IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 00-6594

MALISSA ANN CRAWLEY,
APPELLANT,

v.

WILLIAM D. CATOE, Director-Designate, Department of Corrections, State of South Carolina; **CHARLES M. CONDON**, Attorney General of the State of South Carolina; and **STEPHEN K. BENJAMIN**, South Carolina Department of Probation, Parole and Pardon Services,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

Far from demonstrating that the district court correctly denied Appellant Malissa Ann Crawley's petition for habeas relief, Appellees Catoe et al. (the State) have committed a series of legal errors in interpreting the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and in applying the notice and vagueness doctrines under the Fourteenth Amendment's Due Process Clause. The State's three procedural arguments for denying habeas relief—timeliness, procedural default, and waiver—are unavailing. As set forth below, the plain language of 28 U.S.C. § 2244(d)(2) requires tolling of the one-year habeas limitations period while a properly filed State post-conviction relief application is pending in any forum, including while it is pending before the United States Supreme Court on certiorari review following the state supreme court's reversal of state habeas relief. Second, when a petitioner has raised federal constitutional claims at every step of the state habeas proceedings, her claims are not procedurally defaulted merely because a state court did not discuss those claims. Finally, it is well settled that a guilty plea does not waive constitutional challenges to the state's authority to bring the charges at all.

The State likewise misstates the law governing due process notice and vagueness and distorts the substance of Ms. Crawley's constitutional claims. If adopted, the State's submissions would render state courts' retroactive application

of unforeseeably enlarged criminal statutes unreviewable by federal courts and would eviscerate the requirement that penal laws clearly delineate the contours of prohibited conduct. For these reasons, the judgment of the district court should be reversed, and Ms. Crawley's petition should be granted.

I. THIS COURT SHOULD NOT ADOPT *RHINE V. BOONE'*S MISINTERPRETATION OF THE FEDERAL HABEAS TOLLING PROVISION.

The State's argument for affirming the district court's ruling that Ms. Crawley's petition was untimely relies on faulty legal reasoning and scant, unpersuasive authority from other jurisdictions.[1] The State does not explain why the plain language of § 2244(d)(2) should be disregarded in order to impose on the statute a limiting construction confining the tolling provision to proceedings pending in state court. Indeed, the State can only achieve this limiting construction by inserting into the tolling provision words and concepts concerning forum, exhaustion, and finality borrowed from other statutes and other aspects of habeas jurisprudence. As detailed in Ms. Crawley's opening brief, the plain language of § 2244(d)(2) includes in the tolling period the entire period of time during which a

[1] In an unintended error, the State claims that Ms. Crawley was required to file her federal habeas petition by January 8, 1998, the *same day* the South Carolina Supreme Court denied her motion for rehearing. *See* Brief of Respondent at 8 ("Br. Resp."). This Reply Brief addresses the argument that Ms. Crawley's petition had to be filed by January 8, 1999.

State post-conviction application is pending, including when it is pending on a petition for certiorari before the United States Supreme Court.

Of the cases cited in support of the State's argument, only *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 808 (2000)—a pro se case decided without the benefit of full briefing or argument—addresses the issue raised here. As Ms. Crawley has shown in her opening brief, *see* Brief for Appellant at 23-29 ("Br. Appellant"), *Rhine* misinterprets the plain language of the tolling statute. The *Rhine* court reads into the language of § 2244(d)(2) three concepts Congress did not include in the statute. First, *Rhine* reads a state court forum requirement into language denoting a state remedy only. *See* Br. Appellant at 17-19, 23-24. Second, *Rhine* reads exhaustion principles into the tolling provision, even though the provision does not mention exhaustion and even though exhaustion is not relevant to statute of limitations analysis for habeas petitions. *See* Br. Appellant at 27-28. Third, *Rhine* inserts a finality requirement into § 2244(d)(2), even though Congress omitted all references to finality in the tolling provision while including the word "final" in other habeas provisions. *See* Br. Appellant at 26-27. This Court should reject the inappropriate addition of these limitations into a Congressional statute. *See McKinney v. Board of Trustees of Maryland Community College*, 955 F.2d 924, 927 (4th Cir. 1992) (stating that it is

not "appropriate for a court to add a word to a statute"); *see also Commissioner v. Lundy*, 516 U.S. 235, 252 (1996) (stating that court cannot rewrite a clear statute).

