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IN THE
INDIANA COURT OF APPEALS

NO. 49A02-1106-CR-486

BEI BEI SHUAI,)	Interlocutory appeal from the
)	Marion Superior Court
Appellant (Defendant Below),)	
)	
v.)	49G03-1103-MR-14478
)	
STATE OF INDIANA,)	The Honorable
)	Sheila Carlisle,
Appellee (Plaintiff Below).)	Judge.

BRIEF OF APPELLEE

STATEMENT OF THE ISSUE

Whether the trial court properly denied bail where Defendant failed to meet her burden to prove that the proof is not evident or the presumption strong that Defendant committed murder.

STATEMENT OF THE CASE

Nature of the Case

Bei Bei Shuai (“Defendant”) brings this interlocutory appeal from the denial of her motion for bail in a murder case.

Course of Proceedings

On March 14, 2011, the State charged Defendant with murder and class B felony attempted feticide (Appellant’s App. 4, 38-39).¹ On March 22, 2011, Defendant filed a petition for habeas corpus and reasonable bail (Appellant’s App. 7, 47-54). The court held hearings on

¹ The information was amended on April 13, 2011, to change the date of the charges from January 3, 2011, to December 23, 2010 (Appellant’s App. 10, 15, 328-30).

the motion on April 5-6, 2011, and April 13, 2011 (Appellant's App. 12-15). On June 6, 2011, the court denied the motion for bail (Appellant's App. 29-30, 534-37).

Defendant filed a notice of appeal on June 6, 2011 (Appellant's App. 30, 539-40).² On June 27, 2011, this Court granted Defendant's motion for an expedited appeal (Docket). The notice of completion of clerk's record was issued on June 30, 2011, and the notice of completion of transcript was issued on July 13, 2011 (Appellant's App. 555; Docket). Defendant's Brief of Appellant was filed and served on the State by mail on July 28, 2011 (Docket). Pursuant to the Court's order of June 27th, the State's Brief of Appellee is due on August 12, 2011 (Docket).

STATEMENT OF FACTS

Defendant is a thirty-four year old restaurant owner who was dating a married man, Zhiliang Guan, and became pregnant by him (Tr. 182, 184). Defendant has lived in this country for over a decade, but she is not a United States citizen, and her parents still live in China (Tr. 175-76, 237-38, 254). In May of 2010, Defendant moved in with her close friends Bing and Sui Mak, but although she was pregnant, she did not reveal that fact to them until November, around the same time when she moved back into her own apartment (Tr. 180-81, 221-24). Defendant probably had not revealed her pregnancy because she was not married to the father; however, she seemed to be happy and excited about the pregnancy (Tr. 181-82). On December 23, 2010, Defendant was thirty-three weeks pregnant (Tr. 136, 303). A fetus is viable by twenty-six to twenty-eight weeks gestation (Tr. 132).

² Defendant has also filed a motion to dismiss the information (Appellant's App. 8, 84-121), which the trial court denied on June 20, 2011 (Appellant's App. 546-47). At Defendant's request, the trial court certified that order for interlocutory appeal on June 27, 2011 (Appellant's App. 548-54). Defendant filed a motion asking this Court to accept jurisdiction over that interlocutory appeal on July 7, 2011. *See* Docket, Cause No. 49A02-1107-CR-590. As of the preparation of this brief, however, the motion is still pending and has not been granted by this Court. Thus, the order denying Defendant's motion to dismiss is not before this Court in this appeal.

Approximately one week before Christmas, Guan ended his relationship with Defendant and moved back in with his wife after his children begged him to return to the family (Tr. 226-28, 302, 473-74). Defendant was upset that Guan had left her and was now refusing to acknowledge their baby (Tr. 218-19, 300, 302, 459, 473-74; State's Ex. 26; Def's Ex. F at 28). Defendant felt it would now be shameful for her and the baby to live and that it would be better – indeed, the only honorable thing – if she and the baby were to die together (Tr. 474, 483-84; Def's Ex. F at 33). The baby's existence, as well as her own, was a “burden, trouble, and even hindrance” to Guan, and Defendant resolved to kill both herself and the baby (Tr. 483; State's Ex. 26). Defendant considered different methods of accomplishing this, but after some research decided to ingest rat poison (Tr. 459, 475). Defendant purchased the rat poison on Tuesday but did not ingest it until Thursday because she wanted to finish some Christmas shopping first (Tr. 325, 475).

Around 9:00 a.m. on Thursday, December 23, 2010, Defendant ingested multiple packages of rat poison (Tr. 189-90, 323, 443-44, 475; Def's Ex. F at 3). This was a “last ditch effort” to win Guan back, and Defendant called him to tell him what she had done, but she did not think he seemed to care (Tr. 324, 475-76, 478-79; Def's Ex. F at 33). Around 2:20 p.m., officers performed a welfare check on Defendant after receiving an anonymous call, but she told the officers that she was fine (Tr. 331-34). Later in the afternoon, Bing Mak saw Defendant out in her car; she did not look well and appeared to be very upset, so he told her to go to their house for dinner, which Defendant did (Tr. 187, 248-49, 475-76). Defendant was watching television and did not appear to be in a good mood when Sui Mak arrived home, so Sui talked to her only briefly before preparing dinner and cleaning up the kitchen (Tr. 187-88, 228-29). That evening, Sui and Defendant talked for a couple of hours before Defendant finally told Sui that she had

ingested rat poison and showed her two empty boxes of the poison (Tr. 188-90). Bing and Sui insisted on taking Defendant to the hospital, although she wanted to go to Guan's place of employment instead to die in front of him (Tr. 189-91, 233-34, 249). Bing later returned to Defendant's apartment, where he found two more empty boxes of rat poison that he threw away and several pellets in a bottle that he threw on the floor and vacuumed up (Tr. 256-58). The police subsequently found several more pellets and an empty rat poison package in the apartment (Tr. 281, 340-41, 349-59).

The active ingredient in rat poison (hydroxycoumarin or brodifacoum) impairs the ability of blood to clot by preventing the body from reusing Vitamin K and passes easily through the placenta (Tr. 83-85, 88, 442-43). The poison is counteracted by giving the patient regular doses of Vitamin K or fresh frozen plasma containing clotting agents (Tr. 404-05, 442-43, 446). Vitamin K does not pass through the placenta well (Tr. 83-85, 386). The Internationalized Normalization Ratio, or INR, is a ratio of bleeding times – essentially, it measures the ability of blood to clot (Tr. 130, 406). An INR of one is considered normal (Tr. 130). For an adult, an INR in the 2-3 range may still be safe, but for a newborn anything above a 1.2 is considered an abnormal or dangerous level (Tr. 131, 406). The easiest way to assess the amount of poisoning that has occurred is to follow the INR level, which will directly reflect it (Tr. 444-45).

