

NO. 2010-M-819-SCT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RENNIE T. GIBBS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

On Grant of Interlocutory Appeal from the Circuit Court of Lowndes County

BRIEF OF THE APPELLANT

Oral Argument Requested

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STATEMENT OF THE ISSUES

Although the non-capital murder statute, Miss. Code Ann. § 97-3-19(1) specifically provides that “[t]he killing of a human being . . . shall be murder . . . (d) [w]hen done with deliberate design to effect the death of an unborn child,” there is no reference to “unborn child[ren]” in the depraved heart section of that statute, 97-3-19(1)(b). Moreover, the “unborn child” offenses statute, Miss. Code Ann. § 97-3-37, specifically provides that an “unborn child” can be the victim of assault, capital murder, and certain types of manslaughter, but not depraved heart murder. The issues presented in this appeal are:

1. Does Mississippi’s depraved heart murder statute, Miss. Code Ann. § 97-3-19(1)(b), apply to a pregnant woman who suffered a stillbirth?
2. Would applying the depraved heart murder statute to women who suffer stillbirths violate due process or render the statute void for vagueness because it fails to give fair notice of this application, or otherwise violate the Mississippi or United States constitutions?

STATEMENT OF THE CASE

Rennie Gibbs suffered a stillbirth on November 12, 2006. She had turned sixteen one month earlier. Just over a month after the stillbirth, she was arrested on the basis of an autopsy by Dr. Steven Hayne. On February 4, 2007, the indictment in this case was issued in Lowndes County, Mississippi, charging her with depraved heart murder and claiming she “kill[ed] her unborn child, a human being, while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, by using cocaine while pregnant with her unborn child . . . in violation of MCA § 97-3-19” Record Excerpts Document 3.

Through her counsel, Ms. Gibbs filed a motion to dismiss the indictment in the Circuit Court

of Lowndes County. The motion argued that there had been no reported cases and no media reports showing that the State of Mississippi had ever applied the depraved-heart homicide statute to a pregnant woman who suffered a stillbirth or miscarriage, that the language of the depraved heart murder statute did not encompass the death of an unborn child or the actions or omissions of a pregnant woman, that the legislature never intended for that statute to encompass the actions or omissions of a pregnant woman, and that the state and federal constitutions prohibited courts from rewriting the statute to cover a case like this. The motion was supported by an amicus brief filed on behalf of 16 public health and child welfare organizations and experts.

The trial court denied the motion on April 23, 2010, but indicated that this “case of first impression” should be the subject of interlocutory review. Record Excerpts Document 2. Counsel for Ms. Gibbs filed a Petition for Permission to File Interlocutory Appeal in this Court. This petition was also supported by an amicus brief on behalf of public health and child welfare organizations and experts. This Court, on June 16, 2010, granted the petition and accepted review of this case.

SUMMARY OF ARGUMENT

There are no reported cases, and we have found no media reports, showing that the State of Mississippi has ever applied the depraved-heart homicide statute to a pregnant woman who suffered a stillbirth or miscarriage. For several reasons, it is clear that the statute does not apply to this case and that the indictment must be dismissed:

1. Miss. Code Ann. § 97-3-19(1) contains four subsections describing types of non-capital murder for the “killing of a human being.” Subsection (a) covers “deliberate design to effect the death of the person killed, or of any human being.” Subsection (b) covers “an act eminently

dangerous to others and evincing a depraved heart . . . although without any premeditated design to effect the death of any particular individual.” Subsection (c) covers unintentional killings occurring during the course of certain felonies. Subsection (d) covers “deliberate design *to effect the death of an unborn child*.” (Emphasis added). (A copy of the statute is contained in Appendix A-1, which is filed separately from this brief). In other words, the only subsection of § 97-3-19(1) that applies to “the death of an unborn child” requires a “deliberate design.” The “depraved heart” subsection does not cover the death of an unborn child.

2. A separate statutory section, Miss. Code Ann. § 97-3-37, lists specific “offenses” for which “the term ‘human being’ includes an unborn child.” Those offenses include “simple and aggravated assault and domestic violence,” “capital murder,” and various types of manslaughter. They do not include non-capital murder. (App. A-2). Indeed, the Mississippi Attorney General has issued an opinion stating if a “statute is not included in the list of crimes set forth in Section 97-3-37,” that unlisted statute “does not apply to an unborn child being present in the mother’s womb.” Thus, the only part of the non-capital murder statute that applies to an “unborn child” is, as explained above, § 97-3-19(1)(d) involving “deliberate design to effect the death of an unborn child.” The depraved heart portion of the statute does not apply.

3. Even for those offenses that specifically cover an “unborn child,” such as capital murder and certain types of manslaughter, it is clear that the legislature intended only to criminalize the conduct of third parties who kill the “unborn child” and not a pregnant woman who suffers a stillbirth or miscarriage. On several occasions, bills have been proposed in the Mississippi Legislature providing that “[a]ny death of an unborn child of twenty (20) weeks or more gestational age, resulting from the use by the mother of any illegal controlled substance during the mother’s

pregnancy . . . , shall be manslaughter to be charged against the mother.” (App. A-3, A-4, A-5, A-7). However, none of those bills have ever been passed. Another bill was proposed to make a pregnant woman guilty of felonious abuse if she tests positive for controlled substances on two occasions while pregnant. That bill also failed. (App. A-13). An examination of other provisions of Mississippi law that address pregnancy also demonstrate that the state does not, as a matter of policy, seek to punish pregnant women for the outcome of their pregnancies. For example, the legislature made it a crime for physicians to perform partial-birth abortions, but specifically provided that women who seek and obtain such an abortion cannot be prosecuted. Miss. Code Ann. § 41-41-73. (App. A-8). Similarly, the legislature passed a prospective abortion statute, to take effect if Roe v. Wade is overruled, that criminalizes the conduct of doctors and others who procure abortions, but specifically excludes “the pregnant woman” from prosecution. Miss. Code Ann. § 41-41-45. (App. A-9). Given that the legislature has not sought to penalize women who *deliberately* seek to end a pregnancy by obtaining a partial-birth abortion, it follows that it would not use the criminal law to punish pregnant women who experience *unintentional* stillbirths, even where the pregnant woman has done or failed to do something that may have caused the stillbirth.

4. Even if there were ambiguity about whether the criminal law permitted prosecution in this situation, “criminal statutes are to be *strictly* construed against the State and *liberally* in favor of the accused.” Tipton v. State, 41 So. 3d 679, 682 (Miss. 2010) (citation omitted, emphasis in original).

5. Interpreting the criminal law in the manner sought by the prosecution would lead to illogical and counterproductive results not intended by the legislature. Such an interpretation would subject every pregnant woman who suffers a miscarriage and stillbirth to investigation and

prosecution based upon a claim that her loss was caused by her actions or inactions, including smoking, drinking alcohol, using drugs, using prescription-drugs, or failing to follow advice regarding conditions such as obesity and hypertension. Any number of actions or inactions could be deemed by law enforcement officials to be “eminently dangerous” since it is now well established that many activities, including smoking cigarettes and drinking alcohol, are at least as likely to risk harm as the use of illegal drugs. It could increase risks to the health of children, born and unborn, by deterring women from seeking prenatal care to avoid discovery of addictions or conditions they could not overcome in the short length of pregnancy. It could encourage them to seek abortions rather than risk being prosecuted for homicide if they could not guarantee a healthy birth outcome. Absent a specific statute, the Court should not presume that the legislature intended these consequences.

6. With only one exception, every state appellate court to address the issue has declined to interpret existing criminal laws to reach and punish drug-using or addicted pregnant women who attempt to carry their pregnancies to term.

7. Interpreting the criminal law to encompass the allegations in this case would violate the state and federal constitutions in numerous respects.