The State also relies on *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1834 (2000), and *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000), which it claims "squarely addressed" the question presented here. *See* Brief of Respondent at 15 ("Br. Resp."). However, a close reading of those cases reveals that they are inapposite. Both cases addressed whether to toll the limitations period for the ninety days when a petition for certiorari *could have been but was not* filed. In both cases, the petitioner did not actually file a petition for certiorari and thus had nothing "pending" under § 2244(d)(2). Unlike in *Ott* and *Coates*, Ms. Crawley's petition for State post-conviction relief was continually "pending" in successive forums, including through a petition for certiorari in the United States Supreme Court. As this Court has recognized in a different habeas context, this essential difference distinguishes Ms. Crawley's case from those cases in which no petition for certiorari was actually filed. *See United States v. Torres*, 211 F.3d 836, 842 (4th Cir. 2000) (in a case interpreting § 2255, differentiating cases from other circuits based on whether the petitioner actually filed a petition for certiorari). Thus, *Ott* and *Coates* provide this Court with no guidance.[2]

[2] The State also cites four district court cases, two of which are unpublished. *See* Br. Resp. at 11-12 (citing *Ramos v. Walker*, 88 F. Supp.2d 233 (S.D.N.Y. 2000); *Neloms v. McLemore*, 2000 Westlaw 654942 (E.D. Mich. May 22, 2000); *Young v. Head*, 90 F. Supp.2d 1370 (N.D.

The State similarly relies upon *Taylor v. Lee*, 186 F.3d 557 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1262 (2000), in which this Court held a federal habeas petition to be timely filed. *Taylor* rejected the "gap" theory of tolling and refused to reach the issue presented in Ms. Crawley's case, deeming the petition before it timely filed regardless of whether the period of certiorari review was also tolled.[3] *See id.* at 558 n.1. The Court explicitly refused to reach the point of law for which the State cites it. *See* Br. Resp. at 20. In light of the Court's clear statement reserving this question for another day, reading any relevance for Ms. Crawley's case into the Court's language about the "highest state court," as the State does, *see id.*, would be counter to the Court's express acknowledgment that it did not reach the issue. *Taylor* thus does not support the State's argument.

The State also places substantial reliance on *Moseley v. Freeman*, 977 F. Supp. 733 (M.D.N.C. 1997), a district court case it claims addressed Ms. Crawley's "precise issue," *see* Br. Resp. at 12, for the proposition that the Supreme Court "is not part of a state court."[4] *See id.* at 11. *Moseley* did not involve the

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Ga. 2000); *Belle v. Varner*, 2000 Westlaw 274011 (E.D. Pa. Mar. 10, 2000)). Like the Fifth and Eleventh Circuit cases, none of these district court cases involved a properly filed and pending petition for certiorari. Each instead involved the question, not presented in Ms. Crawley's case, of tolling the period during which the petitioner *could have filed but did not file* a petition for certiorari.

[3] Thus, the State's claim that "*Taylor v. Lee* did not extend the tolling period to the ninety days in which a state post-conviction relief applicant could seek certiorari from the United States Supreme Court," *see* Br. Resp. at 20, is misleading since *Taylor* did not reach this question.

[4] The State claims that, in the case of *Whitner v. Moore*, C.A. No. 2:98-3564-23AJ (D.S.C.), a case containing the identical statute of limitations issue, the resolution of the question

application of § 2244(d)(2) to a properly filed State post-conviction application pending on a petition for certiorari. Instead, *Moseley* concerned the completely different question of whether the period of actual or potential U.S. Supreme Court certiorari review must expire before counsel is appointed for death penalty litigants under 21 U.S.C. § 848(q)(4)(B). To make this determination, the district court considered at what point the defendant had a right to file a § 2254 petition and would accordingly need the assistance of counsel. *Id.* at 734. That determination hinged on whether the petitioner had exhausted his state court remedies, a matter unrelated to AEDPA's statute of limitations. *See* Br. Appellant at 27-29. *Moseley* concluded, for "prudential" reasons, that a capital prisoner should not have to wait until the expiration of time for Supreme Court review before receiving appointed counsel for his habeas petition. 977 F. Supp. at 735.

