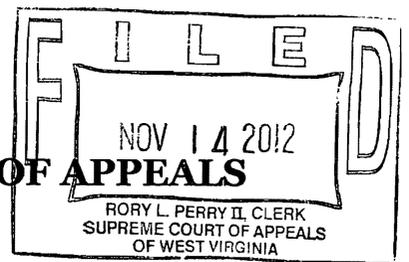


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**  
**at**  
**CHARLESTON, WEST VIRGINIA**  
**No. 12-0120**



**STATE OF WEST VIRGINIA,**  
**Plaintiff,**

**v.**

**WILLIAM R. JOHNSON,**  
**Defendant.**

**SUPPLEMENTAL BRIEF**  
**ON BEHALF OF**  
**WILLIAM R. JOHNSON**

On Appeal from the  
Circuit Court of Wood County, West Virginia  
The Honorable Jeffrey B. Reed, presiding  
Wood County Case #08-F-24

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## **TABLE OF AUTHORITIES**

### **West Virginia Cases**

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### **Federal Cases**

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**OF**  
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Now comes the Defendant-below and the Appellant herein, WILLIAM R. JOHNSON by and through his counsel, MICHELE RUSEN and pursuant to the *Amended Scheduling Order* of this Court files this “*Supplemental Brief.*”

As previously set forth, WILLIAM JOHNSON seeks reversal of his convictions of three felony charges in connection with the death of J.W. Those convictions include second degree murder (lesser included offense as charged in Count I); murder of a child by a guardian or custodian by failure to provide necessary medical care (Count II); and death of a child by a guardian or custodian by intentional infliction of physical harm (Count III). The verdict was rendered in the Wood County Circuit Court, the Honorable Jeffrey B. Reed presiding, after a seven-day trial in August, 2008.

The Court sentenced the Defendant to forty (40) years in prison pursuant to his conviction upon Count I (Second Degree Murder); life without the possibility of parole pursuant to his conviction upon Count II (Murder of a Child by a Guardian or Custodian); and forty (40) years pursuant to the conviction upon Count III (Death of Child by a Guardian or Custodian). All sentences were imposed consecutively. (A.R. 284-286.)

In this *Supplemental Brief*, WILLIAM R. JOHNSON asserts an additional argument in support of his contention that the jury’s verdict finding of guilt upon Count II of the indictment is legally insufficient and improper as a matter of law. Specifically, WILLIAM R. JOHNSON contends that the verdict of guilt upon Count II is contrary to and inconsistent with the finding of guilt upon Count III of the indictment. This argument further supports the Appellant’s assignment of error regarding his conviction upon Count II. This argument

was not considered by the court-below, and was not raised in the Appellant's *Opening Brief* and *Reply Brief*.

In addition to charging WILLIAM JOHNSON with murder in Count I of the indictment, the State of West Virginia also charged WILLIAM JOHNSON with two counts of child abuse pursuant to West Virginia Code Chapter 61, Article 8D.

Count II charged WILLIAM R. JOHNSON with violating §61-8D-2 and alleged:

That on or about the \_\_\_ day of January, 2007, in Wood County, West Virginia, WILLIAM RYAN JOHNSON unlawfully, feloniously, maliciously and intentionally caused the death of J.M.W. by failing to provide the child, J.M.W. with necessary medical care, at a time when WILLIAM RYAN JOHNSON was guardian or custodian of J.M.W. and J.M.W. was under his care, custody and control, against the peace and dignity of the State. (A.R. 124.)

The statute regarding this offense, West Virginia Code §61-8D-2(b) provides that:

If any parent, guardian, or custodian shall maliciously and intentionally **cause the death** of a child under his or her care, custody or control **by his or her failure or refusal to supply such child with** necessary food, clothing shelter or **medical care**, then such parent, guardian or custodian shall be guilty of murder in the first degree. (emphasis added.)

In Count II of the indictment, WILLIAM R. JOHNSON was charged with violating West Virginia Code §61-8D-2a. This count of the indictment alleged:

That on or about the \_\_\_ day of January, 2007, in Wood County, West Virginia, WILLIAM RYAN JOHNSON unlawfully, feloniously, maliciously, and intentionally inflicted substantial physical pain and/or impairment of physical condition upon J.M.W., a child, by other than accidental means thereby causing the death of said child, J.M.W. while J.M.W. was in the care, custody or control of WILLIAM RYAN JOHNSON, who was the guardian or custodian of the child at the time, against the peace and dignity of the State. (A.R. 125).

This statute provides that:

If any parent, guardian or custodian shall maliciously and intentionally inflict upon a child under his or her care, custody or control substantial physical pain, illness or any impairment of physical condition by other than accidental means, **thereby causing the death of such child**, then such parent, guardian or custodian shall be guilty of a felony. West Virginia Code §61-8D-2a(a).

As is evident, the State of West Virginia charged two crimes and alleging two different causes of the death of J.W. which are contradictory.

