

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0021

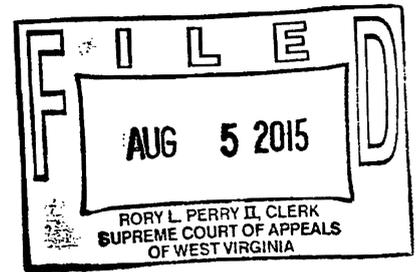
STEPHANIE ELAINE LOUK,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.



BRIEF ON BEHALF OF THE RESPONDENT

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BRIEF ON BEHALF OF THE RESPONDENT

Comes now the Respondent, the State of West Virginia, by counsel, Elbert Lin, Solicitor General, and Julie A. Warren, Assistant Attorney General, and files the within brief in opposition to the Petitioner's Brief.

I. STATEMENT OF THE CASE

The following is a summary of the appendix record supplied by the Petitioner, Stephanie Elaine Louk, relative to her conviction for child neglect resulting in the death of her infant, Olivia Louk:

Olivia Louk was born on the morning of June 12, 2013, via Cesarean section, after her mother, the Petitioner, appeared in the Summersville Emergency Room 37 weeks pregnant and complaining of suffering from respiratory distress. App. at 316-444. In the Petitioner's statement to law enforcement concerning the events leading up to Olivia's birth, she admitted that on the night before Olivia was born, she went into her bathroom and "loaded the needle with meth and injected the meth into my vein in my left arm." Id. at 10-11, 129-34. The

methamphetamine was given to her by her cousin in exchange for allowing him use of her vehicle a couple days prior. *Id.* at 10. A few hours after injecting the methamphetamine, the Petitioner began to experience a loss of breath. *Id.* at 11. Her husband took her to the hospital, where she told hospital personnel that she was experiencing an allergic reaction to a pain medication, because she was “initially hesitant about telling them about the meth.” *Id.* She recalled that she did eventually disclose the methamphetamine use to hospital personnel. *Id.* However, she claimed that she did not “remember anything else after that,” and “[woke] up later with a tube down my throat.” *Id.*

The testimony and medical records from medical personnel who treated both Olivia and the Petitioner shed light on events that transpired upon the Petitioner’s presentation at Summersville Regional Medical Center and the methamphetamine’s effect on baby Olivia. Dr. Tracy Lester was the emergency medical doctor who treated the Petitioner upon her arrival at Summersville Regional Medical Center. *Id.* at 177-88. Dr. Lester explained that the Petitioner presented to the E.R. acute respiratory distress syndrome (“ARDS”) caused by her admitted methamphetamine use. *Id.* at 178-80, 183, 428-30. She explained that ARDS caused the Petitioner’s lungs to fill with fluid which deprives the blood and organs of oxygen. *Id.* A drug test performed on the Petitioner while she was being treated at Summersville Regional Medical Center returned positive for methamphetamine. *Id.* at 188, 192-97, 346. Aside from methamphetamine use, no other factors were presented to implicate another cause for the Petitioner’s respiratory distress. *Id.* at 181, 184, 187, 207, 356-59.

The Petitioner’s medical records indicate that she was at 37 weeks and 3 days gestation on June 12, 2013, and that she was actually scheduled for a Cesarean section on June 26, 2013.

Id. at 181, 327, 390. Dr. Lester confirmed the Petitioner's 37 week gestation, and testified that hospital personnel were unsure how far along she was until they received the Petitioner's obstetric records from Raleigh General Hospital, which was not until after they had treated the Petitioner. Id. at 181, 187. She also testified that the Petitioner's pregnancy was "full term," and cited the fact that at 38 weeks gestation is when Cesarean sections are scheduled when the mother has undergone a Cesarean section with a prior pregnancy. Id. at 182.