Because it addressed a different statute and special considerations for capital cases, *Moseley*'s reasoning does not apply and should not be extended beyond the context of death penalty cases and the question of appointment of counsel for those cases. Unlike the district court in the present case, the district court in *Moseley* did

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of whether *Moseley* is relevant to the § 2244(d)(2) determination is "still pending in the District Court." *See* Br. Resp. at 14 n.8. This statement is incorrect. District Judge Duffy ruled against the State on the statute of limitations issue in *Whitner* almost one year ago and reassigned the case to the magistrate for a recommendation on the merits. *See Whitner v. Moore*, C.A. No. 2:98-3564-23AJ (D.S.C. Sept. 24, 1999) (Opinion of District Judge Duffy) (attached to this Brief).

not construe the provisions of AEDPA narrowly in order to foreclose the possibility of substantive federal review of a prisoner's claims. Rather, it interpreted § 848(q)(4)(B) to permit the appointment of counsel for a death penalty litigant at the earliest possible time. If any relevant principle can be gleaned from *Moseley*, it is that courts should not read AEDPA to create harsh rules that unduly restrict access to federal review of constitutional claims.

Nowhere does the State refute Ms. Crawley's analysis of the plain language of § 2244(d)(2), *see* Br. Appellant at 16-20, or offer an alternative analysis of the language of that provision. Rather, the State points to the markedly contrasting language in 28 U.S.C. § 2263(b)(2), the tolling provision for death penalty cases in "opt-in" states. Despite the State's protests that this contrasting tolling provision sheds no light on Congress's intent in enacting the general habeas tolling provision in § 2244(d)(2), *see* Br. Resp. at 21-22, the comparison of the two provisions is valid and instructive. Section 2263(b)(2) uses language describing a forum ("*State court* disposition of [the] petition"), and § 2244(d)(2) uses language describing a remedy ("*application* for State post-conviction . . . review") (emphases added). That comparison, more completely set forth in Ms. Crawley's opening brief, *see* Br. Appellant at 20-21, indicates that Congress intended to create a shorter tolling provision in death penalty cases in opt-in states than it created with the general habeas tolling provision, which is not limited to proceedings in State court. The

State seems to argue that because the language in the death penalty tolling provision in § 2263(b)(2) differs meaningfully from the language in the death penalty statute of limitations in 28 U.S.C. § 2263(b)(1),[5] a court could not also draw a helpful inference from the differences between the death penalty tolling provision in § 2263(b)(2) and the general tolling provision in § 2244(d)(2) upon which Ms. Crawley relies. *See* Br. Appellant at 20-21. However, language from one section of a statute can certainly be instructively compared to more than one other section, especially when there is an obvious and natural comparison between § 2263(b)(2) and § 2244(d)(2) because they both address the topic of tolling. *See Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (finding relevance in comparison of different provisions of AEDPA).[6]

Ultimately, the State's brief fails to answer the question left unanswered by the unpersuasive reasoning in *Rhine*: if the state habeas action pending in the U.S. Supreme Court on certiorari review is no longer an "application for State post-

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[5] The State does not set forth in its brief what this meaningful difference is. Presumably, the State believes the difference is meaningful to show that the limitations period in § 2263(b)(1) initially runs from the date of denial of certiorari but that the certiorari process is not included in the tolling period in § 2263(b)(2).

[6] The State also claims that the legislative history cited by Ms. Crawley does not have any bearing on this case. *See* Br. Resp. at 21. However, Senator Orrin Hatch's statement indicates that one of the steps that Congress anticipated would "take place" before federal habeas review would be "a second petition in the U.S. Supreme Court [from the denial of state post-conviction relief]." *See* Br. Appellant at 22. There is no indication anywhere in the legislative history that Congress intended to sever this stage of review from the tolling period.

conviction or other collateral review," then what is it?[7] Plainly, it is still the same "application" as it awaits disposition by each court empowered to review it. This reading is faithful to the plain language of § 2244(d)(2), which denotes a remedy, not a forum, and does not improperly import into the tolling provision extraneous concepts of exhaustion or finality. Congress certainly could have written § 2244(d)(2) to include a forum requirement (as it did in the opt-in tolling provision, *see* 28 U.S.C. § 2263(b)(2)), the concept of exhaustion (as it did in the federal habeas prerequisites, *see* 28 U.S.C. § 2254(b)(1)(A)), or the concept of finality (as it did in the general limitations provision, *see* 28 U.S.C. § 2244(d)(1)); but, a plain reading of § 2244(d)(2) shows that it did not. None of the State's arguments proves otherwise.[8]

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[7] The State similarly fails to address the scenarios set forth in Ms. Crawley's opening brief illustrating the untoward consequences of the State's construction of the tolling provision. *See* Br. Appellant at 25 n.17.

