CONSTITUTIONAL CHALLENGES TO FETAL HOMICIDE STATUTE
Points of Error 33-39:
Common Background, Preservation and Relief Applicable to these Points

In 2003, the Legislature redefined "individual" as a live human being, "including an unborn child at every stage of gestation from fertilization until birth." TEX. PENAL CODE §1.07(a)(26). Another amendment defined "death" as including, "for an individual who is an unborn child, the failure to be born alive." *Id.* 1.07(a)(49).[264] Under the new law, ending the life of an embryo or fetus at any stage of development is murder. The Legislature exempted the following conduct:

> (1) conduct committed by the mother of the unborn child;
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;
> (3) a lawful medical procedure performed by a physician or other licensed health care provider . . . as defined by Section 160.102, Family Code[265]; or
> (4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

TEX. PENAL CODE § 19.06**.** Appellant's capital murder conviction depended on these unconstitutional changes because he was charged with killing two people (Ms. Sanchez and their not-yet-viable, not yet quickened,[266] two and-a-half-month-old fetus) during the same transaction.[267] § 19.03(a)(7)(A).[268]

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[264] An individual was previously defined as "a human being who has been born and is alive." S.B. No. 319.
[265] Assisted reproduction under this provision includes: intrauterine insemination, donation of eggs, donation of embryos, in vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection. Tex. FAM CODE § 160.102 (2).
[266] Quickening occurs when the movements of the fetus are first observed, ordinarily between the 16th and 18th weeks of pregnancy. *Roe*, 410 U.S. at 132-33.
[267] The constitutional challenges and arguments made herein are distinct from those rejected in *Lawrence v. State*, 240 S.W.3d 912 (Tex.Crim.App. 2007), and *Flores v. State*, 245 S.W.3d 432 (Tex.Crim.App. 2008). In those cases, this Court rejected 14th-Amendment vagueness, due process, and Establishment Clause challenges to this statute. Appellant also raises challenges under these constitutional provisions, but presents new analyses and thus those decisions do not control. In addition, Appellant raises Equal

Preservation. A number of the claims raised herein were preserved by motion in the trial court. *See* 2 CR 377-84 (pre-trial motion raising Eighth Amendment, vagueness, due process, establishment clause, and equal protection challenges); 8 RR 10-13 (argument on motion). Additionally, this challenge to the constitutionality of a statute did not have to be preserved in the trial court in order to be considered on appeal even "if raised for the first time on appeal." *Rabb*, 730 S.W.2d at 752; *see also Holberg*, 38 S.W.at139 n.7.

Relief Pertinent to All Unconstitutional Feticide Statute Points. Each of the Constitutional errors raised herein requires reversal of either Appellant's conviction or death sentence These errors cannot be resolved by this Court rewriting the feticide statute in a constitutional manner because (1) this Court does not have the constitutional power to rewrite the statute to fix any of the numerous constitutional errors described below, including but not limited to rewriting it to exclude non-viable fetuses, non quickened fetuses, embryos, and/or non-implanted fertilized eggs from the definition of individual;[269](2) any such rewriting would violate Mr. Estrada's rights to due process and against Ex Post Facto

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Protection, due process, and 8th-Amendment vagueness challenges to the statute which this Court has never addressed on the merits.

[268] 2 CR 523 (jury charge instructing the jury that if it finds Mr. Estrada intentionally or knowing killed Ms. Sanchez and her "unborn child, . . . you will find the defendant guilty of capital murder . . .").

[269] For example, striking the exemption from criminal liability for pregnant women is within the exclusive domain of the Legislature, not the courts. *Grant v. State*, 505 S.W.2d 279, 282 (Tex.Crim.App. 1974). Texas courts have no authority to "add to or take from such legislative pains, penalties and remedies." *Ex parte Hughes*, 129 S.W.2d 270, 274 (1939). This Court may not sever the unconstitutional portion of a statute where such severance would broaden the statute's scope and violate legislative intent. *Howard v. State*, 617 S.W.2d 191, 192 n. 1 (Tex.Crim.App. 1979). Subjecting pregnant women to prosecution would violate the separation of powers doctrine by broadening the scope of the statute against the explicit legislative intent to exclude them from liability. *Id.* Tex. Const., art. II, § 1 (separation of powers).

punishment;[270]; and (3) in any event, Mr. Estrada is entitled to a new trial under any such reformulated statute to avoid violation of his constitutional rights.[271]

33. Texas Penal Code 1.07(a)(26) Violates the Due Process and Supremacy Clauses by Defining Fertilized Eggs, Embryos, and Fetuses as Persons.

