

No. 45586-2-II

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,  
Respondent,

v.

MELISSA MCMILLEN,  
Appellant.

IN RE PERSONAL RESTRAINT PETITION OF  
MELISSA MCMILLEN,  
Petitioner.

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**AMENDED *AMICUS CURIAE* BRIEF OF NATIONAL  
ADVOCATES FOR PREGNANT WOMEN, AMERICAN CIVIL  
LIBERTIES UNION OF WASHINGTON, LEGAL VOICE AND  
BIRTH RIGHTS BAR ASSOCIATION**

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## **I. STATEMENTS OF INTEREST OF AMICI CURIAE**

The statements of interest of *amici curiae* are set forth in the Motion for Leave to File Amicus Brief filed with this brief.

## **II. SUMMARY OF ARGUMENT**

The circumstances presented by this case are no doubt tragic. A young woman—seemingly out of a combination of fear, denial, and ignorance—gave birth alone and unexpectedly in a bathroom in her home in the middle of the night. The trial court found the birth occurred quickly and that although the baby was born alive, the baby suffered blunt force trauma from hitting its head on the toilet after the quick birth. Believing the baby had died, Ms. McMillen did not summon emergency assistance. According to the State, this was murder.

This prosecution reaches far beyond the traditional ambit of felony murder, which seeks to deter people from committing felonies that imperil lives. It makes failure to seek emergency assistance during or immediately following childbirth—even if the assistance seemed or was in fact futile—a form of murder. The State contends that despite the lack of evidence indicating violence or that medical assistance would have saved the baby, it may prove murder by searching for criminal intent in the circumstances of the pregnancy itself. In doing so, it seeks to fill serious factual gaps in its case with gender-based stereotypes and insinuations based on Ms.



McMillen's response to her pregnancy. This is a dangerous approach that allows criminal conviction based on insufficient evidence and that makes all women who choose to give birth outside of a hospital vulnerable to threats of police investigation, arrest, and imprisonment.

Amici do not excuse infanticide; rather, amici ask this Court to follow the lead of other courts, and rule that the murder conviction here is legally flawed. The risk of confusing ignorance for malfeasance and shock for malice is simply too great. But the risk of wrongful convictions is not the only interest at stake. Punishing women based on unattended perinatal losses also poses a grave risk to women's constitutional rights, and threatens the underpinnings of the criminal justice system itself.

### **III. ARGUMENT**

#### **A. Prosecuting Women who Experience Perinatal Losses Creates Cruel and Unsound Public Policy not Intended by the Legislature, Further Demonstrating the Lack of Sufficient Evidence Here**

Central to this prosecution is the notion that a woman's failure to summon emergency aid after she believes a stillbirth has occurred constitutes second-degree criminal abandonment under RCW 9A.42.070. As the Appellant/Petitioner's briefs have explained, and as this brief explains in Section II below, Ms. McMillen's conviction should be reversed for lack of sufficient evidence and because other constitutional rights are violated. Moreover, as courts in other states have recognized, a

murder conviction is especially difficult to prove in a case of an unattended perinatal loss (stillbirth or death in the first 28 days after birth) in the absence of evidence of a violent injury to a live infant. The problematic tendency, reflected in the trial court's ruling in this case, is to look to a woman's pregnancy circumstances to discern what she might have done with a living infant. Given the high rates of unintended pregnancies in the United States, and the stigma faced by women who are pregnant outside of societal expectations, this is a dangerous proposition.

**1. Prosecuting women for perinatal losses for child abandonment and murder subjects all pregnant women to potential criminal investigation and prosecution for events outside their control.**

There was disputed evidence of a live birth and a lack of evidence showing the baby remained alive long enough after the head injury so that the failure to summon medical assistance constituted actual abandonment. To fill these gaps in the evidence, the State substituted its subjective judgments about Ms. McMillen's behavior during her pregnancy:

Our theory of the case is simply that she denies that she's pregnant, she doesn't really want the child, she has the baby, and, yes, there's an issue of whether or not the baby was born alive or not and we're going to let our experts hash that out. But everything that she does prior to having the baby is consistent with what she does after having the baby, which is nothing.

TR 56:3-16. The State attempted to relax its burden to prove that Ms. McMillen *actually did something* that caused her infant's death by treating

her ambivalence about the pregnancy as equivalent to criminally culpable conduct .

