IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,
Appellant/Cross-Appellee

V.

KAWANA ASHLEY,
Appellee/Cross-Appellant

: Case No. 87,719,87,750

: 2d DCA Case No. 95-510
: Pinellas Co. CRC94-13748CFANO

AMENDED
APPELLANT/CROSS APPELLEE'S REPLY BRIEF

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STATEMENT OF THE FACTS

The State does not accept Defendant's argument on page 6 of the facts that the fetus was not viable, nor that it was obvious from its death that it was not viable. To the contrary, the record shows that the child, which lived over two weeks, was viable both as a fetus and after birth. (R.3-4). Defendant and the trial court accepted the State's version of the facts for purposes of the Motion to Dismiss. (R.26, note 2, 150, 155, 169.) Defendant's argument is interjection of facts not in the record and contrary to the State's position in the trial court. By separate Motion to Strike, the State seeks to have this and other portions of Defendant's Brief stricken and disregarded,

SUMMARY OF ARGUMENT

A pregnant woman is as guilty as anyone else would be under Florida law for commission of an unenumerated felony, or culpably negligent act toward the viable fetus, which foreseeably resulted in the unintentional death of her born-alive child.

One is guilty of third degree murder, contrary to Sec. 782.04(4), Fla. Stat., for the unintentional death of a human being occurring as a result of the perpetration or attempted perpetration of a felony which is not already enumerated for second degree murder. The State relies on the unenumerated felony of abortion, or illegal termination of pregnancy, contraryto Sec. 390.001, Fla. Stat. The termination of pregnancy is illegal if performed by a nonphysician or if committed in the third trimester without written opinion of two physicians as to medical necessity. The penalty

provisions (390.001(10)) are expressly applicable to "any person" for violation of the provisions of the section. There is no required element of proof that the termination was done with intent for other than a live birth, but it is an exception available as defense to the crime. Sec. 390.001(9).

Contrary to Defendant's contention, the elements of third degree murder are not inconsistent with those of the underlying felony of abortion. The Second District correctly held that the elements of third degree murder were met on the facts charged against Defendant. Defendant attempted the illegal termination of her viable fetus, but the viable fetus was born alive. The child, not the fetus is the subject of the third degree murder. No inconsistent intents are at issue. Defendant is charged with unintentional death of her born-alive child foreseeably resulting from the intentional act of illegally attempting to terminate her pregnancy. The viable fetus, not the child, is the subject of the termination. The statutes at issue are not contradictory nor susceptible to differing constructions and therefore not subject to judicial construction to resolve a conflict.

Florida legislation does impose criminal liability on a pregnant female for terminating her own pregnancy contrary to the requirements of Sec. 390.001, Fla. Stat.

Defendant's criminal liability for the death of her born-alive child is not absolved by the fact of its having died over two-weeks after birth of complications of prematurity. Defendant's claim that the child was not separate from her and not viable because it

later died of complications of premature birth is not the legal definition of either a viable child or of a viable fetus.

The homicide statutes are applicable to Defendant because of the born-alive rule. Once the child was born alive, Defendant became liable for her criminal agency which resulted in the child's death. The abortion law did not preempt the prosecutor's discretion in selecting applicable homicide statutes.

Defendant has not shown that she cannot be charged with homicide by reliance on case law holding that a pregnant woman's ingestion of drugs does not constitute child abuse or delivery of drugs to another person.

Defendant has not shown that the legislature intended by passage of the felony abortion statute in 1979 to preempt application of the homicide statutes. Case law supports that the prosecutor has discretion to chose among statutes applicable to the criminal conduct.

Defendant's and Amici Curiae's reliance on case law holding that a pregnant mother's drug ingestion was not shown to have been intended to harm her fetus or child after it was born is inapplicable to the facts of this case.

Defendant contends she cannot be guilty of Manslaughter because of her right of privacy in her own body. A woman's right of privacy in decisions affecting her viable fetus is not prevailing over the State's interest in preservingthe viable fetus and the life of the born-alive child.

ARGUMENT

ISSUE I. THE DISTRICT COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF THE **LAW** IN CONSTRUING THE PLAIN MEANING OF THE STATUTE TO HOLD THAT A PREGNANT FEMALE CANNOT BE CHARGED WITH THIRD DEGREE MURDER IF ABORTION OR ATTEMPTED ABORTION IS THE PREDICATE FELONY OFFENSE. (STATES ISSUES 1 AND II REWORDED AND COMBINED AND DEFENDANT'S ISSUES I AND III A. AND C. REWORDED AND COMBINED AND AMICI CURIAE'S ISSUE II REWORDED).

Defendant contends first, in Issue I.A., that third degree murder cannot be charged for her offense because the elements of the underlying felony of abortion, Sec. **390.001,** Fla. Stat., are inconsistent with the elements of third degree murder.

Defendant's contention and as held **by** the trial court, that the charge of third degree murder based on the underlying felony of abortion is internally inconsistent, is legally incorrect. Defendant contends that the inconsistency in the intent for each is mutually exclusive. Third degree murder requires that the death be accidental, while the abortion statute "requires a specific intent to cause fetal death." Defendant's Brief p.8. The Second District did not accept the ruling of the trial court on third degree murder for good reason. The subject of the intent of third degree murder is the born-alive child, while that of the abortion statute is the viable fetus. Because of the intention to cause fetal death, the live birth was unintended, and the resulting death of the born-alive child **was** the accidental death required for third degree murder.

There is no inconsistency of the elements of the two offenses. Third degree murder requires an accidental death of **a** human being.

