

IN THE SUPREME COURT, STATE OF WYOMING

THE STATE OF WYOMING,)
Plaintiff, Respondent,)
)
vs.)
)
LEIGHA STEWART,)
Defendant, Petitioner.)

S-20-0230

Case No.

IN THE SUPREME COURT
STATE OF WYOMING
FILED

OCT 30 2020

SHAWNA GOETZ, CLERK

by CHIEF DEPUTY

PETITION FOR WRIT OF REVIEW

COMES NOW PETITIONER, Leigha Stewart, by and through counsel, pursuant to W.R.A.P. 13.01, and respectfully petitions this Court for a Writ of Review. In the alternative, pursuant to Art. 5 § 3 of the Wyoming Constitution, Petitioner requests a Writ of Certiorari. The following information in support of this Petition is set forth below in accordance with W.R.A.P. 13.04:

PRELIMINARY STATEMENT

Petitioner seeks interlocutory review, vacation and reversal of the District Court's Order Denying Petition for Writ of Review, entered on October 19, 2020, which denied Petitioner's request to vacate and reverse the Circuit Court's Order Denying the Motion to Dismiss criminal case CR 2020-487, entered September 3, 2020. With its decision denying the motion to dismiss, the Circuit Court judicially expanded the reach of W.S. § 6-4-403(b)(iv), usurping the role that the Wyoming Constitution delegates to the legislature. *See* Wyo. Const. Art. 2, § 1. That judicial expansion runs contrary to the plain text and legislative history of the statute, as well as every application thereof by the Wyoming courts. It contravenes the Wyoming Supreme

Court's unambiguous holding that a fetus is not a child under Wyoming law. *See In re Guardianship of MKH*, 382 P.3d 1096, 2016 WY 103 (Wyo. 2016); *State v. Osmus*, 276 P.2d 469 (Wyo. 1954). Furthermore, because the Circuit Court's expansion of W.S. § 6-4-403(b)(iv) is contrary to prior decisions and the legislative text and history, Ms. Stewart had no notice of potential prosecution on this basis in violation of her due process rights. *See, e.g., State v. Foust*, No. 05-6062 (Wyo.Dist.Ct.-9th Sept. 21, 2005) (dismissing child endangerment charges for alleged drugs delivered through the umbilical cord before it was severed); *State v. Farrell*, No. CR-98-75 (Wyo. Dist. Ct.-3d Oct. 2, 1998) (dismissing child endangerment charges when infant tested positive at birth for methamphetamines); *State v. Pfannenstiel*, No. 1-90- SCR, Albany County (dismissing child abuse charges for drinking alcohol while pregnant). Judicial expansion of the child endangerment law to authorize prosecution of pregnant women would render the law unconstitutional in violation of the rights to due process, privacy, and equal protection under the Fourteenth Amendment to the U.S. Constitution and the parallel provisions of the Wyoming Constitution.

Wyoming's child endangerment statute provides, in pertinent part: "No person shall **knowingly**: (iv) Sell, give or otherwise furnish a **child** any drug prohibited by law without a physician's prescription." W.S. § 6-4-403(b)(iv) (emphasis added).

In this case, the State alleges that Ms. Stewart was pregnant and ingested a controlled substance, and that she then passed those drugs to her newborn child via the umbilical cord in the seconds after birth and before the cord was severed. To the

State, this constitutes “knowingly” furnishing drugs to a “child.” However, the precipitating act from which the alleged criminal liability flows was begun and completed well before childbirth. Respondent's attempt to focus on the brief window after Ms. Stewart's child was born but before the umbilical cord was severed has repeatedly been rejected by courts and the legislature. The interpretation of W.S. § 6-4-403(b)(iv) that the State advances thus represents a drastic departure from the status quo and has far reaching consequences. By subjecting countless Wyoming mothers to a novel form of criminal liability, an expansion of W.S. § 6-4-403(b)(iv) would inevitably deter pregnant women from seeking necessary medical care, thus endangering the health and safety of fetuses and newborn babies.

This judicial expansion of Wyoming's criminal statute—in contravention of prior precedent and legislative history, and in violation of Ms. Stewart's rights to due process, privacy, and equal protection—cannot be allowed to stand. Petitioner cannot be prosecuted for a crime that falls outside the clear scope of the statute, and the case must be reversed and dismissed with prejudice.