ARGUMENT

I. THE DEPRAVED- HEART HOMICIDE STATUTE, §97-3-19(1)(B), DOES NOT ENCOMPASS “UNBORN CHILDREN,” AND MISSISSIPPI’S LAWS DO NOT AUTHORIZE CRIMINAL PROSECUTION OF PREGNANT WOMEN WHO SUFFER UNINTENTIONAL STILLBIRTHS AND MISCARRIAGES DUE TO THEIR ACTIONS OR INACTIONS

The prosecution is asking the courts of this State to radically re-write state law to permit the prosecution and punishment of women because they become pregnant and suffer an unintended

stillbirth or miscarriage that allegedly is due to their own actions or inactions. However, as written, the criminal statutes do not authorize that sort of prosecution, even where the allegation is that they used an illegal drug. As the Mississippi Supreme Court has recognized, “[t]he court cannot create a law . . . [i]ts sole power is to enforce the statute as written by the Legislature.” State v. Traylor, 56 So. 521, 522–23 (Miss. 1911). See Miss. Const. Ann. Art. 1 §2 (“[n]o person . . . belonging to one of these departments, shall exercise any power properly belonging to either of the others.”).

A. The Depraved-Heart Homicide Statute, Mississippi Code § 97-3-19(1)(b), By Its Plain Language, Does Not Apply to Harm to Unborn Children.

A statute must be interpreted “according to its plain meaning.” Finn v. State, 978 So.2d 1270, 1272 (Miss. 2008). “All words and phrases contained in the statutes [of Mississippi] are used according to their common and ordinary acceptation and meaning.” Miss. Code. Ann. § 1-3-65 (2010) (A-10). The non-capital murder statute, Miss. Code § 97-3-19(1), reads as follows:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies;

(d) When done with *deliberate design to effect the death of an unborn child*.

Miss. Code Ann. § 97-3-19(1) (2009) (emphasis added) (App. A-1).

Subsection (1)(d) expressly defines a class of homicide offense “[w]hen done with deliberate design to effect the death of an unborn child.” This, for example, would apply when a person intentionally kicks a pregnant woman in the stomach with the intent to cause, and actually causes, a miscarriage or stillbirth. By contrast, Subsection (1)(b), which defines depraved heart murder, does not refer to “unborn child[ren].” Similarly, it does not refer to pregnancy, pregnancy loss, miscarriages or stillbirths, and therefore does not apply to a situation where a woman experiences a pregnancy loss. Obviously, the legislature could have amended subsection (1)(b) and included “unborn child[ren]” as potential victims of depraved heart murder, just as it did with “deliberate design” murder when it wrote subsection (1)(d). But it has not done so.

B. The “Unborn Child” Offenses Statute, Mississippi Code § 97-3-37, Specifically Provides That “Unborn Child[ren]” Can Be Victims of Assault, Capital Murder, and Certain Types of Manslaughter, But Not Non-Capital Depraved-Heart Murder.

It is clear that when the Mississippi legislature intends to include unborn children as victims of criminal offenses, it says so explicitly. Indeed, the Mississippi legislature passed a law that enumerates a specific list of criminal offenses for which an “unborn child” is included in the definition of “human being.”

(1) For purposes of the offenses enumerated in this subsection (1), the term “human being” includes an unborn child at every stage of gestation from conception until live birth and the term “unborn child” means a member of the species homo sapiens, at any stage of development, who is carried in the womb:

- (a) Section 97-3-7, simple and aggravated assault and domestic violence;
- (b) Section 97-3-15, justifiable homicide;
- (c) Section 97-3-17, excusable homicide;

- (d) Section 97-3-19, *capital murder*;
- (e) Section 97-3-27, homicide while committing a felony;
- (f) Section 97-3-29, homicide while committing a misdemeanor;
- (g) Section 97-3-33, killing a trespasser unnecessarily;
- (h) Section 97-3-35, killing without malice in the heat of passion;
- (i) Section 97-3-45, homicide by means of a dangerous animal;
- (j) Section 97-3-47, all other homicides;
- (k) Section 97-3-61, poisoning with intent to kill or injure

Miss. Code Ann. § 97-3-37(1) (emphasis added) (App. A-2). This statute lists specific “offenses” for which “the term ‘human being’ includes an unborn child.” Those offenses include “simple and aggravated assault and domestic violence,” “capital murder,” and various types of manslaughter. They do not include non-capital murder.

Thus, the only part of the non-capital murder statute that applies to an “unborn child” is, as mentioned earlier, § 97-3-19(d) involving “deliberate design to effect the death of an unborn child.” This list of criminal offenses from 97-3-37(1) does *not* include depraved-heart murder, § 97-3-19(1)(b).¹ If the legislature had intended to include depraved heart murder within the list of “offenses” for which “the term ‘human being’ includes an unborn child.,” it could have done so. But it has not.

Indeed, the Mississippi Attorney General issued an opinion letter stating that a woman who

¹ While the list includes “Section 97-3-19, capital murder,” the use of the words “capital murder” after “97-3-19” means that the only “offense” designated from 97-3-19 is “capital murder” and not depraved heart murder, which is non-capital.

used drugs during pregnancy could *not* be prosecuted for the crime of child endangerment by exposure to controlled substances under Miss. Code § 97-3-39(2)(b). The Attorney General gave several reasons for this, including the fact that child endangerment under § 97-3-39 is not one of the offenses listed in § 97-3-37(1):

It is a well-settled rule that criminal statutes must be construed strictly, and that courts must adhere closely to the definition of the crime. . . . [I]t is the opinion of this office that Section 97-5-39(2)(b) of the Mississippi Code does not apply to an unborn child being present in the mother's womb [T]his statute is not included in the list of crimes set forth in Section 97-3-37 which crimes specifically relate to an unborn child at every stage of gestation.

Op. Atty. Gen. No. 2007-00182, Brewer, April 16, 2007, 2007 WL 1725165 (Miss. A.G.). The same principle applies with respect to the depraved-heart murder statute. Allowing this prosecution to go forward would conflict with the position and reasoning of the State of Mississippi as expressed by the Attorney General in this opinion letter.

C. Even for Offenses That Specifically Apply to an “Unborn Child,” the Legislature Has Authorized Only the Prosecution of Third Parties Who Harm the Unborn Child, and Not the Pregnant Woman Who Suffers a Miscarriage or Stillbirth.

Even for those offenses that specifically cover an “unborn child,” such as capital murder and certain types of manslaughter, it is clear that the legislature intended only to address the conduct of third parties who kill the “unborn child” and not the pregnant woman who suffers a miscarriage or stillbirth. The legislature has had many opportunities to pass laws that penalize pregnant women who use drugs and seek to continue to term, and has repeatedly declined to do so.

In 1998, Senate Bill 2602 was introduced to allow the prosecution for manslaughter of any mother whose illegal drug use caused a miscarriage or stillbirth of an unborn child after twenty weeks of gestation. This bill, which clearly would have allowed prosecution under the facts alleged

in the present case, read as follows:

Any death of an unborn child of twenty (20) weeks or more gestational age, resulting from the use by the mother of any illegal controlled substance during the mother's pregnancy . . . , shall be manslaughter to be charged against the mother.

S.B. 2602, 1998 Leg., Reg. Sess. (Miss. 1998) (App. A-3). However, the bill failed. *Id.*

In the 1999 legislative session, legislation again was introduced to allow the prosecution of pregnant women for manslaughter if their miscarriage or stillbirth after twenty weeks is caused by illegal drug use. This bill, Senate Bill 2221, was identical to that introduced the year before. Once again, it was not passed by the legislature. S.B. 2221, 1999 Leg., Reg. Sess. (Miss. 1999) (App. A-4).

In 2000, this same bill again was introduced and again it was not passed. S.B. 2314, 2000 Leg., Reg. Sess. (Miss. 2000) (App. A-5). Yet, during the same 2000 legislative session, other changes to the unborn child offenses statute, § 97-3-37, were proposed and became law. House Bill 923 was proposed to amend § 97-3-37 to include subsection (2), which provides criminal penalties for “[a] person who intentionally injures a pregnant woman” when that “conduct results in a miscarriage or stillbirth by that individual” (App. A-6). While this amendment passed both houses of the legislature and was signed into law on April 16, 2000, the legislation criminalizing the stillbirths of pregnant women caused by their illegal drug use was defeated for the third time.