As for Olivia's injuries, the ARDS shut off the blood flow to the placenta and redirected blood flow to the Petitioner's brain and heart to keep her alive. Id. at 185-86. As a consequence, Olivia was denied oxygen. Id. at 220. Dr. Lukasz Rostocki, the OB/GYN at Summersville Regional Medical Center, performed an emergency Cesarean section and delivered Olivia Louk. Id. at 219. He confirmed that she was indeed born alive. Id. at 221, 225. In fact, she was born 47 centimeters (18.5 inches) long, and weighed 2691 grams (5 lbs). Id. at 425.

Olivia was transferred to CAMC Women's and Children's Hospital immediately after delivery. Id. at 221, 397. Dr. Adelhamid Bourbia, the neonatologist who treated her upon transfer, testified that upon her arrival she was "around four hours of life," and suffered from "severe encephalopathy." Id. at 253-55. Dr. Bourbia described the various treatments that were performed on Olivia Louk over the course of 11 days in an attempt to save her life. Id. at 257-60. Medical records indicate that on June 14, 2013, while being treated in the CAMC Neonatal Intensive Care Unit, Olivia experienced seizures and "continue[d] to have jerking movement" throughout the day. Id. at 434. On June 18, 2013, a MRI and EEG revealed "anoxic injury of entire brain" and "gray matter encephalopathy." Id.

A team of 4 neonatologists and 2 nurse practitioners, including Dr. Bourbia, eventually met and discussed Olivia condition. Id. at 261-62. They agreed that she had shown no signs of improvement and that it was “futile to continue support,” since “it was just to prolong suffering if we continue doing what we’re doing.” Id. The decision was made by the family to remove Olivia from life support, and on June 23, 2014, she died at CAMC Women’s and Children’s Hospital. Id. at 263, 431.

Olivia weighed 2740 grams (6 lbs.) at the time of her death. Id. at 431. According to her Certificate of Live Birth, Olivia Louk was born on June 12, 2013. Id. at 436. This record also notes the complications surrounding Olivia Louk’s delivery, but indicates that she did not otherwise have any “congenital anomalies.” Id. The Certificate of Death identifies Olivia’s full name as Olivia Ann Vangelina Louk. Id. at 437. It also confirms that she was born on June 12, 2013, and died on June 23, 2013, due to “anoxic encephalopathy due to maternal cardiorespiratory insufficiency in the setting of methamphetamine, benzodiazepine and opioid intoxication.” Id.

Susan Venuti, the forensic pathologist who performed Olivia’s autopsy, explained that death by anoxic encephalopathy was “essentially deprivation – deprivation of oxygen that causes brain damage.” Id. at 202-04. More specifically, “the child died in the setting of methamphetamine intoxication of the mother.” Id. at 207. While Dr. Venuti admitted that the oxygen deprivation Olivia Louk experienced had occurred in utero, she also confirmed that Olivia Louk lived for 11 days and actually died at CAMC Women’s and Children’s Hospital. Id. at 202, 204-05, 438. In her autopsy report, Dr. Venuti described the state of Olivia’s body as “a normally developed, well-nourished white female infant weighing 6.5 pounds whose

appearance is consistent with the chronological age of 11 days.” *Id.* at 440. It also notes that she was “clad in a disposable diaper with some pale yellow urine staining.” *Id.* She confirmed in both her testimony and in her report that Olivia’s umbilical cord blood tested positive for methamphetamine. *Id.* at 206, 444.

Petitioner attributed her behavior to “stupidity.” *Id.* at 12. She admitted to ingesting hydrocodone and morphine while pregnant with Olivia, and that her husband knew of the morphine use “and he did not like it,” adding, “we usually would fight over it.” *Id.* at 12-13. When asked if she considered Olivia’s welfare when she took the drugs, the Petitioner confessed “I didn’t and I should have.”

