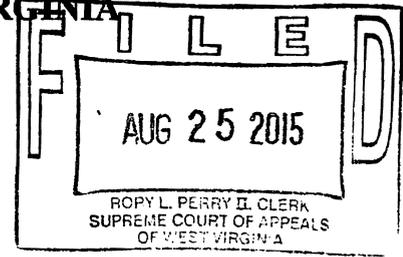


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

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The relevant facts of this case are that Ms. Louk ingested methamphetamine while she was thirty-seven (37) weeks pregnant, and a few hours later, she began to suffer from cardiomyopathy, a heart disease that decreased the amount of oxygenated blood in Ms. Louk's tissues. A.R. 206-07, 231. Ms. Louk's cardiomyopathy started a chain of events that caused her body to shunt oxygen from her fetus to the rest of her body, and this biological response led to brain death in the fetus prior to its removal from Ms. Louk's body via C-section. A.R. 204-07, 255-56.

The medical evidence in this case is clear that Ms. Louk's fetus was dead before she had the C-section. State Medical Examiner Susan Venuti testified that "[t]he child had been deprived of oxygen in utero, and, when she was born, she was essentially brain dead. She had no movement, no spontaneous respirations, and they had to immediately put her on a ventilator to help her breathe." A.R. 204. Dr. Adelhamid Bourbia, the treating pediatrician at CAMC Women's And Children's Hospital, concurred with this opinion. Dr. Bourbia testified that when he saw the fetus four hours after birth, it was on life support and could not independently live without extraordinary medical procedures. A.R. 259. Dr. Bourbia further stated that the fetus did "not make an effort to breathe. Had complete flaccid tone. No reactivity. No spontaneous breathing. Absent reflexes, no gag reflex, no suck reflex. The pupils were ... non-reactive." A.R. 255-56.

I. Unborn children are not persons that may be victims of child neglect.

The fundamental flaw in the State's argument is it asks this Court to apply the common law "born alive" rule to expand the statutory definition of "child" despite the fact that unborn children are not included in the statutory definition of persons that may be victims of child neglect. Chapter 61, Article 8D of the West Virginia Code clearly defines a "child" as "any

person under eighteen years of age not otherwise emancipated by law.” W.Va. Code § 61-8D-1(2) (2014). This Court has already held that, absent a specific Legislative enactment, a viable unborn child cannot be the victim of murder. Syllabus Point 2, *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 332 S.E.2d 807 (1985). In *Wilson*, this Court refused to alter the common law rule that an unborn child cannot be the victim of a murder, instead leaving this matter for the Legislature. In this case, the State asks this Court to read the “born alive” rule of torts into the criminal child neglect statute. By doing so, the State asks this Court to usurp the Legislative function and effectively amend substantive criminal law that only recognizes that unborn children can be victims of violence in specific situations. W.Va. Code §§ 61-8D-4a, 61-2-30; R.B. 7-10.

- A. The State asks this Court to ignore the Unborn Victims of Violence Act, which specifically excludes pregnant mothers from prosecution for acts or omissions that result in harm to their fetus.

Under common law, an unborn viable fetus could not be the victim of a crime. Syllabus Point 2, *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 355, 332 S.E.2d 807, 810 (1984). This rule was changed by the Legislature with The Unborn Victims of Violence Act. W.Va. Code § 61-2-30. This Act allows a fetus to be a separate and distinct victim of a crime in certain prosecutions under Chapter 61, Article 2, namely, murder, voluntary manslaughter, attempt to kill or injure by poison, stalking, wanton endangerment by use of fire, assault during the commission of a felony, malicious and unlawful assault, and domestic battery. W.Va. Code § 61-2-30(c). Importantly, this Act specifically exempts pregnant women from prosecution for these offenses when the alleged victim is “the embryo or fetus she is carrying.” W.Va. Code § 61-2-30(d)(5). This exemption likely explains why the county prosecutor pursued a novel

approach of prosecuting Ms. Louk for child neglect rather than other more seemingly appropriate crimes under Article 2 of Chapter 61.