In 2002, two bills were introduced that would have provided criminal penalties for pregnant women using drugs during pregnancy. One of them was the legislation that had been proposed in 1998, 1999, and 2000, and that would allow prosecution of pregnant women for manslaughter if their use of controlled substances caused a stillbirth or miscarriage after twenty weeks of gestation. For the fourth time, it was defeated. S.B. 2123, 2002 Leg., Reg. Sess. (Miss. 2002) (App. A-7). In

addition, legislation was introduced to to allow prosecution of pregnant women who test positive for a controlled substance on more than one occasion. Section 1 of the bill proposed the following language:

A pregnant woman who is arrested for a first violation of the Uniform Controlled Substances Law shall, in addition to the requirements imposed by the initial violation, undergo drug testing to determine if any controlled substances are present in her body. If the presence of drugs is determined, the court may require the defendant to undergo drug rehabilitation and shall require random and sequential testing of the defendant. If subsequent testing determines that a controlled substance is present, the defendant shall be guilty of child abuse and shall be subject to the provisions of Section 97-3-39.

H.B. 1393, 2002 Leg., Reg. Sess. (Miss. 2002) (App. A-13). Section 2 of the bill proposed an amendment to § 97-5-39(2) of the Mississippi Code, the felonious child abuse statute. (App. A-14).

The amendment would have added the underlined language to that provision:

Any person who shall intentionally (a) burn any child, (b) torture any child * * * , (c) except in self-defense or in order to prevent bodily harm to a third party, whip, strike or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm, or (d) test positive for a controlled substance for a second time while pregnant as provided by Section 1, House Bill No. , 2002 Regular Session, shall be guilty of felonious child abuse and/or battery of a child and, upon conviction, may be punished by imprisonment in the penitentiary for not more than twenty (20) years.

(App. A-13). Like the manslaughter bills described earlier, this bill also failed in the legislature. *Id.*

Clearly, the legislature has had repeated opportunities to subject pregnant women to criminal penalties in these situations, but has not done so. Moreover, an examination of other provisions of Mississippi law that address pregnancy demonstrate that the State, as a matter of policy, does not seek to punish pregnant women for the outcome of their pregnancies. For example, the legislature has prescribed that:

Any *physician* who knowingly performs a partial-birth abortion and thereby kills a human fetus shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Twenty-five Thousand Dollars (\$25,000.00) or imprisoned in the State Penitentiary for not more than two (2) years, or both.

Miss. Code Ann. 41-41-73(1) (2009) (emphasis added) (App. A-8). But while the statute punishes doctors, the women who enlist the doctors to (in the words of the statute) “perform[] a partial-birth abortion and thereby kill[] a human fetus,” cannot be prosecuted. Indeed Subsection (4) of that statute expressly states:

A woman upon whom a partial-birth abortion is performed *may not be prosecuted* under this section for a conspiracy to violate this section.

Id. (emphasis added) Further, under the prospective abortion prohibition statute, Mississippi Code Ann. 41-41-45, which becomes effective ten days after the Mississippi Attorney General acknowledges that the Supreme Court has overruled Roe v. Wade (when and if this happens), pregnant women will still be excluded from prosecution for obtaining an abortion.

Any person, *except the pregnant woman*, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape, upon conviction, shall be punished by imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years.

Miss. Code Ann. § 41-41-45(4) (2009) (emphasis added) (App. A-9). Given that the legislature has not criminalized the actions of women who *deliberately* obtain partial-birth abortions, it follows that it also has not criminalized *unintentional* stillbirths, even where it is believed that the pregnant woman's actions or inactions caused that loss.

D. Because This Is A Criminal Case With A Potential Punishment Of Life In Prison, Any Perceived Ambiguity Must Be Resolved in Favor Of Dismissing the Indictment.

A potential criminal conviction and life sentence are at stake in this case. Even if there were some ambiguity in section 97-3-19(1)(b), any ambiguity must be resolved in favor of the accused. “[A]ny doubt should be resolved in favor of the defendant.” McKlemurry v. State, 417 So.2d 554 (Miss. 1982); Tipton v. State, 41 So. 3d 679, 682 (Miss. 2010) (internal quotations omitted) (emphasis in the original) (“[T]he bedrock law in Mississippi [is] that criminal statutes are to be

strictly construed against the State and *liberally* in favor of the accused.”)

For example, in McLamb v. State, 456 So. 2d 743 (Miss. 1984) the defendant was sentenced to life imprisonment without parole under a habitual offender sentencing statute, § 99-19-83 Miss. Code Ann. (Supp. 1983). His third and final crime was one of violence, but his first two crimes were not. He argued that the statutory language requiring that “one (1) of such felonies shall have been a crime of violence” applied to the earlier statutory language “hav[ing] been convicted twice previously,” and not to the third crime that triggered the statute. The Court noted that the statute was “inartful.” Recognizing that “[p]enal statutes are to be interpreted strictly against the state and construed liberally in favor of the accused” and that ambiguity “must be interpreted in favor of the accused,” *id.* at 745, the Court reversed the habitual sentence.

Here, if the Court finds that there is ambiguity as to whether § 97-3-19(1)(b) applies to Ms. Gibbs, it must construe the statute in her favor.

E. Applying Section 97-3-19(1)(b) to Pregnant Women Who Experience Stillbirths Would Lead to Absurd Results Not Intended by the Legislature and Harmful to Maternal, Fetal and Child Health.

In Kennington v. Hemingway, this Court explained that: “Legislators must be presumed to be reasonable and sane men, ‘and to intend the natural, direct, and probable consequences of their acts, that these shall not be absurdly or unreasonably construed, and therefore that they intend to avoid absurdities and nonsense.’” 57 So. 809, 810 (Miss. 1912). It has long been established that the Court, in construing a statute, will not impose an unjust or unwise purpose on the legislature when any other reasonable construction can save it from such imputation. Tutweiler v. Jones, 394 So.2d 1346, 1349 (Miss. 1981); Gunter v. City of Jackson, 130 Miss. 637, 94 So. 844, 845 (1923); Pattison v. Clinghan, 93 Miss. 310, 47 So. 503 (1908). Courts are required, therefore, to avoid construing a statute in a manner that would produce absurd or illogical results that would not likely have been intended by the legislature

Judicially rewriting section 97-3-19(1)(b) to permit prosecution of a pregnant woman who

experiences a miscarriage or stillbirth would lead to the illogical result of undermining, rather than improving, the health of Mississippi children, born and unborn. Research shows that rather than deterring drug use, laws that threaten drug using women with arrest have been shown to deter women from what little help might be available if they do not think they can overcome an addiction in the short length of a pregnancy. As every leading medical group recognizes, addiction is a powerful force that has physiological and psychological components. Even people highly motivated to end their drug use often take months or even years to achieve total abstinence. It is widely recognized that even when people have access to appropriate treatment, recovery is a long-term process.²

Studies of pregnant women who are drug dependent find that such women are particularly motivated to stop using drugs,³ but often are unable to in the short length of a pregnancy. Pregnant women, like other people who become addicted to alcohol or illegal drugs, generally do not start drinking or taking drugs with the intent of becoming addicted. Some start out using medically prescribed drugs and become addicted, others seek relief from emotional or physical pain that they are experiencing in their lives.⁴ For these women, obtaining complete abstinence is especially

² National Institute on Drug Abuse, Department of Health and Human Services, Principles of Drug Addiction Treatment: A Research-Based Guide 14 (2d ed 2009), <http://drugabuse.gov/pdf/PoDat/Podat.pdf> (“[R]esearch has shown unequivocally that good outcomes are contingent on adequate treatment lengths. Generally, for residential or outpatient treatment, participation for less than 90 days is of limited effectiveness, and treatment lasting significantly longer is recommended for maintaining positive outcomes.”) (App. B-1); Lisa Rosenblum, Mandating Effective Treatment for Drug Offenders, 53 Hastings L.J. 1217, 1228 (2002) (“Treatment outcome studies show that ‘[c]ontinuous abstinence is obtained for 88% of those who attend twelve months of continuing care after inpatient addictions treatment and 93% of those who used an outpatient program.’”) (App. B-2); Harry K. Wexler, Gregory P. Falkin & Douglas S. Lipton, Outcome Evaluation of a Prison Therapeutic Community for Substance Abuse Treatment, 17 Crim. Just. & Behav. 71, 73, 85-87 (1990) (App. B-3).