Following her admission into the hospital and despite receiving Vitamin K treatments, Defendant's INR level continued to rise for several days, peaking at a level of 7.14 on December 26th (Tr. 466; Def's Ex. O). While in the hospital, Defendant was remorseful for what she had done and consented to all medical procedures needed by the baby (Tr. 195-97, 390-93, 425). By December 28th, the baby, later named Angel, was in distress with a very erratic heart rate and had to be delivered via an emergency C-section (Tr. 423-24). At birth, Angel was pale, had very

little muscle tone and was flaccid, and she starting seizing shortly after birth (Tr. 384, 428-29). Seizures while still *in utero* could explain the erratic heart rate and the limpness she exhibited at birth (Tr. 429). Seizures have been caused by brodifacoum poisoning (Def's Ex. F at 15). Angel's INR at birth was over eleven, a level described by doctors as "extremely high" and "super high" (Tr. 130, 406; Def's Ex. A at 96). An INR level this high is consistent with rat poison ingestion (Tr. 136, 406). A head ultrasound showed that Angel had a bilateral Grade III intraventricular hemorrhage at birth (Def's Ex. A at 95, 96). Such bleeding in the brain is also consistent with rat poison ingestion (Tr. 405). Doctors treated Angel with plasma and Vitamin K (Tr. 134, 386). By January 2, 2011, Angel's brain was so damaged by the bleeding in her brain and consequent swelling that there was nothing medically that could be done for her; she was removed from life support and pronounced dead at 1:30 a.m. on January 3rd (Tr. 153-54, 394-96; Def's Ex. A at 104-05, 110-11, 157). The cause of death was intracranial hemorrhage due to maternal ingestion of rat poison (Tr. 140-41; Def's Ex. D).

The State charged Defendant with murder and class B felony attempted feticide (Appellant's App. 38-39, 329-30). The murder charge specifically alleges that on December 23, 2010, Defendant knowingly killed a viable fetus by voluntarily ingesting rat poison while thirty-three weeks pregnant causing Angel to be born in distress and promptly die (Appellant's App. 329). On March 22, 2011, Defendant filed a petition for reasonable bail (Appellant's App. 47-54). The court held hearings on April 5-6, 2011, and April 13, 2011, and considered all the evidence presented during those hearings (Appellant's App. 12-15, 534-36). On June 6, 2011, the trial court denied Defendant's request for bail, finding that the proof of guilt was evidence and the presumption of guilt was strong (Appellant's App. 534-37). This interlocutory appeal follows in due course.

SUMMARY OF ARGUMENT

The trial court properly denied Defendant's request for bail on a murder charge. The court's decision is reviewed for an abuse of discretion, and Defendant bore the burden of proving to the court that the proof was not evident or the presumption strong that she committed murder. The proof should be deemed evident and the presumption strong when the evidence demonstrates probable cause to believe the defendant committed the crime. The murder statute, by its plain language, applies to any person who knowingly or intentionally kills a viable fetus; the statute does not require the act to be committed by a third party. The evidence in this case showed that Defendant deliberately ingested several packages of rat poison with the specific intent to kill not just herself but also her unborn viable fetus. The poison substantially impaired the ability of the fetus' blood to clot, and the baby was born in distress with a Grade III intraventricular hemorrhage via an emergency C-section. The baby lived only two days before dying due to massive intracranial hemorrhaging resulting from the poisoning. This constitutes evident proof that Defendant knowingly or intentionally killed a viable fetus, and Defendant's specific challenges to the admissibility or persuasiveness of the State's evidence are without merit.

Most of Defendant's brief is devoted to arguments pertaining to her motion to dismiss, namely reasons why Defendant cannot or should not, as a matter of policy, be charged with murder. Those issues are not properly raised in this separate appeal from the denial of bail, but they are without merit in any event. Defendant's conduct falls within the purview of the murder statute. The plain language of the statute prohibits any person from intentionally killing a viable fetus; it does not limit the reach of the statute only to those people who kill the fetus of another person. This statutory language is very different from that found insufficient to support

prosecutions in other jurisdictions. Defendant does not point to any case where a court outlawed a prosecution of a pregnant female for knowingly killing her viable fetus in the face of statutory language explicitly authorizing such a prosecution. In Indiana, the legislature has adopted a clear policy of protecting viable human life, and if Defendant believes that is an unwise public policy she must direct her efforts to the legislature.

Prosecuting Defendant for murder does not violate any federal or state constitutional right. This is not a case implicating the right to abortion, the right to privacy, or a pregnant woman's right to make decisions regarding her medical care. This case also does not implicate constitutional rights to notice, equal protection, or prohibitions on *ex post facto* laws. For all these reasons, this Court should affirm the trial court's denial of bail.

ARGUMENT

The trial court properly denied the request for bail on a murder charge.

A. Standard of Review

An appellate court reviews the denial of bail in a murder case for an abuse of discretion. *Phillips v. State*, 550 N.E.2d 1290, 1295 (Ind. 1990); *Partlow v. State*, 453 N.E.2d 259, 274 (Ind. 1983); *Rohr v. State*, 917 N.E.2d 1277, 1279-80 (Ind. Ct. App. 2009). On the two most recent occasions when the Indiana Supreme Court has reviewed the denial of bail in a murder case, it has explicitly applied an abuse of discretion standard. *See Phillips*, 550 N.E.2d at 1295 (“A review of the hearing transcript does not persuade us that the trial court abused its discretion [in denying bail] nor that its decision was unreasonable or arbitrary, either procedurally or substantively.”); *Partlow*, 453 N.E.2d at 274 (“In view of the evidence presented to the trial court we do not find that it abused its discretion in making that determination [to deny the request for bail].”). Although the Court briefly noted in both cases that the issue was moot, as it

was being raised post-trial, the Court did not resolve the issue on mootness grounds but went on to address the merits of the determination.

Because of this binding Supreme Court precedent, this Court has already addressed and rejected the claim made by Defendant here – that the review should be *de novo* instead of for an abuse of discretion. *See Rohr*, 917 N.E.2d at 1279-80. This Court held that it would “apply the standard applied by the Supreme Court in *Phillips* and *Partlow*” – an abuse of discretion standard – and it rejected the suggestion that those decisions could be ignored because the issue was technically moot, noting the Supreme Court had, nevertheless, reviewed the bail determination on the merits. *Id.* Defendant has provided no persuasive reason why *Phillips*, *Partlow*, and *Rohr* should not be followed in this case. The determination as to whether the evidence shows that the proof is not evident or the presumption strong is as much a question of fact in this case as it was in those other cases – this Court must review the evidence presented in the bail hearing and decide whether that evidence is sufficient to sustain the trial court’s decision to hold Defendant without bail.

B. Defendant is not entitled to bail because the proof of her guilt is evident and the presumption of guilt is strong.

Defendant is not entitled to bail. Article 1, Section 7 of the Indiana Constitution provides: “Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.” That language is echoed by Indiana Code Section 35-33-8-2(a), which provides: “Murder is not bailable when the proof is evident or the presumption strong. In all other cases, offenses are bailable.” Thus, as a general rule, “murder is not a bailable offense” in Indiana and the “presumption is against the right to be admitted to bail on a murder case.” *Partlow*, 453 N.E.2d

at 274.³ A person charged with murder has the burden of proof to show that he is entitled to bail because the proof is not evident nor the presumption strong. *See* Ind. Code § 35-33-8-2(b); *Partlow*, 453 N.E.2d at 274.