Even assuming that there was a live birth, and even assuming that Ms. McMillen could have discerned that the infant was alive and in need of medical aid, the State did not present any evidence that summoning medical assistance would have ensured the infant's survival. According to the experts who testified at trial, the infant's most significant injury was head trauma, likely caused by having been birthed into a toilet. The only way to have prevented this injury would have been to deliver in another location, yet there is no established legal duty on a pregnant woman to deliver a child in any particular location — and reasonably so, as any such duty would be impossible for the State to enforce given the unpredictability of childbirth.<sup>1</sup>

Indeed, Courts have long recognized that they should tread carefully when criminal prosecutions of women who give birth to babies unattended turn on what happened at birth and immediately thereafter. As the Supreme Court of Wyoming recognized in 1954, “[c]hildren are born of unattended mothers on trains, in taxis, and in other out of the way

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<sup>1</sup> Bonnie Rochman, *A Baby Is Born on Train to NYC: Why Labor Is So Unpredictable*, Time Mag., Jan. 18, 2012, <http://healthland.time.com/2012/01/18/a-baby-is-born-on-train-to-nyc-why-labor-is-so-unpredictable/> ("In a recent study of deliveries in 19 states, 17% of non-hospital births in 2006 were unplanned births — the kind that take a woman by surprise in a train car or an elevator.").

places, and we fear to open up a field for unjust prosecutions of actually innocent women.” *State v. Osmus*, 73 Wyo. 183, 276 P.2d 469, 476 (Wyo. 1954) (reversing manslaughter conviction of woman who gave birth alone in her room, then put the deceased infant’s body under the bed for three days before leaving it along a highway, telling no one she had given birth); *see also Commonwealth v. Pugh*, 462 Mass. 482, 969 N.E.2d 672, 688 (Mass. 2012) (reversing woman’s homicide conviction for delivery of a breech fetus alone at home, explaining, “[s]peculation that the baby might have survived if the defendant had summoned medical help does not satisfy the Commonwealth’s burden of proving causation beyond a reasonable doubt because that the baby ‘*might* have survived with proper care . . . engender[s] considerable doubt as to what actually happened.”) (citing *Osmus*, 276 P.2d at 476).

The potential for unjust prosecution and conviction in cases like these is great, given that it is often medically impossible to determine the cause of a particular birth outcome. In addition, race and class prejudice can influence which women are targeted for investigation and arrest arising out of adverse pregnancy outcomes.<sup>2</sup> Beliefs and stereotypes about

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<sup>2</sup> Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. Health Pol., Pol’y & L. 299, 311 (2013) (women targeted for criminal prosecution or forced intervention in relation to their pregnancies were disproportionately of color and almost universally poor).

how pregnant women should behave also make it difficult if not impossible to fairly subject pregnancy outcomes to judicial scrutiny. In recognition of this risk, the Supreme Court of Illinois refused to hold women civilly liable to their children for injuries that occurred prenatally:

If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. . . . In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?

*Stallman v. Youngquist*, 125 Ill.2d 267, 531 NE.2d 355, 360 (Ill. 1988).

Those biases raise concerns about whether any finder of fact can disentangle preconceived notions of how women should act during pregnancy from what transpires after an unexpected or emergency childbirth. Indeed, stereotypical beliefs about how pregnant women should behave were omnipresent in Ms. McMillen's trial. The State's closing argument emphasized Ms. McMillen's demeanor, TR 827:7-15, unfairly suggesting that there is only one correct way women should act while pregnant and after a perinatal loss, and that her failure to meet that assumption indicates her criminal culpability. TR 827:7-15.

## **2. Punishing women for perinatal losses will not prevent them.**

For pregnant women and their families, a perinatal loss is a life-altering and traumatic event. Pregnancy losses often feel shocking and unexpected to the women who experience them, but unfortunately they are a common phenomenon. Approximately 15 percent of all clinically recognized pregnancies result in miscarriages.<sup>3</sup> In 2002, approximately 26,000 pregnancies ended in stillbirth.<sup>4</sup> Another 19,000 ended in neonatal death.<sup>5</sup> These statistics belie the notion that a live birth is a guaranteed pregnancy outcome.

Stillbirth is the one of the most common adverse pregnancy outcomes, but its causes are not well understood,<sup>6</sup> and it can result from the cumulative effect of several risk factors.<sup>7</sup> Medical science has great difficulty separating the effects of these various factors and identifying the causes of a stillbirth.<sup>8</sup> Indeed, most stillbirths that occur after 28 weeks of

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<sup>3</sup> Raj Rai & Lesley Regan, *Recurrent Miscarriage*, 368 *Lancet* 601, 601 (2006).