On January 14, 2014, the Petitioner was indicted by a Nicholas County Grand Jury on the felony charge of Child Neglect Resulting in Death, in violation of W.Va. Code 61-8D-4a. *App. at 1.* The indictment specifically charged the Petitioner with having ingested methamphetamine resulting in the death of her child, Olivia Louk. *Id.*

The Petitioner moved to dismiss the indictment on grounds that because the neglect perpetrated on Olivia was prenatal it did not fall within the confines of the criminal statute charged. *Id.* at 58. She cited this Court’s opinion in *State ex. rel. Atkinson v. Wilson* to support the proposition that “you can’t be prosecuted for the death of an unborn child.” *Id.* at 58, 62. However, the Petitioner did stipulate that Olivia was born alive and that she lived “10 or 11” days. *Id.* The State argued that Olivia was not an unborn child, but was born alive and later died outside the womb as a result of the Petitioner’s use of methamphetamines. *Id.* at 58-59. The trial court agreed with the State and denied the motion, finding “that we don’t have an unborn child,” because Olivia Louk was born alive and died 11 days later. *Id.* at 62.

Following a two day trial that commenced on August 19, 2014, the Petitioner was convicted of Child Neglect Resulting in Death, and then sentenced 3 to 15 years in prison. *Id.* at 43, 300. The Petitioner now appeals her conviction on the grounds that Olivia was not a child, and to convict her of parental neglect violates her due process rights, since the law did not provide sufficient notice that her actions could constitute child neglect.

II. SUMMARY OF THE ARGUMENT

Olivia Louk was a “child” as defined in W.Va. Code § 61-8d-1(2), because she was 11 days old when she succumbed to injuries sustained as a direct result of the Petitioner’s administration of methamphetamine into her blood stream just hours before Olivia was born.

The Petitioner’s criminal liability for Olivia’s death is consistent with the common law “born alive” rule adopted in this State, the context of which must be read alongside W.Va. Code § 61-8d-4a, the child neglect statute upon which she was convicted. There is no statutory provision that exempts the Petitioner from criminal liability under W.Va. Code § 61-8d-4a. Moreover, the statute is clear and unambiguous in its application to the Petitioner’s conduct toward Olivia, and thus, she was afforded sufficient notice that her conduct qualified as parental neglect for which she could be held criminally liable.

III. STATEMENT UPON ORAL ARGUMENT

The assignment of error set forth in the Petitioner’s Brief is one of first impression before this Court, and is suitable for consideration upon oral argument pursuant to Rule 20 the West Virginia Rules of Appellate Procedure.

IV. ARGUMENT

A. Standard of Review

The Petitioner's appeal centers on a question of statutory interpretation, to which this Court has determined a de novo standard of review to be appropriate. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

B. Olivia Louk Was Properly Considered A Victim Of Child Neglect Resulting In Death, Under The Plain Terms Of The Statute And Consistent With The Common Law "Born Alive" Rule

1. The victim in this case is Olivia Louk, a living human being born on June 12, 2013. She was born at nearly full term with no evidence of a congenital defect that would have otherwise prohibited her from living a normal, healthy life. Olivia lived only 11 days due to a brain injury inflicted by her mother's decision to shoot methamphetamine into her blood stream just hours before Olivia was born.

This Court has consistently held that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959). Thus, having achieved the status of a living baby, Olivia was a "child" as defined in W.Va. Code § 61-8d-1(2) to mean "any person under eighteen years of age not otherwise emancipated by law." There is no ambiguity concerning the application of the statutory definition to the facts in this case. Olivia, an 11 day old baby, is clearly a "person under eighteen years of age not otherwise emancipated by law."

Consistent with the common law "born-alive" rule, it is irrelevant that the harm was inflicted upon her a day before she was born. In *State ex. rel. Atkinson v. Wilson*, this Court

acknowledged the common law “born alive” rule. 175 W.Va. 352, 353, 332 S.E.2d 807 (1984). The English common law rule provides that if a “child is born alive, and dies by reason of injuries received in the womb, or in the act of birth, the person who deliberately inflicted those injuries may be guilty of murder.” *Id.*, citing 4 S. Stephen, Commentaries on the Laws of England 58 (1914). Thus, W.Va. Code § 61-8d-4a must be read in context with the English common law “born alive” rule.¹