The abortion statute requires the intentional termination of a pregnancy during the third trimester, or the attempt to do so. Defendant's attempt to terminate her pregnancy, by shooting herself in the stomach during the third trimester, resulted in the accidental death of her born-alive child. The Second District's opinion is correct in holding that the elements of third degree murder are met by the facts as alleged in the charging documents.

Defendant mistakenly continues to equate the born-alive child, which was the human subject of the third degree murder, with the viable fetus, which was the subject of the attempted abortion. The legal distinction between the born-alive child and the viable fetus presents no inconsistency between the elements of third degree murder and the underlying felony. A fetus, even though viable, is not the subject of homicide in Florida Law, unless it is born alive. State v. Gonzalez, 467 So. 2d 723 (Fla. 3d DCA 1985). Keeler v. Sup. Ct. Amador Co., 470 P. 2d 617 (Ca. 1970), relied on by Defendant, like Gonzalez holds that a fetus is not the subject of homicide unless it is born alive. Only because the child survived Defendant's attempt to kill her viable fetus in her womb, did the born-alive child become the subject of the accidental death. Defendant did not intend that her child be born alive, and its death was, therefore, accidental. Defendant intended the death of her viable, third-trimester fetus by her attempted abortion. The necessary intent for both the abortion statute and the third degree murder statute were met.

Contrary to Defendant's argument, Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992), is inapplicable because it held that there is no crime of solicitation to commit third degree murder. Defendant is not charged with solicitation to commit third degree murder. Defendant's attempt to equate her own crime with the facts of Hieke is illogical and is premised on the mistaken failure to recognize the distinction in Florida law between the fetus and the born-alive child.

Second Defendant contends, in Issue I.B., as does Amici Curiae in Issue 11, with the Second District, that Florida law does not impose criminal liability on a pregnant woman for terminating her own pregnancy. The State takes the contrary position and contends that the legislature did, after Walsinsham v. State, 250 So. 2d 857, 863 (Fla. 1971), change the wording of Florida's abortion law to include the pregnant woman as one who could be liable for participating in or causing her own abortion. The trial court expressed the belief that the State could have charged Defendant with abortion. (R.173).

Both the Second District and the Defendant fail to acknowledge that enactment of legislation which became numbered 390.001(10)(a) is a clear statement of the intent that any and all persons be made criminally liable for termination of a pregnancy in the third trimester, unless certified by two physicians, or at any time unless they are a physician. Justice Ervin's concurring opinion in Walsingham, supra, had pointed out the inequities in leaving the pregnant female out of those who could be liable for terminating

her pregnancy, and the legislature corrected that difference and adopted the suggestion of Justice Ervin that, fairly, the law should include all persons.

That the legislature intended this result is obvious not only from the plain meaning in the use of the words "any person," but also from the fact that an entirely new provision was passed, letting the older law, 797.03, Fla. Stat., stand, which had imposed liability only on those who performed an abortion on a pregnant female. State v. Carey, 56 A. 632 (Conn. 1904) held that the pregnant female could be charged with her own abortion, pursuant to legislation worded differently than the separate statute prohibiting one to commit an abortion upon a pregnant female. The Second District mistakenly relied on State v. Carev and apparently overlooked this comparison in the Carey opinion. Defendant's Brief does not address the State's interpretation of Carey, but merely requotes from the Second District's slip opinion.

Defendant points out that legislative wording was similar since passage of ch. 72-196, Laws of Fla., (which became numbered s. 458.22 in the 1972 Supplement to Florida Statutes). This would put the date of the legislative change much closer to Justice Ervin's concurring opinion and provide even earlier notice of liability for termination of pregnancy.

The current statute, s. 390.001, was not in effect, however, until the passage of ch. 79-302, Laws of Fla. Chapter 390 first appeared in 1978, ch. 78-382, Laws of Fla., governing abortion clinics, but the criminal penalty provisions thereof, ch. 78-382

s. 10, Laws of Fla., had been numbered *s.* **797.03**, with a reviser's note referring **to** s. 390.001 for the definitions thereof. Chapter **390** first got **a** criminal provision in 1979, ch. **79-302**, **s.1**, **p.1613-1615**. In **1972**, ch. 72-196, Sec. 458.22 was criminally violated by termination of the pregnancy of a human being. In **1976**, ch. **76-231** s.1, the amended criminal violations were renumbered 458.225 and included not only violation by termination of pregnancy on a human being in the last trimester but also prohibited termination of any pregnancy except by **a** doctor. The latter prohibition did not include language "on a human being," just as the current s. 390.001(3) does not include those words. "No termination **of** pregnancy shall be performed **at** any time except by a physician as defined in this section." Chapter 458 was repealed effective July 1, **1979**, by ch. **77-457** s.1, Laws **of** Fla., when ch. 79-302 went into effect. Defendant's and Amici Curiae's argument that she cannot be charged with abortion on herself as the "human being" ignores that the statute is also violated by termination of pregnancy except **by a** doctor.

Defendant's contention and Amici Curiae's argument in Issue I, that she, as the first person in Florida *so* prosecuted, could not be charged with homicide, for her conduct of shooting herself in the stomach while in the third trimester of her pregnancy with the intention **of** harming her baby, is illogical. On this premise no one could ever **be** charged with any crime because there would never have been a first person who was chargeable. To the contrary, one is on notice of prohibited conduct as of the effective date of the

legislation. See Wainwright v. Stone, 414 U.S. 21 (1973); cf. Beasley v. State, 580 So. 2d 139, 142 (Fla. 1991).

Beginning with the "Introduction," Defendant attempts to cover a weakness in her argument by confusing the born-alive rule with viability. "Viability" is not a word used to define "born-alive" but is used to define when a fetus becomes a subject of protection by society. "Viability" is defined in Black's Law Dictionary, inter alia, as: "That stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." "Viable child" is similarly defined in Black's Law Dictionary in terms of the development of the fetus. "For a child to be 'viable' means that it is so far developed and formed that if then born it could exist outside its mother's womb even if only in an incubator."