[8] The State also contends that having the U.S. Supreme Court and a federal district court consider a prisoner's case at the same time is not incompatible with a streamlined habeas process because the district court could simply suspend its consideration of the case if the Supreme Court grants certiorari. *See* Br. Resp. at 22-23. However, this suggestion does not satisfactorily respond to the problem. Under the district court's interpretation of § 2244(d)(2), a state prisoner who had filed her State post-conviction relief petition 360 days after the conclusion of direct review would have five days remaining to file her federal habeas petition after the state supreme court denied her State petition. Provided that her State petition raises federal issues, the prisoner would still have the right to file for certiorari review in the United States Supreme Court, something the prisoner would typically have 90 days to complete. If the district court considers the prisoner's petition promptly and the Supreme Court considers the petition for certiorari on its normal timetable of two or three months, the two courts would be reviewing the prisoner's claim at the same time, and the district court would not know whether to stay its proceedings.

Even more troubling, if the district court denies the petition very promptly, even before the 90 day period expires for filing the certiorari petition, but then the Supreme Court grants certiorari, the prisoner's State post-conviction relief petition would still be pending in the

Because Ms. Crawley's "application for State post-conviction . . . review" was continuously pending until the United States Supreme Court denied her petition for certiorari on May 26, 1998, her first and only federal habeas petition, filed on February 26, 1999, was timely.

II. THE STATE'S ARGUMENTS THAT MS. CRAWLEY CANNOT RAISE HER FEDERAL CONSTITUTIONAL CLAIMS BEFORE THIS COURT MUST FAIL.

Although these arguments were rejected by both the magistrate, *see* J.A. 54-57, and the district court, J.A. 69-70, the State again claims that Ms. Crawley's federal constitutional claims are not properly before this Court because she procedurally defaulted and waived them. Both arguments are without merit.

A. The State's Procedural Default Analysis Is Flawed.

Because her federal constitutional claims were raised before the state courts and the state supreme court addressed them in its ruling, Ms. Crawley has not procedurally defaulted those claims. In order for a claim to be preserved for federal habeas review, it must not have been foreclosed in the state courts by an adequate and independent state rule of procedure. *See Harris v. Reed*, 489 U.S. 255, 262 (1989); *see also Thomas v. Davis*, 192 F.3d 445, 450 (4th Cir. 1999). The State claims that the South Carolina Supreme Court applied an adequate and

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Supreme Court while the federal habeas petition had already been denied. In such a situation, a stay request would not be feasible because the federal petition would have been denied already. This procedural quagmire would not arise under Ms. Crawley's reading of the statute, which

independent rule of procedure barring Ms. Crawley's federal constitutional claims because of Ms. Crawley's alleged failure to raise them before the state trial court that granted her state habeas petition. For two reasons, the State's claim is misguided.

First, Ms. Crawley has raised her federal constitutional claims at every step of the State post-conviction process. *See* J.A. 21 (explicitly raising federal Due Process Clause on the face of her state habeas petition); Brief of Respondent Malissa Ann Crawley at 6, *Crawley v. South Carolina*, Mem. Op. No. 97-MO-117 (S.C. Dec. 1, 1997) (again raising federal Due Process Clause before state supreme court); Petition for a Writ of Certiorari at 17-29, *Whitner v. South Carolina*, 523 U.S. 1145 (1998) (joint petition for Malissa Ann Crawley and Cornelia Whitner). The State's apparent confusion arises from the fact that the state habeas trial court granted Ms. Crawley's state petition without explicitly basing its ruling on her federal due process claim. *See* Br. Resp. at 28. Yet, whether the trial court reached the federal claims has no bearing on whether Ms. Crawley raised those claims. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978) (labeling the matter "too obvious to merit extended discussion"). When a state habeas petitioner *wins* on her state claims, the court obviously has no reason to reach the federal claims.

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avoids dual consideration by federal courts.