³ See Sheigla Murphy, Marsha Rosenbaum, Pregnant Women on Drugs: Combating Stereotypes and Stigma, Rutgers University Press, 83 (1999) (App. B-4).

⁴ Physician Leadership on National Drug Policy, Position Paper on Drug Policy (2000) at 11 (“An individual’s behavior can influence the etiology and outcome of many medical conditions: cigarette smoking, hypertension, and obesity can influence the onset and prognosis of coronary heart disease; salt intake, cholesterol, and obesity impact essential hypertension; dietary controls are vital to manage diabetes; and drug abuse no doubt contributes to the onset of drug addiction. But no person eats

difficult without treatment. The threat of prosecution makes it less likely they will seek treatment. Moreover, with opiates like heroin and Oxycontin, time is required for withdrawal.⁵

Research shows that the threat of prosecution is likely to deter women from receiving prenatal care. Early, high quality, and comprehensive prenatal care improves pregnancy outcomes for all children, born and unborn, and women, including and especially those who are unable to overcome their addictions during the short term of pregnancy.⁶ The Board of Trustees of the American Medical Association determined that “[p]regnant women will be likely to avoid prenatal or other medical care for fear that their physicians’ knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.” Legal Intervention During Pregnancy, 264 J. of the Am. Med. Assn. (JAMA) 2663, 2670 (1990). This is one of the reasons why every leading group to address the issue of applying criminal penalties in the context of pregnancy, including the March of Dimes, the American College of Obstetrics and Gynecologists, and the American Academy of Pediatrics, like the AMA, conclude that the interpretation or passage of criminal laws to apply to pregnant women who cannot overcome a drug

fatty foods with the purpose of developing heart disease or hypertension, just as no drug user begins to use with the hope of becoming addicted. Dependence is essentially marked by the loss of consistent control over intake, a continuous desire for a drug in spite of possible harmful effects, and frequent relapses following periods of abstinence. Most people who drink alcohol or use illicit drugs never become addicted or develop an uncontrollable problem, just as poor diet does not always lead to health problems. In many cases, various environmental and biological factors significantly contribute to or trigger an illness or addiction.”) (App. B-5)

⁵ Karol Kaltenbach, Vincenzo Berghella & Loretta Finnegan, Opioid Dependence During Pregnancy, 25 Obstetrics & Gynecology Clinics of N. Am. 139, 145 (1998) (recommending methadone maintenance for the opioid addicted pregnant woman in part because of the harmful effects of withdrawal to the fetus) (App. B-6); see also Stephen R. Kandall & Wendy Chavkin, Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women, 43 Hastings L.J. 615, 629 n. 136 (1992) (App. B-7).

⁶ S. C. M. Roberts, C. Pies, Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care, MATERN. CHILD HEALTH J. (2010) (App. B-8).

problem during the short term of pregnancy is bad for the health of children, born and unborn.⁷

Studies of drug-dependent pregnant women have found that “fear and worry about loss of infant custody, arrest, prosecution, and incarceration for use of drugs during pregnancy,” characterized “women’s psychosocial response toward disclosure of their drug use during pregnancy....” Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, J. Drug Issues (2003) (App. B-16). See also Southern Reg’l Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 21 (1993) (“If pregnant women ... feel that they will be ‘turned in’ by health care providers or substance abuse treatment centers, they will avoid getting care. If women

⁷ Am. Med. Ass’n, *Legal Intervention During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990) (reporting on AMA resolution that “[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate”) (App. B-9). March of Dimes, *Statement on Maternal Drug Abuse* 1 (1990) (punitive approaches to drug addiction may be harmful to pregnant women because they interfere with access to appropriate health care. “Fear of punishment may cause women most in need of prenatal services to avoid health care professionals.”) (App. B-10); Comm. On Substance Abuse, Am. Acad. Of Pediatrics, *Drug Exposed Infants*, 86 Pediatrics 639, 642 (1990) (“The public must be assured of non-punitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant.”) (App. B-11); Nat’l Counsel on Alcoholism & Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (“A punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drugs addictions. It thus works against the interest of infants and children . . .”) (App. B-12); Am. Nurses Ass’n, *Position Statement* (1991) (“ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants. . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.”) (App. B-13); Nat’l Perinatal Ass’n, *Position Paper: Substance Abuse Among Women*, available at <http://www.nationalperinatal.org/advocacy.php#statements> (last visited July 31, 2009) (“Such a threat prevents many women from seeking prenatal care and earl intervention for their alcohol or drug dependence. It undermines the relationship between the healthcare providers and their patients and may keep women from giving accurate and essential information vital to their care.”) (App. B-14); Am. Psychiatric Ass’n, *APA Document Reference No. 200101, Position Statement: Care of Pregnant and Newly Delivered Women Addicts* (2001) (“Policies of prosecuting pregnant . . . women who have used either alcohol or illegal substances during pregnancy, on grounds of prenatal child abuse [and their] subsequent incarceration, either in jails, prisons or in locked psychiatric units both deprives the mother of her liberty and seriously disrupts the incipient or nascent maternal-infant bond. . . . Such policies are likely to deter pregnant addicts from seeking either prenatal care or addiction treatment, because of fear of prosecution and/or civil commitment.”) (App. B-15).

are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment.”) (App. B-17).

As noted in Section I-C of this brief, the Mississippi Legislature has declined to pass laws creating special criminal penalties for pregnant women who use drugs. However, the State has taken action expressing a preference for non-punitive, public health approaches to issues relating to pregnancy and drug use. For example, in 1992, the legislature created a task force to serve a public awareness role regarding the value of maternal and infant health and make recommendations to the legislature about how it could improve maternal and infant health in Mississippi. Miss. Code Ann. § 41-89-5 (2010) (A-15).

In a report to the Public Health and Welfare and Human Services Committees of the Mississippi Senate and House of Representatives, the Mississippi Department of Health stated: “In 2008, mothers who received “‘inadequate’ prenatal care (defined as prenatal care that began after the 4th month or less than 50% of recommended prenatal visits received) had the highest infant mortality rate” in the State. In July of this year, in response to the problem of poor maternal health and high infant mortality, the legislature passed a law creating a Nurse-Family Partnership Program in Mississippi. The program uses registered nurses to make home visits and deliver education, support, and guidance to low income-first-time pregnant women and their children, starting at 28-weeks gestation and continuing until the child is two-years old. Miss. Code Ann. § 41-117-3 (2010) (A-16). The program “seeks to improve pregnancy outcomes by helping women engage in good preventative health practices, including through prenatal care providers, improving their diets, and reducing their use of cigarettes, alcohol and illegal substances.” *Id.* The overall purpose of Title 41, of which the Nurse Family Partnership is a part, is to “coordinate, develop, improve, plan for, and provide all services for the mentally ill, emotionally disturbed, alcoholic, drug dependent, and mentally retarded persons of this state... [and] to promote, safeguard and protect human dignity, social well-being and general welfare of these persons....” Miss. Code Ann. § 41-4-1 (2010) (A-17).

Interpreting section 97-3-19(1)(b) in a manner urged by the prosecutor in this case would conflict with this goal of encouraging all pregnant women, including those who are drug dependent, to seek prenatal care.

As explained more fully in section II-B of this brief, the use of the state's homicide law to punish a pregnant woman because her behavior is believed to be "eminently dangerous" to her unborn child would further lead to the illogical result of placing many women who suffer a pregnancy loss at risk of potential prosecution. This is because a wide range of habits, conditions, addictions, actions, and inactions have been shown to risk harm to the developing child. For example, smoking cigarettes during pregnancy is widely considered to be the single most important preventable risk factor for unsuccessful pregnancy outcomes.⁸ Indeed, scientific research demonstrates that cocaine use creates no greater danger to fetal health than smoking cigarettes.⁹ In Mississippi, fourteen percent of women report smoking cigarettes in the third trimester of pregnancy.¹⁰ If a pregnant woman could be prosecuted because her cocaine use is considered "eminently dangerous" and allegedly caused the miscarriage or stillbirth of her baby, the same could happen to a woman whose pregnancy loss allegedly was caused by cigarette smoke.