To overcome this presumption against bail, Defendant must show that the proof is not evident and the presumption not strong. The caselaw does not explicitly define what is meant by that standard, but it is clear that the State's evidence does not have to demonstrate guilt beyond a reasonable doubt in order for a court to say that the proof is evident and the presumption strong. *See Caudill v. State*, 262 Ind. 40, 41, 311 N.E.2d 429, 430 (1974) (“Although a jury may ultimately find the State's evidence to be insufficient to support the allegations in the indictment, we believe that the trial court acted properly in refusing to admit the defendant to bail.”); *Bozovichar v. State*, 230 Ind. 358, 366, 103 N.E.2d 680, 683 (1952) (“A jury may indeed take the view of the case now urged by the appellant, but we do not feel justified in disturbing the finding and judgment of the trial court refusing to admit the appellant to bail” in a case where the accused had stabbed someone following a fight and argued that he had committed only manslaughter). These cases recognize that even though a jury may ultimately find the evidence to be insufficient and agree with the defendant's view of the case, that does not entitle a murder defendant to bail.

Although never explicitly stated, it appears that Indiana courts have simply required the evidence to demonstrate probable cause that the defendant committed murder. It is the existence of probable cause, after all, that grants the State the authority to hold a person in custody for a

³ Murder is the most serious criminal charge that can be brought by the State, and it carries with it the possibility of the harshest possible term of imprisonment. *See* Ind. Code § 35-50-2-3; *Phillips*, 550 N.E.2d at 1294-95. Because the seriousness of the charge and the penal consequences attendant upon a conviction, there is a presumption that no amount of money will be sufficient to secure the accused's presence. *Phillips*, 550 N.E.2d at 1295.

pending charge, and the Supreme Court has stated that when a murder defendant applies for bail, “the indictment by the grand jury stands with all its presumptions in favor of its truth, until its force is broken by a showing that the grand jury acted upon insufficient evidence” *State v. Hedges*, 177 Ind. 589, 98 N.E. 417, 417 (1912) (emphasis added). Insufficient evidence to support an indictment is simply another way of saying an absence of probable cause. The proof of guilt is evident and the presumption of guilt is strong when there is probable cause to believe the person committed the crime. This Court’s decision in *Rohr* provides further support for this conclusion. In *Rohr*, the denial of bail was upheld even in the face of new evidence that a key witness was recanting and averring that the defendant had done no wrong and that she was the one who had injured the child, evidence that, if believed, would have completely exonerated the defendant. *Rohr*, 917 N.E.2d at 1278-81. If the proof can be evident even in the face of potentially exonerating evidence, the standard being applied appears to be only one of requiring probable cause. If, after a hearing in which the accused is afforded his due process rights to challenge the State’s evidence, including representation by counsel, the right to cross-examine witnesses, and the right to present evidence, the court finds that there is probable cause the crime was committed, the State is justified in holding the individual, and the presumption that bail is not appropriate remains in effect. It is only where the existence of probable cause is in doubt that it would violate due process to hold the accused prior to trial with no opportunity for bail.

- 1. The evidence shows that Defendant knowingly or intentionally killed her viable fetus by ingesting rat poison, which caused extensive and fatal intracranial hemorrhaging, and this conduct falls within the purview of the murder statute.**

The proof of murder is evident and the presumption of guilt strong. Indiana’s murder statute provides in relevant part as follows:

A person who:

...

(4) knowingly or intentionally kills a fetus that has attained viability (as defined in IC 16-18-2-365);

commits murder, a felony.

Ind. Code § 35-42-1-1. A person engages in conduct “intentionally” if, when he engages in the conduct, it is his “conscious objective” to do so. Ind. Code § 35-41-2-2(a). He engages in conduct “knowingly” if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code § 35-41-2-2(b).⁴ Indiana Code Section 16-18-2-365 defines viability as “mean[ing] the ability of a fetus to live outside the mother’s womb.” Finally, for purposes of Title 35, the term “person” is defined as “a human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity.” See Ind. Code § 35-41-1-22(a).

a. The plain language of the statute applies to Defendant and does not require an act by a third party.

Defendant’s conduct falls within the plain language of the murder statute. The primary purpose in statutory interpretation is to ascertain and give effect to the legislature’s intent. *B.K.C. v. State*, 781 N.E.2d 1157, 1167 (Ind. Ct. App. 2003). The best evidence of legislative intent is the language of the statute itself, and the words in a statute must be given their plain and ordinary meaning unless otherwise indicated by the statute itself. *Glotsbach v. State*, 783 N.E.2d 1221, 1227 (Ind. Ct. App. 2003). If the text of the statute is clear and unambiguous, it is not subject to judicial interpretation and must be held to mean what it plainly says. *Campbell v.*

⁴Defendant’s focus on “malice” is misplaced (Appellant’s Br. 19-21). Indiana no longer defines murder in terms of malice but in terms of the knowing or intentional nature of the act. If Defendant acted with the conscious objective of killing her fetus or if she acted with the awareness of a high probability that her conduct would kill her fetus then she has acted with the requisite *mens rea* to be guilty of murder. And if she can be convicted and punished for murder, then the reasons for the presumption against bail apply. Regardless, however, the evidence in this case shows that Defendant acted with malice aforethought.

State, 716 N.E.2d 577, 578-79 (Ind. Ct. App. 1999); *State v. Eilers*, 697 N.E.2d 969, 971 (Ind. Ct. App. 1998). This Court presumes that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals. *B.K.C.*, 781 N.E.2d at 1167; *see also Glotzbach*, 783 N.E.2d at 1227 (legislature is presumed to have intended that statutory language not be interpreted as to bring about an absurd or unjust result). Although penal statutes are construed strictly against the State, they are not to be read so narrowly as to exclude cases they fairly cover or in a manner that disregards that legislative purpose and intent. *B.K.C.*, 781 N.E.2d at 1167-68.

By its terms, the statute applies to “a person” who kills a fetus. A pregnant woman is a person. *See* Ind. Code § 35-41-1-22(a). The State assumes that Defendant and her amici do not want to claim that a woman ceases to be a “human being,” the definition of a person, simply because she is pregnant with a viable fetus. Indiana Code Section 35-42-1-1(4) defines murder as the knowing or intentional killing of a viable fetus by a person. It does not limit the definition of the actor to third parties by saying “a person, other than the pregnant woman herself.” It does not say a person who “kills the fetus of another person.” Rather, it makes it a crime for any human being to kill a viable fetus. The statutory language could not be more plain, and it includes within its definition any person who kills a viable fetus. It is Defendant who is trying to read into the statute the limitation that it applies only to acts of a third party that kill the fetus. Nothing in the language of the statute is so limited.

The fact that subsection (4) was originally enacted in response to an incident where the viable fetus was killed by someone other than the pregnant mother does not mean that it is limited in its application only to an identical circumstance. That tragic case highlighted for the legislature the problem that viable fetal life was not protected and vindicated under the murder

statute, and it was the impetus for the legislature to consider closing that loophole. But what matters is the language that the legislature chose to enact in addressing that gap in the statute. And that language does not limit itself to only the acts of a third party but broadly prohibits any person from knowingly or intentionally killing a viable fetus.

b. The proof is evident that Defendant knowingly and intentionally killed a viable fetus.