<sup>4</sup> Ruth C. Fretts, *Etiology and Prevention of Stillbirth*, 193 *Am. J. Obstetrics & Gynecology* 1923, 1924 (Mar. 2005).

<sup>5</sup> R.L. Goldenberg et al., *Stillbirth: A Review*, 16 *Journal of Maternal-Fetal & Neonatal Medicine* 79, 80-88 (2004).

<sup>6</sup> *Id.* at 79.

<sup>7</sup> Donald J. Dudley et al., *A New System for Determining the Causes of Stillbirth*, 116 *Obstetrics & Gynecology* 254, 258 (Aug. 2010) (recognizing the difficulty of assigning a cause of fetal death with a significant degree of certainty and noting that the cause of death can be assigned with certainty in a relatively small proportion of cases).

<sup>8</sup> *Id.*

gestation are unexplained.<sup>9</sup> Although the rate of infant deaths in Washington State is lower than the nation's, Native American and Black women are significantly more likely than white women to experience adverse perinatal outcomes.<sup>10</sup> If neonatal losses may trigger criminal charges, women of color will face a double-penalty for belonging to a marginalized group.

Like the correlation with race, many of the risk factors for perinatal loss are beyond a pregnant woman's control. These include genetic predisposition, environmental hazards, mental health, intimate partner violence, paternal factors, and lack of access to health care.<sup>11</sup> Even when one identifiable factor associated with an elevated risk of such a loss is present, the complex interaction with other factors makes it extremely difficult to discern how and why the individual loss occurred. Prosecuting a pregnant woman because she has experienced perinatal loss is not only wrong as a matter of policy, it is likely to be wrong as a matter of fact.

The difficulty of determining the cause of a perinatal loss was apparent here. The medical examiner was unable to ascertain a definitive

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<sup>9</sup> Ruth C. Fretts, *Etiology and Prevention of Stillbirth*, 193 *Am. J. Obstetrics & Gynecology* 1923, 1924 (March 2005).

<sup>10</sup> Washington State Dep't of Health, *Maternal Child Health Report, Infant Mortality*, No. 160-015, June 2014 at 3. (From 2009 to 2011, the annual number of infant deaths per 1000 births was 10.3 for Native American women and 6.9 for Black women, compared to 4.3 for white women), *available at* <http://www.doh.wa.gov/Portals/1/Documents/Pubs/160-015-MCHDataRptInfantMort.pdf>

<sup>11</sup> R.L. Goldenberg et al., *Stillbirth: A Review*, 16 *Journal of Maternal-Fetal & Neonatal Medicine* 79, 80-88 (2004).

cause of death, or even conclusively prove that there had been a live birth. But even if the events transpired as the State proposes, neither the facts nor Ms. McMillen's conduct during her pregnancy are sufficient to prove the necessary criminal intent.

Presumably, the State will claim the deterrence effect of a murder prosecution, and a concern for the wellbeing of children born to mothers who are unable to care for them, justify these prosecutions. However, deterrence will have no effect on women in cases like the one at bar. Simply put, no criminally culpable state of mind exists to deter. Prosecutions of women like Ms. McMillen will fail to protect newborns, and serve only to compound the tragedy of perinatal losses for women in difficult circumstances.

**3. The threat of prosecution will unnecessarily stigmatize women who deliver at home.**

The State dismissed as "grandiose" the notion that Ms. McMillen had a constitutional right to forego medical care. Whether the fact that she did not summon aid was a principled stance, a product of disoriented panic, or resignation to the futility of the circumstances is irrelevant: the law imposes no duty that a woman engage emergency services for a delivery, planned or otherwise. Naturally, there is no disagreement that a woman who gives birth to a full-term infant in obvious distress should



seek medical assistance. But the suggestion that a woman who experiences an apparent stillbirth has a duty to seek medical assistance comes perilously close to requiring law enforcement review of every unexpected pregnancy outcome for possible criminal wrongdoing. Even more chilling is the suggestion that a grim outcome will be judged by a woman's behavior during pregnancy or based on stereotypes about how she should respond to the loss.

