute focused on punishing criminals committing violent acts against pregnant women and their fetuses, the legislature *sub silentio* reversed its 1977 actions and took the drastic and controversial step of suddenly subjecting women to prosecution for their own abortions. Second, one would have to conclude that for the first time in Indiana history, such women were exposed to severe felony convictions. Third, making this account even more implausible, one would have to conclude that, instead of using the carefully crafted Unlawful Abortion Statute to accomplish all this, the legislature lumped such women into the Feticide Statute with criminals who

strangle their pregnant wives or fire shots into bank tellers' visibly pregnant bellies.[11]

Each of these assumptions is itself highly improbable; the three together can be easily dismissed as untenable. Rather, there is a simple and obvious answer here. Consistent with the widespread understanding of the Feticide Statute, it was passed to protect pregnant women from violence, not to prosecute them.[12] Of the

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[11] Recognizing this about the Feticide Statute does not conflict with the core holding in *Shuai* that a pregnant woman can be prosecuted under the murder statute for knowingly or intentionally taking action to terminate the life of a fetus *she knows* to be viable and can also be prosecuted for attempted feticide for that act. The *Shuai* case had nothing to do with abortion. Rather, Ms. Shuai was accused of ingesting rat poison in a suicide attempt, expecting it would kill her fetus as well. No one would ever describe that as an "abortion" subject to regulation under the Unlawful Abortion Statute. Thus, the Court was never asked—and never said anything—about the applicability of the Feticide Statute to abortions in general or to pregnant women who aborted their fetuses in particular.

More generally, the point advanced here is not that English common law afforded pregnant women immunity from prosecution for their own abortions. *Shuai*, 966 N.E.2d at 631 (rejecting that argument). Rather, the point here turns on the legislature's intent in 1979 when the Feticide Statute was passed, and at the time of subsequent amendments. It should be noted that there are weighty arguments against the conclusion in *Shuai* (*see id.* at 632-36 (Riley, J., concurring in part and dissenting in part)), and this Court is, of course, not bound by the panel's decision there. Should the Court choose to rule differently here on the common-law maternal immunity point at issue there (as we ask the Court to do), that would resolve this case as well. But it is unnecessary for the Court to reach that question given Purvi's clear entitlement to relief based on other issues raised here. Space limitations preclude offering arguments on that issue beyond the adoption by reference of Judge Riley's analysis.

[12] This explains why many strong advocates of abortion rights support Feticide Statutes. As one authority has written of those who attack women and their fetuses, "These criminal actors stripped their victims of the choice to become mothers, which denies female autonomy just as much as much as forcing women to carry unwanted

265 cases published on Lexis that mention the word "feticide" or "foeticide," no case has ever used a Feticide statute to prosecute a woman for her own abortion. There is absolutely no evidence that Indiana decided to buck hundreds of years of precedent across dozens of states. For these reasons, too, the conviction must be reversed.

C. The Avoidance Doctrine Demands That the Court Avoid Construing the Statute in a Manner That Would Trigger Grave Doubts About Its Constitutionality.

In *Indiana Wholesale Wine & Liquor Co. v. State*, 695 N.E.2d 99 (Ind. 1998), the Court reaffirmed that "even if a serious doubt" of a statute's constitutionality is raised, "it is a cardinal principle that [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 106 (*quoting Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). As shown above, construing the Feticide Statute as not criminalizing a woman's actions in connection with her own abortion is not only "fairly possible," it is compelled by ordinary rules of statutory construction. In the following section, we will show that reading the statute otherwise would render it unconstitutional and, by any measure, would raise "a serious doubt of its constitutionality."

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pregnancies to term." Carolyn Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 752 (2006).

D. Applying the Feticide Statute to Women Who Choose Abortions Would Violate Both the United States and the Indiana Constitutions.

If the Court declines to grant relief on statutory grounds, the Feticide Statute must be invalidated as violating the United States and Indiana Constitutions. This is because the statute, as so interpreted, would place an "undue burden" on women by exposing them to severe criminal penalties absent proof they had any idea they or anyone else were doing anything wrong.