I. Nature of Review Desired and Relief Sought

1. Rule 13.01 of the Wyoming Rules of Appellate Procedure states that petitions for extraordinary relief, “including such applications as are established by statute, may be made as petitions for writ of review.” W.R.A.P.13.01(b).

2. This Petition is being filed within the fifteen-day period provided by W.R.A.P. 13.03(a) for petitioning for a writ of review. The Order complained of herein (Order Denying Writ of Review) was entered on October 19, 2020. (Exhibit 1).

3. The Court has jurisdiction based upon Art. 5 § 3 of the Wyoming Constitution.

4. Petitioner seeks interlocutory review and reversal of the Order Denying the Motion to Dismiss criminal case CR 2020-487, entered September 3, 2020. Petitioner seeks a determination that being pregnant and ingesting a controlled substance, which the State claims leads the drugs to be passed from mother to newborn child through the umbilical cord in the brief window after the infant is born but before the umbilical cord is cut, does not constitute a crime under the Wyoming's child endangerment statute, W.S. § 6-4-403(b)(iv). Petitioner alleges she cannot be prosecuted for this crime and the case must be dismissed. This case presents questions of statutory interpretation that could transform the statute into one that, on its face, violates Petitioner's constitutional rights to due process, privacy, and equal protection. This inquiry presents a question of local importance as numerous similar cases are being prosecuted in this jurisdiction and raise matters of imperative public policy.¹

5. This matter also meets the requirements of W.R.A.P. Rule 13.02. This matter presents a controlling question of law as to which there are substantial bases for difference of opinion. Review of this petition would materially advance resolution of this litigation. The prosecution should be dismissed.

In support, the Petitioner attaches the following: (1) District Court's Order Denying Petition for Writ of Review, (Exhibit 1); (2) the Defendant's Motion to Dismiss

¹ Counsel believes that the Cheyenne Public Defender office represents at least five defendants in virtually identical cases in which mothers are charged with violations of W.S. § 6-4-403(b)(iv) due to allegations that they were pregnant and ingested drugs, which purportedly led to passage of the drugs from the mother to the newborn child through the umbilical cord shortly after birth.

Pursuant to W.R.Cr.P. 12(b)(2), filed June 26, 2020, (Exhibit 2); (3) the State's Response and Objection to Defendant's Motion to Dismiss, filed July 16, 2020, (Exhibit 3); (4) the Order Denying Motion to Dismiss dated September 3, 2020, (Exhibit 4); and (5) the Information and Affidavit of Probable Cause, filed March 12, 2020, (Exhibit 5).

6. Petitioner requests that this Writ be granted, to provide relief for the failure to provide her with due process of law, the right to privacy, and the right to equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution and Art. 1, §§ 2, 6, and 10 of the Wyoming Constitution, and to dismiss this case as the facts presented do not constitute a crime under Wyoming law.

II. Factual Background

Petitioner gave birth to "O.S.," a newborn, on March 6, 2020, at Cheyenne Regional Medical Center. On March 12, 2020, the State charged Petitioner with Count I: Child Endangering – Drugs, alleging that on March 6, 2020, Leigh Stewart "did unlawfully and knowingly sell, give or otherwise furnish a child any drug prohibited by law without a physician's prescription, to wit: did unlawfully and knowingly sell, give, or furnish O.S. (3/06/2020) with amphetamines and opiate drugs prohibited by law without a valid prescription, in violation of W.S. § 6-4-403(b)(iv)." The Affidavit of Probable Cause states the infant was tested at the hospital shortly after birth and tested positive for amphetamines and opiates. The Affidavit states Ms. Stewart admitted to using drugs 10 to 14 days prior to giving birth to O.S. The State alleges that Petitioner "furnished" the drugs to the infant via the umbilical cord during the short window between childbirth and the severing of the umbilical cord.