Texas's statutory elevation of fertilized eggs, embryos and fetuses to "individuals" violates both the Due Process and Supremacy Clauses of the United States Constitution, including deeply rooted principles of justice stretching back for centuries. Accordingly, § 1.07(a)(26) is unconstitutional and Appellant's conviction must be reversed. *See* U.S. Const. Amend. XIV.

A state is free to define the elements of a crime as long as its definition does not offend some deeply rooted principle of justice.[272] Section 1.07(a)(26)'s equation of fertilized eggs, embryos, and fetuses with individuals – and their intentional extinguishment with murder – violates the Due Process Clause because "it offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[273]

By treating as murder the destruction of fertilized eggs, embryos, and fetuses neither quickened nor viable, Texas's statute flies in the face of centuries

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[270] *See* U.S. Const. art. I, § 9, cl. 3; amend. XIV; *Bouie v. City of Columbia*, 378 U.S. 347, 354, (1964) (holding that due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law existing prior to the conduct in issue).

[271] U.S. Const. amends. V, VI, VIII, XIV. *See, e.g.*, *Apprendi*, 530 U.S. at 476 (requiring, under 14th amend., that all elements of an offense to be submitted to a jury, and proven beyond a reasonable doubt).

[272] *See Speiser v. Randall,* 357 U.S. 513, 523 (1958). *See also Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975) (finding Due Process violation where state statute violated important doctrine stretching back to the "inception of the common law of homicide").

[273] *Speiser*, 357 U.S. at 523. *See also McMillan v. Pennsylvania*, 477 U.S. 79, 90 (1986) (applying test asking how law had "historically been treated 'in the Anglo-American legal tradition'"); *Mullaney*, 421 U.S. at 696 (looking to the "inception of the common law of homicide").

of common law, including the law in force at the time of our Nation's founding and when the Fourteenth Amendment was ratified. Never in this Nation's common law history did the killing of a non-viable, non-quickened fetus constitute *any* crime, much less murder.[274] Lord Coke's "born alive" rule became the common law for **quickened** fetuses, and states:

> "If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive."[275]

Under this rule, intentional acts against a quickened fetus resulting in the death of a child born alive constitute murder, but acts resulting in a stillbirth constitute a lesser crime.[276]

The born alive rule was applied in the U.S. as early as 1791,[277] and was almost universally applied until recent legislative amendments.[278] Meanwhile in the nineteenth century, abortion laws proliferated, but the abortion of non-quickened fetuses was punished leniently, if at all. *Roe*, 410 U.S. at 138-39. In the latter part of the 19th century, abortion statutes began

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[274] *Keeler v. Superior Court*, 470 P.2d 617, 620 nn.6, 7 (Ca. 1970) (exhaustively tracing development of common law and finding history of crimes **only** for quickened fetuses). *See also Roe*, 410 U.S. at 132-33 (same with respect to abortion of non-quickened fetus), 136 n.27 (collecting cases establishing this point).
[275] *Comm. v. Morris,*142 S.W.3d 654, 656-57 (Ky. 2004) (quoting Sir Edward Coke, 3d Inst. 50-51 (1644)).
[276] Blackstone stated that the killing of a quickened child (not born alive) was a "heinous misdemeanor." *Keeler*, 470 P.2d at 620 n.6 (quoting 1 Blackstone, Commentaries 129-30 (1765)).
[277] Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U.L.REV. 563, 598 (1987) (citing *Comm. v. McKee*, 1 Add. 1 (Pa. 1791)). This ancient rule has been followed in Texas for *at least* 127 years. *See Wallace v. State*, 10 Tex.App. 255 (Tex.Ct.App. 1881). *See also Dietrich v. Inhabitants of Northampton,* 138 Mass. 14 (1884) (Holmes, J.) (similar result in civil case).
[278] *See Comm. v. Booth*, 766 A.2d 843, 849 (Pa. 2001) (collecting cases); *People v. Guthrie*, 293 N.W.2d 775, 778, n.1 (Mich. App. 1980) (finding "[n]o appellate court of the United States or England has ever, as a matter of common law definition, treated a fetus as a person for the purposes of criminal law").