As noted by Justice Ervin in Walsingham, supra, a child was considered alive and "quick" at common law when movement was felt inside the mother. A fetus may be viable though unborn, Duncan v. Flynn, 342 *So.* 2d 123 (Fla. 2d DCA 1977); af'd., *358 So.* 2d 178 (Fla. 1978), and is synonymous with "quick child." State v. McCall, 458 *So.* 2d 875 (Fla. 2d DCA 1984). "[U]nder the Florida Constitution, the State's interest becomes compelling upon viability" of the fetus, defined as being after the second trimester. In re T.W., 551 *So.* 2d 1186, 1194 (Fla. 1989). To be born alive requires only that the child have a "separate and independent existence" from the mother. Duncan, supra, at 126.

Defendant contends that she was not criminally liable for the death of her born-alive child because it was not viable, as shown from its death resulting from complications of prematurity. The child was not still-born and lived for over two weeks. Whether she was the criminal agency of its death is a jury question. Vaillancourt, supra. The court in People v. Hall, 557 N.Y.S. 2d 879 (A.D. 1st Dept. 1990), confirmed defendant's manslaughter conviction for shooting a pregnant woman resulting in the death of her premature child which was born alive by caesarean birth and lived only 36 hours. The court rejected defendant's argument that the baby was not a person despite the failed medical assistance for its prolonged survival. Similarly, in State v. Anderson, 343 A.2d 505 (N.J. 1975), the issue of prematurity and the deaths of the twins 3 hours and 15 hours after their premature caesarian births, necessitated by the shooting of their mother, was rejected as a basis for the acquittal of their murder.

Defendant did not make the argument in either the trial court or the district court that the fetus was not viable, and that claim is refuted on the record created on the Motion to Dismiss. (R.3-4).

Third, the Defendant contends in Issue I.C. and III.C. that the homicide statutes do not apply because homicide requires the existence of two separate persons at the time of the act and that to apply the born-alive rule is to create a human being retroactively.

That the fetus was only a part of the mother and not a separate legal entity with legal rights has not been the law since

1946, as noted in Day v. Nationwide Mutual Insurance Co., supra; and Stallman v. Youngquist, **531** N.E.2d 355, 357 (Ill. 1988), the latter relied on **by** Defendant and Amici Curiae. In relying on Stallman, Defendant and Amici Curiae have not established that Illinois would have used the same analysis if the act had been intentional. Defendant's and Amici Curiae's reliance on the claim that a pregnant woman's relation to her fetus is different than anyone else's because it **is** part of her, is unsubstantiated in Florida law which recognizes the born-alive rule and which makes it a crime for anyone but a physician to terminate a pregnancy and for anyone to terminate a pregnancy after the third trimester without exceptional medical purpose, That a fetus is part of the mother is irrelevant in Florida criminal law.

Defendant's argument fails to acknowledge that Florida **law** does not, because of the born-alive rule, require two separate human beings at the time of the act resulting in the death of a human being, In Knishton v. State, 603 So. 2d 71 (Fla. 4th DCA 1992), adopted by the Second District in this case, the court affirmed conviction for third degree murder for the act on the fetus which resulted in its death after it was born alive. The court in Knishton held that the crime of murder "focuses on the end result, the time of death, rather than on the time of the act." Knishton at 73. For purposes of Florida's homicide statutes, a "human being... [is] one who has been born alive." State v. McCall, 458 ***So.*** 2d 875, 877 Fla. 2d DCA **1984);** accord, State v. Gonzalez, 467 ***So.*** 2d 723 (Fla 3d **DCA** 1985). The Second District in this

case, noted that the same is true in civil tort actions, quoting from Day v. Nationwide Mutual Insurance Co., 328 So. 2d 560, 562 (Fla. 2d DCA 1976). "A child injured before birth and born alive is a person under the Florida and Federal Constitutions. As such, that person is entitled to all of he constitutional rights, privilege and protections afforded to all other persons."

Defendant's and Amici Curiae's contention that a fetus is not a separate being overlooks that civil and criminal law treat the fetus as having rights independent of the mother. In Shinall v. Pergeorelis, 325 So. 2d 431 (Fla. 1st DCA 1976), for example, it was held that the mother could not contract away her unborn child's right to child support from its father. Shinall notes that it was recognized in Roe v. Wade, infra, that unborn children have inheritance and other property rights that often require the appointment of guardians ad litem.

Defendant's claim in I.C.1., that Florida's parent-child immunity doctrine for tort liability precludes application of the born-alive rule to homicide by a parent, ignores that Florida law has always distinguished between civil and criminal liability, see Stern v. Miller, 348 So. 2d 303, 306 (Fla. 1977); that a parent has always been liable for causing the death of a child, see Mahaun v. State, 377 So. 2d 1158 (Fla. 1979); and that parental tort immunity may be in question after the partial waiver in Ard, infra, and the ruling in Waite v. Waite, 618 So. 2d 1360 (Fla. 1993), abrogating interspousal immunity in Florida law, even prior to the legislative abrogation in Sec. 741.235, ch. 85-328, Laws of Fla. The reasoning

in Waite, that "[a]n otherwise meritorious claim should not be foreclosed simply because a person is married to a wrongdoer," Waite at 1361, is equally, logically applied to parent-child immunity. An otherwise meritorious claim should not be foreclosed simply because the born-alive child was the son or daughter of the wrongdoer. See also, as to "ordinary negligence," Justice Grimes concurring as to intentional harm but dissenting as to negligent acts, and Justice Boyd's dissent, in which Justice Alderman concurred in Ard v. Ard, 414 So. 2d 1066, 1070 (Fla. 1982).