The evidence is undisputed that Defendant was approximately thirty-three weeks pregnant and that a fetus of thirty-three week's gestation is viable (Tr. 132, 303). It is also undisputed that on the morning of December 23, 2010, Defendant deliberately ingested several packages of rat poison (Tr. 155, 163, 190, 249, 278, 323, 440, 443-44, 459, 475-76).⁵ Defendant was upset because her boyfriend and the father of her baby had broken up with her to return to his wife and family, and he was refusing to acknowledge their baby (Tr. 299-300, 302, 459, 473-74; Def's Ex. F at 28). Defendant felt she had shamed her family and that the honorable thing was for her and her baby to die together (Tr. 474, 483-84; Def's Ex. F at 33). Defendant told Joyce Hafer that it was her intention to kill herself *and* the baby (Tr. 483), and she wrote her boyfriend a letter saying in relevant part, "I know that my existence *as well as the child's* is a burden, trouble, and even hindrance to your own happy life. So I choose death to give you a successful and happy life in the future. . . . *I am taking this baby*, the one you named Crystal, *with me*" (Tr. 327-28; State's Exs. 25, 26, emphasis added). Taking the poison was a "last ditch

⁵ Defendant showed Sui Mak two empty boxes of rat poison that she said she consumed, which Sui gave to the nurse at the hospital (Tr. 190, 233). Bing Mak found a bottle and two empty boxes of rat poison in Defendant's apartment; he threw the boxes away (Tr. 257-58). The police also subsequently found a package of rat poison and several pellets on the floor in Defendant's apartment (Tr. 340-41, 349-59; Ex. R-1). Detective Shelton was advised that Defendant had reported consuming four bags of rat poison (Tr. 323). Hospital records indicate that Defendant advised hospital staff that she had ingested seven packets of rat poison (Def's Ex. N (5th page of exhibit bearing bate stamp "Shuai 00073")), and the initial admission records indicate she had consumed "massive amounts" of poison (Def's Ex. F at 3).

effort” to win back her boyfriend, and she called him to tell him what she had done but she did not think he cared (Tr. 475-76, 478-79; Def’s Ex. F at 33). When police made a welfare check on her that afternoon, Defendant told them she was fine (Tr. 331-34). She went to the home of friends that evening for dinner and talked to Sui Mak for a couple of hours before finally telling her that she had ingested rat poison; her friends then took her to the hospital (Tr. 187-91, 228-30, 475-76).

The active ingredient in rat poison harms the body by preventing it from reusing Vitamin K, which in turn is what helps blood to clot (Tr. 404-05, 442-43). The poison has a long half-life and readily passes through the placenta (Tr. 83-85, 443). The poison is counteracted by regularly providing the patient with doses of Vitamin K and with fresh frozen plasma, which contains clotting agents (Tr. 404-05, 442-43, 446). Vitamin K does not pass through the placenta well (Tr. 83-85, 386). The Internationalized Normalization Ratio, or INR, is a ratio of bleeding times – essentially, it measures the ability of blood to clot (Tr. 130, 406). An INR of one is considered normal (Tr. 130). For an adult, an INR in the 2-3 range may still be safe, but for a newborn anything above a 1.2 is considered an abnormal or dangerous level (Tr. 131, 406). The easiest way to assess the amount of poisoning that has occurred is to follow the INR level, which will directly reflect it (Tr. 444-45).

Despite receiving Vitamin K treatments, Defendant’s INR level continued to rise during her first few days in the hospital, peaking at a level of 7.14 on December 26th (Tr. 466; Def’s Ex. O). On December 28th, the baby, later named Angel, was in distress with a very erratic heart rate and had to be delivered via an emergency C-section (Tr. 423-24). At birth, Angel was pale, had very little muscle tone and was flaccid, and she starting seizing shortly after birth (Tr. 384, 428-29; Def’s Ex. A). Seizures while still *in utero* could explain the erratic heart rate and the

limpness at birth (Tr. 429). Seizures have been caused by brodifacoum poisoning (Def's Ex. F at 15). Angel's INR at birth was over eleven, a level described by doctors as "extremely high" and "super high" (Tr. 130, 406; Def's Ex. A at 96). An INR level this high is consistent with rat poison ingestion (Tr. 136, 406). A head ultrasound showed that Angel had a bilateral Grade III intraventricular hemorrhage at birth (Def's Ex. A at 95, 96). Such bleeding in the brain is also consistent with rat poison ingestion (Tr. 405; Def's Ex. F at 15). Doctors treated Angel with plasma and Vitamin K (Tr. 134, 386). However, by January 2, 2011, Angel's brain was so damaged by the bleeding in her brain and consequent swelling that there was nothing medically that could be done for her; she was removed from life support and pronounced dead at 1:30 a.m. on January 3rd (Tr. 153-54, 394-96; Def's Ex. A at 104-05, 110-11, 157).

An autopsy uncovered no congenital abnormalities or problems with the cardiovascular, respiratory, or other systems (Tr. 79-80; Def's Ex. D). There were also no problems with the placenta (Tr. 81; Def's Ex. D). The autopsy revealed that Angel had "cerebral edema, extensive, with widening of calvarial sutures," "subdural hemorrhage, extensive and diffuse," and "subarachnoid hemorrhage, patchy and moderate" (Def's Ex. D; State's Exs. 23-24; Tr. 136-40). Angel's brain had "severe" swelling due to the extensive hemorrhaging; as a result, her brain was very soft and almost liquefied (Tr. 139-40). The pathologist determined that the cause of death was "intracranial hemorrhage due to maternal ingestion of rat poison" (Tr. 140-41; Def's Ex. D).

This evidence more than gives rise to probable cause for murder. Defendant expressed the intention to kill her viable fetus and deliberately ingested a poison for the express purpose of killing her child as well as herself. Angel's extremely high INR and cerebral hemorrhaging at birth showed that she had been significantly impacted by that poison. The medical evidence showed that the poisoning, which greatly impaired the ability of her blood to clot, was consistent

with the extensive hemorrhaging that caused Angel's death, there were no other problems uncovered during the autopsy that could have caused those hemorrhages, and the forensic pathologist concluded that the cause of her death was intracranial hemorrhaging caused by the ingestion of rat poison. By showing a direct causal connection between the ingestion of the poison and Angel's death, the State's evidence demonstrates a knowing or intentional killing of a viable fetus.

2. Defendant's specific challenges to the strength of the evidence are without merit.

Defendant suggests that the State's evidence fails to prove the requisite causal connection between the ingestion of the poison and the death of the fetus, but the standard is not whether a jury might ultimately agree with Defendant that the evidence fails to prove that connection beyond a reasonable doubt. It is only whether the proof is evident and the presumption strong, and Defendant has not shown that the evidence fails to rise to that level. Defendant suggests that the State's witnesses failed to rule out any other unspecified condition that might have caused a previously healthy fetus to suddenly and coincidentally happen to develop extensive brain hemorrhaging within days of being poisoned by a substance that impairs blood clotting, but Defendant presented no medical or expert evidence suggesting that such a condition actually existed in this case.