Consistent with West Virginia Code §61-8D-2(b) the jury was instructed that in order to convict WILLIAM JOHNSON of the offense charged in Count II, the State was required to prove that WILLIAM JOHNSON. **caused J.W.'s death** by unlawfully, feloniously, maliciously and intentionally refusing to supply her with necessary medical care. (A.R. 202-203; Trial Tr. 1104-1106.)

Consistent with West Virginia Code §61-8D-2a(a), the jury was instructed that in order to convict WILLIAM JOHNSON of the offense charged in Count III, the State was required to prove that WILLIAM JOHNSON **caused J.W.'s death** by unlawfully, feloniously, maliciously and intentionally inflicting substantial physical pain and/or impairment of a physical condition by other than accidental means while he was J.W.'s guardian or custodian. (A.R. 205-206; Trial Tr. 1107-1108.)

The State argued throughout trial that the injuries to J.W. were intentional, and were severe, and that those injuries caused her death, arguments consistent with guilt upon Counts I and III. Yet the State charged that a failure to seek medical care also caused the child's death as well. (*See, e.g., Closing Argument*, Trial Tr. (1134-1135.)) As the Appellant has previously established, none of the numerous medical personnel who testified on behalf of the State of West Virginia, not a single doctor, nurse, or paramedic was asked any question concerning whether prompt medical care could have saved this child's life, or offered any chance of survival.

Nevertheless, despite basing its theory of the case upon the intentional infliction of injuries alleged to have been inflicted by WILLIAM JOHNSON with the goal of causing death, the State additionally requests that this Court to sustain a conviction which is inconsistent with the evidence, inconsistent with the State's theory of the case and inconsistent with the verdict rendered upon Count III. The very specific causation elements in these two statutes, each critical to the State's case with respect to each count, were completely ignored by the State of West Virginia in the presentation of its evidence and later by the trial court in upholding this conviction. These two modes of causation are of necessity, exclusive of one another.

Generally, rational consistency in verdicts is not necessary, and judicial review upon the basis on inconsistency is sparingly granted. State v. Green, 187 W.Va. 43, 50, 415 S.E.2d 449, \_\_\_\_ (1992); State v. Hall, 174 W.Va. 599, 603, 328 S.E.2d 206, \_\_\_\_ (1985). While verdicts on differing counts need not be consistent with each other, the verdicts must be consistent with the evidence, even where no rational explanation for the verdicts can be found. United States v. Daigle, 149 F.Supp. 409 (1957 D.D.C). However, this general rule does not apply in situations “where a guilty verdict on one count logically excludes a finding of guilt on the other.” State v. Hall, 174 W. Va. at 603, 328 S.E.2d at 211, *quoting* United States v. Powell, 469 U.S. at 69 n. 8, 105 S.Ct. at 479 n. 8, 83 L.Ed.2d at 471 n. 8. State v. Green, 187 W.Va. 43, 415 S.E.2d 449 (1992). “[W]here a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand.” United States v. Daigle, 149 F.Supp. 409 (1957 D.D.C), [*citing*] Fulton v. United States, *supra*, 45 App.D.C. at page 41; Davis v. United States, 37 App.D.C. 126, 133.

In this case, the evidence was insufficient for any rational trier of fact to find that the State of West Virginia proved, beyond a reasonable doubt, all of the essential elements of the crime charged in Count II, causing a death by failure or refusal to supply such child with medical care. To the contrary, the State of West Virginia focused upon proving causation of death consistent with the acts charged in Counts I and III. This proof logically excludes and “negatives” proof of guilt of causing a death due to failure to provide medical care. Accordingly, a judgment of acquittal for WILLIAM JOHNSON on Count II is further warranted for the reason set forth herein as well as the other reasons previously presented to the Court.

#### **VI. Conclusion and Prayer**

WILLIAM JOHNSON renews his request and respectfully prays that this Court enter an *Order* reversing his conviction upon Count II; that this matter be remanded to Wood County Circuit Court for a new trial; that the Wood County Circuit Court be directed to enter a verdict of acquittal upon Count II of the within indictment; and for such further and other relief as this Court may deem appropriate.

WILLIAM R. JOHNSON

By Counsel,

A handwritten signature in cursive script, reading "Michele Rusen", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

**This 12th day of November 2012, the undersigned certifies that the enclosed “*Supplemental Brief of William R. Johnson*” in case No. 12-0120, *State of West Virginia v. William R. Johnson* was served upon the following person, by mailing, first class postage prepaid, a true and accurate copy thereof to:**

Thomas W. Rodd, Assistant Attorney General  
State of West Virginia, Office of the Attorney General  
812 Quarrier Street, 6<sup>th</sup> Floor  
Charleston, WV 25301

A handwritten signature in cursive script, reading "Michele Rusen". The signature is written in black ink and is positioned above the printed name and contact information.

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