Defendant admits that parental immunity has already been eliminated as a bar to tort liability for which there is available insurance coverage. Ard v, Ard, 414 So. 2d 1066, 1070 (Fla. 1982). In Bonte v. Bonte, 616 A.2d 464 (N.H. 1992), the court held that the mother could be sued in tort for negligent actions toward her fetus which was later born alive. The New Hampshire court had in 1966 abolished parental immunity as to a father in a case which considered "whether a court should continue to discriminate against a class of individuals by depriving them of a right enjoyed by all other individuals." Bonte at 466. In Bonte, the New Hampshire Supreme Court found no reason to treat the mother differently than the father and rejected that she had no duty of care to the fetus by virtue of any special relationship she had with it as the mother. Rather, the court held her to the same duty of care to her fetus as she had to her child after it was born. Whether the logic of Bonte is an anomaly, as claimed by Defendant, or foreshadows the future remains to be seen. A similar result was reached earlier in

Grodin v. Grodin, 301 N.W. 2d 869 (Mi. 1981), in holding that the mother was liable to her son and his father for negligently taking a prescription drug while pregnant which later affected her son's teeth. The court found that the question of whether the mother acted reasonably was a jury question rather than one for summary judgment. The Second District, in the instant case, noted that it would not, in light of Johnson, infra, rule out liability for "egregious negligence" by a pregnant woman toward her fetus.

Defendant and Amici Curiae offer no reason why the "born alive" doctrine should be applicable to everyone except the pregnant woman. The woman would have no more rights than anyone else concerning such a born-alive person. Defendant and Amici Curiae attempt to distinguish Knishton v. State, as fundamentally different because the defendant therein was charged with third degree murder of the born-alive child based on the underlying felony of aggravated battery on the pregnant woman. That Defendant was charged with third degree murder based on a different underlying felony, i.e., illegal termination of pregnancy, does not make Knighton fundamentally different. As Defendant and Amici Curiae argue here, Knishton argued that the "born alive" common-law rule was not applicable to him. Knighton argued that legislation of Sec. 782.09 and 390.001(10), Fla. Stats. abrogated or superseded the common-law "born alive" doctrine. The court rejected this argument, stating that "Baby Sorrel1 was born alive and was thus a 'human being' who enjoyed during its brief life, all the protections accorded to human beings ....Baby Sorrell was a human

being who **died** as a result of Appellant's act." Knighton at 73. Similarly, Defendant's baby is dead because of her act, although the child lived for over two weeks before succumbing.

The legislature has not in adopting Sec. 390.001(5), Fla. Stat. preempted application of the born-alive rule to the more general homicide statutes, as claimed by Defendant in I.C.2.

Is well established law that the legislature's enactment of more than one criminal statute applicable to the same conduct operates as an alternative for prosecution at the discretion **of** the prosecutor. Faverweather v. State, *332* So. 2d 21 (Fla. 1976); Soverino v. State, *356* So. 2d 269, 272 (Fla. 1978); State v. Cogswell, 521 ***So.*** 2d 1081 (Fla. 1988); State **v.** Vikhlyantsev, 602 So. 2d **636** (Fla. 2d DCA 1992). As noted in the latter case, quoting from State v. Dunmann, 427 So. 2d 166, 168 (Fla. 1983), legislative "enactment of a statute does not operate to repeal by implication **prior** statutes **unless** such is clearly the legislative intent ....If the two may operate upon the same subject without positive inconsistency **or** repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless **a** contrary intent clearly appears." Vikhlvantsev at **636**. In Dunmann the Court stated that "repeal **by** implication is not favored." Dunmann at **168**. Defendant has not established that the legislature actually or impliedly repealed either the third degree murder or manslaughter statutes **by** adoption of the criminal abortion statute.

Reliance on Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959), and McKendry v. State, 641 So. 2d 45 (Fla. 1994), for authority that a special statute takes precedence over a more general statute is misplaced. The Florida Supreme Court explained in State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990), that application of Adams v. Culver depended on an initial finding that there is "a hopeless inconsistency between the two statutes before rules of construction are applied to defeat the express language of one of those statutes." Accord, Florida Police Benevolent Ass'n., Inc. v. Dept. of As. and Consumer Affairs, 574 So. 2d 120, 123 (Fla. 1991). In Fayerweather, supra, this Court approved the court's opinion in State v. McCurdy, 257 So. 2d 92 (Fla. 2d DCA 1972), that "irreconcilable conflict [was required] between the act and another law before 'denying a clear field of operation to either, at the election of the State.'" Fayerweather at 22. Defendant has not shown that the murder statutes with which she was charged are hopelessly inconsistent or in irreconcilable conflict with the termination of pregnancy statute with which she claims she should have been charged instead.

In Faverweather this Court noted that "[i]t is not unusual for a course of conduct to violate laws that overlap yet vary in their penalties. Multiple sentences are even allowed for conduct arising from the same incident ....Traditionally, the legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender." Fayerweather at 22, cites omitted. Fayerweather approved the

State's election of the felony offense over the misdemeanor offense. Accord, State v. Weir, 488 So. 2d 555 (5th 1986).

In Soverino v. State, 356 So. 2d 269 (Fla. 1978), this Court again upheld the discretion of the prosecutor to elect between Sec. 784.07, battery on a police officer, Sec. 784.03, misdemeanor battery, or Sec. 843.01, resisting officer with violence, for the same conduct, quoting, at 272, the above passage from Fayerweather. This Court added that the elements of proof might be more difficult to show violation of Sec. 843.01, and that the State might then elect to proceed on the felony of Sec. 784.07. Soverino at 273.