to punish abortion more severely and the distinction between quickened and non-quickened fetuses vanished. *Id.* at 139. But never was the abortion of a fetus, whether or not quickened, ever treated as murder.[279]

More recently, several states abandoned the "born alive" rule, because medical science can now determine "the viability, health, and cause of a fetus's death . . ."[280] Under these state laws, viable fetuses are considered persons. Texas's statute, however, would violate due process even if viability had always been the touchstone. Texas law extends murder liability for the killing of the unborn back to before viability, before quickening, all the way to fertilization. It runs roughshod over centuries of deeply-rooted criminal-law principles and breaks well-established foundations of Anglo American law. Our Nation and its forbearers have only leniently punished for the killing of an embryo or a non-quickened, non-viable fetuses, if at all. It has **never** treated such killings as murder until Texas and a minority of state legislatures recently changed their long-standing laws.[281]

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[279] *Keeler*, 470 P.2d at 621-23 (recounting history of these laws); *Roe*, 410 U.S. at 139 (noting that the laws became *most* severe in the 1950's), 117-18 n.1 (noting Texas statute was similar to that "in a majority of the states," and setting forth punishment for abortion as 2-5 years, and double that for non-consensual abortion, and 5 years to life for the killing of an infant during childbirth).

[280] *Morris*, 142 S.W.3d at 659 (citing Note, *Hughes v. State: The "Born Alive" Rule Dies a Timely Death*, 30 Tulsa L.J. 539, 543 (1995); *Hughes v. State*, 868 P.2d 730, 732 (Okla.Crim.App.1994)).

[281] Ala. Code §§ 13A-6-1, 13A-6-2 (2006 statute); Ariz. Rev. Stat. Ann. § 13-1105 (C)(2005 statute); Ark. Code Ann. §§ 5-10-101, 5-1-102 (13)(B)(i)(a) (1999 statute); Idaho Code § 18-4001 (2002 statute); Kan. Stat. Ann. §§ 21-3401, 21-3452(b)(2) (2007 statute); Minn. Stat. Ann. §§ 609.266(a), 609.2661) (1986 statute); Miss. Code Ann. §§ 97-3-37(1), 97-3-19 (2004 statute); Mo. Ann. Stat. §§ 1.205 (3), 565.020 (2006 statute); N.D. Cent. Code §§ 12.1-17.1-01, 12.1-17.1-02 (punishing killing of embryos or fetuses equally with murder); Ohio Rev. Code Ann. §§ 2903.01, 2903.09(A) (1996 Statute); 21 Okl.St.Ann. §§ 691, 701.7, 63 Okla. Stat. Ann. § 1-730(2) (2006 statute); South Dakota C.L .§§ 22-16-4, 22-1-2 (31) (2005 statute); Utah Code § 76-5-201 (2002 statute); W. Va. Code §§ 61-2-1, 61-2-30 (2005 statute); Wis. Stat. Ann. §§ 939.75(1), 940.01(1)(b) (1997). 34 states have no such laws.

Texas's ability to protect "human life" is not in question in this appeal.[282] This appeal involves the unconstitutional elevation of embryos and fetuses to individuals, allowing convictions for **murder** when their "deaths" are knowingly or intentionally caused. Protecting human life by criminally punishing a third party for killing an embryo or fetus is one thing; ratcheting the "crime" up to murder is quite another.[283] Such punishment violates due process, which does not permit Texas's wholesale change to our Nation's foundational law. Because 1.07(a)(26) violates the Due Process Clause, Mr. Estrada's conviction under that statute must be reversed.

