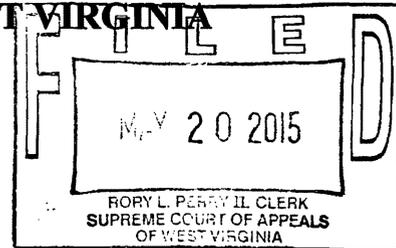


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0021



STATE OF WEST VIRGINIA,
RESPONDENT,

V.

STEPHANIE ELAINE LOUK,
PETITIONER.

Appeal from a final order of
the Circuit Court of Nicholas
County (14-F-13)

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Circuit Court erred when it failed to dismiss the indictment for child neglect against Ms. Louk because the child neglect statute does not criminalize her conduct.

STATEMENT OF THE CASE

Petitioner Stephanie Louk was unlawfully convicted of child neglect as a result of acts that she committed during her pregnancy while her unborn child was in utero. W.Va. Code § 61-8D-4a. Before trial, Ms. Louk's attorney moved to dismiss the indictment, alleging that the child abuse statute does not apply to a pregnant mother's ingestion of controlled substances while pregnant. A.R. 4. The court denied Louk's motion "for the reason that the case at hand involves a child who was born, not a fetus or embryo." A.R. 15. This finding ignores the fact that the alleged neglect occurred when the child was a fetus or embryo, not after the child was born. It also does not address the statute that exempts pregnant women from prosecution for any "acts or omissions ... with respect to the embryo or fetus she is carrying." W.Va. Code § 61-2-30(d)(5) (2005).

It is undisputed that the acts for which Ms. Louk was charged occurred while her child was in utero. Ms. Louk ingested methamphetamine when she was thirty-seven (37) weeks pregnant and, a few hours later, she started losing her breath. A.R. 231. Ms. Louk then went to Summersville Regional Hospital to seek medical treatment for her respiratory distress. A.R. 178. Ms. Louk was in serious condition at Summersville Hospital and she was scheduled to be transferred to CAMC Women's and Children's Hospital. A.R. 219-21. While awaiting transport, Dr. Lukasc Rostocki became concerned about the condition of Ms. Louk's unborn child, and he decided to perform an emergency C-section. *Id.* Unfortunately, Ms. Louk's child

was brain dead from birth and she was taken off life support after several days. A.R. 204, 255-56.

State medical examiner Susan Venuti attributed Ms. Louk's respiratory distress to cardiomyopathy, a heart disease that decreased the amount of oxygenated blood in Ms. Louk's tissues. A.R. 206-07. The cardiomyopathy, in turn, deprived Ms. Louk's unborn child of oxygen, which led to the death of the fetus. *Id.* Dr. Venuti testified that although she thinks methamphetamine use probably caused Ms. Louk's cardiomyopathy, she could not exclude the possibility that there were other natural causes. A.R. 207-08.

SUMMARY OF ARGUMENT

The circuit court erred when it refused to dismiss the indictment against Ms. Louk because the West Virginia child neglect statute does not apply to unborn children. Moreover, Ms. Louk's due process rights were violated by the lower court's refusal to dismiss the indictment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is proper for a Rule 20 argument because it involves an issue of first impression, an issue of fundamental public importance, and a constitutional question regarding the validity of the circuit court's refusal to dismiss the indictment against Ms. Louk.

ARGUMENT

"This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syllabus Point 1, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009).

I. The West Virginia child neglect statute does not criminalize the acts or omissions of a pregnant mother that result in an unborn child's death.

A. The Legislature has not included unborn children in the category of people that may be a victim of child neglect.

The child neglect statute under which Ms. Louk was prosecuted does not apply to unborn children. W.Va. Code § 61-8D-1(2) (2014); W.Va. Code § 61-8D-4a (1997). For the purposes of child neglect, a "child" is defined as "any person under eighteen years of age not otherwise emancipated by law." W.Va. Code § 61-8D-1(2) (2014). However, this statutory definition does not expressly include unborn children in the category of persons under eighteen. Other jurisdictions have considered similar factual situations to those at bar and have held that, absent a specific Legislative enactment to the contrary, an unborn child is not a legal person and therefore cannot be a victim of its mother's acts. *State v. Cervantes*, 223 P.3d 425 (Or. Ct. App. 2009); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999); *State v. Dunn*, 916 P.2d 952 (Wash. Ct. App. 1996); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court*, 141 Cal.Rptr. 912 (Cal. Ct. App. 1977).

Similarly, this Court has held that an unborn child is not a "person" that may be the victim of a crime unless the Legislature makes it so. Syllabus Point 2, *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 332 S.E.2d 807 (1985) (under common law, an unborn child cannot be the victim of a murder). Following this logic, therefore, Ms. Louk's unborn child cannot be a victim of child neglect unless the Legislature has passed a statute that explicitly allows pregnant women to be prosecuted for neglecting their unborn child. It has not.