In State v. Young, 371 So. 2d 1029 (Fla. 1979), this Court reversed the district court's reliance on Adams v. Culver and held that the State could elect between statutory offenses covering the same conduct. Specifically, this Court held that the State could charge either manslaughter contrary to Sec. 782.07 or vehicular homicide pursuant to Sec. 782.071. This Court found the latter to be a lesser included offense of the former, with a lesser standard of proof. In Eville v. State, 430 So. 2d 555, 556 (Fla. 3d DCA 1983), this Court relied on Young to affirm conviction for vehicular homicide despite jury acquittal of manslaughter by driving while intoxicated. In Smith v. State, 383 So. 2d 959 (Fla. 4th DCA 1980), this Court relied on Young to reject defendant's claim that he could not be convicted of grand theft pursuant to Sec. 812.021, Fla. Stat., because his conduct was also covered by the more specific provisions of Sec. 409.325, governing welfare fraud. In State v. Sammons, 446 So. 2d 1177 (Fla. 2d DCA 1984),

the court relied on Young to reinstate dismissed counts of first degree grand theft of automobiles valued at over $20,000 and to hold that the State was not bound to charge the more specific third degree felony of automobile theft. Accord, Davis v. State, 445 So. 2d 627 (Fla. 1st DCA 1984).

In Nicholson v. State, 600 So. 2d 1101 (Fla. 1992), this Court disapproved the district court's analysis in State v. Harris, 537 So. 2d 1128, 1129 (Fla. 2d DCA 1989), that Adams v. Culver required the State to charge the more specific culpable negligence statutes of Sec. 827.04(1) or 827.04(2), than the more general charge of aggravated child abuse pursuant to Sec. 827.03(1)(b), when acts of commission were involved. In Cash v. State, 628 So. 2d 1100 (Fla. 1993), this Court affirmed the majority's upholding the conviction for grand theft, despite the dissent's reliance on Adams v. Culver as authority that the State was required to charge the more specific statute applicable to failure to submit sales tax than the general grand theft statute.

In Vikhlvantsev, supra, the Court found that the general theft statute did not repeal by implication, nor was it legally inconsistent with the cheating statute, Sec. 817.29, and that the State had the discretion to charge the conduct as the third degree felony of cheating rather than a second degree misdemeanor pursuant to the theft statutes.

Defendant contends that the legislature must specifically say so if it wants the homicide statutes to apply to abortion, as it did in 1868. This statement is legally incorrect because of the

wording of the third degree murder statute, which incorporates all felonies not enumerated for second degree murder. Defendant's false premise would require the illogical premise that the third degree murder statute applies to **all** unenumerated felonies except abortion. Defendant's intended conclusion that the third degree homicide statute does not **apply** to the underlying felony of abortion is not supported on these faulty premises. Both the trial court and the Second District rejected Defendant's conclusion as to her liability under the manslaughter statute. As more thoroughly argued in Issue III, herein, Defendant and Amici Curiae are not **legally** convincing in their contention that anyone but Defendant would be liable for the death of her born-alive child.

Defendant's and Amici Curiae's reliance on case law rejecting criminal prosecution for a pregnant woman's use of drugs which results in harm to her born-alive child is unavailing. The holdings therein can be explained that on the facts presented such conduct **does** not, as a matter of law, constitute the requisite intent or foreseeable consequence. The case law does not address the result if it could be shown that the mother actually took the drugs with the express purpose of terminating the pregnancy. In Johnson v. State, 602 So. 2d 1288 (Fla. 1992), the Court adopted Judge Sharp's dissenting opinion, which found no evidence that the drug passed to the infant after birth. Johnson at **1291**. Judge Sharp also found no evidence that the mother timed her ingestion of the drugs to be able to transmit drugs to the child as it was being born. Id. As to this analysis, Johnson turned on insufficiency of

the evidence. Additionally, Judge Sharp found that the legislature did not intend that Sec. 893.13(1)(c)1, Fla. Stat., delivery of a controlled substance, apply to "an involuntary act such as diffusion and blood flow." Id. Again, this analysis depends on the evidence presented and the involuntariness of the act affecting the fetus. To the contrary, Defendant's act of shooting herself in the stomach to terminate her pregnancy was not an involuntary act. Johnson nor the cases from 21 states Defendant miscites as having rejected the born-alive doctrine to hold a woman liable for prenatal conduct, did not, as contended by Defendant and Amici Curiae, resolve whether a pregnant mother can be held criminally liable for harming her fetus which is subsequently born alive. Those holdings were not based "on the unique relationship between a pregnant woman and her fetus," as claimed by Defendant, but on lack of proof of criminal agency. Johnson does not address a voluntary act of a pregnant mother against her fetus which is subsequently born alive. See also State v. Gethers, 585 So. 2d 1140 (Fla. 4th DCA 1991).