Article VIII, Section 13 of the West Virginia Constitution dictates that the common law exists in this State unless expressly abrogated by the Legislature. See also, *Id.* at n.7. As this Court has repeatedly explained, the “[o]ne of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law.” Syl. pt. 2, *Smith v. West Virginia State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982). The Court also “presume[s] that the legislators who drafted and passed [the statute] 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....” Syl. pt. 5 *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908), *see also* Syl. Pt. 1, *State v. Hutton*, 2015 WL 3822814 (W.Va. 2015). Ergo, “[i]f the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation.” *State ex. rel. Van Nguyen v. Burger*, 199 W.Va. 71, 75, 483 S.E.2d 71 (1996), *see also*, Syl. pt. 4, *Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605 (1962) (“The common

¹ W.Va. Code § 2-1-1 states “[the common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State.”

law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested.”), citing *Shifflette v. Lilly*, 130 W.Va. 297, 303, 43 S.E.2d 289 (1947).

There is no unequivocal evidence of the Legislature’s intent to alter the application of the common law “born alive” rule in connection with its statutory definition of the term “child.” Nothing in the relevant statute requires that the death-causing neglect be inflicted on the child after he or she is born. Absent this intent, the Court must find that a child injured prior to birth but born alive, is a “child” as defined in W.Va. Code § 61-8d-1(2), and may be a victim parental neglect pursuant to W.Va. Code § 61-8d-4.

2. There is no merit to the Petitioner’s assertion that the “born alive” rule has been abrogated in West Virginia. Petitioner relies heavily on *Atkinson*, but that case involved a mother who was prosecuted for the death of her unborn child. 175 W.Va. 352, 353, 332 S.E.2d 807 (1984). There, the Court held “that neither our murder statute, W.Va. Code § 61-2-1, nor its attendant common law principles authorize prosecution of an individual for the killing of a viable unborn child.” Syl. Pt. 2, *Id.*

As Justice McGraw’s dissent explained, the majority opinion “refus[ed] to alter the archaic ‘born-alive’ rule” to include an unborn viable fetus. *Id.* at 357. (McGraw, J. dissent). The “born-alive” rule, the Court noted, only permitted prosecution for crimes committed in utero against children that were born. The issue in *Atkinson* was “whether we [the Court] have the authority to alter the common law rule that an unborn child cannot be the victim of a murder.” *Id.*, at 354. The Court held that it did not have the authority to alter common law, since “at common law, the killing of a viable unborn child was not murder.” *Id.* at 353. Absent a clear

expression from the Legislature, the Court refused to expand the “born alive” rule to include unborn babies who died from prenatal injuries.

Although the *Atkinson* Court refused to extend the “born-alive” rule to include unborn children, it never abrogated the “born-alive” rule itself, and confirmed that it did not have the authority to do so. Furthermore, the Legislature has never expressed its intent to abolish the common law “born-alive” rule. To the contrary, the Legislature’s response to *Atkinson* was the unequivocal expansion of the “born-alive” rule via the Unborn Victims of Crime Act, W.Va. Code § 61-2-30, which applies specifically to unborn babies who are the victim of certain violent acts that are criminalized in Chapter 61, Article 2. The Unborn Victims of Crime Act does not apply to the child abuse crimes set forth in Chapter 61, Article 2, but the unexpanded “born-alive” rule remains applicable absent a clear legislative directive to the contrary. Thus, Olivia clearly qualified as a “child” under the statutory definition set forth in W.Va. Code § 61-8d-1(2).

3. The Petitioner also cites case law from other states that are both unpersuasive and readily distinguishable or do not comport with this Court’s precedent in *Atkinson*. A number of these cases are not on point since these cases involved the death of an unborn child in utero. See *State v. Greiser*, 763 N.W.2d 469 (N.D. 2009); *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998) (The state’s criminal abortion statute does not apply to a woman.). That question is not presented here. The child here was born alive, and lived for 11 days.