Section 1.07(a)(26)'s equation of fertilized eggs, embryos, and fetuses with individuals – and their intentional extinguishment with murder – also violates the Supremacy Clause of the U.S. Constitution.[284] In *Roe*, 410 U.S. at 156-57, the State of Texas argued that a "fetus is 'person' within the language and meaning of the Fourteenth Amendment." The Supreme Court roundly rejected that claim. *Id.* at 156 ("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."). The Court surveyed the multiple uses of person in the Constitution and found that "the use of the word is such that it has application **only** postnatally." *Id.* at 157 (emphasis

[282] *Lawrence*, 240 S.W.3d at 917 n.21 (quoting *Gonzales v. Carhart*, 555 U.S. 124, 127 S. Ct. 1619, 1626 (2007)).
[283] *See Mullaney*, 421 U.S. at 697-98 (noting that "criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . . the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly").
[284] The U.S. Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution **or Laws of any State** to the Contrary notwithstanding. *See* U.S. Const. art. VI, cl. 2 (emphasis added).

added). It also reasoned that "throughout the major portion of the 19th century [when the 14th Amendment was ratified] prevailing legal abortion practices were far freer than they are today," establishing that the Constitution's framers did not mean for "persons" to include embryos or fetuses. *Id.* at 158. Finally, the Court addressed the inherent inconsistencies between Texas's claim that an embryo or fetus is a person and a number of its statutory provisions. The Court pointed out that Texas did not treat the pregnant woman as a principal or accomplice to illegal abortions and asked: "If the fetus is a person, why is the woman not a principal or an accomplice?" *Id.* at 157 n.54. Noting that Texas law allowed abortions to save the woman's life, the Court asked, "[I]f the fetus is a person who is not to be deprived of due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear out of line with the Amendment's command?" *Id.* at 157 n.54. The Court also asked how abortion and murder penalties could be different if a fetus were a person. *Id.*

Roe controls here.[285] The Texas legislature has no authority to pass laws directly at odds with the Supreme Court's constitutional ruling in *Roe*

[285] *Lawrence v. State* does not. In *Lawrence*, this Court stated, "in the absence of a due process interest triggering the constitutional protections of [privacy and liberty women enjoy under] *Roe*, the Legislature is free to protect the lives of those whom it considers to be human beings." *Id. See also id.* at 918 n.24 (collecting similar decisions). 240 S.W.3d at 917-98. But, without the benefit of the arguments presented here, the *Lawrence* decision did not recognize that the Supreme Court in *Roe* decided that an embryo or *fetus was not a person*, irrespective of the relationship between the embryo or fetus and the rights of the woman carrying it. *Roe*, 410 U.S. at 157-59. In addition, the *Lawrence* Court ignored that in *Roe*, the Court explicitly observed that if Texas's fetal personhood argument were accepted, it would not only impact abortion, but would also call into question the State's homicide law. *Roe*, 410 U.S. at 157 n.54.

that an embryo or fetus is not a person.[286]

On the basis of either the U.S. Constitution's Supremacy Clause or Due Process Clause, *supra*, Section 1.07(a)(26) is unconstitutional.

34. Texas Penal Code § 1.07(a)(26) Violates the Establishment Clause by Defining Life as Beginning at Fertilization.

By defining life as including "an unborn child at every stage of gestation from fertilization until birth," the Texas legislature defined life in a manner that can only be justified on religious grounds and thus violates the Establishment Clause of the First Amendment to the United States Constitution and the Freedom of Worship Clause of the Texas Constitution. U.S. Const. amend. I; Tex. Const. art. 1, § 6. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set out the following three-pronged test to determine whether a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13. Section 1.07(a)(26)'s definition of "alive" fails this test and violates the Establishment Clause.

[286] Contrary to any attempts to cabin *Roe*'s decision on personhood to the context of a state's interest in human life in relation to women's liberty interests, courts have applied this aspect of the *Roe* holding in other contexts. *See, e.g.*, *Walker v. Firelands Cmty. Hosp.*, 869 N.E.2d 66, 73 (Ohio Ct. App. 2007) (finding that the trial court, as a matter of law, properly referred to *Roe* in determining the meaning of "person" in state statute forbidding unlawful possession of the body of a deceased person); *In re Guardianship of J.D.S.*, 864 So.2d 534 (Fla.Dist.Ct.App. 2004) (finding fetus and that "no Florida statute or case law that has determined a fetus to be a person," and citing *Roe* to show the "opposite is true")). *Matter of D.K.*, 497 A.2d 1298, 1302 (N.J.Super.Ct.Ch.Div. 1985) (similar to *In re J.D.S.*); *Roe v. Casey*, 464 F.Supp. 483, 487 (E.D.Pa. 1978) (same); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App.1st Dist. 1997) (same). *See also Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 312 n.9 (11th Cir. 1989) (holding that an "unborn fetus is not a 'person' or a 'citizen'" for purposes of civil rights law).