Because there is a specific statute addressing when an unborn child may be a victim of a particular class of crimes, this Court should look to the rule of statutory construction *expressio unius est exclusio alterius* to determine whether Ms. Louk's unborn child can be a victim of child neglect. Syllabus Point 6, *Phillips v. Larry's Drive-In Pharmacy*, 220 W.Va. 484, 647 S.E.2d 920 (2007). This legal maxim holds that "the express mention of one thing implies the exclusion of another." *Id.* When the Unborn Victims of Violence Act is viewed in this manner, it is apparent that the Legislature intentionally omitted the crime of child neglect from the list of crimes for which an unborn child can be a victim. W.Va. Code § 61-2-30(c). Even if the Legislature had included child neglect among the list of crimes for which an unborn child can be a victim, Ms. Louk would be exempt from prosecution because the Legislature made a policy choice to exempt pregnant mothers from the Act. W.Va. Code § 61-2-30(d)(5). There are no other sections of the Code that allow the prosecution of pregnant women for crimes against their unborn children, and the maxim *expressio unius est exclusio alterius* requires this Court to presume that this approach is a conscious choice by the Legislature to exclude unborn children as potential victims of any other crimes.

The State claims that although there is an exemption for pregnant mothers from prosecution for a multitude of heinous crimes of violence under Article 2 of Chapter 61, this exemption does not apply to *in utero* child neglect prosecutions, because child neglect is found in Article 8D of Chapter 61. However, the State ignores this Court's rule of statutory construction that requires interpretation of the pregnant mother exemption in such a way that makes

it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who

drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Gerlach v. Ballard, 223 W.Va. 141, 146, 756 S.E.2d 195, 200 (2013), *citing* Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908). Therefore, this maxim requires this Court to presume that the Legislature’s exemption of pregnant mothers from the crimes enumerated in the Unborn Victims Violence Act also exhibits a tacit intention to exempt pregnant mothers from *in utero* child neglect prosecutions.

B. The Legislature has considered criminalizing *in utero* child neglect, but has refused to do so.

The State contends that the title of W.Va. Code § 61-8D-2 indicates a Legislative intent “to subsume the administration or ingestion of a controlled substance by a parent as act [sic] in violation of W.Va. Code § 61-8D-2.” R.B. 16. First, Ms. Louk was prosecuted under W.Va. § 61-8D-4a, so this argument is irrelevant to the instant case. Second, the West Virginia Code provides that legislative intent cannot be inferred from section headings because these headings are “mere catchwords and shall not be deemed or construed ... [as an indication of] legislative intent or purpose.” W.Va. Code § 2-2-12 (1965).

Third, the State misinterprets the Legislature’s actions when it enacted Chapter 61, Article 8D in 1988. The House of Delegates amended Senate Bill 255 to insert the following two subsections into § 61-8D-2 regarding the delivery, administration or ingestion of a controlled substance as a contributing factor in the death of a child as follows:

(c) If any person shall knowingly and feloniously deliver a controlled substance to a child, and if the administration or ingestion of such controlled substance to or by the child is then a contributing factor in the death of the child, then such person shall be guilty of murder in the first degree.

(d) If any parent, guardian or custodian shall knowingly allow another person to knowingly and feloniously deliver a controlled substance to a child under his or her care, custody or control, with the knowledge that such controlled substance shall be administered to or ingested by such child, or shall, knowingly and feloniously, administer a controlled substance to such child or cause such child to ingest a controlled substance, or knowingly allow another person to knowingly and feloniously administer a controlled substance to such child or cause such child to ingest a controlled substance, and if the administration or ingestion of such controlled substance to or by the child is then a contributing factor in the death of the child, then such parent, guardian or custodian and such other person shall each be guilty of murder in the first degree.

H. Journal, 68th Leg., 2nd Sess. 1319-1320 (W.Va. 1988). It is likely that the House of Delegates inserted the section heading to correspond with the addition of the above language.