Petitioner filed a Motion to Dismiss the Information on June 26, 2020, alleging the Information and Affidavit did not state facts sufficient to constitute a crime under Wyoming law. The State's allegation that being pregnant and taking drugs and then "knowingly" "furnish[ing]" these drugs via the umbilical cord after the infant is born is not a crime under the Child Endangerment Statute, W.S. § 6-4-403(b)(iv). The State filed a Response and Objection to the Defendant's Motion to Dismiss on July 16, 2020, alleging this was a question of fact, not law. The Circuit Court held a hearing on the Motion to Dismiss on August 7, 2020. On September 3, 2020, the Circuit Court filed an Order Denying the Motion to Dismiss. The Court held it was unable to rule on the Defendant's motion to dismiss "without development of the underlying facts at trial," citing *Mathews v. State*, 2014 WY 54, ¶ 17, 322 P.3d 1279, 1281-1282 (Wyo. 2014). (Exhibit 4, p. 5). The Court found that the State's theory of the case was that the Defendant had ingested drugs while pregnant, and that those drugs were in her system when she gave birth and were then passed on to the child via the umbilical cord. The Court found that "the State would be required to prove that during the time after birth before severing the umbilical cord the Defendant knowingly gave or otherwise furnished her child with drugs." (Exhibit 4, p. 4-5, ¶ 9). The question of law Petitioner raised, however, was whether the legislature ever intended for such circumstances to be considered criminal, or whether this prosecution falls outside the scope of W.S. § 6-4-304(d)(iv).

III. Questions Presented

1. Do the facts alleged in the Information—that Petitioner "knowingly"

“furnished” drugs to a “child” through the umbilical cord when she used drugs 10-14 days prior to childbirth—constitute a violation of W.S. § 6-4-304(d)(iv) for which Petitioner may be criminally prosecuted?

2. Was Petitioner denied her rights to due process, privacy, and equal protection under both State and Federal Constitutions by the Circuit Court when it judicially expanded the child endangerment statute as defined by W.S. § 6-4-304(d) contrary to clear legislative intent and previous decision by Wyoming Courts, and thus permitted the prosecution of Petitioner never authorized by state law?

IV. Principles of Law Upon Which Petitioner Relies

Petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution and Art. 1, §§ 6 and 10 of the Wyoming Constitution as her actions are not criminalized under Wyoming law. If this prosecution moves forward, she will also face the denial of her rights to privacy and equal protection under the Fourteenth Amendment and the parallel provisions of the Wyoming Constitution.

The issue before the Court is one of law: Does Wyoming Statute 6-4-403 apply to a woman who becomes pregnant, ingests controlled substances, and then incidentally passes those drugs to the infant via the umbilical cord? Wyoming’s courts, like other courts that have interpreted similar statutes, recognize that the criminal charge that gives rise to Petitioner’s prosecution squarely presents an issue of state law. The precipitating act from which the alleged criminal liability flows began and was completed well before childbirth. Respondent’s attempt to convert an issue of law to one of fact by focusing on

the brief moments after Ms. Stewart's child was born but before the umbilical cord was severed has repeatedly been rejected by courts.

Questions of law are within the sole province of the Court. *See Hopkinson v. State*, 632 P.2d 79, 155 (Wyo. 1981). The laws of this State do not allow prosecution of a mother for drugs purportedly ingested during her pregnancy, and then allegedly passed to her newborn child through the umbilical cord. Ms. Stewart is without notice that her pregnancy and conduct constituted child endangerment or violated any other Wyoming law.

A. Petitioner's Alleged Conduct Took Place During Pregnancy, Not During or After Childbirth

The Affidavit of Probable Cause indicates that O.S. was delivered on March 6, 2020 and tested positive shortly after birth for amphetamines and opiates. The Affidavit states that Ms. Stewart admitted to using drugs 10 to 14 days prior to giving birth. Wyoming Statute Section 6-4-304(d) reads, "As used in this section, "child" means a person under the age of sixteen (16) years." The Wyoming Supreme Court has stated that a fetus is not a child under Wyoming law. *See In re Guardianship of MKH*, 382 P.3d 1096, 1101, 2016 WY 103 (Wyo. 2016); *State v. Osmus*, 276 P.2d 469 (Wyo. 1954).