Similarly, in the Wyoming case of Bennett v State, 377 P.2d 634 (Wy. 1963), State v. Osmus, 276 P.2d 469 (Wy. 1954), relied on by Defendant, was explained as reversing the conviction for the child's death because the evidence failed to show criminal agency and that the death was not of natural causes. The Bennett court confirmed the born-alive rule and held that it did not require proof of independent circulatory system. The conviction of the mother for strangulation of her new born was upheld as based on

sufficient evidence to sustain the jury verdict. Even Stallman v. Youngquist, 531 N.E. 2d 355 (Ill.1988), relied on by Defendant did not rule out holding a woman liable for intentional infliction of prenatal injuries. Stallman at 359-360. Williams v. Md., 550 A. 2d 722 Ct.Spec.Ap. (Md.1988), relied on by Defendant, found that the common law recognized the born-alive rule and affirmed the manslaughter conviction for the defendant's accidental shooting of a pregnant woman whose nine-month fetus was born alive but died seventeen hours later, for lack of oxygen resulting from the mother's loss of blood. William v. State, 561 A.2d 216 (Ct.App.Md. 1989), relied on by Defendant, also affirmed the same manslaughter conviction and only considered the common law case law as to liability of another for acts on a pregnant woman resulting in the death of her born-alive child. Neither of the two Williams cases addresses applicability of the born-alive rule to the pregnant woman, and both are similar to the holding in Knighton.

ISSUE 111. THE SECOND DISTRICT'S HOLDING THAT A PREGNANT FEMALE MAY BE CHARGED WITH MANSLAUGHTER FOR THE DEATH OF HER BORN-ALIVE CHILD RESULTING FROM SELF-INFLICTED INJURY IS NOT A DEPARTURE FROM ESSENTIAL REQUIREMENTS OF THE LAW. (DEFENDANT'S ISSUES II AND III B. REWORDED AND COMBINED AND AMICI CURIAE'S ISSUE I REWORDED.)

Defendant's argument for reversal of the Second District's holding that she can be prosecuted for manslaughter for the death of her born-alive child depends entirely on her contention that the victim was not a separate human being at the time of her act. This contention is based on Defendant's argument that the born-alive doctrine should be applied to anyone except the pregnant woman.

Both the trial court and **Second** District found that the elements of manslaughter were sufficiently established to deny the Motion to Dismiss.

The **facts** establish that the **child was** a separate legal entity at the time of its death, over two weeks after the emergency cesarean section. Whether Defendant's conduct of shooting herself in the stomach in the third trimester of pregnancy was the cause of death, as alleged **by** the State, will be a matter of proof for jury consideration. Defendant has not established that she could not be charged with manslaughter for the death of her born-alive child.

Civil liability is not at issue in the instant case, but interjected by the Defendant to claim that the result of the criminal proceeding could be extended to simple negligence in either a criminal or a civil action to produce a previously unavailable result. The Second District's opinion addresses the unlikeliness due to Johnson of **such** hypothetical application for simple negligence, and contrasts Bonte, a New Hampshire case from 1992 finding a civil cause of action against the mother for her negligent prebirth injury to her born-alive child. Amici Curiae's argument ignores that Johnson has already precluded criminal prosecution for **a** pregnant woman's merely ingesting drugs for her own recreation. Normal daily acts of smoking, driving and working in a polluted atmosphere will similarly be governed by the Johnson analysis **for** culpability, proximate cause and criminal responsibility. Cf. Phillips v. State, 289 So. 2d 447 (Fla. 2d DCA 1974), and Maynard v. State, 660 So. 2d 293 (Fla. **2d DCA** 1995),

with **Todd** v. State, 594 *So.* 2d 802 (Fla. 5th DCA 1992), Penton **v.** State, 548 *So.* 2d 273, 275 (Fla. 1st DCA 1989), and Velazquez **v.** State, **561** So. 2d 347 (Fla. 3d DCA 1990). In Penton, the court **said:** "because the consequences of a determination of guilt in a criminal case are far more severe than the consequences suffered by a defendant in a tort action, a closer relationship between the result effected and that intended or hazarded is required." Contested criminal causation of death is a jury question when there is sufficient legal nexus and **gross** and flagrant character of a defendant's actions to support **a** charge of manslaughter. Maynard, supra at 296. The trial court's concern in Jaurique v. People, case number **18988,** Justice Ct. Cr. No. 23611 (Sup. Ct. Ca., San Benito Co., August **21,** 1992), relied on **by** Amici Curiae (ex. 4, **R.82-87),** for **a** woman's smoking, drinking and working in **a** polluted atmosphere did not trouble a different trial judge **in** the same state a year later in People v. Jones, case number 93-5 (Justice Ct. Yreka **Jud.** Dist., Siskiyou *Co.,* Ca. July 28, 1993), relied on **by** Amici Curiae (ex. *3,* R.74-80), who doubted that such lawful conduct would make the woman liable for homicide. (R.76-77).

The Second District's opinion **was** not based on a duty of care owed by **a** pregnant woman to her fetus that differed from the duty of care owed by any other person. Defendant's contention that she has no duty of care to her fetus at any stage of its development suggests an unequal application of the law without a rational basis. See Bonte, supra. The questions certified by the Second District addressed the facts of this case -- the criminal liability

of a pregnant mother for the prenatal injury of her viable **fetus** which is subsequently born alive. The Second District did not address the hypothetical questions raised by Defendant, of criminal liability for "death of a non-viable fetus at **16** weeks gestation, so **long** as the fetus was born alive and lived for 30 seconds, as well as for the death of a **15** year old teenager where the death was caused by an injury inflicted prenatally." Brief p. 10. Defendant cites to nothing, not even Ripley's Believe it or Not, for the live birth of a non-viable fetus, and ignores the unlikelihood of proximate cause and the bar of statutes *of* limitation for a fifteen-year survival rate of a prenatal injury resulting in death,

Whether Defendant has a defense of self-mutilation or attempted suicide as alleged by Defendant, Brief p. **36**, presents only a jury question and was not legally part of the trail court's consideration of Defendant's Motion to Dismiss, nor for appellate review. Similarly, whether she can obtain a jury pardon by claiming she could not timely afford an abortion or that her mental state, as evidenced **by** her actions, qualified her for a legal abortion, and, indeed, whether these matters will ever be admissible evidence, are questions of fact which are in dispute and not the proper subject of the Motion to Dismiss criminal charges or of appellate review of the order entered on the Motion to Dismiss.

