IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

STATE OF IOWA, **Plaintiff,** **v.** **JUDY KAY JONES,** **Defendant.**	**Case No. SRCR014055** **RULING ON MOTION TO DISMISS**

This matter comes before the Court on Defendant's Motion to Dismiss the Trial Information filed against her in the above referenced case. After reviewing the record, considering the parties' written arguments, and examining the applicable statutes and case law, the Court now enters the following ruling.

FACTUAL BACKGROUND

Defendant was formally charged by Trial Information on January 16, 2013 with the crime of Practicing Medicine Without a License. The Trial Information alleges that on or between the dates of March 1 and May 21, 2011, Defendant unlawfully engaged in the practice of medicine, surgery, or nursing without first obtaining a license to do so. Subsequently filed Minutes of Testimony indicate the charge against Defendant arises from events occurring on May 21, 2011 at the Hawarden Harvest Inn.

Jennifer Martinsen, the manager at the Inn, became suspicious of Defendant's activities at the hotel when Defendant began frequenting the establishment in the spring of 2011. Ms. Martinsen alleges Defendant would check into rooms but then would leave after a few hours and never stay the night. One day, Ms. Martinsen noticed a man walking around the hotel lobby, and upon inquiring if she could help him, he responded that his wife was seeing the midwife. On May 21, 2011, Leonard and Renee Decker checked into the Inn. According to Ms. Martinsen, the wife was pregnant at the time of check-in. A short time later, Ms. Martinsen saw Defendant walking down the hallway with bags. Later that evening, Ms. Martinsen called the police when she became alarmed at the sound of a crying newborn baby coming from the Decker's room. According to the police report of Officer Hulstein, when he knocked on the hotel room door upon arrival at the hotel, Defendant opened the door in a dress that appeared to be stained with

blood. Officer Hulstein asserts that upon questioning Defendant admitted she had delivered a baby in the hotel room. Hawarden Chief of Police, Michael DeBruin, also spoke with Defendant, during which Defendant admitted she is certified as a midwife through the North American Registry of Midwives (NARM). Defendant nevertheless handed Chief DeBruin an expired certification card. When Chief DeBruin inquired from Defendant why her and the couple were in a hotel in Iowa even though all three were residents of South Dakota, Defendant responded that she was banned from practicing in South Dakota. Defendant further admitted she had been meeting in Hawarden in order to continue her practice and had been seeing as many as five couples per month.

On October 30, 2013, Defendant, through her attorney Kirk Goettsch, filed a Motion to Dismiss the Trial Information that charges Defendant with the crime of Practicing Medicine Without a License, a Serious Misdemeanor, in violation of Iowa Code sections 147.2 and 147.86. Defendant alleges the Trial Information lacks evidence to supply the necessary probable cause to support the charge against her. The State, through Assistant County Attorney Mary Frugé, filed a Resistance on November 5, 2011, requesting a hearing in front of the Court on Defendant's motion. On November 14, 2013, Defendant filed a Supplemental Motion to Dismiss, further alleging Iowa Code section 147.2 is unconstitutionally vague as applied to Defendant. The State filed a second Resistance on November 27, 2013, addressing and denying both of Defendant's claims.

CONCLUSIONS OF LAW

A) Motion to Dismiss Standard

Defendant moves to dismiss the Trial Information pursuant to Iowa Rule of Criminal Procedure 2.11(6)(*a*).[1] This rule of procedure provides:

> If it appears from the indictment or information and the minutes of evidence that the particulars stated do not constitute the offense charged in the indictment or information, or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of the defendant shall dismiss the indictment or information unless

[1] Defendant, in her Reply to the State's Resistance, asserts the State ignored Rule 2.11(6)(*a*), which appears to signify to Defendant that the State was insisting Defendant's claim based on subpart (*a*) was incorrect. However, the Court did not interpret the State's argument to assert that; instead, the Court interpreted the State's argument to assert another reason as to why the Motion to Dismiss must be overruled. Because the Court finds Rule 2.11(6)(*a*) is the correct rule for application in this case, the Court will address only this subpart as it pertains to Defendant's charge.

> the prosecuting attorney shall furnish a bill of particulars which so states the particulars as to cure the defect.

Iowa R. Crim. P. 2.11(6)(*a*).