Finally, rewriting the state's depraved heart statute to permit punishment of women who experience pregnancy losses could lead those who cannot overcome an addiction in the short length of pregnancy to choose an abortion to avoid the prospect of arrest and prosecution. This possibility

⁸ Tobacco Use; Smoking During Pregnancy Is Preventable Risk Factor for Unsuccessful Outcome, Health & Medicine Week, Jul. 26, 2004, at 8 (App. B-18). See also Tom Corwin, Nicotine's Effects on Babies Called Serious: Study Claims Smoking by Pregnant Women Causes More Birth Defects than Cocaine Use, The Augusta Chronicle, June 3, 1998 at A1 (App. B-19); Deborah Frank et al., Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review, 285 JAMA 1613, 1620-21 (2001) (App. B-21).

⁹ See Deborah Frank et al., Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review, 285 JAMA 1613, 1620-21 (2001) (App. B-21).

¹⁰ Miss. Dep't of Health, Mississippi PRAMS Surveillance Report 2006 at 47, available at http://www.msdh.state.ms.us/msdhsite/_static/31,0,299,361.html#Reports. (App. B-22).

has been recognized by other state courts, see Johnson v. State, 602 So.2d 1288, 1296 (Fla. 1992); State v. Gethers, 585 So.2d 1140, 1143 (Fla. Dist. Ct. App. 1991), and an arrest leading to an abortion has been documented in the North Dakota case of State v. Greywind. There, the defendant was charged with child endangerment based on inhaling paint fumes during pregnancy. She obtained an abortion while her case was pending. In response, the prosecutor dropped the charge, stating: “Defendant has made it known to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation. “ See Motion to Dismiss With Prejudice, State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (App. B-43).

There is no specific statutory language signaling that the legislature intended to apply the criminal law to pregnancy loss, even when pregnant women engage in acts or omissions that can harm the health of the unborn child. Criminal penalties could prevent pregnant women from seeking addiction treatment and prenatal care, and absent specific statutory language to that effect, the Court should not presume that the legislature intended that result.

F. In Near-Unanimous Numbers, Other State Courts Have Refused To Expand Criminal Laws To Prosecute Pregnant Women Because They Use Drugs During Their Pregnancy.

This Court often looks to the decisions of other state courts as persuasive authority, particularly when there is no Mississippi case directly on point. Paz v. Brush Engineered Materials, Inc., 949 So.2d 1, 7 (Miss. 2007). Every state appellate court to address this issue but one has refused to expand existing state laws – child abuse, drug delivery, and homicide laws – to punish drug-using women who become pregnant and attempt to continue those pregnancies to term.

Most recently, the Supreme Court of Kentucky in 2010 reversed the opinion of the state’s intermediate court of appeals and held that the trial court properly dismissed an indictment charging Ina Cochran for first-degree wanton endangerment when she gave birth to an infant who tested positive for cocaine. Cochran v. Commonwealth, 315 S.W.3d 325 (Ky. 2010). The Court

recognized that rewriting the state's wanton endangerment statute to reach pregnant women in relationship to the unborn children would have an unlimited scope and create an indefinite number of new crimes because the law could be construed as covering the full range of habits, conditions, addictions, actions, and inactions that have been shown to or are believed to risk harm to the developing child – a plainly unconstitutional result that would render the statute void for vagueness.

As the Court noted:

The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road?

Id. at 328. The Court also addressed the prosecution's argument that illegal drug use distinguished that case from alcohol and smoking:

[I]t is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct per se. The Commonwealth's approach would exclude alcohol abuse, however devastating to the baby in the womb, unless the Commonwealth could prove an act of drunk driving; but it is the mother's alcoholism, not the act of driving that causes the fetal alcohol syndrome. The "case-by-case" approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; they lack fair notice and violate constitutional due process limits against statutory vagueness.

Id., quoting, Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1995).

The Kentucky Supreme Court in Cochran further held that applying a criminal penalty to the context of pregnancy contradicted the legislature's expressed preference for public health approaches, and that punitive actions taken against pregnant alcohol or substance abusers would create additional problems, including discouraging these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn. 315 S.W. 2d at 329. In so doing, the Court echoed its earlier holding in Welch, 864 S.W.2d at 284, that the plain

language and legislative intent of the Kentucky criminal child abuse statute did not encompass pregnant women who used illegal substances.

Likewise in 2009, the North Dakota Supreme Court reversed the conviction of Michelle Geiser, who was convicted of the crime of child endangerment based on the claim that she suffered a stillbirth as a result of her drug use during pregnancy. The court recognized the core issue in the case to be one of statutory interpretation. State v. Geiser, 763 N.W.2d 469, 471 (N.D. 2009). The court explained that “[r]ather than a ‘plain reading’ of the statute,” the State was “urging an interpretation” that was “more expansive” than permitted by the plain language of the statute. Id. The court considered legislative history, related state laws, legislative intent, and the decisions of other state courts and concluded that the North Dakota’s child endangerment law could not be used to reach and punish a pregnant women who suffered a stillbirth as an alleged result of the drugs she took. Id. at 471-74.

The Missouri Supreme Court also declined to rewrite the state’s child endangerment statute to reach pregnant women who continue to term in spite of a drug problem. State v. Wade, 232 S.W.3d 663, 666 (Mo. 2007). That case involved the prosecution of a pregnant woman whose baby tested positive for marijuana and methamphetamine. Id. at 663. The Court reasoned that despite Missouri’s legal authority for protecting the rights of unborn children as against third parties, the legislature never intended to create special criminal penalties for pregnant women who engaged in conduct or experienced health problems or other circumstances that might allegedly cause harm to an unborn child. Id. at 665. The Court reasoned that “the logic of allowing such prosecutions would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother’s unborn child. It is a difficult line to draw and, as such, our legislature has chosen to handle the problems of pregnant mothers through social service programs instead of the court system.” Id. at 666.

Similarly, Maryland’s highest court held that the state legislature did not intend for its child

abuse and neglect law to be applied to women during their pregnancy. Kilmon v. State, 905 A.2d 306, 313-14 (Md. 2006). In that case, the Court reversed convictions in two cases where the defendant had admitted to ingesting cocaine intentionally while pregnant and was convicted under a law making it a misdemeanor to engage in conduct creating a substantial risk of death or serious physical injury to another person. Id. at 306. The Court reasoned that interpreting the state's law to apply to pregnant women would lead to farfetched, absurd, and illogical results, and that legislative actions demonstrated that the state had opted to deal with the problem of maternal drug use by providing drug treatment programs for pregnant women. Id. at 311-313.

Other examples of state supreme courts rejecting the expansion of existing criminal statutes to prosecute women in the context of pregnancy include those from Florida, Ohio, Texas and Hawaii. See State v. Aiwohi, 123 P.3d 1210, 1224 (Haw. 2005) (holding that the use of the term "person" in the Hawaii manslaughter statute does not include unborn children); Ex parte Perales, 215 S.W.3d 418 (Tex. Crim. App. 2007) (decision of Texas's highest court refusing to imply a broad interpretation of a drug delivery statute); Johnson v. State, 602 S.2d 1288, 1296-97 (Fla. 1992) (reversing the conviction of a woman who used cocaine during pregnancy for 'delivering drugs to a minor,' noting the opposition of medical groups to the prosecution of pregnant women under the statute, and concluding that "[t]he Court declines the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread"); State v. Gray, 584 N.E.2d 710, 712-13 (Ohio 1992) (holding that the criminal child endangerment statutes did not encompass a pregnant woman who used cocaine during her pregnancy).