Treating a neonatal death that occurs at an unattended birth as felony murder potentially affects all pregnant women in Washington State. Thousands of babies are born in the United States at home, with or without skilled attendants, by intention or by accident, every year.<sup>1</sup> Washington State has one of the highest rates of home births in the United States.<sup>2</sup> Most of those births are planned, but some are not.<sup>3</sup> Women experiencing pregnancy denial symptoms may deliver unattended;

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<sup>1</sup>See Am. Coll. Obstetricians & Gynecologists, Comm. on Obstetric Practice, *Committee Opinion No. 476: Planned Home Birth* 3 (2011, reaffirmed 2015) (hereinafter ACOG Practice Opinion 476) (stating that approximately 25,000 babies are born at home in the United States each year, approximately one quarter of these unassisted); Marian F. MacDorman et al., *Trends in Out-of-Hospital Births in the United States, 1990–2012*, U.S. Dept. Health & Human Services: Centers for Disease Control and Prevention No. 144 (Mar. 2014) (documenting more than 31,000 home births in 2010, and noting an increase in out-of-hospital births).

<sup>2</sup> *Committee Opinion*. at 1.

<sup>3</sup> *Committee Opinion*. at 6.

other women may experience precipitous births in which labor occurs unexpectedly and sometimes too quickly to get to a skilled attendant.<sup>15</sup>

**B. Prosecuting Women like Ms. McMillen who Experience Perinatal Losses Violates their Constitutional Rights**

The constitutional rights at stake here are well-recognized standards protecting the human dignity of all adults in the United States, including pregnant women.

**1. Treating unassisted perinatal losses as felony murder deprives women of their constitutional right to due process.**

Due process is guaranteed by the U.S. and Washington State constitutions, U.S. Const. Amend. XIV, Wash. Const. art. I, § 3, and includes the right to notice of prohibited behavior before being subject to criminal conviction and punishment. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

The trial court convicted Ms. McMillen of murder under Washington's second-degree felony murder statute, with abandonment of a dependent person in the second degree as the predicate felony. See RCW 9A.32.050(1)(b), RCW 9A.42.070. Nothing in these statutes or case law

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<sup>15</sup> Marian F. MacDorman et al., *Nat. Ctr. Health Stats. Data Brief No. 84: Home Births in the United States, 1990–2009* at 6 (Jan. 2012).

suggests that a woman can be convicted of murder for failing to summon medical assistance following a home birth. Indeed, this case is novel in Washington and would be extremely unusual in other jurisdictions.

Murder convictions are generally not premised on the failure to act, and the predicate felony in this case (which most clearly applies to people who abandon living children) does not put an ordinary woman on notice of what to do in the event that she believes she has had a stillbirth.

Further, due process also demands that the state prove each element of the charged criminal offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Even had Ms. McMillen delivered a live infant, the statute requires the State to prove that she “recklessly abandon[ed] the child.” The statute neither specifies that a failure to summon assistance following birth would constitute reckless abandonment nor describes the contours of the supposed duty to seek aid. Indeed, the State adduced no evidence at trial that had Ms. McMillen summoned emergency services, her infant’s life could have been saved. Without a finding that Ms. McMillen’s failure to contact emergency services following her infant’s birth in fact caused her infant’s death, the elements of criminal culpability are not proven to the degree required by the Constitution.

**2. Allowing Ms. McMillen’s murder conviction to stand violates the constitutional right to forego medical treatment.**

Misusing the criminal law in this context has sweeping, harmful consequences for *all* pregnant women’s rights. Rather than looking to the circumstances after birth – the only circumstances that are legally relevant in this prosecution – the trial court and the prosecutor relied on Ms. McMillen’s decisions and actions in relation to her *pregnancy*. But those decisions are constitutionally protected.<sup>16</sup> Treating a woman who delivered at home as a murderer infringes upon her constitutional right to forego medical treatment for herself. *See, e.g., Cruzan v. Dir., Mo. Dep’t Health*, 497 U.S. 261, 289, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (O’Connor, J., concurring) (“[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment. . .”); *see also In re Welfare of Colyer*, 99 Wn.2d 114, 660 P.2d 738 (1983), *holding modified by Matter*

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<sup>16</sup> Sister jurisdictions have recognized the danger to due process posed by criminal prosecutions based on pregnancy outcomes: prosecuting women for pregnancy outcomes would create an infinite number of new crimes, “a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.” *Cochran v. Commonwealth*, 315 S.W.3d 325, 328 (Ky. 2010). *See also State v. Wade*, 232 S.W.3d 663, 666 (Mo. App. 2007) (noting that such prosecutions could extend to legal but risky conduct, like smoking); *Reinesto v. Super. Ct.*, 182 Ariz. 190, 894 P.2d 733, 736-37 (Ariz. App. 1995); *Kilmon v. State*, 394 Md. 168, 905 A.2d 306, 311-12 (Md. App. 2006) (such prosecutions potentially penalize “engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child.”).