In considering a Rule 2.11(6)(*a*) motion to dismiss, the court is to accept as true the facts as alleged in the trial information and attached minutes. *State v. Johnson*, 528 N.W.2d 638, 640 (Iowa 1995) (citing *State v. Sullins,* 509 N.W.2d 483, 484 (Iowa 1993); *State v. Doss,* 355 N.W.2d 874, 881 (Iowa 1984)). "[T]he only relevant inquiry by the court is whether the facts the State has alleged in the trial information and attached minutes charge a crime as a matter of law." *State v. Gonzalez*, 718 N.W.2d 304, 309 (Iowa 2006). The question is not whether the evidence is sufficient to support a finding of the charge alleged or whether the State will be able to prove its case beyond a reasonable doubt at trial, but rather whether the evidence constitutes the crime charged and supports the filing of the trial information against the defendant. *State v. Majeres*, No. 01-1805, 2002 WL 31031048, at *2 (Iowa Ct. App. Sept. 11, 2002).

B) <u>Analysis</u>

Defendant is moving to dismiss the Trial Information filed against her, which alleges violation of Iowa Code sections 147.2 and 147.86, and charges Defendant with practicing medicine, nursing, or surgery without a license. Defendant's combined motions center on two separate arguments. First, Defendant asserts the evidence alleged in the Trial Information does not support a finding that she engaged in the practice of medicine, surgery, or nursing without a proper license, because the practice of midwifery is a separate vocation from the practice of medicine or nursing and should not fall within the definition of either profession. Second, Defendant contends Iowa Code section 147.2 is unconstitutionally vague as applied to her, because, based on a fair reading of the statute, an ordinary person could not be expected to know that practicing midwifery without a medical or nursing license is prohibited in the State of Iowa. The Court will consecutively address each of Defendant's arguments. The Court sees Defendant's first argument in two parts: (1) whether the State of Iowa has a clear proscription against the practice of midwifery without a proper license, and (2) whether the practice of midwifery falls within the definitions of the practice of medicine, surgery, or nursing. Lastly, the Court will determine whether section 147.2 is unconstitutionally vague as applied to Defendant.

1. Is there a Clear Proscription Against the Practice of Midwifery Without Certification as an Advanced Registered Nurse Practitioner (ARNP) in the State of Iowa?

As initial support for her first argument, Defendant argues Iowa law does not require the licensure of midwives. At first glance, this appears to be a strong argument. Section 147.2, Iowa Code, lists the professions that require a license in order for a person to practice in the State of Iowa. As Defendant correctly points out, midwifery is conspicuously absent from this list. Defendant asserts this omission is significant based on the well-established principle of statutory construction, *inclusion unius est exclusion alterius*, which means the inclusion of one is the exclusion of the other. *See State v. Bonstetter*, 637 N.W.2d 161, 167 (Iowa 2001). This principle dictates that the legislature expresses intent not only by inclusion but by exclusion as well. *Id.* (affirming a district court's refusal to grant defendant an offset for restitution when only one exception is allowed per statute and this exception was not present based on the facts). As a result, Defendant argues the omission of midwifery from section 147.2 makes it clear that the Iowa legislature intended to omit the vocation of midwifery from the requirement of licensure. However, this argument has its flaws.

As the State argues, Iowa Code section 148.1, "Persons engaged in practice," details persons who will be deemed to have engaged in the practice of medicine or surgery. The list includes:

> (1) Persons who publicly profess to be physicians and surgeons or osteopathic physicians or surgeons, or who publicly profess to assume the duties incident to the practice of medicine and surgery or osteopathic medicine and surgery;
> (2) Persons who prescribe, or prescribe and furnish, medicine for human ailments or treat the same by surgery; [and]
> (3) Persons who act as representatives of any person in doing any of the things mentioned in this section.

IOWA CODE § 148.1 (2013).

The following code section, 148.2, exempts particular professions from the previous section, 148.1. The list of exemptions includes, but is not limited to: nurses, dentists, pharmacists, and chiropractors. Notably, however, midwives are not included in the list of exemptions. Based on Defendant's enunciated principle above, the exclusion of midwifery could also be seen as an expression of legislative intent. The State argues this implication is in fact a necessary deduction. Because Defendant argues the practice of midwifery is separate from the

profession of nursing, then, according to the State, the profession of midwifery must also be listed in order to not fall within the definition of persons unlawfully engaged in the practice of medicine. Furthermore, the Court finds it more probable that the legislature intended to exclude midwifery from the protection of exemptions in section 148.2, since the practice of midwifery can be considered closely related to the practice of medicine, than the notion that a person can practice midwifery in the State of Iowa without a license because it is not listed in section 147.2.