As explained above, under the Feticide Statute a woman would be guilty of Feticide if any deviation from the abortion statutes occurred (rendering the abortion "*not in compliance*"). *See supra* 31-36. For example, this could include the staff's failure to provide the physician's license number, Ind. Code § 16-34-2-1.1(a)(1)(A), or providing a black and white copy, not the required colored copy, of the informed consent brochure, Ind. Code § 16-34-2-1.1(a)(4). These may seem like farfetched examples of trivial violations, but that is the very point: to avoid the possibility of a Feticide prosecution, a woman contemplating an abortion would not only have to muddle through and understand page after page of dense legalese, she would also have to somehow ensure that all those around her are complying with the letter of the law.

The same concern applies to women using the Internet to obtain pills to terminate pregnancy. It is widely known one can legally buy all kinds of medications—some requiring prescriptions and some not—from foreign vendors. By contrast, it is also widely known one cannot go on the Internet and have heroin or

cocaine delivered through the mail—because those substances are illegal. Thus, a woman finding multiple Internet vendors selling the product openly and notoriously has no reason to suspect ordering it is illegal—especially knowing a drug like RU486 is approved and widely used in the United States. Yet she could be prosecuted—for Feticide no less—because she had no proper prescription.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992), the Supreme Court adopted the now-familiar "undue burden" standard, which invalidates "a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. *See also Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 983-84 (Ind. 2005) (finding the Indiana Constitution's "material burden" standard is "virtually indistinguishable" from *Casey*'s standard).

Only one court, to our knowledge, has confronted a statutory scheme similar to one the State claims is in place here. In *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012), a woman self-aborted through pills acquired on the Internet. The Idaho statute provided that *"[e]xcept as permitted by this act"* (referencing the abortion statute), a woman who "knowingly submits to an abortion . . . or who purposely terminates her own pregnancy . . . shall be deemed guilty of a felony." Idaho Code § 18-606(2) (emphasis added). The only scienter requirements in the Idaho statute relate to "knowingly" taking part in an abortion and "purposely" terminating one's pregnancy. There is no requirement that the woman know she is acting illegally or even know the facts that trigger the illegality. Upholding a

preliminary injunction against enforcement of the statute, the United States Court of Appeals for the Ninth Circuit held:

> There can be no doubt that requiring women to explore the intricacies of state abortion statutes to ensure that they and their provider act within the Idaho abortion statute framework, results in an "undue burden" on a woman seeking an abortion of a nonviable fetus. Under this Idaho statute, a pregnant woman in McCormack's position has three options: (1) carefully read the Idaho abortion statutes to ensure that she and her provider are in compliance with the Idaho laws to avoid felony prosecution; (2) violate the law either knowingly or unknowingly in an attempt to obtain an abortion; or (3) refrain altogether from exercising her right to choose an abortion.

McCormack, 694 F. 3d at 1016. See also *Planned Parenthood, Sioux Fall Clinic v. Miller*, 63 F.3d 1452, 1465 (8th Cir. 1995) (striking down a statute that allowed prosecution of physicians with no scienter requirement because it created a chill that constituted a "substantial obstacle" to women's exercising their abortion rights).

As *McCormack* explains, the specter of uncertain exposure to prosecution for having an abortion constitutes an "undue burden," regardless of whether the uncertainty arises from a woman's recognition she cannot possibly discern and control all the facts surrounding the procedure or whether it arises from a woman's recognition she cannot possibly master the governing abortion laws.[13] Either way,

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[13] There are several areas in which courts, recognizing the unrealistic nature of pretending that a person can know the particular law, have imposed a requirement that a defendant have acted in willful violation. *See, e.g., Lambert v. California*, 355 U.S. 225 (1957); *Cheek v. United States*, 498 U.S. 192 (1991). This rule should most certainly apply to a woman who cannot possibly be expected to comprehend all the abortion laws as she walks into a clinic or takes a pill. The Court need not decide whether doctors—who are professionals engaged in this kind of practice and who have the realistic capacity to be counseled on the laws—ought be treated differently on this front.