*of Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 137 (1984). Neither under the Constitution, nor at common law, may a person be subjected to medical treatment without consent. *See Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891) (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person[.]”).

This precedent extends to a woman’s decision not to seek assistance during childbirth. *See, e.g., Commonwealth v. Pugh, supra*, 969 N.E.2d at 690. In *Pugh*, the Massachusetts high court explained its refusal to impose criminal liability on a pregnant woman for failing to seek medical help to deliver her baby presenting in the breech position, which allegedly led to the baby’s death: “Imposing a broad and ill-defined duty on all women to summon medical intervention during childbirth would trench on their ‘protected liberty interest in refusing unwanted medical treatment . . . . Moreover, such a duty is inchoate and would be highly susceptible to selective enforcement.’” *Id.* at 677 (citing *Cruzan*, 497 U.S. at 278).

Here, the claim that Ms. McMillen had a duty to seek medical assistance for a baby she believed stillborn is distinct from the question of whether she had a duty to seek medical care *for herself* during childbirth.

The constitutional problem arises because the State conflated these issues. *See, e.g.*, TR 820:23-821:2 (“[She] gave birth to a live baby girl. Not in a hospital or with the assistance of a doctor, and no preparations for a home birth either. No mid-wife [sic] present, no sterile environment, no help.”). Not only does a woman have no legal duty to accept medical treatment during childbirth, it is her constitutional right to decline to do so. *See Cruzan*, 497 U.S. at 278-279; *In re A.C.*, 573 A.2d 1235, 1247 (D.C. App. 1990) (reversing court-ordered cesarean section imposed on terminally ill pregnant women, and holding that “[e]very person has the right, under the constitution and common law, to accept or reject medical treatment”).<sup>17</sup>

As the Massachusetts high court held, “[a]ll births, regardless of venue, carry inherent risks . . . in the ordinary course, competent women who are pregnant may weigh these risks themselves and make decisions about the course of their own pregnancies and childbirths.” *Pugh*, 969 N.E.2d at 692. The criminal law must not be used to circumvent the constitutional right to medical decision-making, including forgoing medical treatment.

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<sup>17</sup> The recognition of the right to refuse or accept medical treatment is in keeping with medical ethics, which recognize the right of pregnant women to make medical decisions. Am. Coll. of Obstetricians & Gynecologists, Comm. on Ethics, *Committee Opinion 321: Maternal Decision Making, Ethics, and the Law* 9 (Nov. 2005) (hereinafter “ACOG Ethics Opinion 321”).

**C. The Murder Prosecution Here is Over-Criminalization.**

Ms. McMillen's murder conviction is well outside the core of cases traditionally prosecuted as murder, and is inappropriate and excessive even considering the modern trend towards criminalizing conduct not previously recognized as criminal. The facts of this case, while undeniably tragic, do not fit the elements of felony murder.

Extending murder to cover a case in which a woman who has unexpectedly given birth at home fails to call 911 represents reactive over-criminalization rather than a valid application of Washington's criminal statutes.

**1. Washington law does not treat perinatal loss as murder absent purposeful assault.**

There is not a single reported case in Washington State of a woman being prosecuted for abandonment or murder of a child based on a failure to summon medical care following an unexpected home birth. The only cases in which Washington courts have thus far permitted felony murder charges stemming from child maltreatment have involved children subjected to purposeful assault. *See State v. Daniels*, 124 Wn.App. 830, 103 P.3d 249 (2004), *aff'd in part, rev'd in part* 160 Wn.2d 256, 156 P.3d 905 (2007) (child's death caused by shaking or blunt head trauma); *State v. Creekmore*, 55 Wn.App. 852, 783 P.2d 1068 (1989) (father caused

child's death by kicking the child in the stomach and had engaged in a lengthy prior course of physically abusive conduct).

In fact, the Washington Supreme Court has rejected attempts to prosecute parents for second-degree murder based on a failure to act. *State v. Jackson*, 137 Wn.2d 712, 724-25, 976 P.2d 1229 (1999) (affirming reversal of a second-degree murder conviction against a foster mother on an accomplice liability theory for failure to prevent the child's death by abuse at her husband's hands). These cases demonstrate an appropriate reluctance to permit prosecutions for felony murder absent an assault.