Defendant's argument that Iowa courts have consistently refused to read something into the law that is not apparent from the face of the statute is also weak. Defendant seeks to frame her argument around the proposition that a person cannot be charged with practicing medicine without a license, because midwifery does not require a license, and therefore a person should be free to practice the profession of midwifery without any governmental interference. However, these two ideas are not mutually exclusive: Simply because a vocation does not require a license in order to practice within the state, does not mean the profession cannot be subjected to regulation through other statutes or means.

On the other hand, Defendant asserts a stronger argument concerning whether the State of Iowa has expressed a clear intent to regulate the practice of midwifery. Defendant correctly states that no statutes, regulations, case law, or other clear proscriptions against practicing midwifery in the State of Iowa without a medical or nursing license exist. However, the State strongly argues that "[t]he only type of midwife that is legally able to practice in the State of Iowa is the ARNP." In doing its own research, the Court has found that the State's contention does seem to be a well-accepted norm, especially within the midwifery community in the State of Iowa.

An internet search reveals multiple articles that detail prosecutions against individuals for practicing midwifery without a proper license, because, according to these articles, the State of Iowa only allows nurses to do so. A chart published by NARM indicates that the practice of midwifery without education or a nursing license is illegal in the State of Iowa.[2] *Direct Entry Midwifery State-by-State Legal Status*, N. AM. REGISTRY MIDWIVES, http://narm.org/state-

[2] In her Reply, Defendant asserts "[t]he NARM website indicates that the practice of direct entry midwifery in Iowa is 'unregulated,'" and then cites to the same document utilized by the Court. However, a clear reading of this document indicates NARM believes the practice of direct entry midwifery to be "illegal" in the State of Iowa (light grey shading indicates "unregulated," whereas no shading/white background indicates the practice is "illegal" in that state). Iowa's cells are not shaded with a white background, thus indicating the practice is considered illegal in this state.

organizations/state-info/ (click on "Legal Status of Direct Entry Midwifery" link) (last updated Aug. 2, 2013). This is the same organization that Defendant states she is certified through to nationally practice midwifery as a direct-entry midwife (even though she handed the officer an expired certification).

Additionally, The Cedar Rapids Gazette published an article in February of 2012 detailing the growing number of at-home births across the nation and in Iowa. The article states that "[b]ecause state law requires midwives helping in home births to have a nursing education, many of Iowa's home births are being aided by illegal practitioners." Vanessa Miller, *Number of Home Births on Rise Across Nation and in Iowa*, THE GAZETTE (Cedar Rapids), Feb. 10, 2012, http://thegazette.com/2012/02/10/number-of-home-births-on-rise-across-nation-and-in-iowa/. The article then goes on to state that even midwives classified as certified professional midwives are breaking the law and could face a charge of practicing medicine without a license. A consumer advocate for Friends of Iowa Midwives also opined that this "prohibition" forces midwives who are not licensed nurses to practice underground and not advertise their services, because they know their practice is not legal.

However, the fact that it may be well-known that midwives cannot practice in the State of Iowa unless the individual is licensed as a certified nurse midwife still does not explain from where the proscription against lay-midwifery stems but clearly there is a perpetuation of the perception that there is such a proscription. A Suffolk University Law Review article succinctly explains the general confusion surrounding the legal status of a practicing midwife in Iowa who is not licensed as a nurse: Because Iowa has no legislation pertaining to lay-midwifery, midwives could theoretically practice within the state without express statutory authorization (such as a licensing requirement),[3] but they risk sanctions for violating the statutory prohibition against practicing medicine without a license. Kerry E. Reilley, Note, *Midwifery in America: The Need for Uniform and Modernized State Law*, 20 SUFFOLK U. L. REV. 1117, 1125 (1986). Therefore, the Court finds the pertinent question for this issue to be, as suggested by Defendant, not whether the State is able to regulate the practice of lay-midwifery but whether it indeed has done so.