The case law cited by Petitioner that involved the postnatal death of a child are also distinguishable, since the courts do not factor in the common law “born alive” rule. For example, the baby in *State v. Martinez*, 139 N.M. 741 (2006) was born alive, but the New

Mexico court did not distinguish between an injured fetus and a baby injured in utero but born alive. It concluded that the legislature's inclusion of a "viable fetus" as a "human being" for the purpose of the state's fetal homicide law was evidence that it did not otherwise qualify as a "human being" under the criminal code. *See also, State v. Deborah J.Z.*, 596 N.W.2d 490, 496 (Wis. Ct. App. 1999) ("present case, we arrive at our conclusion using purely statutory grounds; therefore, an extensive discussion of the common-law "born alive" rule is not necessary."); *State v. Dunn*, 916 P.2d 952 (Wash. App. Ct. 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). The Kentucky Supreme Court dismissed the born alive rule because it believed child abuse was not a common law crime. *Kentucky v. Welch*, 864 S.W.2d 280, 282 (Ky. 1993). Of course, this premise conflicts with case law from this Court, as well as courts in other jurisdictions, as explained infra.

Other courts have held that the plain meaning of the term "child" in a criminal statute should include an unborn viable fetus. *See Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *Hicks v. State*, 153 So.3d 53 (2014). However, West Virginia's adoption of the common law "born-alive" rule is dispositive of the issue presented in this case. Thus, this Court does not have to decide whether the law at issue in this case applies to a child who is injured and dies before birth, or whether and when a child not yet born constitutes a "child" under the law.

C. There is No Exemption Barring Petitioner's Criminal Liability Under W.Va. Code § 61-8d-4

There is no statutory exemption in W.Va. Code § 61-8d-4a to protect the Petitioner from criminal liability due to her status as the victim's mother.

1. There is no exemption under the common law “born-alive” rule based on Petitioner’s status as Olivia’s mother. As summarized in *Atkinson*, the common law “born alive” rule recognizes criminal liability for “the person” who causes the injury to a baby in utero that results in the baby’s death after being born alive. The rule includes no exception for circumstances where the person causing the injury is the child’s mother. To carve out such an exception is to alter established common law, which this Court has already held is an act reserved for the Legislature.

2. Nor is the Petitioner exempt from her common law duty as Olivia’s mother to preserve Olivia’s health and safety. This Court has held that “[t]he right to bear children carries with it the responsibility for both parents to care for, nurture, and provide for the children to the best of their joint abilities. At a minimum, the parents must see to the children’s health and safety and ... help the child to obtain a quality and productive life.” *In re Lacy P.*, 189 W.Va. 580, 433 S.E.2d 518 n.8 (1993). It is widely understood that parents have a “duty ... under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation.” 59 Am. Jur. 2d Parent and Child § 22, *see also In re S.D.*, 204 P.3d 1182, 1188 (Kan. App. Ct. 2009) (“[I]n Kansas, it has been recognized that parents have a natural, as well as common-law, duty to protect their children from abuse.”), *State v. Rooney*, 788 A.2d 490, 492 (Vt. 2001), *Owens v. State*, 116 P. 345, 346 (Ok. App. Ct. 1911).

The duty of a parent under the common law is reflected in the child abuse provisions found in Chapter 61, Article. Like the “born-alive” rule, the Legislature has not altered this common law rule by creating an exception for acts of neglect perpetrated in utero. In W.Va.

Code, § 61-8D-1(7), the Legislature’s definition of child “neglect” includes only a few specific exceptions:

“Neglect” means the unreasonable failure by a parent, guardian or custodian of a minor child to exercise a minimum degree of care to assure the minor child's physical safety or health. For purposes of this article, the following do not constitute “neglect” by a parent, guardian or custodian:

(A) Permitting a minor child to participate in athletic activities or other similar activities that if done properly are not inherently dangerous, regardless of whether that participation creates a risk of bodily injury;

(B) Exercising discretion in choosing a lawful method of educating a minor child; or

(C) Exercising discretion in making decisions regarding the nutrition and medical care provided to a minor child based upon religious conviction or reasonable personal belief.