Second, the South Carolina Supreme Court did not rule that Ms. Crawley procedurally defaulted her federal constitutional claims. The State claims that because the state supreme court in Ms. Crawley's case "simply cites *Whitner II* and section 20-7-50" there is no evidence that the state supreme court considered Ms. Crawley's federal constitutional claims. *See* Br. Resp. at 29. However, Ms. Crawley's "is the rather unusual case where the merits of the state-law claim are bound tightly with those of the constitutional claim," and the state court's rejection based on statutory interpretation "can easily be read as also rejecting the fair-notice claim on its merits." *Thomas*, 192 F.3d at 454. Moreover, by citing the entirety of *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) (*Whitner II*), which was decided based on federal constitutional grounds as well as state grounds, the South Carolina Supreme Court referenced not only that decision's ruling on state law but also its ruling on federal law. If the South Carolina Supreme Court had failed to reach the merits of Ms. Crawley's constitutional claims and instead applied its procedural bar, as the State conjectures, *see* Br. Resp. at 29, instead of citing the entirety of *Whitner II*, it would have cited the statutory interpretation portion of that decision only, as well as one of its own decisions about procedural bar; however, it did not do so. Thus, the South Carolina Supreme Court clearly addressed Ms. Crawley's federal constitutional claims, making them appropriate for review in this Court.

B. The State's Analysis of the Waiver Doctrine Is Also Mistaken.

The State further contends that Ms. Crawley waived her federal constitutional claims by pleading guilty. Clear precedent from the United States Supreme Court and this Court proves this contention wrong. The rule of waiver cited by the State, *see* Br. Resp. at 33, is subject to the exception that a plea of guilty does not waive a claim that "the charge is one which the State may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 n.1 (1975); *accord United States v. Broce*, 488 U.S. 563, 574-75 (1989) (A guilty plea does not prevent a challenge based on "the right not to be haled into court at all upon the felony charges."); *Blackledge v. Perry*, 417 U.S. 21, 30 (1974).

This Court has interpreted *Blackledge v. Perry* to allow for a challenge alleging that "the kind of conduct [at issue] cannot constitutionally be punished in the first instance" even when there has been a guilty plea. *See United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975); *see also United States v. Brown*, 155 F.3d 431, 434 (4th Cir. 1998) (noting the exception to the waiver rule when "the government had no right to bring the charges at all").[9] Ms. Crawley's federal constitutional arguments—that, because the State had not provided her with notice as to its application of S.C. Code § 20-7-50 and because the statute as applied to

[9] *Brown* shows the folly in the State's claim that there is only one exception to the waiver rule: an attack on the voluntariness of the plea. *See* Br. Resp. at 33. *Brown* clearly lists "two exceptions"—"if the plea entered was not knowing and voluntary, or if the government had no

her behavior was vague, the State had no right to bring child endangerment charges against her—fall within this well-recognized exception. Therefore, Ms. Crawley's guilty plea does not stand in the way of her habeas petition.

III. THE STATE MISCONSTRUES U.S. SUPREME COURT PRECEDENT CONCERNING DUE PROCESS NOTICE AND VAGUENESS.

A. The State Misconstrues *Bouie* and the Doctrine of Due Process Notice.

The State does not point to a single authority from any source in existence at the time of the conduct for which Ms. Crawley was sentenced informing her that the word "child" in S.C. Code § 20-7-50 included a viable fetus. In fact, there was no such authority.[10] Conceding the heart of Ms. Crawley's argument, the State writes that "section 20-7-50 did not proscribe fetal abuse *in so many words*." *See* Br. Resp. at 46 (emphasis added). Instead of relying on the language of § 20-7-50, the State contends that state supreme court precedent permitting certain civil claims on behalf of fetuses and recognizing the crime of "feticide" adequately gave Ms. Crawley notice that the child endangerment statute was also a fetus endangerment

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right to bring the charges at all." 155 F.3d at 434.

[10] The State quotes Ms. Crawley's opening brief inaccurately. *See* Br. Resp. at 39-40 n.19. The correct quote from Ms. Crawley's brief reads, "Not only had no state appellate court before the *Whitner* court ever construed the child endangerment statute to apply to fetuses, no administrative body in South Carolina had ever construed the child endangerment statute to apply to circumstances similar to Ms. Crawley's." *See* Br. Appellant at 39. This statement is in fact correct and is dispositive of Ms. Crawley's due process notice claim.

statute. Surely, though, just because the court has recognized that some statutes apply to viable fetuses does not mean that *every* statute does. *See, e.g.*, *Doe v. Clark*, 457 S.E.2d 336 (S.C. 1995).