The only specific alternative Defendant pointed to below was the fact that she was given indomethacin on December 28th-30th, a drug in the ibuprofen family that, among other things, is used to try to temporarily halt premature contractions (Tr. 90-92, 417; Def's Ex. F at 77, 85, 96). However, even Defendant's own evidence does not support the suggestion that the indomethacin usage casts reasonable doubt on the cause of Angel's cerebral hemorrhages. Although there is some evidence that indomethacin may have negative side effects on the fetus that include

intraventricular hemorrhages (Tr. 105-07; Def's Ex. L at 784-86), such fetal side effects "are very unlikely when the treatment lasts fewer than seven days" (Tr. 97; Def's Ex. I), as it did in this case. "In actual practice, serious complications [to the fetus] have been rare" (Def's Ex. L at 785). Indomethacin has a "low incidence of neonatal complications" and problems connected to the drug "have not occurred consistently" at gestational ages of more than thirty-two weeks (Def's Ex. M at 1602), which, of course, Angel was.

The study that Defendant admitted examined the effects of indomethacin use on premature infants *prior* to thirty weeks gestation; even there the study revealed essentially no difference in the risk of a *Grade III* intraventricular hemorrhage, which is the type of hemorrhage Angel was diagnosed with at birth, as opposed to a Grade II hemorrhage (Def's Ex. M at 1602, 1604, 1605 at Figure 2), and the authors of the study acknowledged that their finding of an increased risk in intracranial hemorrhage "contrasts" with other studies showing that "indomethacin administered neonatally *reduces* the risk of severe intracranial hemorrhage in very premature infants" (Def's Ex. M at 1606) (emphasis added). In fact, indomethacin is a drug that is "frequently" given to premature infants (Tr. 416-17). It is used to close small vessels in premature infants that remain open and fail to close on their own (Tr. 90-91), and it is part of the "standing order" for babies weighing less than 1200 grams who are admitted at Riley (Tr. 416-17). This evidence simply does not show that the proof is not evident or the presumption strong that it was the rat poison that caused Angel's fatal injuries.

The proof of *mens rea* is evident (Appellant's Br. 49-50). Defendant told Hafer that when she ingested the rat poison, she intended to kill herself *and* her unborn baby (Tr. 483), and she left a letter explicitly stating that the baby's life was a burden to her boyfriend and that she was choosing death for the baby as well as for herself (State's Ex. 26). There was absolutely no

evidence presented at the bail hearing to suggest that Defendant was legally insane; in fact, Defendant has not even filed a notice of any intent to claim insanity. All the evidence shows that Defendant engaged in a deliberate act with the express purpose of killing herself and her unborn child. In fact, Defendant bought the rat poison on Tuesday but did not ingest it until Thursday (Tr. 325, 475), demonstrating that she had time for deliberation and premeditation regarding her chosen course of action. Furthermore, the fact that Defendant felt remorse for what she had done and hoped that she had not killed her baby after she was hospitalized does not, *ipso facto*, mean that she did not intend to kill her baby when she ingested rat poison. A person who deliberately shoots another person in the head is no less guilty of murder because he immediately regrets having done so and summons medical aid in an attempt to undo the harm he has inflicted. The evidence clearly shows that at the time Defendant acted by ingesting the poison, she was trying to kill her baby as well as herself, and any change of heart after the fact does not erase the evidence of that *mens rea*.

Defendant asserts that her medical records should be suppressed (Appellant's Br. 44-45), but that issue is not before the Court in this bail appeal. Defendant has filed a motion to suppress her medical records because they were obtained without a subpoena or court order or her consent (Appellant's App. 21), but at the parties' joint request the hearing on that motion and a ruling on that motion have been put off until after a potential interlocutory appeal of the motion to dismiss is decided (Appellant's App. 542-44). Even if it were ripe, the eventual admissibility of the evidence at trial is not relevant to the assessment of probable cause. *See Brinegar v. United States*, 338 U.S. 160, 172 (1949). Indeed, the Rules of Evidence do not apply to bail hearings, *see* Ind. Evidence Rule 101(c)(2), so it is clear that the bail determination does not need to be based only on evidence that will be able to be used at trial. Thus, whether this evidence is

ultimately admissible at trial is irrelevant to the question of bail and does not provide any basis for concluding that the proof is not evident or the presumption strong.

In any event, to the extent any of the records may have been improperly provided by the hospital initially in the absence of a subpoena, that is a matter between Defendant and the hospital. The record indicates that the prosecutor has now issued subpoenas and third party requests for the records (Appellant's App. 346-56) and was going to make a motion requesting the court to hold a hearing to authorize those subpoena requests (Appellant's App. 530).

Defendant cites to no authority holding that the State cannot obtain medical records through the proper process if those records were prematurely given to the State by the hospital outside of that process, so there is no basis to conclude that the evidence will not be admissible at trial. Finally, the evidence in the records is merely cumulative of the doctors' testimony about Defendant's statements and the condition and treatment of both Defendant and Angel. Therefore, even if the records were ultimately suppressed, that would not render the proof insufficient.

Defendant's challenge to the credibility and reliability of Dr. Clouse's testimony is similarly premature and not properly before this Court in this appeal (Appellant's App. 45-49). Defendant has filed a *Daubert* motion to exclude Dr. Clouse's testimony at trial as well as to strike her testimony from the bail hearing (Appellant's App. 440-58). Although the court denied the request to strike the bail hearing testimony (Appellant's App. 532-33), it has not yet held a hearing on, much less ruled on, the motion to exclude the testimony at trial. In any event, Defendant has not shown that Dr. Clouse's testimony is excludable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Dr. Clouse is an eminently qualified forensic pathologist. She graduated from the Indiana University School of Medicine in 2003, did a four-year residency in pathology, and then completed a forensic pathology fellowship at Wake Forest

University in 2008 (Tr. 37-39). She has been a board certified forensic pathologist since 2008 (Tr. 39). She is a member of the National Association of Medical Examiners, the American Academy of Forensic Scientists, the American Society of Clinical Pathology, the College of American Pathologists, and the United States and Canadian Association of Pathology (Tr. 45). She follows the guidelines of the National Association of Medical Examiners on how to conduct autopsies (Tr. 45).

Although Defendant cannot dispute the evidence that rat poison impairs the blood's ability to clot, that Angel's INR shows that her blood was not clotting, and that Angel died from a massive intracranial hemorrhage, she disputes Dr. Clouse's conclusion that the rat poison was the cause of the hemorrhage. But Defendant did not present her own expert testimony contradicting Dr. Clouse's conclusion or demonstrating that there is another more likely explanation for the cause of Angel's death. At most, Defendant suggested the indomethacin as a possible alternative explanation, but as was argued above, the evidence does not support that theory. Defendant criticizes Dr. Clouse for not having reviewed Defendant's medical records in addition to Angel's medical records, but, again, the only thing Defendant points to in Defendant's medical records is the indomethacin that was given to her for three days. Although Dr. Clouse did not know the precise amount of rat poison that Defendant had ingested, she knew that it was enough to raise Angel's INR to the extraordinarily high level of eleven, and there was nothing in Angel's medical records or the autopsy findings that provided another explanation for that INR level. These lines of criticism and cross-examination simply do not provide a basis for excluding the testimony of a qualified forensic pathologist on her opinion of the cause of death.