State intermediate courts have also rejected attempts by prosecutors to apply penal statutes to the context of pregnancy. See State v. Martinez, 137 P.3d 1195, 1197 (N.M. App. 2006) (refusing to apply child abuse statutes to punish a woman for continuing her pregnancy to term in spite of cocaine addiction); State v. Gethers, 585 So. 2d 1140, 1141 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug exposure on ground that such application misconstrues

the purpose of the law); Reinesto v. Superior Court, 894 P.2d 733, 736-37 (Ariz. App. 1995) (refusing to interpret child abuse statute to context of pregnancy); State v. Dunn, 916 P.2d 952, 955-56 (Wash. App. 1996) (holding that the legislature did not intend to include fetuses within the scope of the term “child”); People v. Hardy, 469 N.W.2d 50, 53 (Mich. App. 1991) (dismissing drug delivery charges against a pregnant woman who used cocaine during her pregnancy and holding that “to prosecute defendant for delivery of cocaine is so tenuous that we cannot reasonably infer that the Legislature intended this application, absent unmistakable legislative intent”); Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. App. 1997) (dismissing child abuse charges filed against a woman who was pregnant and addicted to heroin and concluding that the statute was not intended to include a pregnant woman and that a contrary holding would offend due process notions of fairness and render the statute impermissibly vague); State v. Deborah J.Z., 596 N.W. 2d 490 (Wis. App. 1999) (granting motion to dismiss first degree homicide and reckless conduct charges brought against a woman who used alcohol during pregnancy); Collins v. State, 890 S.W.2d 893, 898 (Tex. App. 1994) (dismissing charges against a pregnant woman who continued to term despite a drug problem, on state and federal due process grounds); Herron v. State, 729 N.E.2d 1008, 1011 (Ind. App. 2000) (dismissing as a matter of statutory interpretation and due process the criminal charge of neglect of a dependent based on claim that a pregnant woman used cocaine while pregnant); State v. Luster, 419 S.E.2d 32, 35 (Ga. App. 1992) (holding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women in relation to their fetuses, that to interpret the law otherwise would deprive pregnant women of fair notice, and noting that viewing addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution was the approach “overwhelmingly in accord with the opinions of local and national medical experts”).

The only state supreme court to have ever ruled otherwise is the Supreme Court of South Carolina. In a 3-2 decision, that court interpreted the word “child” in the state’s child endangerment statute to include viable fetuses, and upheld the application of the newly interpreted law to a woman

who gave birth to a child who tested positive for cocaine. Whitner v. State, 492 S.E.2d 777, 786 (S.C. 1997). The Court expressly distinguished itself from “the many decisions from other states’ courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment or drug distribution statutes.” Id. at 782. In 2003, the same court, in another 3-2 decision, expanded the state’s homicide by child abuse law to apply to a woman who suffered a stillbirth allegedly caused by her drug use. State v. McKnight, 576 S.E. 2d 168, 179 (S.C. 2003).

Significantly, the McKnight conviction was later unanimously overturned on post-conviction review by the same court, which held that Ms. McKnight had been inadequately represented at trial, in part because her counsel had failed to call experts who would have testified about “recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.” McKnight v. State, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

As previously noted, the South Carolina Supreme Court’s expansion of the criminal laws stands in contrast to the decision of every other state appellate court to address this issue. More typical of the near unanimity among state courts is the opinion by Maryland’s highest court in Kilmon:

[I]f, as the State urges, the statute is read to apply to the effect of a pregnant woman’s conduct on the child she is carrying, it could well be construed to include not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature – everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State’s position were to prevail, there would seem to be no clear basis for categorically

excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.

Kilmon, 905 A.2d at 311-12.

The plain language of Mississippi's depraved heart homicide statute, the language of related provisions, the rejection by the legislature of laws that would authorize the prosecution of a pregnant woman whose miscarriage or stillbirth results from drug use, the rejection of laws penalizing women who test positive for drugs during pregnancy, the explicit decision by the legislature not to prosecute women who obtain unlawful abortions, the illogical results that would flow from the interpretation urged by the prosecutor in this case, the requirement that ambiguity be resolved in favor of a criminal defendant, and the near unanimous approach of other state appellate courts demonstrates that this Court should not accept the prosecution's invitation to expand the criminal law to encompass the context of pregnancy.

II. THE PROSECUTION'S PROPOSED JUDICIAL EXPANSION OF MISSISSIPPI'S CRIMINAL LAW WOULD VIOLATE THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

Courts have a duty to construe legislation in harmony with the Constitution, if the statute's language will permit. Mississippi law provides that if a statute has two possible interpretations, one that would render the law unconstitutional and another that would be constitutionally valid, courts should adopt the interpretation that is consistent with the Constitution. In order to avoid interpreting the state's depraved heart murder statute in a manner that is in conflict with the Constitution, this Court should decline the state's invitation to expand it to cover the context of pregnancy.

A. Applying Section 97-3-19(1)(b) To Ms. Gibbs Would Violate Her Right To Due Process Notice And The Prohibition On Retroactive Application of New Constructions of Criminal Statutes.

Under the United States and Mississippi Constitutions, a judicial construction that is new and

unborn children.

If section 97-3-19(1)(b) is judicially interpreted to encompass the types of allegations contained in this indictment, that interpretation cannot be retroactively imposed against Ms. Gibbs since she did not have notice of that interpretation. The absence of notice applies not only to the depraved heart provision, but also to any other Mississippi criminal statute that is judicially interpreted to include the allegations against Ms. Gibbs. No criminal statute in Mississippi as written gives a woman in Ms. Gibbs's situation notice that she might be prosecuted under these circumstances.

B. Expanding Section 97-3-19(1)(b) To The Context of Pregnancy And Birth Would Render The Statute Unconstitutionally Vague.

An interpretation of the depraved homicide statute or other criminal statutes to encompass this case would render the statutes void for vagueness. This is a constitutional defect similar to the absence of notice. A statute is void for vagueness if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). See also Lewis v. State, 765 So.2d 493, 499 (Miss. 2000).

Expanding section 97-3-19(1)(b) in the manner the prosecution requests would render the statute void for vagueness. The term "eminently dangerous" would not provide pregnant women with the clarity or notice required by the state and federal constitutions. That term has never been used in the case law to describe an action, omission, or circumstance experienced by a woman during pregnancy. Accepting the prosecutor's strained interpretation would render the statute vague because pregnant women of ordinary intelligence would not be on notice of which actions, inactions or circumstances would subject them to prosecution would they suffer a miscarriage or stillbirth.

Many types of actions and inactions during pregnancy are believed to cause physical or mental abnormalities in the newborn or even result in miscarriage or stillbirth. There is often

disagreement and uncertainty about the effect of certain actions on a woman's pregnancy and her developing child and agreement changes over time, making it impossible for a pregnant woman to know which of those actions are "eminently dangerous." For example, there are numerous conflicting studies and reports about whether or not a pregnant woman can safely consume any alcohol during her pregnancy and, if any, how much. The potential adverse effects of alcohol are documented and known to be dangerous, as are those of numerous prescription drugs. The March of Dimes warns that "[a]lthough many women are aware that heavy drinking during pregnancy can cause birth defects, many do not realize that moderate or even light drinking also may harm the fetus. In fact, no level of alcohol use during pregnancy has been proven safe." See March of Dimes, Quick Reference Fact Sheets, Drinking Alcohol During Pregnancy, at 1, available at http://www.marchofdimes.com/professionals/14332_1170.asp. (App. B-25.) Yet a recent study in Great Britain by University College London, well publicized in the United States, was just issued declaring that pregnant women can safely have as many as two drinks a week without harming their babies.¹²

Additionally, more than fourteen percent of pregnant women in Mississippi smoke cigarettes during the last three months of their pregnancies.¹³ Medical research links cigarette smoking to an increased risk of stillbirth¹⁴ and federally-mandated cigarette packaging explicitly warns smokers of

¹² See Y. Kelly et al., Light drinking during pregnancy: still no increased risk for socioemotional difficulties or cognitive deficits at 5 years of age? J. EPIDEMIOLOGY COMMUNITY HEALTH (2010) (App. B-26).

¹³ Miss. Dep't of Health, Mississippi PRAMS Surveillance Report 2006 at 47, available at http://www.msdh.state.ms.us/msdhsite/_static/31,0,299,361.html#Reports. Among female high school students, 16.9% smoke cigarettes. (App. B-22) Miss. Dep't of Health, Mississippi Youth Tobacco Survey, available at http://www.msdh.state.ms.us/msdhsite/_static/31,0,303.html. (App. B-23)

¹⁴ See, e.g., K. Wisborg, et al., Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life, 154 AM. J. EPIDEMIOLOGY 322, 324 (2001) (reporting that in a study of 25, 102 deliveries, the authors found that smoking "increased the risk of stillbirth and infant death[.]" Smokers, irrespective of amount of cigarettes smoked per day suffered a rate of 7.1% of stillbirths compared to a rate or 3.6% for non-smokers at 16 weeks gestation) (App. B-27).

risks of fetal injury.¹⁵ If the depraved heart homicide law is interpreted to encompass pregnant women, there is no way for a pregnant woman in Mississippi to know whether cigarette smoking will be considered “an act eminently dangerous” and result in a homicide prosecution should she suffer a miscarriage or stillbirth.