As discussed in Ms. Crawley's opening brief, since *Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960), *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964), and *State v. Horne*, 319 S.E.2d 703 (S.C. 1984), construed different statutes and different areas of the law, none of them provided notice of the meaning of the child endangerment statute. *See* Br. Appellant at 42. Indeed, *Hall* and *Fowler* were civil cases that could not have put Ms. Crawley on notice of the reach of a criminal statute. *See Bouie v. City of Columbia*, 378 U.S. 347, 357-58 (1964) (criticizing South Carolina Supreme Court's reliance upon "irrelevant" civil trespass statutes in construing criminal trespass law).

The State points to *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973), to support its contention that "[p]rior precedents of the state courts explaining the meaning of a statute are appropriate in determining whether the defendant had notice that her conduct was prohibited." *See* Br. Resp. at 35. However, *Wainwright* does not stand for the principle that the expansion of any law can be read by implication into unrelated criminal statutes. Rather, in discussing statutory construction in the context of a vagueness challenge, *Wainwright* stated that "[t]he judgment of federal courts as to the vagueness or not of a state statute must be

made in the light of prior state constructions *of the statute*." 414 U.S. at 22 (emphasis added). What *Wainwright* makes clear is that a federal court is to consider state constructions of the specific statute at issue, not constructions of other unrelated statutes.

Hall, Fowler, and *Horne* neither construed the child endangerment statute nor created a general rule of law that fetuses were to be regarded as children or persons in all statutes. The State's suggestion that this general rule exists is disingenuous. The State does not contend, for example, that the word "child" in the adoption provisions of the Children's Code now includes viable fetuses or that *Whitner* overruled *Doe v. Clark*, 457 S.E.2d 336, which explicitly determined that the word "child" does not include "fetus." *See* Br. Appellant at 37. Nor can the State seriously maintain that viable fetuses are regarded legally as persons for purposes of child support obligations, custody proceedings, taxation, and legislative reapportionment, or for a host of other purposes.

The State's specific contention that the state supreme court in *Horne* announced a general rule that the word "person" includes viable fetuses in all criminal law is belied by *Horne* itself. *See* Br. Resp. at 41-42 ("*Horne* clearly stated that a 'person' under state criminal law constituted a viable fetus. Nothing in the opinion limited its scope to homicide prosecutions. . . . Therefore, *Horne* clearly states that the term "person," as it is generally understood in state criminal

law, includes a viable fetus."); *see also id*. at 52 ("The State Supreme Court's previous decisions defined 'person' in criminal law as a viable fetus long before the Petitioner was prosecuted."). Nowhere in *Horne* does the state supreme court announce such a sweeping revision of South Carolina criminal law; indeed, in creating the crime of feticide, the *Horne* court abandoned its effort to construe the homicide statute, recognizing the new crime pursuant to its common law authority and explicitly not interpreting the word "person" in the homicide statute or any other statute. *See Horne*, 319 S.E.2d at 704.[11] The State's conclusion that the *Horne* decision created a rule of law that the word "person" includes viable fetuses everywhere the word appears in criminal law is unsupportable and goes even further than the text in *Whitner* from which this reading of *Horne* is drawn.[12] That a criminal statute not even before the court could be enlarged through dicta or by implication in an unrelated case violates basic legal principles and would eviscerate *Bouie*.

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[11] Significantly, following the command of *Bouie*, the *Horne* court gave the newly created crime prospective application only, declining to apply it to the defendant. *See Horne*, 319 S.E.2d at 704. The court specifically reasoned that because "at the time of the stabbing, no South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide," the defendant's conviction had to be vacated. *See id.* The same logic applies to Ms. Crawley's case.

[12] *Whitner* contains the less sweeping observation that it would be absurd to recognize a viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. *See Whitner II*, 492 S.E.2d at 780.

Contrary to the State's expectations, the Constitution does not require people to predict trends in the evolution of criminal law. Here, the only notice of the meaning of the criminal child endangerment statute Ms. Crawley even arguably could have received is that the developing case law in other areas of criminal law appeared to be headed in the direction in which the state supreme court ultimately expanded the child endangerment statute.[13] Under *Bouie*, the Due Process Clause requires more.