C. The murder charge is valid and encompasses Defendant’s conduct.

Much of Defendant’s brief, as well as those of her amici, consists of policy arguments why Defendant should not be charged with murder. These are arguments that go to Defendant’s request for dismissal of the charge, not to the question of whether the evidence is strong enough to deny bail, and are not properly raised in this appeal. They should be considered only in an appeal from the denial of the motion to dismiss if this Court elects to accept jurisdiction of that appeal. Defendant has requested permission to bring an interlocutory appeal from the denial of the motion to dismiss, but this Court has not yet granted that motion so it would be premature to address those issues in this case. Moreover, her policy arguments are matters that must be addressed to the legislature, not to the courts. The wisdom of prosecuting a woman for deliberately causing the death of her viable fetus is a fundamental question of public policy that is properly left to the legislature to decide, and in Indiana the General Assembly has unambiguously adopted a policy of protecting viable human life and punishing those who take such life.

1. Defendant’s conduct falls within the purview of the murder statute.

As was argued above, the plain language of the statute encompasses Defendant’s conduct. The statute explicitly prohibits a “person,” defined to mean a “human being,” from knowingly or intentionally killing a fetus, not just the fetus of another, that has attained viability. It does not require proof of malice but of knowing conduct; however, the evidence shows that Defendant acted with malice aforethought when she decided to kill herself and her baby, purchased rat poison, ingested the rat poison after waiting two days, and then rebuffed earlier opportunities to seek aid.

a. Other states do not provide guidance because they have not enacted the same statutory language adopted by the Indiana legislature.

Defendant's reliance on caselaw from other states is unpersuasive (Appellant's Br. 37-43). Those cases rely on statutory language that is different from the language at issue here. To take just a few examples, in *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. Ct. App. 1998), the state was attempting a prosecution of the pregnant woman under Georgia's criminal abortion statute, which made it an offense to administer a substance to a woman or use an instrument upon a woman that produced an abortion, language that "clearly indicat[ed] that at least two actors must be involved." In *State v. Aiwohi*, 123 P.3d 1210, 1213 (Hawaii 2005), the state was attempting a voluntary manslaughter prosecution for recklessly killing "another person" based on conduct committed while she was pregnant, but the Hawaii legislature had specifically defined "person" to mean "a human being who has been born and is alive." In *State v. Wade*, 232 S.W.3d 663, 665 (Mo. 2007), the state was attempting to bring a child endangerment prosecution based on a woman's drug use while pregnant, but the Missouri legislature had passed a statute explicitly stating that a woman could not be prosecuted for indirectly harming her unborn child by failing to follow proper prenatal care or properly care for herself while pregnant. In *State v. Ashley*, 701 So. 2d 338, 340 (Fla. 1997), the statute under which the defendant was being prosecuted prohibited the killing of a "human being" but did not include any definition of that term that explicitly included a fetus. These are not cases in which a court outlawed a prosecution of a pregnant woman in the face of explicit statutory language that expressly prohibited any person from killing a viable fetus.

Indiana's statutory language is very different from the language in those cases. The legislature did not prohibit the intentional killing of a "person" or a "child" without giving any guidance as to what that term covered nor did it explicitly define the statutory term to exclude

unborn life. Rather, it explicitly prohibited the intentional killing of a “fetus that has attained viability.” It did not use language clearly indicating a third party actor must be involved, but instead prohibited a “person” from killing a fetus and broadly defined person to mean any “human being,” which unambiguously encompasses the woman herself. Finally, the legislature did not pass any statute explicitly exempting a pregnant woman from the application of this statute.

The underlying premise of many of those cases is that it should be left to the legislature to decide whether to allow such prosecutions as a matter of public policy. In Indiana, however, our legislature has already spoken, both in the plain language of the murder statute and in the wide array of other statutes that have been enacted to punish the unlawful taking of fetal life. The public policy question has already been answered in this state and, with respect to actions that intentionally kill the fetus, any common law to the contrary has been abrogated by the specific language of the statute. Indiana does not have to make the same policy choices other states make, but she is not alone in choosing to allow a criminal prosecution of a pregnant woman who intentionally kills her viable fetus. For several years now, South Carolina has applied its criminal statutes prohibiting homicide and child neglect to pregnant women who kill or harm their own viable fetus. *See McKnight v. State*, 576 S.E.2d 168, 174-75 (S.C. 2003), *cert. denied*; *Whitner v. State*, 492 S.E.2d 777, 778-84 (S.C. 1997). If Defendant believes that the legislature has enacted an unwise public policy, she is free to seek to persuade the legislature and her fellow citizens that the law should be narrowed and that a pregnant woman should never be held criminally accountable for intentionally killing her own viable fetus. But unless and until the legislature amends the statute, this Court must apply it as written.

b. The plain language is in keeping with the General Assembly’s policy of protecting fetal life from destruction.

The plain language of the murder statute is in keeping with Indiana’s consistent and explicit policy of protecting viable human life from destruction (Appellant’s Br. 28-32). The General Assembly has passed a wide array of statutes expressing Indiana’s policy of valuing unborn human life. For example, in Indiana, “[c]hildbirth is preferred, encouraged, and supported over abortion.” *See* Ind. Code § 16-34-1-1. Abortion is outlawed and is a “criminal act” if it is performed after the earlier of viability or twenty weeks of post-fertilization age unless it is necessary to prevent substantial permanent impairment of the mother’s life or health. *See* Ind. Code § 16-34-2-1; *see also* Ind. Code § 16-34-2-7 (setting forth the levels of criminal offenses for illegal abortions performed by physicians or by other persons). Indiana Code Section 35-46-5-1(d) makes it a felony to traffic in fetal tissue. For purposes of Indiana’s civil wrongful death statute, the definition of the term “child” includes “a fetus that has attained viability (as defined in IC 16-18-2-365).” Ind. Code § 34-23-2-1(b).

In Title 35, in addition to the murder statute, the General Assembly has acted to outlaw the killing of fetal life through several other statutes. Indiana Code Section 35-42-1-3 provides that a person who, while acting under sudden heat, knowingly or intentionally kills a fetus that has attained viability commits voluntary manslaughter. Indiana Code Section 35-42-1-4 provides that a person who kills a fetus while committing or attempting to commit battery or an offense that inherently poses a risk of serious bodily injury commits involuntary manslaughter. Indiana Code Section 35-42-1-6 provides that a person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or remove a dead fetus, except in the context of a legal abortion, commits feticide. Indiana Code Section 35-42-2-1.5 provides that a person who knowingly or intentionally inflicts injury on a person that

causes the loss of a fetus commits aggravated battery. In addition, statutes that impact the level of offense or potential punishment available also demonstrate the State's interest in protecting fetal life. Indiana Code Section 35-41-1-25 defines serious bodily injury in part as an injury that causes the loss of a fetus. It is an aggravating factor authorizing the death penalty or life imprisonment without parole if the person killed is a pregnant woman and the murder also resulted in the intentional killing of a viable fetus. *See* Ind. Code § 35-50-2-9(b)(16). If a fetus is not viable, Indiana Code Section 35-50-2-16 authorizes an additional term of punishment for a person who commits or attempts to commit murder if that crime caused the termination of a pregnancy. These statutes demonstrate a declared and consistent policy of preventing the killing of unborn human life.