Defendant misstates the holdings of In re T.W., 551 So. 2d **1186, 1192-93** (Fla. 1989), and Roe v. Wade, 410 U.S. **113** (1973), in claiming that "the right to abortion is constitutionally protected," and the import ***of*** Sec. **390.001**, Fla. Stat., in claiming

that right to abortion is "specifically authorized by statute." Roe established the right to states to regulate abortion in the third trimester, even to the extent of prohibiting it entirely. In re T.W. merely held that it is unconstitutional to require the consent of a minor's parents before a legal abortion could be performed. Section 390.001 prohibits abortions except by licensed medical physicians and all abortions in the third trimester unless specifically excepted.

Defendant's claim at p.37 that she had not been informed of her right to an abortion, the medical consequences of a cesarean or other late abortion, and whether she gave informed consent to the cesarean section, are contested factual matters which were not presented to the trial court nor the Second District and are improperly interjected into this appellate review as not being part of the record. Issues not raised in the trial court on a motion to dismiss will not be considered in the appellate court. Whitted v. State, 362 So. 2d 668, 681 (Fla. 1978).

No duty of care by the doctors is at issue on this record. Rather, the doctors did everything they could to save Defendant's child in performing the emergency cesarean operation. Whether the child died as a result of the criminal agency of the Defendant is a jury question. Vaillancourt, supra; see Bennett, supra. No "dangers of arbitrary and discriminatory enforcement" (Brief p.38) of the homicide statutes are at issue on this record, and Defendant's attempt to interject a duty of care by the doctors at

this stage of the appellate proceedings is inappropriate, unverified and untenable.

Defendant contends that the homicide statutes cannot be applied to her for lack of notice that her conduct, of shooting herself in the stomach while in the third trimester of pregnancy with the admitted purpose of harming her baby and which resulted in the death of her born-alive child, constitutes homicide. Defendant claims that application of the homicide statutes to her conduct is a "radical interpretation." Brief p.39.

It is not a new or unforeseeable application of Florida's homicide statutes to apply them to the death of a human being due to the agency of another person. See Vaillancourt v. State, 288 So. 2d 216 (Fla. 1974). Defendant's action of shooting herself in the stomach resulted in the foreseeable death of a human being. It was not unforeseeable that her baby be born alive and die thereafter as a result of her action. It is not the first time in recorded Florida history that termination of pregnancy by shooting the mother in the stomach resulted in the live birth of a human being which died thereafter and became the victim of homicide. Knishton, supra.

Defendant offers no real reason why she would not expect to be criminally responsible for her act causing her born-alive baby's death as much as anyone else. That Defendant was aware at the time that her conduct was criminal is apparent from her initially reporting the incident as, and lying to police to say that she was shot in, a drive-by shooting. If, as argued by Defendant and Amici

Curiae, she believed she had the legal personal right to terminate her own pregnancy by shooting herself in the stomach, she would have had no reason to fabricate the defense that someone else did it to her. At least since the Knighton case if not the tort case of Day, infra, all persons are on notice that Florida follows the common law born-alive doctrine to impose liability on the person whose conduct toward a viable fetus results in the death of the born-alive child. Defendant, as any other Florida resident, is presumed to be aware of Florida law. Beasley v. State, 580 So. 2d 139, 142 (Fla. 1991). Defendant, as one presumed to be within the class of ordinary intelligence, was on notice that her conduct of shooting herself in the stomach, through a pillow, with a low caliber weapon, while in the third trimester of pregnancy (R. 94) could result in a deprivation of life of her viable fetus and of her child were it to be born-alive. As one of the class of persons of ordinary intelligence, she was on notice that Florida law imposes a criminal liability for such conduct, that may result in deprivation of her life, liberty, or property.

Defendant's reliance on her conduct as being merely a suicide attempt or self-inflicted harm, Issue 111, does not avail her for purposes of a Motion to Dismiss. Only those facts most favorable to the State were at issue for consideration of the Motion to Dismiss and appellate review thereof. Defendant's claim to have inflicted self-harm or attempted suicide presents only a factual matter to be raised as defense and resolution by the jury.

Application of homicide statutes for prenatal injury to a born-alive child resulting in its death is not a radical interpretation of the homicide statutes. Knishton, supra. The father was charged with second degree murder for the death of his born-alive child resulting from his beating its mother before its birth in Clarke v. State, 117 Ala. 1, 23 *So.* 671 (1898), in which the court reversed and remanded for exclusion of the wife's testimony. Defendants were convicted of homicide on facts similar to those in Kniqhton in State v. Anderson, 343 A.2d 505 (N.J. Super. 1975), and **People v. Hall**, 158 App. Div. 2d 69, 557 N.Y.S. 2d 69 and 565 N.Y.S. 2d 771. It would seem more strange that a pregnant woman, alone, could avoid liability for the death of one which society has the right to protect, the viable fetus and the born-alive child. Roe v. Wade, 410 U.S. 113 **(1993)**; In re T.W., 551 ***So.*** 2d 1186 (Fla. **1989)**.

Application of the manslaughter statute to Defendant's conduct does not violate her rights of privacy. Defendant takes the position that she has the right to terminate her own pregnancy in the third trimester as a personal right of privacy. Such contention has not been supported by the law since Roe v. Wade, supra. As expressed by Judge Grimes in Day v. Nationwide Mutual Insurance ***Co.***, 328 ***So.*** 2d 560, 562 (Fla. 2d DCA 1976),

> "[t[he decision to have an abortion during the first trimester has been held to be private and personal to the individual woman .... The primary interest, at least in the early stages of pregnancy, is that of the woman and her right to privacy. But, Roe ... and Doe ... also recognize that the interest of society increases with the development of the fetus to the point that states may proscribe abortions during the last trimester of pregnancy except where necessary to preserve the life or health of the mother." Citations omitted.