[3] According to NARM's *Direct Entry Midwifery State-by-State Legal Status*, approximately twenty-seven states directly regulate the practice of lay-midwifery either through licensure, certification, registration, or permit. Twelve states do not regulate the practice but do not prohibit it either. Finally, lay-midwifery is illegal in only eleven states, which, according to the chart, includes Iowa.

An article published in 2004 in the Journal of Gender, Race and Justice gives three reasons for why direct-entry midwives are effectively banned from practicing in the state. First, section 148.1, Iowa Code, which defines the practice of medicine, allows midwifery to fall within the umbrella of actions that qualifies as the practice of medicine without a license. Second, an opinion issued in 1978 by the Attorney General of Iowa states that a midwife who treats pregnancies and delivers babies can be considered to be practicing medicine and surgery without a license. Third, as previously explained, section 148.2 exempts nurses from the definition of practice of medicine but does not do the same for the practice of midwifery. Caitlin Slessor, *The Right to Choose in Childbirth: Regulation of Midwifery in Iowa*, 8 J. GENDER RACE & JUST. 507, 523–24 (2004).

In its 1978 opinion, the attorney general interpreted sections 148.1 and 148.2, as well as a few cases from the Supreme Court of Iowa that enunciated standards for what is considered to be the practice of medicine and surgery,[4] to reach the conclusion that the practice of midwifery without a medical or nursing license can be considered unlawful in this state.

> Although not having a practical, as opposed to legal, definition of either midwifery or obstetrics, it can hardly be disputed that the treatment given to a pregnant woman and the delivery clearly fall within the scope of medicine and surgery. Until the legislature recognizes midwifery, an unlicensed 'midwife' who administers to and treats pregnant women and deliver babies outside the supervision of a licensed physician, is practicing medicine without a license. Even if a licensed physician is present, if an unlicensed midwife does all of the same a violation of the law would still exist.

1978 Iowa Op. Att'y Gen. 371, 1978 WL 17337.

The State appears to follow the same line of thinking as in Slessor's article when it summarized why the practice of midwifery without a license is illegal in this state: "A common-sense analysis would conclude, with the Attorney General's Opinion, coupled with the definitions of the practice of medicine and nursing, their exceptions, and the extra requirements to become a Certified-Nurse Midwife, that in order to treat pregnant women and assist in the act of childbirth, an individual needs a proper license from the State of Iowa." However, the Court finds fault with this analysis.

[4] The Supreme Court of Iowa has only interpreted and applied section 148.1 in twenty-one different published cases. Eighteen of these opinions were issued before the 1960's. The remaining three opinions were decided in 1982, 1987, and 1995. None of these opinions address the legality of lay-midwifery and whether it falls within the section.

First, in its 1978 opinion, the attorney general relied on a section from Corpus Juris Secundum, which was published in 1951, and defined "midwifery" as "the practice of obstetrics." The same source then defined "obstetrics" as "the branch of medical science having to do with the care of women during pregnancy and birth." 1978 Iowa Op. Att'y Gen. 371. The State devotes a paragraph to the analysis of the attorney general that ultimately concluded "[t]here can be no doubt that obstetrics falls within the practice of medicine and surgery," and therefore midwifery must as well. *Id.* However, Corpus Juris Secundum has since changed its own definition of midwifery. The current version of the secondary source gives the definition of midwife under the heading of "Healing Arts" and indicates the following professions within the healing arts "may or may not be within the practice of medicine or surgery." 70 C.J.S. Physicians and Surgeons § 4 (2013). A "midwife" is then defined as "a person who assists at childbirth." *Id.* Furthermore, the source states that "[t]he 'practice of medicine and surgery,' within the statutory definition of healing arts, does not include a midwife's aiding in childbirth." *Id.* To support this proposition, the source cites a case from the Supreme Court of Kansas, *State Bd. of Nursing v. Ruebke*. *Id.* § 4 nn. 16–17.

Defendant has also cited *Ruebke* as support in her brief. In *Ruebke*, the Supreme Court of Kansas held midwifery is separate from the practice of medicine, and therefore the practice of midwifery does not fall within the statutory definition of the practice of medicine. *State Bd. of Nursing v. Ruebke*, 913 P.2d 142, 157 (Kan. 1996). Relying on the unique history of midwifery as separate from the medical profession and the fact that the Kansas statute defined medicine more narrowly to include only injuries and abnormalities (as opposed to any human condition), the Court held:

> Even if the traditional and time-honored techniques employed by midwives fit within a technical definition of the practice of medicine or surgery, if the legislature did not intend to regulate the historically separate practice of midwifery, then it should not be considered the practice of medicine or surgery for the purpose of the . . . act.