any woman knows that choosing to have an abortion puts her in jeopardy of prosecution, regardless of her complete good faith—and knows that the only way to avoid that risk is to forego the abortion. *See Gonzalez v. Carhart*, 550 U.S. 124, 149-150 (2007) (it is the presence of a statutory scienter requirement that protects against criminal liability for an abortion that mistakenly violates the legal requirements). As the Supreme Court put it, "Because of the absence of a scienter requirement," this abortion "statute is little more than 'a trap for those who act in good faith.'" *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (quotation omitted). This looming threat is surely an "undue burden" on the right of choice.[14]

E. Feticide Requires the Death of a Fetus.

The prosecution was able to secure convictions for the inconsistent crimes of Feticide and Neglect of a live child by maintaining that a person is guilty of *feticide* regardless of whether a fetus is killed—indeed, *even if there is a live birth*. This position is unsustainable.

As set forth above, the Feticide Statute provides that one who "knowingly or intentionally terminates a human pregnancy with an intention other than to

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[14] The unconstitutionality of this statute directly affected Purvi. The jury was never asked to find (a) that she knew she was doing anything unlawfully or (b) that she otherwise "knowingly or intentionally" violated the abortion laws. Indeed, the instruction never mentioned any elements beside "knowingly terminat[ing] a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus." (App. 298) Because one or both of these elements are constitutionally necessary, a conviction without them cannot stand. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.").

produce a live birth or to remove a dead fetus commits feticide." I.C. § 35-42-1-6. The word "feticide" is not all ambiguous. The suffix "cide" unvaryingly means "killing," as in homicide, suicide, infanticide, pesticide, etc. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 335 (4th ed. 2000) ("killer" or "act of killing"). The word "fetus" is similarly unambiguous. *See id.* at 653 ("unborn young"). There is simply no meaning, nor has there ever been a meaning, of the term feticide other than the "intentional destruction of a human fetus." *Id. See Jones v. Commonwealth*, 830 S.W.2d 877, 878 (Ky. 1992) ("at common law . . . birth is what distinguished feticide from infanticide"); *Gilpin v. Gilpin*, 197 Misc. 319, 321 (N.Y. Fam. Ct. 1950) ("[Birth] determines the distinction between the crimes of foeticide and infanticide."). These definitions are thoroughly consistent with ordinary usage of the term. It would be ludicrous to say of a live person, "she was a homicide victim," and it would be equally ridiculous to say of a live infant, "she was a feticide victim."[15]

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[15] The Court cannot simply modify the Feticide conviction to Attempted Feticide. First, the other flaws in using the Feticide Statute bar an Attempted Feticide conviction. Second, the Feticide Statute is part of the Homicide section of the Criminal Code and it has been recognized that in the homicide context, a jury's guilty finding under a "knowingly or intentionally" standard, does not satisfy the need for a specific finding of intentionality for attempted homicide charges. *See Spradlin v. State*, 569 N.E.2d 948, 949-50 (Ind. 1991) (requiring a specific jury finding of intent required for attempted murder conviction); *Harris v. State*, 884 N.E.2d 399, 403 (Ind. Ct. App. 2008) (*Spradlin* rule applies to attempted voluntary manslaughter). In *Harris*, the Court explained that (unlike most crimes) voluntary manslaughter poses the same "intent ambiguity" as murder because "it is often unclear whether the defendant intended [the death, or] whether he knew of a high probability of death." *Id.* (*quoting Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998). This is also true of the Feticide Statute. In its classic application, a defendant

Despite all this, the prosecution maintains the Feticide Statute applies even if a person's acts result in the birth of a perfectly healthy baby—because a live birth is one of the ways a pregnancy can be "terminated." (Tr. B:189-90) This distortion of the statute violates fundamental principles of statutory construction by advancing a completely unnatural use of a phrase. *See* Ind. Code § 1-1-4-1 ("Words and phrases shall be taken in their plain, or ordinary and usual, sense."). And it creates a wholly unnecessary war between the statute's terms.[16]