W.Va. Code § 61-8D-4a is also narrowly tailored to specifically criminalize child neglect by “any parent, guardian or custodian” that results in the death of the child. The term “parent” is defined in W.Va. Code, § 61-8D-1(8) to include “the biological father or mother of a child....”

The Legislature carved out specific exemptions in its definition of child “neglect,” none of which apply to the Petitioner. Clearly the Petitioner’s use of methamphetamine while 37.5 weeks pregnant with Olivia, while knowing the significant risk of postnatal injury to Olivia, was a failure on her part to exercise a minimum degree of care to assure Olivia’s physical safety or health. The Legislature did not exempt mothers whose acts constitute a prenatal failure of this duty of care at the expense of the health and safety of their living child.

In contrast, the Unborn Victims of Violence Act, W.Va. Code § 61-2-30(d)(5) is an example of an express statutory carve-out for pregnant mothers. The Act in whole states as follows:

(a) This section may be known and cited as the Unborn Victims of Violence Act.

(b) *For the purposes of this article, the following definitions shall apply:* Provided, that these definitions only apply for purposes of prosecution of unlawful acts under this section and may not otherwise be used: (i) to create or to imply that a civil cause of action exists; or (ii) for purposes of argument in a civil cause of action, unless there has been a criminal conviction under this section.

(1) "Embryo" means the developing human in its early stages. The embryonic period commences at fertilization and continues to the end of the embryonic period and the beginning of the fetal period, which occurs eight weeks after fertilization or ten weeks after the onset of the last menstrual period.

(2) "Fetus" means a developing human that has ended the embryonic period and thereafter continues to develop and mature until termination of the pregnancy or birth.

(c) For purposes of enforcing the provisions of sections one, four and seven of this article, subsections (a) and (c), section nine of said article, sections ten and ten-b of said article and subsection (a), section twenty-eight of said article, a pregnant woman and the embryo or fetus she is carrying in the womb constitute separate and distinct victims.

(d) Exceptions. -- The provisions of this section do not apply to:

(1) Acts committed during a legal abortion to which the pregnant woman, or a person authorized by law to act on her behalf, consented or for which the consent is implied by law;

(2) Acts or omissions by medical or health care personnel during or as a result of medical or health-related treatment or services, including, but not limited to, medical care, abortion, diagnostic testing or fertility treatment;

(3) Acts or omissions by medical or health care personnel or scientific research personnel in performing lawful procedures involving embryos that are not in a stage of gestation in utero;

(4) Acts involving the use of force in lawful defense of self or another, but not an embryo or fetus; and

(5) *Acts or omissions of a pregnant woman with respect to the embryo or fetus she is carrying.*

(e) For purposes of the enforcement of the provisions of this section, a violation of the provisions of article two-i, chapter sixteen of this code shall not serve as a waiver of the protection afforded by the provisions of subdivision (1), subsection (d) of this section.

(f) Other convictions not barred. -- A prosecution for or conviction under this section is not a bar to conviction of or punishment for any other crime committed by the defendant arising from the same incident.

The Unborn Victims of Crime Act also serves as the Legislature's unequivocal expression of its intent to supersede or expand the common law "born alive" rule to also include unborn babies. Perhaps the Act was the Legislature's response to the Court's prior ruling in *Atkinson*.

Regardless, the exceptions in the Unborn Victims of Crime Act do not apply to child abuse violations set forth in Article 8d. W.Va. Code § 61-2-30 is titled "[r]ecognizing an embryo or fetus as a distinct unborn victim of certain crimes of violence against the person," but is known as the Unborn Victims of Violence Act. The Unborn Victims of Violence Act, and the exemptions contained therein, applies only to those crimes of violence against the person that are set forth in Chapter 61, Article 2 of the West Virginia Code. The Petitioner was not charged under Article 2, but Article 8d. Specifically, she was convicted for child neglect resulting in death in violation of W.Va. Code 61-8d-4a.