When the House of Delegates sent the amended bill back to the Senate, the Senate refused to concur in the House amendments. *Id.* at 1612. Ultimately, a Conference Committee decided the fate of the bill, and struck out the subsections related to the delivery, administration or ingestion of controlled substances. *Id.* at 2246. The language in the section heading was not removed, which was no doubt inadvertent, as the bill passed during the last hours of the Legislative Session. *Id.* at 2115, 2238, 2246.

Whether an unborn child can be a victim of a crime is obviously a policy matter that is unsuited for this Court's determination. Although the State attempts to discount the vast, unforeseeable consequences of the creation of a common law crime of *in utero* child neglect, it never explains why this Court should wade into this particular policy matter that is more suited to action by a representative legislature. R.B. 18; *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 355, 332 S.E.2d 807, 810 (1984), *citing Bouie v. Commonwealth*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

For example, if upholds the State's interpretation, only children "born alive" can be victims of *in utero* child neglect. R.B. 8. This approach would lead to the absurd result that a

pregnant mother that shoots herself in the stomach and kills her fetus *in utero* would be exempt from prosecution under the child neglect statute; but mothers that undertake risky activities resulting in injury to their fetuses can be prosecuted if the child is born alive. This result is an irrational outcome that makes it readily apparent that the Legislature is the appropriate place to debate this issue in order to avoid a patchwork quilt of common law crimes that have been created for the sole purpose of upholding individual criminal convictions.

C. The State asks this Court to create substantive criminal law, in violation of the constitutional separation of powers.

In this case, the State asks this Court to blur the “distinction between a court’s power to evolve common law principles in areas in which it has traditionally functioned, i.e. tort law,” and its deference to areas “in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties.” *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 355, 332 S.E.2d 807, 810 (1984). If this Court adopts the State’s position that the common law “born alive” rule allows pregnant mothers such as Ms. Louk to be prosecuted for prenatal child neglect, this interpretation will substantively add to West Virginia’s body of criminal law in violation of the separation of powers guaranteed by the West Virginia Constitution. W.Va. Const. Art. 5, § 1 (1872). The separation of powers clause guarantees that the judicial branch will not “exercise the powers properly belonging to either of the other” branches and that no one shall “exercise the power of more than one [branch] at the same time.” W.Va. Const. Art. 5, § 1 (1872). This Court has interpreted the breadth of judicial power as matters that “do not come within the powers granted to the executive, or vested in the legislative department of the Government.” *State ex rel. Richardson v. County Court of Kanawha County*, 138 W.Va. 885, 893, 78 S.E.2d 569, 574 (1953). Justice Davis has further opined that “[c]ourts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits,

are almost plenary.” *Louk v. Cormier*, 218 W.Va. 81, 85, 622 S.E.2d 788, 792 (2005). In accordance with our Government’s constitutional separation of powers, therefore, this Court has deferred to the Legislature’s “primary or plenary power” to create new crimes and punishments. *State ex rel. Atkinson v. Wilson*, 175 W.Va. 352, 355, 332 S.E.2d 807, 810 (1984); *State v. Bush*, 163 W.Va. 168, 184-85, 255 S.E.2d 539, 548 (1979), quoting *Moore v. McKenzie*, 160 W.Va. 511, 236 S.E.2d 342, 343 (1977) (“We ... defer to the legislative prerogative to attack, though the passage of criminal laws, those problems which seem most acute to the legislative mind.”).

Most appellate courts across the nation agree that it is inappropriate for a Court to interpret statutes in a manner that effectively amends substantive criminal law, thereby violating the constitutional separation of powers between the judiciary and the legislature. *See, e.g., Commonwealth v. Booth*, 766 A.2d 843, 852 (Pa. 2001); *Vo v. Superior Court In And For County of Maricopa*, 836 P.2d 408, 415 (Ariz. Ct. App. 1992) (“any redefining of the word ‘person’ must be left to the legislature, which has the primary authority to define crimes.”); *State v. Green*, 781 P.2d 678, 682 (Kan. 1989) (“Imposing criminal liability for the killing of a fetus is a legislative function. We are prohibited from construing ‘viable fetus’ to be within the term ‘human being’ since such action exceeds our judicial power and denies the defendant due process of law.”); *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989) (“we believe that any extension of the crime of murder ... is best left to the discretion and wisdom of the legislature.”); *Meadows v. State*, 722 S.W.2d 583, 586 (Ark. 1987) (“we decline to create a new common law crime by judicial fiat, but, instead, defer to the legislative branch.”) (superseded by statute); *State v. Willis*, 652 P.2d 1222, 1223 (N.M. Ct. App. 1982) (“The Judiciary, without legislative authority, cannot expand the scope of the homicide statute to include feticide” because only the Legislature can “substantially enlarge the scope of penal statutes and such an expansion would violate