The State would severely constrict the fair warning requirement recognized by *Bouie*, reducing it to a lesser requirement that the accused need only be put on notice that her conduct was somehow criminal.[14] In stating that "[t]he U.S. Supreme Court has held that the unforeseeable enlargement of a criminal statute deprives a defendant of due process of law *where she has no notice that her conduct was criminal*," Br. Resp. at 34-35 (emphasis added), the State grossly

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[13] In citing case law construing child abuse statutes from other jurisdictions, Ms. Crawley does not argue that, because other states have ruled that a fetus is not a "child" under their abuse statutes, South Carolina is bound by those rulings. Contrary to the State's claim, *see* Br. Resp. at 42-44, Ms. Crawley argues that she received no notice from any quarter whatsoever—the statute itself, prior cases in South Carolina, prior administrative interpretations of the statute, or even other cases in other jurisdictions—that this statute would be applied against her. *See* Br. Appellant at 40-41; *see also Bouie*, 378 U.S. at 360 (measuring foreseeability of judicial expansion of statute by whether other state courts have interpreted similar statutes in the same way).

[14] Because the State addresses this argument in its discussion of the interpretation of the word "child," Ms. Crawley will also address it here. However, it is worth noting that the question of what conduct by a pregnant woman the statute prohibits is distinct from the question of whether Ms. Crawley had fair warning that the word "child" in S.C. Code § 20-7-50 included a fetus.

understates the protection the Due Process Clause provides. The State essentially argues that Ms. Crawley had fair warning that drug possession is criminal and that, consequently, whether she also had fair warning that drug use during certain stages of pregnancy constitutes the crime of child endangerment is immaterial. The due process notice doctrine is not satisfied, however, simply because another statute criminalizes some of the same conduct swept into the reach of a different, judicially expanded statute. As *Bouie* makes clear, the due process notice doctrine demands that the prohibited conduct must plainly fall under the proscription of the particular statute under which the accused is charged. *See Bouie*, 378 U.S. at 357-58; *cf. DeJonge v. Oregon*, 299 U.S. 353 (1937); *Thornhill v. Alabama*, 310 U.S. 88 (1940). Under the State's reading of *Bouie*, it would be fair game for courts to enlarge criminal statutes unforeseeably and without warning, and apply them retroactively, in any area in which a different statute already imposed criminal liability for any of the same elements of the underlying conduct.[15] Such general notice is insufficient, however: a criminal statute must give fair warning of what conduct *the statute itself* proscribes.

[15] Indeed, this is the point of the footnote in Ms. Crawley's opening brief that she had no notice that the penalty was harsher for violating the child endangerment law than for violating the drug laws. *See* Br. Appellant at 44 n.24. It is not a new claim, but rather develops the Due Process notice claim already made, that notice must be given that conduct is criminalized by a particular statute.

The State goes so far as to argue that because the *Whitner* court held that the child endangerment statute unambiguously encompasses fetal abuse, this Court has no power to rule that that opinion unforeseeably expanded the child endangerment statute. The State claims, "The correctness of the state supreme court's interpretation of the statute cannot be reviewed in this Court." Br. Resp. at 44. This argument is circular: if a state supreme court says that a statute includes fetal abuse and has always included fetal abuse, that determination precludes any further inquiry into whether the statute gave notice of this meaning; and because the construction of a statute is a matter of state law, no federal court can review it. By this reasoning, no one could ever question a retroactive application of a judicially enlarged statute.

The State fundamentally misunderstands the narrowness of Ms. Crawley's claim. Ms. Crawley is not here arguing "whether the State Supreme Court's construction of section [20-7-50] was contrary to federal law as decided by the United States Supreme Court." *See* Br. Resp. at 42. She is not here arguing over whether, with proper fair warning, viable fetuses may ever be regarded as children for purposes of a clearly drawn child abuse or neglect statute.[16] Rather, she argues

[16] In support of her notice argument, Ms. Crawley cites *Roe v. Wade*, 410 U.S. 113 (1977), for the Supreme Court's observation that state wrongful death statutes do not confer full legal personhood on fetuses. *See* Br. Appellant at 42. The Supreme Court has not recognized constitutional fetal personhood. Rather, the interest recognized by the Supreme Court's abortion jurisprudence is the state's interest in protecting potential life, not the markedly different

that the retroactive application of a newly expanded statute to conduct that occurred six years earlier was impermissible.[17] This Court indisputably has the power to review the federal constitutional question of whether the state court's application of its new interpretation of the statute violated Ms. Crawley's due process rights.