The vagueness problem of applying the depraved heart homicide statute to the context of pregnancy is further highlighted by the scientific research already discussed in section IC indicating that “the direct toxic effect of cocaine on the fetus is not well known,”¹⁶ and that cocaine use certainly creates no more of a danger to fetal health than smoking cigarettes or drinking alcohol. See Deborah Frank et al., Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review, 285 JAMA 1613, 1620-21 (2001). As the United States Sentencing Commission concluded, “research indicates that the negative effects from prenatal exposure to cocaine, in fact, are significantly less severe than previously believed” and “research on the impact of prenatal exposure to other substances, both legal and illegal, generally has reported similar negative effects.” United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 21, 29 (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm. (App. B-30.)

¹⁵ 15 U.S.C. 1333(a)(1) (It is “unlawful for any person to manufacture, package or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, of the following labels: [including] SURGEON GENERAL’S WARNING: Smoking by Pregnant Woman May Result in Fetal Injury, Premature Birth, And Low Birth Weight.”)

¹⁶ M.A. Sims & K.A. Collins, Fetal Death: A 10-Year Retrospective Study, 22 Am. J. Forensic Med. & Pathology 261, 264 (2001) (App. B-28). See, also, T.A. Campbell & K.A. Collins, Pediatric Toxicologic Deaths: A 10-Year Retrospective Study, 22 Am. J. Forensic Med. & Pathology 184, 189 (2001) (App. B-29). Federal agencies have indicated that the effects of a woman’s use of cocaine on her children were previously exaggerated. As the National Institute for Drug Abuse has reported, “Many recall that ‘crack babies,’ or babies born to mothers who used crack cocaine while pregnant, were at one time written off by many as a lost generation. . . . It was later found that this was a gross exaggeration.” See United States v. Smith, 359 F. Supp. 2d 771, 780 n. 6 (E.D. Wis. 2005) (pointing to research that “the phenomena of ‘crack babies’ . . . is essentially a myth.”).

As many as 20 to 30 percent of all pregnancies will end in miscarriage or stillbirth. Stillbirth is one of the most common adverse outcomes of pregnancy.¹⁷ Women who take fertility drugs and choose to carry three or more embryos to term often experience pregnancy loss and risk severe, lifelong harm to the children who survive.¹⁸ Certain workplace and environmental hazards, such as exposure to chemicals or solvents, have similarly documented links to stillbirths. See e.g., Int'l Union v. Johnson Controls Inc., 886 F.2d 871, 914-15 n.7 (7th Cir. 1989) (Easterbrook, J. dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk). Furthermore, eating fish with high levels of mercury,¹⁹ handling or eating canned goods that contain BPA,²⁰ failing to take folic acid,²¹ taking certain drugs prescribed by a doctor, being overweight,²²

¹⁷ See e.g., R.L. Goldenberg, Stillbirth: A Review, 16 J. MATERNAL-FETAL & NEONATAL MED. 79, 79 (2004) (App. B-31).

¹⁸ B. Steinbock, The McCaughey Septuplets: Medical Miracle or Gambling with Fertility Drugs?, in ETHICAL ISSUES IN MODERN MEDICINE 375, 376 (5th ed., J. Arras & B. Steinbock, eds. 1999) (“Even if they are born alive, ‘super-twins’ (triplets, quadruplets and quintuplets) are 12 times more likely than other babies to die within a year ... Many will suffer from respiratory and digestive problems. They are also prone to a range of neurological disorders, including blindness, cerebral palsy and mental retardation”) (on file with National Advocates for Pregnant Women).

¹⁹ See Environmental Protection Agency, What You Need to Know about Mercury in Fish and Shellfish, <http://www.epa.gov/waterscience/fish/files/MethylmercuryBrochure.pdf> (“[S]ome fish and shellfish contain higher levels of mercury that may harm an unborn baby or young child’s developing nervous system”) (App. B-32).

²⁰ See BPA in Pregnancy: Cashiers, Canned Veggie Eaters Beware? Study Shows Higher Levels of the Chemical Bisphenol A in Pregnant Cashiers and Pregnant Women Exposed to Canned Foods, <http://www.webmd.com/baby/news/20101008/bpa-im-pregnancy-cashiers> (“[s]ome preliminary studies have suggested that higher levels of BPA may be associated with certain childhood behavior issues as well as obesity”) (App. B-33).

²¹ March of Dimes, Folic Acid, http://www.marchofdimes.com/professionals/14332_1151.asp (App. B-34).

²² See Heather Boerner, Plus-Size Pregnancy, <http://www.plannedparenthood.org/issues-action/std-hiv/obese-pregnancy-10350.htm> (App. B-35).

spending time at a high altitude,²³ standing still for prolonged periods of time²⁴ and using flame retardants found in furniture, carpets and electronics²⁵ are all behaviors that may be harmful to fetal health.

Other factors not involving specific conduct can also affect the fetus and, eventually, the health and development of the child. Many researchers have found that adolescence is, in itself, a risk factor for experiencing a stillbirth. See, e.g., Brian T. Bateman & Lynn L. Simpson, Higher rate of stillbirth at the extremes of reproductive age: A Large nationwide Sample of Deliveries in the United States, 194 Am. J. of Obstetrics and Gynecology, 840-45 (2006). Similarly, “[w]omen ages 35 and older who bear children are at a significantly increased risk of giving birth to low birth weight babies ... and may have increased risk of stillbirth.”²⁶ In fact, among the greatest risk factors to fetal health is poverty, with its attendant nutrition and medical care deficiencies.²⁷

The decisions about what actions, inactions, or circumstances would be deemed “eminently dangerous” and which of the 400 women who suffer stillbirths in Mississippi each year should be prosecuted, would be delegated to police and prosecutors. This case-by-case approach is inherently arbitrary.

²³ See Lauren Streicher, Pregnant? Know Risks if Traveling, Skiing, Chicago Sun-Times, Nov. 19, 2004, at 67 (“Preterm labor and bleeding are the most commonly encountered pregnancy complications among pregnant visitors to high altitudes”) (App. B-36).

²⁴ See Sally Squires, Pregnant Women Get Green Light To Exercise, The Wash. Post, Jan. 18, 1994 at z.07 (App. B-37).

²⁵ See David Gutierrez, Flame retardants alter thyroid hormones in pregnant women, Oct 19, 2010, http://www.naturalnews.com/030096_flame_retardants_thyroid.html (“Ubiquitous flame retardant chemicals appear to alter levels of thyroid hormones in the bodies of pregnant women, with potentially severe consequences for their infants”) (App. B-38).

²⁶ S. Tough, et al., Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Births, and Preterm Delivery, 109 PEDIATRICS 399-403 (March 2002) (App. B-40).

²⁷ See Comm. On Scientific Evaluation of WIC Nutrition Risk Criteria, Institute of Medicine, WIC Nutrition Risk Criteria: A Scientific Assessment 41, 43 (1996) (App. B-41).

That is why the highest courts in the states of Kentucky, Maryland and Arizona have, citing the vagueness doctrine, refused to strain criminal statutes on their books to apply to the context of pregnancy. The Supreme Court of Kentucky held that applying the state's wanton endangerment statute to a woman whose infant son tested positive at birth for cocaine "could have an unlimited scope and create an indefinite number of new 'crimes' ... a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior – a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." Cochran v. Commonwealth, 315 S.W.3d 325, 328 (Ky. 2010) (quoting Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1995)). The Court of Appeals in Maryland also reasoned that to apply the child endangerment statute to the context of pregnancy would subject pregnant women to liability for "engaging in virtually any activity involving risk." Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006). Likewise, the Arizona Appellate Court explained the potential consequences of rewriting the state's law to apply to the context of pregnancy:

A pregnant woman's failure to obtain prenatal care or proper nutrition also can affect the status of the newborn child. Poor nutrition can cause a variety of birth defects: insufficient prenatal intake of vitamin A can cause eye abnormalities and impaired vision; insufficient doses of vitamin C or riboflavin can cause premature births; deficiencies in iron are associated with low birth weight. Poor prenatal care can lead to insufficient or excessive weight gain, which also affects the fetus. Some researchers have suggested that consuming caffeine during pregnancy also contributes to low birth weight.