defendant's right to be free of *ex post facto* enactments...."); *People v. Greer*, 402 N.E.2d 203, 209 (Ill. 1980) ("the General Assembly declined to specifically include the unborn within the potential victims of homicide or to create a separate offense of feticide. We cannot alter that decision or create a new offense."); *People v. Guthrie*, 293 N.W.2d 775, 781 (Mich. Ct. App. 1980) ("For this Court to interpret the [negligent homicide] statute to include unborn viable fetuses as persons would usurp the Legislature's traditional power of defining what acts shall be criminal...."); *State v. Gyles*, 313 So.2d 799, 801-02 (La. 1975), *citing Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970) ("For a court to simply declare, by judicial fiat, that the time has not come to prosecute ... one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it ... [this] raises very serious questions concerning the principle of separation of powers.").

This Court is firmly entrenched in the vast majority of states that ensures that its judicial function remains separate from the legislature's prerogative to define and punish crimes.

Therefore, this Court should resist the State's invitation to recognize a common law crime of prenatal child neglect.

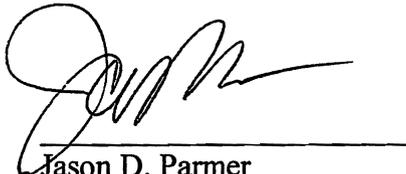
- II. Ms. Louk's fetus was not born alive, therefore application of the "born alive" rule cannot save the conviction in this case.

The State contends that the "born alive" rule saves the conviction in this case. However, the State fundamentally misapprehends the facts of this case, because Ms. Louk's fetus was not born alive; it was brain dead and not independently viable from birth. Therefore, the "born alive" rule cannot apply to this case. In the Public Health chapter of the West Virginia Code, "fetal death" is said to occur when "the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsating of the umbilical cord or definite movement of voluntary muscles." W.Va. Code § 16-5-1(7) (2006). The medical evidence in this case is clear that Ms.

Louk's fetus was dead from birth. It did not independently breathe or show any evidence of life without the benefit of medical intervention. A.R. 204-05, 255-63. Although Ms. Louk's fetus was placed on a ventilator, a cessation of brain function is a proper criterion of death because modern medicine allows a dead body to "be attached to a machine so as to exhibit demonstrably false indicia of life." *State v. Guess*, 715 A.2d 643, 652 (Conn. 1998). Therefore, the "born alive" rule will not preserve the conviction in this case because Ms. Louk's child was not born alive. W.Va. Code § 16-5-1(7); see *State v. Courchesne*, 998 A.2d 1, 89 (Conn. 2010) (a fetus born brain dead is not "born alive," therefore the common law "born alive rule" is inapplicable in a criminal context). Therefore, even if this Court wishes to apply the "born alive" rule of torts to the criminal child neglect statute, Ms. Louk's conviction still must be overturned.

CONCLUSION

Petitioner Stephanie Louk asks this Court to reverse her conviction for child neglect resulting in death, and all other relief deemed just and proper.



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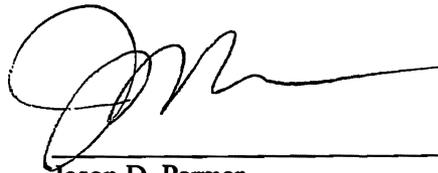
STEPHANIE ELAINE LOUK,
BY COUNSEL

CERTIFICATE OF SERVICE

I, Jason D. Parmer, counsel for Petitioner, Stephanie Elaine Louk, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *Petitioner's Reply Brief* to the following:

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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 25th day of August, 2015.



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