Id. at 158.

The State requests the Court to disregard *Ruebke* and instead focus on the Iowa Attorney General opinion written in 1978. The State urges that this is necessary, even though the State does concede the attorney general opinion is not mandatory law, because Kansas law is separate and distinct from the law of Iowa, whereas the attorney general opinion is persuasive authority

from our own jurisdiction and directly on topic. While an attorney general opinion may generally be more persuasive when compared to case law from another jurisdiction, the Court finds *Ruebke* is exceedingly more persuasive on this issue than the 1978 attorney general opinion.

First, as stated above, in writing its opinion, the attorney general relied on a definition from a secondary source that forced the conclusion that midwifery must fall within the definition of the practice of medicine, because midwifery was defined as the practice of obstetrics (a branch of medicine). That same secondary source no longer follows that definition and instead has chosen to follow the line of thinking developed in *Ruebke*. The Court believes this change is indicative of the changing attitude towards midwifery in the United States in general.[5]

Next, *Ruebke* shows the many similarities between the legal status of midwifery in Kansas at the time the opinion was rendered and the current status of midwifery in the State of Iowa. First, the Kansas Attorney General also issued an opinion in 1978 on this same issue, concluding as the Iowa attorney general had in the same year. Yet, the Supreme Court of Kansas disregarded its own attorney general's opinion, because it found the opinion relied on "a questionable interpretation" of another state's law, just as the Iowa Attorney General relied on a now faulty definition from a secondary source. Just as the Kansas court recognized the opinion as potentially persuasive but not binding, the Iowa Attorney General opinion is equally not as binding on this Court. *See City of Nevada v. Slemmons*, 59 N.W.2d 793, 794 (Iowa 1953) (stating that once a controversy reaches the court for determination, an attorney general opinion, even though highly persuasive, is not binding on the judiciary, which must conduct an independent inquiry into the matter at hand).

Second, the Kansas statute at issue in *Ruebke* is nearly identical in nature to Iowa Code section 148.1 that defines the practice of medicine. *See* KAN. STAT. ANN. § 65-2869 (1996). Even though the State asserts Kansas law has no relevance in determining Iowa's statute, the Court finds the interpretation of this nearly identical law by the highest court of Kansas as exceedingly persuasive, especially when this State's highest court has yet to address the issue.

[5] As Defendant brought to the attention of this Court, this changing attitude is also exemplified by the significant difference in conclusions between the 1978 attorney general opinion and an opinion written in 1897, which opined that midwifery does not fall within the statutory definition of a physician (analyzing an earlier version of section 148.1 that was substantially similar to the current version).

Third, like Iowa, the law of Kansas at the time of the opinion was notably devoid of anything "illustrating any attempt to specifically target midwives." *Ruebke*, 913 P.2d at 149. The court in *Ruebke* also addressed the fact that Kansas law recognized the classification of a certified nurse midwife, but the court rejected the argument that this was indicative of legislative intent to prohibit the practice of lay-midwives, citing to a 1985 Massachusetts case decision. *See id.* at 151 (citing *Leigh v. Board of Registration in Nursing*, 481 N.E.2d 1347, 1352 (Mass. 1985) (holding no state statutory prohibition against the practice of midwifery by lay persons even though a statute was in effect that allowed the certification of nurses in the practice of midwifery)).

Lastly, just like the Kansas legislature, *see Ruebke*, 913 P.2d at 151, the Iowa Legislature has also addressed the idea of recognizing and regulating lay-midwifery in the state. In 2001, 2010, and 2011, a bill has been introduced "relating to the licensing of certified professional midwives, establishing the board of professional midwife examiners, and prohibiting the use of the title certified professional midwife without a license." H.F. 200, 2001 Leg., 79th Sess. (Iowa 2001); *see also* S.F. 484, 2011 Leg., 84th Sess. (Iowa 2011); S.F. 2070, 2010 Leg., 83d Sess. (Iowa 2010). In 2009, the Iowa Senate passed a resolution requesting a legislative study concerning the licensure of professional midwives. S. Res. 22, 2009 Leg., 83d Sess. (Iowa 2009). However, each of these initiatives never reached full fruition. This legislative activity leaves only one impression with the Court and that is that the legislature, when presented with the opportunity to regulate lay-midwifery has not done so.