Other factors not involving specific conduct can also effect the fetus and, eventually, the status of the newborn child. The chance a woman will give birth to a child with Down's Syndrome increases if the woman is over the age of thirty-five. A couple may pass to their children an inheritable disorder, such as TaySachs disease or sickle-cell anemia. Occupational or environmental hazards, such as exposures to solvents used by painters and dry cleaners, can cause adverse outcomes. The contraction of or treatment for certain diseases, such as diabetes and cancer, also can affect the health of the fetus.

Reinesto v. Superior Court, 894 P.2d 733, 736-37 (Ariz. App. 1995).

An expansion of the depraved heart homicide statute to apply to pregnant women who suffer miscarriages and stillbirths would render the law unconstitutionally vague, leaving women without

notice of which of many of life's activities and circumstances that occur prior to a pregnancy loss would subject them to prosecution. Such an interpretation would invite arbitrary and capricious application of this statute by the police and prosecutors, who would have the discretion on a case-by-case basis to decide which women would be subject to criminal prosecution in the wake of a miscarriage or stillbirth. As explained by Maryland's highest court: "If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any of [a number of harmful] activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be." Kilmon, 905 A.2d at 311-12.

C. Interpreting Section 97-3-19(1)(b) To Apply To This Situation Would Render The Statute Unconstitutional In Violation Of The Right To Privacy.

As interpreted by the prosecutor in this case, a woman who is not able to overcome a drug problem in the short length of pregnancy and who goes to term rather than having an unwanted abortion will be severely punished if she experiences a miscarriage or stillbirth. Indeed, it would permit the state to prosecute women who seek to go to term but cannot guarantee that they will not suffer a stillbirth or miscarriage because of whatever factors the state chooses to label as "eminently dangerous." Such an expansion would violate state and federal constitutional rights to privacy.

Mississippi recognizes that the right to privacy includes the right to bodily autonomy and integrity. Pro Choice Miss. v. Fordice, 716 So. 2d 645, 653 (Miss. 1998). As the Mississippi Supreme Court stated in Young v. Jackson, "[i]t requires little awareness of personal prejudice and human nature to know that, generally speaking, no aspects of life is more personal and private than those having to do with one's ... reproductive system." 572 So.2d 378, 382 (Miss. 1990).

The right to procreation privacy includes the right to carry a pregnancy to term. See Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992) (noting that its decision in Roe v. Wade, 410 U.S. 113 (1973), "had been sensibly relied upon to counter" attempts to interfere with a woman's decision

to become pregnant or to carry to term); Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (“The decision whether or not to beget or bear a child is at the very heart of the right to privacy.”) Courts have recognized that prosecutions against women for allegedly endangering fetal health can lead to abortions that women would otherwise not choose to have. See Johnson v. State, 602 So.2d 1288, 1296 (“Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”) If Ms. Gibbs had terminated her pregnancy through a legal or illegal abortion rather than attempt to carry the pregnancy to term, she would not be subject to this prosecution.

The prosecution’s expansion of the depraved heart homicide statute does not rationally advance any legitimate state interest. The United States Supreme Court has noted with approval the conclusions of the American Medical Association and the American Public Health Association that there is (in the Supreme Court’s words) “a near consensus in the medical community that programs of the sort at issue [threatening arrest of women who use cocaine during pregnancy], by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health.” Ferguson v. City of Charleston, 532 U.S. 67, 84 n. 23 (2001). The American College of Obstetrics and Gynecologists recently affirmed the medical consensus, issuing an ethics statement providing:

[P]regnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.

Am. Coll. Obstetricians & Gynecologists, Maternal Decision Making, Ethics, and the Law, ACOG Committee Opinion, No. 321 (2005) (App. B-42). Concern about prenatal exposure of an unborn child to harmful activities by the mother does not strip away the pregnant woman’s right to liberty and privacy. See Ferguson v. City of Charleston, 532 U.S. at 82-86 (2001) (upholding Fourth Amendment protection against concerted law enforcement-hospital drug testing of pregnant women).

If requiring that pregnant teachers take early maternity leave violates constitutional protections, prosecuting women who seek to continue to term and suffer bad pregnancy outcomes is a much greater infringement of personal liberty. Interpreting the depraved heart statute to permit criminal prosecution against women whose newborns do not survive, thus unconstitutionally infringes procreative privacy rights.

D. Interpreting 97-3-19(1)(b) To Apply To The Context Of Pregnancy And Birth Would Render The Statute Unconstitutional In Violation Of The Equal Protection Clause.

State action that burdens women because of pregnancy is gender discrimination. See AT&T v. Hulteen, 129 S. Ct. 1962, 1970 n. 4 (2009) (reaffirming holding of Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), that policies that “burden” women “because of their different role” in pregnancy are gender discrimination subject to heightened scrutiny). Government action that singles out women for special penalties because they become pregnant discriminates on the basis of gender and therefore must be supported by an “exceedingly persuasive justification.” Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)). Moreover, laws cannot be applied unequally because a person is a member of a certain class. Romer v. Evans, 517 U.S. 620 (1996).

As stated earlier, there is no exceedingly persuasive justification for the prosecution’s interpretation of the depraved-heart homicide statute. Interpreting that statute to criminalize a drug-using woman’s own stillbirth or miscarriage would have the effect of burdening women more harshly than drug using males. The prosecution of this case creates a unique criminal offense in which pregnancy is an element. The depraved-heart murder statute, as interpreted by the prosecution, would allow a drug-using woman who suffers a stillbirth or miscarriage to be prosecuted for homicide while the prospective father who also used illegal drugs would not, though both may have used exactly the same amount of the illegal drug. Because there is no “exceedingly persuasive justification” for a policy of selective criminalization that actually creates risks for maternal, fetal

and child health, the prosecution's proposed application of this homicide statute mounts to unlawful sex discrimination.

E. Interpreting Section 97-3-19(1)(b) To Apply To Women Who Are Pregnant And Who Are Also Addicted Would Render The Statute Unconstitutional In Violation of Prohibitions Against Cruel And Unusual Punishment.

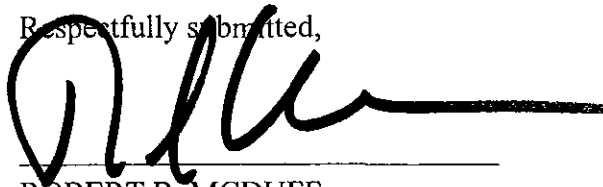
The United States and Mississippi Constitutions prohibit cruel and unusual punishment. U.S. Const. Amend VIII; Miss. Const. Ann. Art. 3, § 28 (2009). The United States Supreme Court has long recognized that it is cruel and unusual to punish someone for the medical condition of addiction. Robinson v. California, 370 U.S. 660, 667 (1962) (“[Addiction] is an illness which may be contracted innocently or involuntarily.”). Criminal punishment is also cruel and unusual if it is disproportionate to the offense. Enmund v. Florida, 458 U.S. 782, 788 (1982).

Under the statutory interpretation advanced by the prosecution, Ms. Gibbs faces life in prison because of her combined status as a pregnant woman and drug user. That sentence is cruel and unusual, both because it punishes the status of being addicted and because it is out of proportion to a controlled substances possession offense. It violates the principle of proportionality to give the same sentence to a murderer and to a woman who has failed to terminate her pregnancy despite a drug problem.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Circuit Court of Lowndes County should be reversed and the indictment should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered by mail to the following:

Attorney Jim Hood
Mississippi Attorney General's Office
P.O. Box 220
Jackson, MS 39205

Hon. James T. Kitchens
Circuit Judge
P.O. Box 1387
Columbus, MS 39703-1387

Office of the District Attorney
P.O. Box 1044
Columbus, MS 39703-1044

This 17th day of November, 2010.

A handwritten signature in black ink, appearing to read 'R. McDuff', written over a horizontal line.

Robert B. McDuff