It is black letter law that "where one part of a statute is susceptible to two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions, and opposed to the other, that construction must be adopted which will render all classes harmonious." *Brown v.*

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has assaulted a woman knowing she was pregnant but it is unclear whether he acted with "intent" to kill the fetus or with "knowledge" of a high probability his act would kill the fetus. *See, e.g., Baird v. State*, 604 N.E.2d 1170, 1190 (Ind. 1992) (defendant who strangled his pregnant wife to death was guilty of Feticide even if he never intended to kill the fetus). A finding of intent is thus critical to a conviction for attempt.

[16] In *Shuai*, the prosecution recognized that Feticide only applies to *in utero* deaths and thus charged Ms. Shuai with *Attempted Feticide precisely* because her act of ingesting rat poison led to a live birth—and *did not cause in utero death*. *See Shuai*, 966 N.E.2d at 629. Even though the charge was *Attempted* Feticide, the Court mistakenly mentioned in passing that it was undisputed Ms. Shuai's pregnancy was terminated when the child was born. *Id.* at 629. In fact, the "undisputed" point was the exact opposite—that without the death of a fetus, Ms. Shuai was not being charged with Feticide *(i.e.*, "terminating a pregnancy"). Given this, the stray statement in *Shuai* must not be taken as resolving an issue not before the court—in a manner neither litigant was seeking. *See generally In re Adoption of J.T.D.*, 21 N.E.3d 824, 830 (Ind. 2014) ("[S]tatements not necessary in the determination of the issues presented are *obiter dictum*. They are not binding and do not become the law.").

Gardner, 308 N.E.2d 424, 427 (Ind. Ct. App. 1974) (quotation omitted). That rule plainly governs here.

Not only is "feticide" unambiguous, there is only "one way of construing" the phrase "terminates a pregnancy" that comports with the natural and common usage of the phrase: it, too, requires death of a fetus. The law is not intended to bend to those who can cleverly show how words can fit a situation to which they were not intended. *See Mayes v. Second Injury Fund*, 888 N.E.2d 773, 776 (Ind. 2008) (courts must avoid "excessive reliance upon a strict literal meaning or the selective reading of individual words").[17]

Examining other statutes using this same term further exposes the untenability of the State's position. For example, the Indiana Code defines abortion as it defines feticide: "the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus." Ind. Code 16-18-2-1. Once again, though, the idea a person might say, "That ten-year-old child was aborted" is farcical. And, even more strikingly, another statute in Section 16 requires the State Department of Health to provide information to expectant parents who receive prenatal test results showing Downs syndrome. Ind. Code § 16-35-9.2-1. The statute mandates that the information "not implicitly or explicitly reference *pregnancy*

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[17] In *Kendrick v. State*, 947 N.E.2d 509 (Ind. Ct. App. 2011), the defendant was convicted of two counts of Feticide (among other offenses) after shooting a bank teller pregnant with twins. One twin died *in utero* and one died shortly after birth. Because the issues the defendant advanced had nothing to do with the live birth question, the Court had no occasion to pass on, or even comment on, this point when vacating the convictions on double jeopardy grounds.

termination." Ind. Code § 16-35-9.2-1(a)(2) (emphasis added). Hence, under the State's interpretation of "pregnancy termination," this statute requires that the information "not implicitly or explicitly reference *live birth*." It is difficult to imagine a more nonsensical conclusion. *See generally Adkins v. Ind. Emp't Sec. Div.*, 117 Ind. App. 132, 70 N.E.2d 31, 32 (1946) (the ways a word is used in another statute involving a related subject is "entitled to consideration").

In the end, there is one undeniable fact that refutes the State's position and shows that neither the words "feticide" nor "terminates a pregnancy" encompasses a live birth: No husband would ever telephone a relative from the delivery room where his wife was delivering a healthy baby and say, "Good news, Susan is in the hospital terminating her pregnancy."