The Fourth District and this Court similarly acknowledged Roe v. Wade in noting that the woman's right of privacy was no longer paramount after the first trimester of pregnancy. Jones v. Smith, 278 So. 2d 339, 342 (Fla. 4th **DCA 1973);** Wright v. State, 351 ***So.*** 2d 708, **710** (Fla. 1977).

The State has no burden in the instant case of showing a compelling state interest to overcome the Defendant's right of privacy in her own body. That burden has long ago been met in Florida law by recognition of society's compelling interest in preserving the viable fetus as outweighing the pregnant woman's rights in terminating her own pregnancy. In In re T.W., supra, this Court held in **1989** that the mother and fetus were sufficiently separate at the time of viability to support the compelling state interest in preservation of the fetus as outweighing the pregnant mother's privacy interests in her **own** body. In re T.W. at 1193-1194. Because Defendant had no right of privacy greater than society's interest in her third trimester pregnancy, she has shown no violation of her rights of privacy from application of the manslaughter statute to her conduct. Amici Curiae's concern of greater government involvement in a woman's pregnancy is

unwarranted. The government already closely scrutinizes the death of any born-alive child if there is any indication of criminal liability. Cf. In re matter of Dubreuil, 629 So. 2d 819, 824 (Fla. 1994).

Defendant's reliance on Stallman, supra, is misplaced. Stallman held that a pregnant woman was not liable in tort for negligent unintentional acts affecting her fetus, acknowledging one Michigan opinion to the contrary. Stallman did not address either criminal liability or intentional acts. Defendant is charged with the intentional act of shooting herself in the stomach and the foreseeable consequences, She is not charged with simple "maternal prenatal negligence ...." Stallman at 361. Stallman is inapposite. She is charged with culpable negligence as to the charge of manslaughter. Stallman does not address culpable negligence.

The State declines to deal in the hypotheticals presented by Defendant as to a pregnant women's negligence in commission or omission of medical advice during her pregnancy. Defendant is not charged with such conduct and such hypotheticals should not be at issue because specific facts determine whether a degree of negligence has become chargeably culpable. See Hermanson v. State, 604 So. 2d 775 (Fla. 1992); cf. Dubreuil at 827, "'these cases demand individual attention' and cannot be covered by a blanket rule."

Defendant's socioeconomic argument on pages 43-44 of her brief is irrelevant and unavailing. The wealthy as well as the poor are

not entitled in Florida law to terminate their pregnancy in violation of criminal statutes.

Application of the homicide statutes to Defendant's conduct is not a penalty based on her being pregnant. Wrisht, supra, confirmed that a woman's right of privacy never extended to the right to an abortion other than by a medical physician. Application of the abortion statute to Wright was affirmed because she was not a medical physician, Wright, alone, supports application of the abortion statutes to this Defendant.

Defendant contends that one who attempted suicide without being pregnant could not similarly be charged with homicide. Defendant's attempt to avoid criminal liability for the death of her born-alive child by referring to her action as a suicide attempt is a factual matter to be raised for defense but refuted on the appellate record of the Motion to Dismiss proceedings by her claiming that someone else shot her, assuring that she would not be treated as a suicide attempt. **(R.3-4).**

Defendant's contention that a woman could be guilty of third degree murder merely for being pregnant if she went into premature labor while committing a felony and her born-alive child later died. Defendant's odd, hypothetical fact pattern, which is not applicable to the facts of her own offense, shows less causal connection, or criminal agency than in the drug ingestion cases such as Johnson.

There is precedent in Florida law for enhancement of the crime depending upon the status of the victim. Misdemeanor battery is

enhanced to a felony if it is directed at a pregnant woman (Sec. 784.045(1)(b), Fla. Stat.), or a law enforcement officer (Sec. 784.07, Fla. Stat.). There is no prohibition against imposing additional penalties when society has a recognized interest in protection of the status at issue.

Defendant's footnote claim that prosecution of homicide on these facts is in violation of federal and state privacy is not supported on the authority cited, Robinson v. Ca., 370 U.S. 660 (1962), held that the California law making narcotic addition a crime was unconstitutional. The Court held that the mere status of narcotic addiction could not be made a criminal offense and that, because it was an illness, it would be cruel and unusual punishment to impose criminal sanctions. The only possible analogy would be if Florida were to make it a crime to be pregnant. In Rodriguez v. State, 378 So. 2d 7, 10, n.6 (Fla. 2d DCA 1979), also relied on by Defendant in note 51, Brief page 44, the court similarly noted that conduct, only, was criminally punishable and that pregnancy might be evidence of a crime if the defendant was not married. Defendant's quote from Rodriguez refers to the Court's inapplicable holding, which struck the condition of probation that defendant was not to become pregnant.

CONCLUSION

WHEREFORE, the Second District's opinion as to Defendant's liability for third degree murder is a departure from essential requirements of the law and should be reversed. The Second District's opinion as to Defendant's liability for manslaughter is legally correct and should be affirmed.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the above Appellant/Cross-Appellee's Reply Brief has been furnished by delivery to Bruce Johnson, Assistant Public Defender, Criminal Courts Building, 5100 144th Avenue North, Clearwater, Florida 34620, and by U.S. mail to Priscilla Smith, Esquire 120 Wall Street, 18th Floor, New York, New York 10005, counsel for Appellee/Cross-Appellant, this 18/19th day of June, 1996.

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