Therefore, given the numerous similarities outlined above concerning the legal status of lay-midwifery in both Kansas and Iowa, the Court hereby finds the *Ruebke* decision more persuasive than the 1978 attorney general opinion, which was largely based on a no longer applicable definition of midwifery from a secondary source published in 1951. Because the Court finds the 1978 attorney general opinion is not controlling on this matter, the only remaining reasons as to why midwives are forbidden from practicing in the State of Iowa without a license are based on Iowa Code sections 148.1 and 148.2. While these sections can be interpreted to imply midwifery constitutes the practice of medicine or nursing without a license, neither of these sections directly address the issue at hand or establish a clear proscription against the practice of lay-midwifery in the state. Based on the foregoing, the Court hereby finds no

clear proscription against the practice of lay-midwifery in the State of Iowa. Without a clear proscription, the Court concludes that lay-midwifery is not proscribed in Iowa.

2. Does the Practice of Lay-Midwifery Fall Within the Definitions of the Unauthorized Practice of Medicine, Surgery, or Nursing?

a. Section 148.1—Practicing Medicine Without a License

As detailed above, Iowa Code section 148.1 details certain activities that will constitute the practice of medicine without a license when conducted by a person without a proper license. The Court will now address each part of this section in succession to determine whether the practice of midwifery without certification as an ARNP can constitute the practice of medicine without a license.

The first class of persons deemed to be engaged in the practice of medicine without a license consists of those who "publicly profess to be physicians and surgeons." IOWA CODE § 148.1(1). Defendants asserts the State has no evidence that the Defendant represented to anyone that she was a nurse, physician, or surgeon. In fact, when confronted by police officers at the Hawarden Harvest Inn, Defendant admitted to the officers that she was a certified professional midwife. The Trial Information also is lacking in evidence that indicates Defendant ever publicly professed to be a physician or nurse to any of her clients. One husband actually told Ms. Martinsen his wife was "seeing the midwife." Furthermore, the Court does not believe an average midwife working within his or her capacity would usually profess to be a physician or surgeon. If that were the case, and the individual were holding him or herself out as a physician, then the Court agrees that this section would undoubtedly apply to prosecute the individual.

The second class of persons deemed to be engaged in the practice of medicine without a license consists of those who "publicly profess to assume the duties incident to the practice of medicine and surgery." *Id.* Based on its reading, the Court believes this is the language the State most rests upon to uphold a finding that Defendant engaged in the practice of medicine without a license. As Defendant references in her brief to the Court, the Supreme Court of Iowa has addressed the particular language of this section in multiple opinions (mostly in the early part of the 20th century). The court has determined the phrase "duties incident to the practice of medicine" to include "diagnosing patients' ailments and prescribing the proper treatment." *State v. Miller*, 542 N.W.2d 241, 246 (Iowa 1995). Even if no medicine is actually given and no

surgery is ever performed, if an individual purports to diagnose a human ailment and treat it in some fashion, then the individual has assumed a duty incident to the practice of medicine. *State v. Howard*, 245 N.W. 871, 873 (Iowa 1932). Defendant argues the State has produced no evidence it intends to prove that Defendant diagnosed any human ailment and attempted to treat others. Furthermore, Defendant asserts it is not aware of any decision in Iowa finding that pregnancy or childbirth are considered human ailments.

On this point the Court finds the *Ruebke* decision most persuasive. "An activity is not 'incident to' the practice of medicine merely because it is engaged in by some members of the medical profession." *Ruebke*, 913 P.2d at 159. Furthermore, "[t]he fact that a person with medical training provides services in competition with someone with no medical degree does not transform the latter's practice into the practice of medicine." *Id.* at 157. This Court also finds no opinions in the State of Iowa that describes pregnancy or childbirth as an ailment or disease. Defendant submits, and the Court agrees, that pregnancy and childbirth are natural life processes; they are not ailments or diseases to be cured or treated. The midwife is merely assisting in the process of childbirth. *See* BLACK'S LAW DICTIONARY 992 (6th ed. 1990).