B. By statute, Ms. Louk is exempt from prosecution.

Several years after the *Atkinson* case, the Legislature enacted the Unborn Victims of Violence Act so that unborn children may be considered victims of certain violent crimes perpetrated by third parties. W.Va. Code § 61-2-30 (2005). However, this statute specifically exempts Ms. Louk and all pregnant women from criminal liability for any “[a]cts or omissions ... with respect to the embryo or fetus she is carrying.” W.Va. Code § 61-2-30(d)(5) (2005).

Not only is there a specific exemption from prosecution that applies to Ms. Louk, the Legislature has repeatedly considered criminalizing the use of drugs or alcohol by pregnant women if it results in harm to the child, but it has never passed a law to this effect. H.B. 4048, 2012 Leg., Reg. Sess. (W.Va. 2012); H.B. 2146, 2013 Leg., Reg. Sess. (W.Va. 2013). The Legislature also discussed this issue when in the process of enacting West Virginia Code Chapter 61, Article 8D, and it ultimately refused to include a provision punishing the delivery of a controlled substance to a child when it contributes to the child’s death. H. Journal, 68th Leg., 2nd Sess. 787, 1136-37, 1316-31, 1356-59, 1612, 1774, 2114-15, 2238-47, 2310-13, 2983 (W.Va. 1988); *see* W.Va. Code § 61-8D-2 (1988). Given that there is a specific statutory exemption, and that the Legislature has considered and rejected a law that punishes a pregnant woman for neglecting her unborn child, this Court should defer to the Legislature’s “primary right to define crimes and their punishments” and vacate Ms. Louk’s conviction. Syllabus Point 1, in part, *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 332 S.E.2d 807 (1984); *see Arroyo v. United States*, 359 U.S. 419, 424 (1959).

Despite a clear expression of Legislative intent to exempt a pregnant mother from prosecution for neglect of her unborn child, the trial court appeared to rely upon the “born alive” common law rule of torts when it denied the motion to dismiss “for the reason that the case at hand involves a child who was born, not a fetus or embryo.” A.R. 15; *see* Syllabus Point 1,

Farley v. Sartin, 195 W.Va. 671, 466 S.E.2d 522 (1995); *Baldwin v. Butcher*, 155 W.Va. 431, 184 S.E.2d 428 (1971). Tort law, however, is primarily defined by common law and the “born alive” rationale is an erroneous ground upon which to sustain the indictment, because our criminal statutes are formulated by the Legislature. *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 354-56, 332 S.E.2d 807, 809-11 (1984). Further, the “born alive” rule is generally not applied to “self-abuse by a mother which negatively impacts an unborn child, later ‘born alive.’” *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. 1999). When the lower court refused to dismiss the indictment against Ms. Louk, it essentially legislated from the bench, creating a new class of crimes that apply to neglectful pregnant mothers. The lower court’s ruling cannot stand, because this Court has already held that our judiciary does not have common law authority to create a new class of crimes. *Id.* Instead, it is the Legislature that “has primary or plenary power” to create and define crimes and penalties. *Atkinson* at 355, 810.

Given that there is a specific statutory exemption for pregnant mothers in the Unborn Victims of Violence Act and that the Legislature has repeatedly considered and rejected criminal liability for pregnant mothers that harm their children in utero, this Court must defer to our Legislature’s decision not to criminalize a pregnant mother’s alleged neglect of her unborn child. *Id.*; W.Va. Code § 61-2-30(d)(5) (2005). Moreover, it is the role of the Legislature, not the courts, “to discuss public policy, as well as the complexity of prenatal drug use, its effect upon an infant, and its criminalization.” *Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596, 598-99 (Nev. 1994), citing *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991); see *Reinesto v. Superior Court*, 894 P.2d 733, 738 (Ariz. Ct. App. 1995); *State v. Gethers*, 585 So.2d 1140, 1142 (Fla. Dist. Ct. 1991); *Cochran v. Commonwealth*, 315 S.W.3d 325, 329 (Ky. 2010).

The Legislature has considered and rejected punishment for pregnant women that neglect their unborn children, and it is not the role of the circuit court to change substantive criminal law by judicial fiat. *See Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998). The circuit court overstepped its authority when it refused to dismiss the indictment against Ms. Louk and she was wrongfully convicted for neglecting her unborn child, a crime that does not exist in this State. This Court must remedy this situation and vacate Ms. Louk's conviction.

II. The application of the child neglect statute to the acts of a pregnant mother violates due process.

This Court must vacate Ms. Louk's conviction because the child neglect statute under which she was prosecuted did not sufficiently notify her that her unborn child could be a victim of child neglect. W.Va. Code § 61-8D-4a (1997); W.Va. Code § 61-8D-1 (2014). Ms. Louk is not alleged to have neglected her child after birth. On the contrary, she is presently incarcerated for an act that she committed while her child was still in utero. This is an unconstitutionally broad interpretation of the child neglect statute.