B. The State Mischaracterizes Ms. Crawley's Vagueness Claim and Misstates the Vagueness Doctrine.

Ms. Crawley does not argue that her sentence is unconstitutional because the application of S.C. Code § 20-7-50 to other pregnant women not presently before the Court is vague. Instead, she argues that her sentence is unconstitutional because the statute is vague as applied to her. *See* Br. Appellant at 48-50. Here, too, the State repeatedly mischaracterizes Ms. Crawley's claim. Framing it in terms of lack of "standing to raise this argument," the State quotes *Parker v. Levy*'s teaching that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *See* Br. Resp. at 49 (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)). As set forth at length in Ms. Crawley's opening brief, the child

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proposition that "a viable fetus has civil rights." *See* Br. Resp. at 41.

[17] A ruling granting Ms. Crawley's petition would for this reason have no bearing on the subsequently enacted *civil* statute cited in the State's brief, *see* Br. Resp. at 42 n.21, designating children born with fetal alcohol syndrome or the presence of a controlled substance as abused or neglected. Of course, this new statute does not affect the construction of the earlier statute under which Ms. Crawley was prosecuted. *See Whitner*, 492 S.E.2d at 782 (legislature's subsequent acts "'cast no light on the intent of the legislature which enacted the statute being construed'") (quoting *Home Health Services, Inc., v. DHEC*, 379 S.E.2d 734, 736 n.1 (S.C. Ct. App. 1989)).

endangerment statute surely did not "clearly appl[y]" to Ms. Crawley's conduct. *See* Br. Appellant at 48-50. Whatever content the South Carolina Supreme Court subsequently conferred on S.C. Code § 20-7-50 when it announced the *Whitner* decision, at the time of the offense for which Ms. Crawley was sentenced there was no core of meaning to that statute *as applied to her*.

Ms. Crawley's vagueness argument turns on the fact that the child endangerment statute did not clearly encompass or clearly exclude any conduct when applied to the health habits and general behavior of pregnant women. Because the entire inquiry was standardless and provided law enforcement officers with unbridled discretion in enforcing the statute, the statute as applied to Ms Crawley was—and continues to be—unconstitutionally vague.

The State would render the protection against vague criminal statutes utterly toothless, arguing that procedural due process guarantees remedy vagueness in criminal statutes by supplying the definiteness a vague statute might lack. Simply because criminal process requires states to prove each element of a crime beyond a reasonable doubt does not negate the requirement that statutes describe with definiteness and particularity the prohibited conduct.[18]

[18] Even the State's hypothetical scenarios of how a criminal justice system should ideally work to protect pregnant women from capricious application of the vague statute are fraught with confusion. *See* Br. Resp. at 51 (civil tort concepts of proximate cause and negligence incorporated into discussion of standard of criminal liability).

Particularly in sensitive and controversial areas of law where criminal and civil liability is evolving, the protections of the Due Process Clause must be vigilantly enforced. It is especially important that criminal statutes proscribing child abuse and neglect give fair warning of their scope and clearly delineate prohibited conduct because the topic is so emotionally charged that fundamental fairness may be overlooked.[19]

[19] At least four times, the State claims that Ms. Crawley's child was harmed by her use of cocaine during pregnancy. *See* Br. Resp. at 25 ("unborn child who was under the influence of drugs after his birth"); *id.* at 45 n.23 ("her illegal use of cocaine harmed viable fetuses [sic] with recognized civil rights in this state"); *id.* at 49 ("the Petitioner pled guilty and thereby admitted that she harmed her children [sic]"); *id.* at 50 ("Under the facts of this case, nothing should prevent the State from prosecuting when a child is born suffering from drug withdrawal symptoms."). Contrary to this inflammatory rhetoric, Ms. Crawley's single child was born healthy, and the record contains no indication to the contrary.

CONCLUSION

For the foregoing reasons, Appellant Malissa Crawley respectfully requests that this Court reverse the district court's Order and grant Ms. Crawley's Petition for a Writ of Habeas Corpus.

Dated: August 31, 2000

Respectfully submitted,

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INSERT CERTIFICATE OF COMPLIANCE HERE

CERTIFICATE OF SERVICE

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