The last relevant class of persons deemed to be engaged in the practice of medicine without a license consists of those who "prescribe, or prescribe and furnish, medicine for human ailments or treat the same by surgery." This last section is inextricably linked to the explanation given by the supreme court for what duties are considered incident to the practice of medicine. In *Miller*, the supreme court held the defendant engaged in the unauthorized practice of medicine by diagnosing and treating different human ailments, such as back pain, constipation, headaches, and rash. 542 N.W.2d at 246. The Court does not find the process required to treat these different ailments similar to the process undertaken by a midwife when he or she engages in their choice profession. As already discussed, the Court does not find pregnancy or childbirth to be a human ailment. Most importantly, the Court holds a midwife does not partake in the act of *treating* childbirth or pregnancy, but a midwife simply *assists* in the natural process the mother and her body is undergoing.

Furthermore, the Court finds the policy reason behind the implementation of section 148.1 of import. In *State v Hughey*, the Supreme Court of Iowa stated that the fraud and imposition of the defendant was the very thing the statute was intended to protect. The court recognized that the purpose behind the statute is to "protect gullible innocence." *State v.*

Hughey, 226 N.W. 371, 373 (Iowa 1929). Similarly, the Supreme Court of Kansas recognized the same logic in *Ruebke*:

> From its inception in Kansas, the regulation of physicians was directed toward 'empyrists,' who were quack 'healers.' No subsequent language in the statutory scheme has clearly shown an intent to expand these enactments to midwives. If the legislature had intended to illegalize such ongoing practices, it could have done so directly. It did not.

Ruebke, 913 P.2d at 156. The Court does not find the ancient profession of midwifery is the kind of fraud and imposition section 148.1 is intended to protect against. Furthermore, as the Kansas court also acknowledged, there has been no clear language by the Iowa Legislature that the practice of lay-midwifery is intended to be considered an illegal practice in this state. The Court cannot help but ponder the potential consequences that may be placed upon a parent or sibling who assisted in the home birthing process of a daughter or sister with the current lack of clarity in the law with regard to lay-midwifery.

For these reasons, the Court hereby finds that the practice of midwifery does not fall within the meaning of section 148.1 and does not qualify as the practice of medicine without a license.

b. Section 152.1—Practicing Nursing Without a License

Unlike the crime of practicing medicine without a license, the crime of practicing nursing without a license is not as simplistically laid out in statute as the former. The Court would be remiss to not agree with Defendant that nothing in the provisions defining the profession of nursing in section 152.1 encompass the practice of midwifery. The only provision that links midwifery and nursing is section 655-7.1(152) of the Iowa Administrative Code. This section lays out the definitions for the ARNP in Iowa, including the certified nurse midwife, who is "authorized to manage the care of newborns and women." The State interprets this provision as a carved-out exception to the attorney general's opinion that the act of assisting in delivery during childbirth is the practice of nursing. The State contends that because the Administrative Code has this definition for a certified nurse midwife other individuals cannot partake in the same activity. The Court disagrees with this illogical assessment.

First, the profession of midwifery is an ancient profession that has its roots in biblical times and continued regularly until the early part of this country's formation. Slessor, *supra*, at 511. Obviously it still continues today and is embraced by many members of society. It wasn't

until the public began utilizing physicians during childbirth in the early 1800's that midwives were seen as second-class. *Id.* at 512. States did not begin prosecuting midwives for practicing medicine without a license until the late nineteenth century. *Id.* Furthermore, just as the Supreme Court of Kansas opined that equating obstetrics with the practice of medicine ignores the historic reality that midwives and physicians have co-existed quite separately for many years, the same applies to the professions of nursing and midwifery. *See Ruebke*, 913 P.2d at 156.

Second, all fifty states recognize the status of a certified nurse midwife. Twenty-seven states recognize a certified professional midwife in some regulatory capacity. As stated above, twelve other states recognize a certified professional midwife without regulation. Therefore, these thirty-nine states acknowledge that both professions, a certified nurse midwife and a certified professional midwife, can and do co-exist. As Defendant asserts: "A licensed nurse cannot necessarily practice midwifery and a midwife cannot practice nursing" without a license. Consequently, the State's logic that because the State of Iowa recognizes a certified nurse midwife, the state must therefore not recognize the profession of certified professional midwifery is flawed. The Court finds the special designation given the ARNP is simply an added degree the nurse is willing to complete in order to engage in the additional practice of midwifery while licensed as a nurse. This does not mean an individual cannot also partake in the same traditional profession of assisting in the natural process of childbirth.