A. The rule of lenity must prevail.

Due process requires that "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000); U.S. Const. Amend. XIV, V. Moreover, the "application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). The rule of lenity is constitutionally required because it prevents a court from creating an *ex post facto* law by judicial construction. *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). If this Court does not apply the rule of lenity in this case, what constitutes "illegal" conduct under the child neglect statute will be litigated for years

to come. Prenatal child neglect will not only be confined to Ms. Louk's ingestion of methamphetamine while pregnant, but it will also apply to any act committed by a pregnant mother that affects the health of her unborn child.

When other courts have applied the constitutionally-required rule of lenity to attempted prosecutions of pregnant mothers, they have decided that unborn children cannot be victims of prenatal child neglect unless the Legislature clearly intends to make it so. *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999); *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998); *State v. Dunn*, 916 P.2d 952 (Wash. Ct. App. 1996); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Reyes v. Superior Court*, 141 Cal.Rptr. 912 (Cal. Ct. App. 1977). Further, it also appears that if this Court interprets the West Virginia child neglect statute in such a broad manner, it will render the statute void for vagueness. *State v. Martinez*, 137 P.3d 1195, 1198 (N.M. Ct. App. 2006); *Reinesto v. Arizona*, 894 P.2d 733, 736 (Ariz. Ct. App. 1995); *Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596, 598 (Nev. 1994), citing *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). If this Court does not vacate Louk's conviction, her due process right to notice of forbidden conduct will be destroyed, and pregnant mothers across the state will be uncertain regarding what conduct constitutes prenatal child neglect. *Bowie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). The end result will be unforeseeable prosecutions of pregnant mothers for various permutations of prenatal child neglect.

- B. The trial court's creation of a common law crime of prenatal child neglect will open the floodgates to unpredictable prosecutions.

The judicial creation of a common law crime of prenatal child neglect has the potential to create a ripple effect of novel prosecutions across the state. Because neglect only requires evidence of criminal negligence, not criminal intent, tragic happenstance could end in criminal

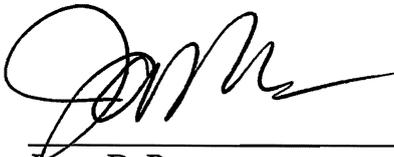
liability. Syllabus Point 1, *State v. Deberry*, 185 W.Va. 512, 408 S.E.2d 91 (1991). The conceivable ramifications of this new crime highlight the reason why Ms. Louk's conviction should be vacated and policy-making should be left to the Legislature. For instance, application of the child neglect statute to the acts of pregnant mothers could create an unreasonable result by giving women an incentive to terminate a pregnancy solely to avoid criminal liability. *State v. Cervantes*, 223 P.3d 425, 438 (Or. 2009). Further, in utero child neglect could be construed to include not just the ingestion of controlled substances but a whole host of possibly negligent activity, e.g., becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, the continued use of legal drugs that are contraindicated during pregnancy, consuming alcoholic beverages, smoking, failure to maintain a proper diet, avoiding prenatal medical care, failure to wear a seat belt, violation of traffic laws that create a risk of personal injury to the child, exercising too much or too little, and any risky activity such as skiing or horseback riding. *State v. Wade*, 232 S.W.3d 663, 665-66 (Mo. Dist. Ct. 2007); *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *Reinesto v. Superior Court*, 894 P.2d 733, 736 (Ariz. Ct. App. 1995). These examples illustrate the difficulty in determining "what types of prenatal misconduct should be subject to prosecution" and the reason why criminal charges for improper prenatal care by the mother violates due process, absent a specific legislative enactment. *State v. Wade*, 232 S.W.3d 663, 665 (Mo. Ct. App. 2007).

The unpredictability of the type of conduct that constitutes prenatal neglect reveals the due process implications of the lower court's ruling. If this Court allows Ms. Louk's conviction to stand, pregnant mothers across the state may reasonably fear that if they have a miscarriage, they can expect a visit from the police to see if they participated in risky behavior during their pregnancy. Because of the potential for capricious prosecutions and the major public policy

impact that would result from an affirmance of Ms. Louk's conviction, this court should apply the due process rule of lenity and vacate Ms. Louk's conviction because she did not have fair warning that that her unborn child could be a victim of neglect.

CONCLUSION

In the present case, the circuit court committed error when it allowed Ms. Louk to be tried for neglecting her unborn child. The child neglect statute does not apply to unborn children, and Ms. Louk did not have fair notice that she could be prosecuted for child neglect for acts that she committed while pregnant. For these reasons, Petitioner Louk asks this Court to vacate her conviction for child neglect, and all other relief deemed just and proper.



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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing petition for appeal by first class mail on May 20, 2015 upon:

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A handwritten signature in black ink, appearing to be 'JDP', written over a horizontal line.

Jason D. Parmer