Section 1.07(a)(26) lacks a secular purpose and thus fails the *Lemon* test's first prong. The clearest signal that this statute is driven by a religious purpose is that it fixes the beginning of life at fertilization.[287] Thus, the law contrasts sharply with the medical consensus that pregnancy begins days later, at implantation.[288]

> [T]he American Medical Association (AMA) defines pregnancy as beginning with implantation rather than fertilization. The American College of Obstetricians and Gynecologists' Committee on Ethics similarly defines pregnancy as beginning with implantation, not fertilization. Indeed, the Committee defines pregnancy as occurring in the implantation stage because the embryo at the time of fertilization through implantation lacks a clear "biologic individuality necessary for a concrete potentiality to become a human person, even though it does possess a unique human genotype."[289]

Texas's statute is consonant with the beliefs of some but by no means all Christian faiths. Justice John Paul Stevens declared a Missouri statute in which the legislature found that life begins at conception unconstitutional as "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths" that "serves no identifiable secular purpose."[290] As Justice Stevens demonstrated in *Webster*, there can be no secular reason for identifying fertilization rather than implantation or viability as the beginning of life; only

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[287] *See also* Proposed Amendment 1 to SB 319 (May 28, 2003), available at http://www.legis.state.tx.us/tlodocs/78R/ amendments/ html/ SB00319H31.HTM (proposing to amend statute to use viability rather than fertility); Rep. Farrar, House Session, May 28, 2003 (presenting the failed amendment and noting that SB 319 "is about legislating when life begins and when personhood begins. . . . We would essentially be adopting one religious position as the law for the rest of the state.").

[288] Mr. Estrada's conviction cannot be affirmed under a hypothetical statute deeming a person a fertilized and implanted egg. *See* note 269, *supra*.

[289] Nancy K. Kubasek et. al, *The Questionable Constitutionality of Conscientious Objection Clauses for Pharmacists*, 16 J.L. & Pol'y 225, 246-47 (2007); *see also Webster v. Reproduct. Health Serv.*, 492 U.S. 490, 563 (1989) (Stevens, J., concurring in part and dissenting in part) ("[S]tandard medical texts equate 'conception' with implantation in the uterus, occurring about six days after fertilization.").

[290] *Webster,* 492 U.S. at 566-67 (1989) (Stevens, J., concurring in part and dissenting in part); *see also*, Kubasek et al., at 247-48 (noting that many Christian faiths preach that life begins at conception, a belief other faiths do not share); Rep. Farrar, Senate Session, May 28, 2003 (noting that right to life organizations and the Christian Coalition made the Texas bill at issue their "top priority").

certain religious groups, and not the medical community, believe that life begins as early as fertilization. *Webster*, 492 U.S. at 563-71. Every single time this law, with its declaration that life begins at fertilization, is applied the state is furthering a religious purpose and violating the Establishment Clause.

Because section 1.07(a)(26) clearly lacks a secular purpose, it is a per se violation of the Establishment Clause.[291] Additionally, the statute fails the other two prongs of the *Lemon* test. It obviously has the effect of advancing religion. As described above, the belief that life begins at fertilization is the belief of only some faiths. The question of when life begins is a difficult and controversial issue, and by enshrining the creed of some faiths, the statute advances the religious agenda of those groups and becomes excessively entangled with those religious groups. Especially given that this law has no secular purpose, the legislature's decision to adopt the belief of some faiths as law can only be seen as the state advancing those religions and their views to the detriment of all others. Every time this law is applied in the criminal system it enshrines the belief of only some faiths, highlighting the state's adoption of an entirely religious position.

35. Texas Penal Code § 1.07(a)(26) is an Arbitrary Classification and Violates the Equal Protection Clause.

Texas Penal Code § 1.07(a)(26) violates the Equal Protection Clause. *See* U.S. Const. amend. XIV. It constitutes an irrational exercise of governmental power because it is not "necessary to the accomplishment of some permissible

[291] *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.").

state objective." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). *See Cleveland B. of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974) (same). Allowing criminal punishment for the "killing" of a non-implanted fertilized egg that medical authorities agree is not "human life," *see* note 289, and accompanying text, *supra*, this criminal statute's classification fails to meet Texas's interest in protecting human life. The statute impermissibly reflects the concerns of a handful of religions, instead of a legitimate state interest. *Oyler v. Boles*, 368 U.S. 448, 453 (1962) (forbidding prosecution based on religion). Reversal is required.