Based on the foregoing, the practice of midwifery is separate and distinct from the practice of medicine, surgery, or nursing. It is not so incident to the practice of medicine or nursing such that it becomes a part of the healing arts or nursing by application of Iowa Code sections 148.1 and 152.1, respectively. Because the legislature has not expressed a clear intent as to whether the practice of midwifery should fall within the unlicensed practice of medicine, surgery, or nursing, and because the courts of Iowa have yet to determine this issue, this Court hereby finds Defendant's actions do not constitute the crime of practicing medicine, surgery, or nursing without a license as a matter of law.

3. Is Iowa Code Section 147.2 Unconstitutionally Vague as Applied to Defendant?

Defendant contends an ordinary person could not be expected to know that practicing midwifery without a medical or nursing license is prohibited in Iowa, and therefore, section 147.2 is void for vagueness as applied to the defendant. Defendant further reiterates how there are no statutes, regulations, case law, or other clear proscriptions against practicing midwifery in

Iowa without a medical or nursing license. While the Court agrees with Defendant's second argument, the Court does not find Iowa Code section 147.2 unconstitutionally vague as applied to Defendant.

"'The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Millsap*, 704 N.W.2d 426, 436 (Iowa 2005) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). A statute will meet this test if its meaning is "fairly ascertainable" by reference to other statutes, case law, dictionaries, or if the word has a generally accepted meaning. *Id.* (quoting *State v Aldrich*, 231 N.W.2d 890, 894 (Iowa 1975)). The rule of lenity requires that ambiguous criminal statutes be strictly construed in favor of the defendant. *State v. Hearn*, 797 N.W.2d 577, 585 (Iowa 2011). This rule is not applied, however, if the statute is unambiguous after the Court examines the statutory text, its context, and any evident statutory purpose. *Id.* at 587.

Defendant argues section 147.2 is unconstitutionally vague, because a person should not be expected to know it is illegal in the State of Iowa to practice midwifery without a medical or nursing license. As stated above, the Court agrees with this much. However, the statute itself, which details the professions that require licensure in order to practice in this state, clearly defines the criminal offense—that is, which professions require licensure. Each profession has a plain meaning that is either readily ascertainable or easily understandable upon inquiry. While the Court understands it is confusing to Defendant whether her conduct should fall under nursing or medicine, the question is not whether the statute is unconstitutionally vague, but rather whether her conduct falls within the definition laid out in section 148.1 as a matter of law. As held above, the practice of midwifery does not fall under the definition of either practicing medicine or nursing without a license.

The Court believes its holding is in accord with the rule of lenity as well. In order for that traditional rule to apply, the statute must be ambiguous after considering other statutes, case law, and the statutory purpose. Because the Court has examined all three, and determined it is not ambiguous whether midwifery falls within the meaning of section 148.1, there is no need to apply this traditional rule of construction.

In sum, the Court concludes the meaning of section 147.2 is easily ascertainable by reference to readily known meanings and easily ascertainable definitions of nursing and medicine. Therefore, the statute gives fair warning of the prohibited conduct, which does not include the practice of lay-midwifery, and does not violate the void-for-vagueness doctrine.

CONCLUSION

For the above stated reasons, the Court hereby grants Defendant's Motion to Dismiss the Trial Information filed against her, charging her with practicing medicine, surgery, or nursing without a license. According to Iowa Rule of Criminal Procedure 2.11(6)(*a*), the Court finds the evidence does not constitute the offense charged in the information as a matter of law. Because there is no clear proscription against the practice of midwifery in this state without a license, and because there is no apparent legislative intent that midwifery was intended to fall within the definition of medicine or nursing, the Court dismisses the Trial Information filed in this case.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1) All of the above.

2) Defendant's Motion to Dismiss filed on October 30, 2013 and Supplemental Motion to Dismissed filed on November 14, 2013 are both SUSTAINED.

3) This case is dismissed. Costs are taxed to the State of Iowa.

Notice: If you require the assistance to participate in court due to a disability, call the disability coordinator at (712) 279-6035. Persons who are hearing or speech impaired may call Relay Iowa TTY at 1-800-735-2942. **Disability coordinators cannot provide legal advice**.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
SRCR014055	STATE V JONES, JUDY KAY

So Ordered

Jeffrey A. Neary, District Court Judge,
Third Judicial District of Iowa