For this reason, too, the Feticide conviction must be reversed.

STATE OF INDIANA	)	IN THE ST. JOSEPH SUPERIOR COURT
	)	
ST. JOSEPH COUNTY	)	CAUSE NUMBER 71D08-1307-FA-000017

STATE OF INDIANA	)	
	)	
vs.	)	
	)	
PURVI PATEL	)	
	)	
Defendant.	)	

JUDGMENT OF CONVICTION AND SENTENCING ORDER

This cause having been submitted to the Jury following trial herein; and the Jury of this cause has delivered in Open Court the following guilty verdicts on Count I – Neglect of a Dependent, Class A Felony and Count II – Feticide, a Class B Felony. Having accepted and filed said verdicts, it is now ORDERED AND ADJUDGED by the Court that the Defendant, who is a female adult person, is guilty of such offenses.

This matter, having been set for sentencing this date, following the entry of Judgment of Conviction herein against the Defendant;

And the Court, having considered I. C. 35-38-1-7.1, and having reviewed and considered the Pre-Sentence Investigation Report prepared in this matter, the Defendant's sentencing memorandum, and having considered the comments of Defendant and both counsel, makes a sentencing statement at the sentencing hearing. The Court now sentences the Defendant to the care, charge and custody of the Indiana Department of Corrections for a period of 30 years on Count I, and 6 years on Count II, with Class 1 Credit for 4 days served prior to imposition of the sentence herein. The sentences are concurrent to each other.

The sentence shall be served as follows: 20 years of the term shall be an executed sentence in the Department of Corrections. The execution of the remaining 10 years shall be suspended. The Defendant shall be placed on probation for a period of 5 years following release from the Department of Corrections.

The Court recites the conditions of probation, which the Defendant acknowledges understanding and agrees to abide by.

The Defendant is assessed court costs and a $500 fine. The Defendant is to provide a DNA sample.

Following advisement of C.R. 11 rights, the Defendant advises the Court she wishes to appeal the conviction. The Defendant shall hire private counsel for purposes of pursuing the Defendant's right to appeal.

So Ordered the date of the filemark hereon.

ELIZABETH C. HURLEY, JUDGE
ST. JOSEPH SUPERIOR COURT

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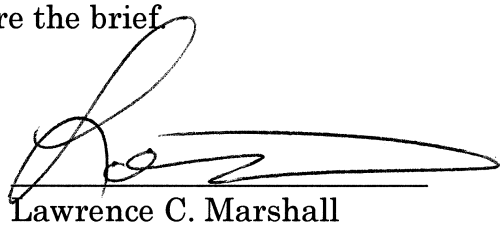

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IN THE INDIANA COURT OF APPEALS

CAUSE NO. 71A04-1504-CR-166

PURVI PATEL,	)	
	)	**Appeal from the St. Joseph**
Appellant/Defendant,	)	**Superior Court**
	)	
	)	**Trial No. 71D08-1307-FA-00017**
v.	)	
	)	**The Honorable Elizabeth Hurley,**
STATE OF INDIANA,	)	**Judge**
	)	
Appellee, Plaintiff.	)	

CERTIFICATE OF FILING AND SERVICE

I, Lawrence Marshall, admitted *pro hac vice* to the Indiana Bar, hereby certify that on the 2nd day of October, 2015, an original and eight copies of the foregoing were deposited with the Federal Express air courier delivery service, postage prepaid, addressed to:

Clerk of the Courts
216 State House
200 West Washington Street
Indianapolis, Indiana 46204

I also certify that on this 2nd day of October, 2015, the foregoing was served by the Federal Express air courier delivery service, postage prepaid, upon:

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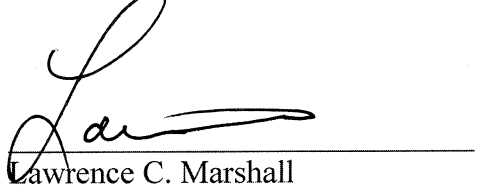

Lawrence C. Marshall