36. Texas Penal Code § 1.07(a)(26) permits the arbitrary imposition of the death penalty and violates the Eighth Amendment.

The Cruel and Unusual Punishments Clause of the United States Constitution prohibits punishments that are imposed arbitrarily. U.S. Const. amend. VIII; *Kennedy*, 128 S. Ct. at 2658. Section 1.07(a)(26) violates this fundamental precept because it allows the death penalty based on the arbitrary classification discussed in the previous point of error.

In *Zant*, 462 U.S. at 885, the Court held that due process prohibits states from designating as aggravating "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . race." *Zant* tracks the general constitutional rule that, where fundamental rights are at stake, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155. By protecting what some religions consider human life but what medical authorities agree is not, Texas's statute is drawn too broadly

stated in the previous point, which demonstrate that Texas's stated interest in enacting the exemption for pregnant women is adequately protected by the statute's other exemptions. The statute must fall under the Texas Constitution.

39. Texas Penal Code § 1.07(a)(26) is unconstitutionally void for vagueness under the 14th and 8th Amendments to the U.S. Constitution.

8th Amendment Vagueness: When the Texas legislature redefined "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth," it amended the capital murder statute which contains the word "individual" and "person" a number of times. *See, e.g.,* TEX. PENAL CODE § 19.03(a)(7)-(8). This redefinition was significant, for it allowed a capital murder prosecution in this case based on the killing of two people in a single transaction, when one of those "persons" was an embryo or fetus. TEX. PENAL CODE § 19.03(a)(7)(A). This Court has held that, under this statute, killing two people in a single transaction sufficiently narrows the class of persons subject to the death penalty, as required by *Furman*, 408 U.S. at 310. *See Vuong v. State*, 830 S.W.2d 929, 941-42 (Tex.Crim.App.1992) (citing *Jurek*, 428 U.S. at 276). As such this "eligibility" factor is subject to Eighth Amendment scrutiny. *See*, *e.g.*, *Brown v. Sanders*. 546 U.S. 212, 217 (2006).

The Supreme Court has distinguished between vagueness under the Due Process Clause and the Eighth Amendment. *See Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). The former concerns "lack of notice," and "may be overcome in any specific case where reasonable persons would know that their conduct is at

risk." *Id.* at 361. The latter involves a failure to "inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman.*" *Id.* Crucially, Eighth-Amendment analysis focuses on the vagueness of the "narrowing principle to apply to [the] facts," rather than an **application of the facts at hand to the law**. *Id.* at 363. Thus, in *Cartwright*, and *Godfrey v. Georgia*, 446 U.S. 420 (1980) (on which it relied), the Court rejected prosecutorial arguments that "a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty."[300]

Texas's capital feticide statute runs afoul of *Cartwright,* 486 U.S. at 361-62, because it fails to guide juries' discretion as required by the Eighth Amendment. The statute defines "a human being [as one] who is alive, including an unborn child at every stage of gestation from fertilization until birth." TEX. PENAL CODE § 1.07(a)(26). A defendant who "intentionally or knowingly causes" a "death" of such an embryo or fetus commits murder -- and capital murder if that "person" is the second one knowingly or intentionally killed in a single transaction. TEXAS PENAL CODE §§ 19.02 (b)(1), 19.03 (a)(7)(A).

This statute is unconstitutionally vague because it provides the jury insufficient guidance concerning the knowing and intentional killing of embryos

[300] *Cartwright*, 486 U.S. at 363. *See also id.* at 361 (rejecting argument that statute can be saved "if there are circumstances that any reasonable person would recognize as covered by the statute").

or pre-viable fetuses.[301] The redefinition of individual allows a jury to impose a death sentence even where neither the defendant nor the woman knew that she was pregnant and even if the defendant did not know his actions would kill the embryo or fetus.[302] *See Lawrence*, 240 S.W.3d at 919 (Johnson, J., concurring) (noting constitutional concerns created by this problem).