Moreover, the Petitioner's reference to the Legislature's "consideration" of H.B. 4048 and H.B. 2146, bills introduced during the 2012 and 2013 Legislative Sessions respectively, is misplaced. There is no legislative history to indicate that these bills were ever presented for a vote in the referenced committees. The mere fact that these bills were introduced does not speak to the intent of the Legislature to exempt the Petitioner from criminal liability in this case.

Also, the Petitioner's reference to the removal of the controlled substance provision in the enactment of W.Va. Code, § 61-8D-2 is irrelevant, since the Petitioner was never charged under this statute. It is otherwise incorrect to assume that the Legislature removed a provision from W.Va. Code § 61-8D-2 that specifically referenced the delivery of a controlled substance because it did not wish to punish a parent for "the delivery of a controlled substance to a child when it contributes to the child's death." Pt'r's Br. at 4. Statutory construction requires the Court give "meaning to all provisions in a statutory scheme." *Gerlach v. Ballard*, 233 W.Va. 141, 146-47, 756 S.E.2d 195 (2013). A look at W.Va. Code § 61-8D-2 reveals it maintained the title "[m]urder of a child by a parent, guardian or custodian or other person by refusal or failure to supply necessities, or by delivery, administration or ingestion of a controlled substance; penalties." Also, the Legislature never removed the definition of "controlled substance," now codified in W.Va. Code § 61-8D-1. Thus, it must be assumed that the intent of the Legislature was to subsume the administration or ingestion of a controlled substance by a parent as act in violation of W.Va. Code § 61-8D-2.

D. The Petitioner's Claim That She Was Not Afforded Sufficient Notice That Her Actions Constituted a Violation of W.Va. Code § 61-8d-4a is Unsubstantiated

The Petitioner's argument that "the child neglect statute under which she was prosecuted failed to provide her with sufficient notice that her unborn child could be a victim of child neglect," is misplaced. The statute upon which she was convicted, W.Va. Code § 61-8d-4a, clearly sets forth the elements of the crime of parental neglect resulting in death as follows:

- (a) If any parent, guardian or custodian shall neglect a child under his or her care, custody or control and by such neglect cause the death of said child, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than five

thousand dollars or committed to the custody of the division of corrections for not less than three nor more than fifteen years, or both such fine and imprisonment.

The Petitioner's drug use at 37.5 weeks gestation falls squarely within the confines of W.Va. Code § 61-8d-4(a). The Petitioner's actions clearly qualified as a failure to exercise the minimum degree of care required to assure her Olivia's physical safety or health as a living child, the result of which was the death of her child at 11 days old.

Petitioner's argument that W.Va. Code § 61-8d-4(a) "did not sufficiently notify her that her unborn child could be a victim of child neglect," is invalid. Pt'r's Br. at 6. It is common knowledge that drug use by pregnant mothers will subject the unborn child to an unreasonably high risk of injury. It is also common knowledge that the child injured in the womb will inevitably suffer from the injury after it is born. Far too often, the injuries are permanent and the child must suffer the effects of the mother's drug use for the rest of its life. The injuries may also prove fatal to the living child, as was the case here.

We know from the record that the Petitioner possessed this knowledge when she injected the methamphetamine into her blood stream. In her statement to authorities, the Petitioner described her actions as "stupidity." App. at 12. When asked if she considered the effect the methamphetamine would have on Olivia, she replied "I didn't and I should have." Id. The Petitioner knew the methamphetamine would put Olivia at risk of an injury that she inevitably suffer outside the womb, but she still injected the drug into her veins. She showed complete disregard for Olivia's welfare as a living child.