Defendant has not claimed, nor could she, that her conduct in this case constituted a legally protected abortion. And outside of that context, Indiana's legislature has not drawn any distinctions in these statutes to exempt the pregnant woman from falling within the statutory language nor has it stated that the statutes only apply to the acts of a third party. Once the fetus has attained viability and is capable of independent life, the pregnant woman has no greater right or liberty to kill that fetus than does anyone else. The legislature could have chosen to give a pregnant woman the liberty to kill her viable fetus with immunity from criminal prosecution, but it has unambiguously chosen otherwise, and it is not the province of the judicial system to substitute its own policy preferences for that of the duly elected legislature.

Defendant points to the fact that the legislature has not enacted other proposed legislation that would have specifically criminalized the use of controlled substances by pregnant women, but that is hardly persuasive. Existing laws already make it a crime for anyone, including pregnant women, to possess and use controlled substances. And those proposed laws apparently

would have imposed criminal penalties without regard to whether the fetus actually suffered any injury, much less a fatal injury, from the woman's actions. Reasonable minds can and do disagree on whether it is wise or counterproductive to treat as criminal a pregnant woman's conduct that harms the well-being of the fetus, and everyone agrees that there are limits on the extent to which such criminal laws can or should reach. Competing rights and interests have to be balanced against one another in deciding where to draw such lines. It is entirely reasonable for the legislature to conclude, as a matter of public policy, that the State should punish conduct that causes the intentional death of a viable fetus but that it should refrain from imposing any criminal liability on conduct that simply carries with it the possibility that some non-fatal harm or injury might result to the fetus. That is especially true with respect to conduct, such as cocaine use, where the potential harm to the fetus is foreseen and knowable but is not the goal or the desired end of the conduct – as opposed to this case, where the death of the fetus was not just an unintended or undesired consequence but was part of the intended result of consuming the poison.

2. Because the fatal injury was inflicted on a viable fetus, Defendant cannot escape liability simply because the baby was born alive before dying.

Defendant is guilty of intentionally or knowingly killing a viable fetus even though Angel was born alive. Defendant claims that she did not kill a viable fetus because Angel was born alive and lived for a few days and was thus not a fetus but a human being at the time of her death (Appellant's Br. 21-24). But statutes are not to be interpreted in a manner that brings about an absurd or unjust result. *Glutzbach*, 783 N.E.2d at 1227. The injury that was the cause of death was inflicted on a fetus, even if that end result was not consummated until after she was born alive through an emergency C-section. It would be an extraordinarily absurd and unfair result to suggest that a person is liable for murder if she inflicts a fatal injury on a baby that is still in the

womb and doctors do nothing to save the fetus, allowing it to die in the womb, but that she is immune from liability if doctors deliver the baby to try to save its life but are ultimately unsuccessful. Defendant should not be given immunity simply because doctors tried to save her baby's life. Indeed, it seems highly unlikely that Defendant and her amici would press that claim in a case involving a third party who had inflicted the fatal injury on the fetus. If a pregnant woman's boyfriend intentionally killed their fetus by shooting the woman in the uterus but the baby did not die of its injuries until after it had been born alive and life-saving medical treatment attempted, the boyfriend would have been guilty of murder under subsection (4). If a third party is guilty of murder in those circumstances, so is Defendant.

When Defendant ingested the rat poison, Angel was still *in utero*, and Angel was fatally poisoned by that substance while she was still *in utero*, as is evidenced by the fact that she already had an INR of eleven and a Grade III intraventricular hemorrhage at the time she was born. Angel's poisoning could not be effectively treated *in utero* because the poison is counteracted by Vitamin K but Vitamin K is not transmitted effectively through the placenta. Angel was in distress, suffering from a very erratic heart rate and apparently already suffering seizures. Given the condition she was in at birth and the inability to effectively treat that condition while she remained in the womb, it is apparent that Angel would have died *in utero* had doctors not taken steps to try to save her life including the emergency C-section that resulted in her live birth. That they made that attempt, however, does not change the fact that she was fatally injured and her death was directly caused by action directed against her while she was still in the womb.

To prove causation in the murder context, the State only needs to prove that the injury inflicted "contributed mediately or immediately" to the death. *Sims v. State*, 466 N.E.2d 24, 25

(Ind. 1984). Even if there is an intervening cause of death, it does not absolve the person of murder unless it was so extraordinary and unforeseeable that it would be unfair to hold the person responsible. *Wooley v. State*, 716 N.E.2d 919, 928 (Ind. 1999); *Sims*, 466 N.E.2d at 25. Thus, Indiana courts have consistently upheld murder convictions even when the individual died as a result of complications due to surgery or other medical care he received for the injury inflicted by the defendant. *See, e.g., Wooley*, 716 N.E.2d at 927-29; *Pittman v. State*, 528 N.E.2d 67, 69-70 (Ind. 1988); *Gibson v. State*, 515 N.E.2d 492, 496 (Ind. 1987); *Sims*, 466 N.E.2d at 25.

Defendant's argument on this score is essentially an attempt to avoid this rule of causation. Defendant inflicted the fatal injury that was the cause of death on a viable fetus. It was certainly foreseeable that medical personnel might intervene and try to save the baby's life and that such efforts would include delivering the baby early. But that technical change of linguistic terminology regarding the baby does not absolve Defendant of criminal responsibility or change the fact that but for her actions her viable fetus would not have died. There is no reason why the applicability of criminal responsibility should hinge on whether the death resulting from the fatal injury occurs while the baby is still in the womb or immediately after its birth, and the legislature's consistent actions in punishing those who unlawfully end fetal life do not suggest it intended for the statute to be limited by a technical matter of semantics. The murder statute provides that whether Defendant killed Angel when she was a "viable fetus" or a "human being," she may be held criminally liable. Defendant may not avoid this liability by proposing some metaphysical conundrum that she did neither. Angel remained the same entity even though the label given to her changed at birth. Applying Defendant's argument to the statute would produce absurd results and defeat the intent of the statute.

3. Prosecuting Defendant for murder does not violate her constitutional rights.

This prosecution does not implicate any of Defendant's federal or state constitutional rights (Appellant's Br. 32-35). This case does not implicate the right to abortion or Defendant's right to privacy. After viability, the State has a compelling and legitimate interest in protecting the life of the fetus that outweighs the pregnant woman's right to privacy. *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 162-64 (1973). The State may proscribe abortion entirely after the point of viability unless it is necessary to preserve the life or health of the mother. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000). Defendant has never argued, nor could she, that this was a lawful attempted abortion or that her ingestion of rat poison was necessary to preserve her life or health. This is also not a case involving rights of personal integrity and privacy. This case does not involve a pregnant woman's decision to forego a medical procedure or treatment that might help her fetus or to undergo a medical procedure or treatment that might harm her fetus. The ingestion of rat poison is not an act that pits the interests of the mother against the interests of the fetus – it is an act that is inimical to the interests of them both.

This case also does not implicate any due process right to notice. Defendant does not claim that the statute is unconstitutionally vague, and the plain language of the statute provided Defendant with the requisite notice. As was argued above, the statute says that a person who knowingly or intentionally kills a viable fetus commits murder, and Indiana has defined "person" in this context to mean a human being. The language of the statute does not limit its application only to those who kill another person's fetus. Thus, Defendant was on notice that her conduct fell within the purview of the statute. The State's prosecution does not ask the courts to alter the meaning of the statute but to apply the plain language of the statute as it has always existed.