Furthermore, before viability there is no way of determining whether the embryo or fetus will develop to a stage at which it could live independently outside the woman. Thus, a jury's decision whether the accused "caused" the death of such an embryo or non-viable fetus necessarily lacks the concrete guidance the Eighth Amendment requires. As in Appellant's case, before viability, the state cannot show that the pregnancy that was terminated would or could have resulted in a fetus capable of life independent of the woman. Here, the fetus was still dependent on the pregnant woman and incapable of any life outside her body. 21 RR 17; 20 RR 121-22. Whether an accused "caused" the "death" of an embryo or non-viable fetus that may or may not have matured to a living person is a matter of philosophy and personal opinion, and proves far too vague to satisfy the rigorous demands of the Eighth Amendment.[303]

Additionally, a lay person will not always know that his or her conduct is

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[301] Although not required under 8th Amendment vagueness, Appellant's facts fall under the impermissibly vague part of the statute. 21 RR 17 (medical evidence that fetus was not viable); 20 RR 121-22 (same).
[302] The statute also states that "death" includes, "for an individual who is an unborn child, the failure to be born alive." TEX. PENAL CODE § 1.07(a)(49). This definition of death does not in any way eliminate the vagueness of the statutory scheme. In any event, however, the jury was not provided with it. 22 RR 5-6. *See also* Point 18, *supra*. Eighth Amendment vagueness analysis concerns the "guidance" the jury actually received in the charge, not the statute at issue. *Maynard*, 486 U.S. at 363.
[303] *See, e.g.*, *Evans v. People*, 49 N.Y. 86 (1872) ("[D]eath cannot be caused when there is no life.").

going to harm a fetus or terminate a pregnancy, creating an additional dearth of guidance for a capital jury. Just as a defendant may not know that a woman is pregnant, he or she may not know that certain conduct will harm the embryo or fetus. *See Lawrence*, 240 S.W.3d at 919 (Johnson, J., concurring). The state acknowledged this fact at Appellant's trial. In order to explain to the lay jury, the state required the expert testimony of the medical examiner and the victim's physician to prove both that the fetus was alive at the time of the incident and that Appellant's alleged actions were the cause of the death of the fetus. *See* 20 RR 68, 116-121; 21 RR 15-17. An expert can testify only if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. The fact that experts were allowed to testify at Appellant's trial regarding whether the fetus was alive and whether the Appellant's alleged actions caused its death shows that these matters are outside the knowledge of normal lay people.[304] The admission of expert testimony on this point further proves that jurors, and other "ordinary people," cannot know what conduct would knowingly or intentionally cause the death of an embryo or fetus.

Thus, the statute is unconstitutionally vague under the Eighth Amendment.

14th-Amendment Vagueness: The feticide statute is also void for vagueness in violation of the Fourteenth Amendment of the U.S. Constitution. "The void-for-vagueness doctrine requires that a penal statute define the criminal

[304] *See K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("Expert testimony assists the trier-of-fact when the expert's knowledge and experience on a relevant issue are beyond that of the average juror and the testimony helps the trier-of-fact understand the evidence or determine a fact issue.").

offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement."[305] A successful claimant must show that the law is vague in all applications or as to his conduct. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

Texas defines embryos and fetuses as "persons" in direct contravention of the Supreme Court's decision in *Roe*, 410 U.S. at 157. The ambiguity in the law created by Texas's statute would cause a person of ordinary intelligence to wonder whether Texas's statute or the United States Constitution, as interpreted by the Supreme Court, controls.[306] In addition, Appellant incorporates by reference here the arguments in Point 19, *supra*, explaining why a lay person would not necessarily know what conduct would knowingly or intentionally cause the death of an embryo or pre-viable fetus. For each of those reasons, Appellant could not know what conduct would be prohibited by the statute. Reversal is required.

OTHER CONSTITUTIONAL ERROR

40. Appellant Was Denied the Effective Assistance of Counsel.

Mr. Estrada was entitled to the effective assistance of counsel at trial. *Strickland*, 466 U.S. at 687. U.S. Const. amends. VI, XIV. Where a preponderance of the evidence in the record demonstrates that there "is … no

[305] *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex.Crim.App. 2006) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

[306] Pertinent court decisions impact heavily on an ordinary citizen's reasonable view of the law. *See United States v. Lanier*, 520 U.S. 259, 271 (1997) (holding that while "general statements of the law are not inherently incapable of giving fair and clear warning, [] in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").