The Petitioner's public policy argument does not withstand scrutiny. She proffers the theory that "because neglect only requires evidence of criminal negligence, not criminal intent,

tragic happenstance could end in criminal liability” if applied to prenatal conduct. Pt’r’s Br. at 7-8. This Court has already determined that intent is not required under the definition of “neglect” in W.Va. Code § 61-8D-1(7), and that this definition is not “unconstitutionally vague.” Syl. Pt. 3, *State v. DeBerry*, 185 W.Va. 512, 408 S.E.2d 91 (1991). In *DeBerry*, the Court addressed a vagueness claim against W.Va. Code § 61-8D-4(b), wherein it is a crime “if a parent, guardian or custodian neglects a child and by such neglect cause the child serious bodily injury.” *Id.* The Court ruled the statute “is not unconstitutionally vague . . . because such statute's use of the term ‘neglect’ gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.” *Id.*; see also *State v. Thompson*, W.Va. 246, 254, 647 S.E.2d 526, 534 (2007). The same unambiguous term “neglect” is also used in W.Va. Code, § 61-8D-4a, which is similar to W.Va. Code § 61-8D-4(b), the only difference being that it relates to parental neglect resulting in the child’s death rather than serious bodily injury. Applying the Court’s rationale in *DeBerry*, it stands that W.Va. Code, § 61-8D-4a gives a mother “of ordinary intelligence fair notice that . . . her contemplated conduct is prohibited and it also provides adequate standards for adjudication.”

There is no support for the premise that the aforementioned standard for neglect deemed clear and unambiguous, becomes vague and unpredictable when applied to prenatal conduct. The Petitioner’s policy argument of “unpredictability” is based solely on unsubstantiated conjecture. Equally tenuous, hypothetical scenarios could arguably be conjured to create an air of unpredictability surrounding every criminal statute wherein a standard of neglect is to be applied.

The examples of conduct the Petitioner claims may be subject to prosecution include: mothers who intentionally conceive a high risk pregnancy; mothers who fail to maintain a proper diet or avoid prenatal medical care; mothers who do not wear seat belts or fail to adhere to traffic laws; mothers who do not exercise, exercise too much, or undergo activities such as skiing or horseback riding. This inventory of activities does not correspond to the certainty of injury caused by exposure to a controlled substance, such as methamphetamine. The risk of injury to a child still exists regardless of whether the exposure is prenatal or postnatal. Clearly direct exposure of an infant—outside the womb—to methamphetamine would constitute an act of child neglect. It stands to reason that the Petitioner had fair notice that direct exposure in utero would also constitute child neglect, given the similar risks of injury to a living child.

This case does not present a facial challenge to the definiteness of the statute, and this Court need not answer whether an indictment for any of those other activities would be constitutionally permissible. The only question is whether Petitioner had sufficient notice that her specific conduct—ingesting methamphetamine during the 37th week of pregnancy—constitutes child abuse. And the answer to that question, by Petitioner’s own admission no less, is “yes.”

III. CONCLUSION

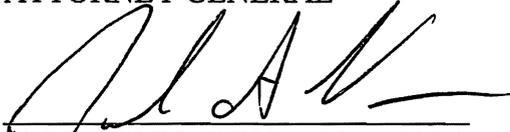
For the reasons herein stated, the State of West Virginia respectfully requests that the Court affirm the conviction of the Circuit Court of Nicholas County, West Virginia.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'ELBERT LIN', written over a horizontal line.

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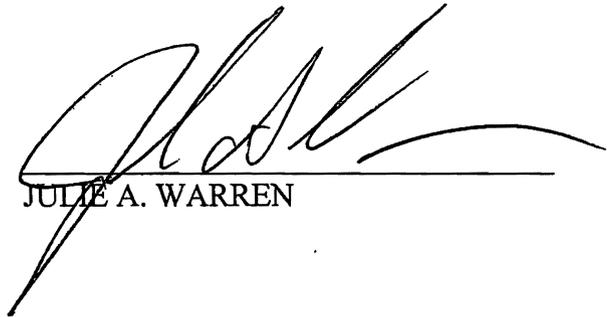
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CERTIFICATE OF SERVICE

I, Julie A. Warren, Assistant Attorney General, do hereby certify that I have served a true copy of a "*Brief on Behalf of the Respondent*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 5th day of August, 2015, addressed as follows:

To: Jason Palmer
Public Defender Services
One Players Club, Suite 301
Charleston, WV 25311



JULIE A. WARREN