B. The Wyoming Legislature Repeatedly Has Refused to Authorize this Type of Prosecution.

Penal statutes must be strictly construed and cannot be extended by inference or construction. *See Meerscheidt v. State*, 931 P.2d 220, 224 (Wyo. 1997) (citing *Smith v. State*, 902 P.2d 1271, 1284 (Wyo. 1995)). If a criminal statute is ambiguous, the ambiguity should be resolved in favor of leniency and the defendant. *Id.* at 224 (citing

ALJ v. State, 836 P.2d 307, 310 (Wyo. 1992)). “[C]ourts cannot supply omissions in a statute and will not read into a statute exceptions not made by the legislature.” *LoSasso v. Braun*, 386 P.2d 630, 631 (Wyo. 1963). Moreover, statutes must not be construed in a “manner producing absurd results.” *K.P. v. State*, 102 P.3d 217, 224 (Wyo. 2004) (citation omitted). It is the duty of Wyoming courts “to construe and enforce the law as enacted by the legislature, and not to make laws.” *LoSasso*, 386 P.2d at 632. A court that makes new laws improperly usurps the role that the Wyoming Constitution delegates to the legislature. *See* Wyo. Const. Art. 2, § 1 (providing that the powers of government are divided into legislative, executive, and judicial departments and that “no person . . . charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others . . .”).

The statute at issue here contains the word “child,” not fetus or unborn child. When the Wyoming legislature has chosen to include a fetus or unborn child within the reach of its laws, it has done so explicitly by using “fetus” or “unborn child.” *See* W.S. § 35-1-401 (defining “live birth” in the context of the administration of vital records to mean “complete expulsion or extraction from its mother of a fetus, which after such expulsion or extraction, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached”); W.S. § 35-5-202 (defining “decendent” to include “a stillborn infant and, subject to restrictions imposed by law other than this act, a fetus”); W.S. § 35-6-101 –109 (using “fetus” and “unborn infant” in the context of abortion statutes). Similarly, the legislature

has modified “child” or “person” with “unborn” or “newborn” when it intended the statute to apply to an unborn or newborn child.

From 1996 until as recently as 2020, the Wyoming legislature has repeatedly refused to pass bills relating to pregnancy and drug use by pregnant women who would then purportedly pass the drugs to their children via the umbilical cord.² The Wyoming

² The legislative history includes:

- a. In 1996, HB 15 "Neonatal Abuse" was brought up but later not introduced by the sponsor. The bill would have made into law:

AN ACT relating to neonatal abuse; amending definitions to include effects of substance abuse by mother; requiring the reporting of neonatal abuse by medical professionals; requiring the department of family services to investigate cases of substance abuse as specified; authorizing the taking of a new born infant into temporary protective custody as specified; creating a presumptions as specified; and providing for an effective date.

- b. In 1999, HB 231 "Child Protection Act amendment" was defeated by the House Judiciary Committee. The bill would have made into law:

AN ACT relation to Child Protection Act; revising the definition of child for purposes of the act; and providing for an effective date.

(a) As used in this act:

(iii) "Child" means an individual who is under the age of majority and includes an unborn child who has gestated sufficiently to bar termination of the pregnancy as provided under law.

- c. In 2006, HB 87 "Methamphetamine - endangering children before birth" failed on introduction. The law would have made prenatal exposure to methamphetamine illegal.

The bill would have made into law:

AN ACT relating to children; **providing that criminal child endangerment includes prenatal exposure to methamphetamine, as specified; amending the definition of "child" for purposes of child protective services to include newborns exposed to methamphetamine prenatally; and providing for an effective date. (Emphasis added).**

legislature's repeated rejection of bills that would impose criminal liability upon women

- d. In 2007, HB 68 "Methamphetamine - endangering children before birth" did not pass.

The bill would have made into law:

AN ACT relating to children; amending the definition of "abuse" as specified; requiring drug courts, juvenile courts and state-supported treatment facilities to give priority to pregnant women and persons **alleged to have abused children by prenatal exposure to methamphetamine**; and providing for an effective date. (Emphasis added).

- e. In 2007, HB 188 "Endangering children and unborn - methamphetamine" was introduced and failed in the Judiciary Committee. It provided, in pertinent part:

No person who is pregnant with a viable fetus as defined by W.S. 35-6-101(a)(vii) shall knowingly and willfully possess, store, manufacture or ingest methamphetamine or remain in a room, dwelling or vehicle where that person knows that methamphetamine is currently possessed, stored, manufactured or ingested. (Emphasis added).

- f. In 2017, HB 215 "Drug induced infant endangerment" was introduced and failed. It stated, in pertinent part:

d) A person is guilty of drug induced infant abuse if:

(i) The person knows or reasonably should know themselves to be pregnant and intentionally injects, inhales, ingests or administers by any other means, in violation of W.S. 35-7-1039, any amount of methamphetamine or a controlled substance which is a narcotic drug listed in Schedule I or II of the Wyoming Controlled Substances Act;

(ii) During or after the person's injection, inhalation, ingestion or administration of the substance specified in paragraph (i) of this subsection, the person gives birth to an infant who at the time of the live birth, as defined by W.S. 35-1-401(a)(v), tests positive for any amount of the substance specified in paragraph (i) of this subsection.