This case does not implicate Defendant's rights against *ex post facto* laws. Constitutional prohibitions on *ex post facto* laws prohibit a legislature from enacting a law that imposes a punishment for an act that was not punishable at the time it was committed or that imposes additional punishment to that authorized at the time the act was committed. *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Teer v. State*, 738 N.E.2d 283, 287 (Ind. Ct. App. 2000). Subsection (4) of the murder statute was enacted in 1997, long before Defendant fatally poisoned her viable fetus in December of 2010. For over a decade before Defendant committed the act for which she is being prosecuted, Indiana law has stated that the intentional killing of a viable fetus is murder, and the penalty for that offense has not changed since the time when Defendant committed that act.

The penalty for Defendant's offense is not disproportionate or a cruel and unusual punishment. Like all murders, Defendant's act of murder is subject to a potential term of imprisonment between forty-five and sixty-five years with the possibility that anything above the mandatory minimum can be suspended. *See* Ind. Code §§ 35-50-2-2; 35-50-2-3. It is not disproportionate for the State to view all human life as equally valuable and to punish the murder of a viable fetus to the same extent as it punishes the murder of any other human being. Defendant is not being prosecuted for trying to commit suicide, so it is irrelevant that suicide is not a criminal offense (Appellant's Br. 24-25, 35).⁶ She is being prosecuted for intentionally

⁶ Defendant's amici also seem to operate from this mistaken premise that Defendant is being prosecuted for committing suicide, but that is not accurate. It is not Defendant's actions toward herself, but her knowing and intentional destruction of another human life that is at issue in this prosecution. And this is not even a case where the evidence is silent as to the woman's intentions and desires regarding her fetus. Angel's death was not simply an unfortunate and undesired consequence of Defendant's decision to kill herself. The evidence shows that wholly apart from her intentions toward herself, Defendant deliberately intended to kill Angel so that Angel would not be a hindrance and a trouble to Guan either. More broadly, the arguments of the amici are policy arguments as to why legislatures should not allow such prosecutions. Those

killing a viable fetus, and this prosecution is occurring in the context of a case in which the evidence shows that Defendant desired to bring about the death of her viable fetus and was intending to bring about the death not just of herself but also of Angel. There is no “suicide exception” to subsection (4) of the murder statute, and this does not somehow treat pregnant women more harshly than it does anyone else. Anyone who intentionally kills a viable fetus in the course of an attempted suicide is subject to the murder statute. If, for example, a pregnant woman’s boyfriend intentionally kills his unborn child at the same time he attempts to kill himself by setting fire to their home or by turning on the gas inside their home while they are both inside, he would not be immune from liability for the murder of the fetus simply because he had also been trying to kill himself.

Furthermore, although suicide is not a crime in Indiana, it is likewise not a constitutionally protected activity that one has a liberty interest in or an activity that is viewed with favor by the state. *Washington v. Glucksburg*, 521 U.S. 702 (1997); *see also* Ind. Code § 35-42-1-2.5 (making assisted suicide a felony in Indiana). And the State has a “compelling” interest in preserving human life after the point of viability. *Roe*, 410 U.S. at 163. Thus, it is in no sense unfair or constitutionally problematic if a pregnant woman’s choice to commit suicide is curtailed due to her unique relationship with the fetus. After the fetus is viable, the woman’s freedom of choice is not the only, or the most compelling, interest at stake, and the State may “burden” her decision to kill herself with the knowledge that if she survives but the fetus does not she may be subject to criminal prosecution. *Cf. Casey*, 505 U.S. at 870 (stating that drawing

arguments must be made to the legislature, not to the courts. Moreover, those arguments are relevant only to the separate issue of Defendant’s motion to dismiss, not to the question of whether Defendant is entitled to bail because the proof of guilt is not evident. In fact, most of the amici briefs explicitly ask the Court to dismiss the charges, a remedy that is not available in this bail appeal.

a line at viability has “an element of fairness” because “[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child”).

Finally, this prosecution does not violate Defendant’s rights to equal protection or equal privileges and immunities. To the contrary, it is Defendant who is claiming for herself and other pregnant women an unequal right to kill a viable fetus with immunity, a right that would not apply to any other actor. The law as it currently exists applies equally to all persons – no person may intentionally kill a viable fetus (outside the context, of course, of a legal abortion necessary to preserve the life or health of the mother), and any person who does has committed murder.

The statute only applies to a pregnant woman when she acts with the requisite *mens rea* and the causal connection between her action and the fetus’ death is proven. The woman must act with the conscious objective to kill the fetus or with the awareness of a high probability that her act will kill the fetus. Thus, the suggestion that allowing this prosecution to go forward will subject any woman who miscarries or has a stillbirth to a potential murder prosecution is a strawman. The statute only applies after the point of viability, it only applies to circumstances where it can be definitively shown that the woman’s act was the specific cause of that baby’s death, and it only applies where the woman engaged in that act with the conscious objective of killing the baby or the awareness of a high probability that the act would kill the baby. Allowing the State to prosecute a woman for intentionally killing her viable fetus with rat poison does not require a woman to prioritize her pregnancy over every other aspect of her life any more than allowing the State to prosecute a woman for the neglect of a dependent requires a woman to prioritize her care of her children over every other aspect of her life.

For all these reasons, the trial court did not abuse its discretion in denying Defendant's motion for bail, and this Court should affirm that determination and remand this case to the trial court for further proceedings.

CONCLUSION

For the foregoing reasons, the State respectfully urges that the trial court's judgment be affirmed.

Respectfully submitted:

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes, contains no more than 14,000 words according to the word count function of the Microsoft Word word-processing program used to prepare this brief.

Ellen H. Meilaender
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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on December 4, 2011, I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellee and upon counsel for the admitted amici one copy of the Brief of Appellee by causing the same to be deposited in the United States mail first-class postage prepaid, addressed as follows:

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IN THE
INDIANA COURT OF APPEALS

NO. 49A02-1106-CR-486

BEI BEI SHUAI,)	Interlocutory appeal from the
)	Marion Superior Court
Appellant (Defendant Below),)	
)	
v.)	49G03-1103-MR-14478
)	
STATE OF INDIANA,)	The Honorable
)	Sheila Carlisle,
Appellee (Plaintiff Below).)	Judge.

BRIEF OF APPELLEE

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December 4, 2011

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Re: *Bei Bei Shuai v. State of Indiana*
Appeals Cause No.49A02-1106-CR-486

Dear Ms. Jack:

Enclosed please find two (2) copies of the Brief of Appellee in the above-referenced case.

Very truly yours,

Ellen H. Meilaender
Deputy Attorney General

EHM/cem

Enclosures

December 4, 2011

The Honorable Terry Curry
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Re: *Bei Bei Shuai v. State of Indiana*
Appeals Cause No.49A02-1106-CR-486

Dear Prosecutor Curry:

Enclosed please find a copy of the Brief of Appellee filed in the Indiana Court of Appeals by this office today.

Very truly yours,

Ellen H. Meilaender
Deputy Attorney General

EHM/cem

Enclosure