This reluctance is apparent in sister jurisdictions as well, which generally only charge women with murder or manslaughter when the newborn has been intentionally assaulted. When a homicide is charged based on the theory that a mother failed to take action, those cases are typically prosecuted as manslaughter, and even then many courts have found such convictions to be unsustainable. *See, e.g., Pugh*, 969 N.E.2d at 510; *Osmus*, 276 P.2d at 220. States simply do not generally seek murder convictions in the absence of physical assaults against a newborn.

**2. This Court should not endorse this prosecutorial overreach.**

Characterizing this sad situation as murder is inappropriate, and emblematic of the troubling trend of using criminal law to address



society's problems and punish all mistakes, regardless of moral blameworthiness.<sup>18</sup> Over-criminalization has ratcheted up punishments, spurred the creation of new crimes that were traditionally civil or regulatory matters, has led to the passage of ambiguous criminal statutes with unclear intent requirements, and has led to reinterpretation of existing law beyond legislative intent.<sup>19</sup>

The over-extended use of criminal law wastes resources, imposes the stigma and other harms of criminal prosecution on too many people, and perpetuates unfair race and class disparities, and thus cautions against extending criminal law into new territory.

In the case at bar, a murder conviction is the most severe of criminal sanctions. Murder at common law required malice and intent to take the life of another person, or a reckless indifference to human life tantamount to intent to kill.<sup>20</sup> Felony murder statutes expanded murder prosecutions to cover killings in which a person intended to engage in

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<sup>18</sup> See generally Douglas Husak, *Overcriminalization: The Limits Of The Criminal Law* 3 (2007); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 712-13 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

<sup>19</sup> See Luna, *supra* note 25, at 716-717; National Association of Criminal Defense Lawyers, *Overcriminalization* (last visited Nov. 30, 2015), [www.nacdl.org/overcrim/](http://www.nacdl.org/overcrim/).

<sup>20</sup> See Joshua Dressler, *Rethinking Criminal Law Homicide Statutes: Giving Juries More Discretion*, 47 Texas Tech L. Rev. 89, 94-97 (2014) (explaining rare circumstances in which unintentional killings are sufficiently culpable to be treated as murder rather than manslaughter).

another serious offense and in so doing caused a death.<sup>21</sup> Even this expansion, however, generally requires that a person act deliberately at least with respect to the predicate crime.

These requirements are not satisfied here. Ms. McMillen took no deliberate actions that caused her infant's death. This case is distinguishable from the one Washington case involving criminal homicide for failure to seek medical care for a child because that case involved an older child (a toddler) and parents who, aware that their toddler had a painful toothache that interfered with his ability to sleep and eat, did not seek medical care sufficiently quickly to prevent the child's death. *State v. Williams*, 4 Wn. App. 908, 484 P.2d 1167 (1971). The parents in *Williams* were aware of their child's medical condition, even if they failed to recognize its seriousness, a situation distinguishable from the one here. Given that the parents in *Williams* were prosecuted for manslaughter rather than murder, it is particularly inappropriate for Ms. McMillen's conviction for felony murder to stand.

#### IV. CONCLUSION

This case is not in the heartland of murder prosecutions, or even that of the felony murder doctrine. To sustain Ms. McMillen's conviction would not only expand the law of felony murder beyond its legislative

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<sup>21</sup> See generally James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1430 (1994).

intent, it would create severe criminal liability for an unclear duty under new law that harms women, fails to protect babies, and sets up a constitutionally-impermissible double standard. Amici therefore urge reversal of Ms. McMillen's conviction.

Respectfully submitted this 3<sup>rd</sup> day of December, 2015.

NATIONAL ADVOCATES FOR PREGNANT  
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*/s/Sara Ainsworth*

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON**

**DIVISION II**

No. 45586-2-II

**State of Washington v. Melissa McMillen**

**DECLARATION OF SERVICE**

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the *Amicus Curiae* Brief of National Advocates for Pregnant Women, American Civil Liberties Union, Legal Voice, and Birth Rights Bar Association via email with consent and submission to the Division II JIS Link system to the following addresses:

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### Comments:

This filing is the Amicus Curiae brief of the National Advocates for Pregnant Women, American Civil Liberties Union of Washington, Legal Voice, and Birth Rights Bar Association

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