- g. In 2020 - HB 107 "Neglect and abuse" failed on introduction. The bill included provisions amending the definition of "neglect" of a "child" to include alleged prenatal exposure to methamphetamine or alleged fetal alcohol syndrome or fetal alcohol effects.

who are pregnant and ingest drugs makes plain that the legislature never intended for its child endangerment law to be wielded against mothers, like Petitioner, who allegedly use drugs 10-14 days prior to their infant's birth. By expanding the scope of W.S. § 6-4-403(b)(iv) beyond its plain text and in contravention of this legislative history, the Circuit Court acted to "make law" rather than "to construe and enforce the law as enacted by the legislature," thus violating the separation of powers enshrined in the Wyoming Constitution. *LoSasso*, 386 P.2d at 631. Moreover, Tennessee is the only state in which a legislature has actually passed a law authorizing arrests of mothers as a response to pregnancy and drug use, and that law was allowed to sunset because of the overwhelming evidence of the harm it did to maternal, fetal and child health.³ The Court must not construe W.S. § 6-4-403(b)(iv) to produce this "absurd result." *K.P.*, 102 P.3d at 224.

Permitting this prosecution to move forward would have dangerous consequences for the health and safety of fetuses and infants in Wyoming. Public health officials and maternal and child health experts uniformly oppose criminal sanctions for use of controlled substances during pregnancy in order to "protect" the health of the fetus

³ See Dr. Rahul Gupta, *Tennessee Lawmakers Want to Prosecute Moms of Drug-Exposed Babies and That's Wrong*, *Tennessean* (Mar. 28, 2019), <https://www.tennessean.com/story/opinion/contributors/2019/03/28/tennessee-legislators-shouldnt-prosecute-moms-drug-exposed-babies/3066976002/> (explaining that a 2014 Tennessee law permitting the criminal prosecution of women who are pregnant and use drugs was allowed to sunset in 2016 after maternal and child health experts advocated vigorously that such laws cause "drug-dependent pregnant women [to] shun the critical care they need to avoid being stigmatized, prosecuted and having their newborns taken away.").

because such sanctions are far more likely to cause harm than to prevent harm by deterring women from seeking prenatal care and giving birth in hospitals.

C. Wyoming Courts Have Not Permitted This Type of Prosecution.

The Circuit Court's ruling allowing Petitioner's prosecution to proceed also contravenes state common law. Wyoming Courts have consistently ruled that the types of charges faced by Ms. Stewart, whose conduct occurred during pregnancy, could not be sustained under Wyoming law. Accordingly, the Circuit Court's decision constitutes a radical departure from existing precedent and, if allowed to stand, will subject countless mothers to a new form of criminal liability.

In *State v. Osmus*, 276 P.2d 469 (Wyo. 1954), the Defendant had been charged with nonfeasance and manslaughter under a statute that, much like the child endangerment statute at issue here, provided in relevant part, "It shall be unlawful for any person having, or being charged by law with the care of custody or control of **any child** under the age of nineteen (19) years knowingly to cause or permit the life of such child to be endangered or the health or morals or welfare of such child to be endangered or injured." *Id.* at 474 (quoting Section 58–101, Wyo. Comp. St. 1945). The defendant was prosecuted for failing to receive medical care while pregnant and during childbirth. The Wyoming Supreme Court held that the woman could not be prosecuted for or convicted of manslaughter because the statute applied to a "living child" and not an unborn child. *Id.* The Court thus adopted a rule that "distinguished between want of care of children as ordinarily understood, and want of care of a newborn child during the time of

birth, holding that criminal conduct cannot be attributed to nonfeasant acts of a mother during the travail of childbirth.” *Id.* at 474-75.

Here, the State has alleged that Ms. Stewart used drugs *while pregnant* but prosecutes her under a law that, as in *Osmus*, addresses the well-being of “children as ordinarily understood”—meaning children who are born. *Id.* Yet as the *Osmus* court recognized, there is a legal distinction between a fetus and a child, and actions undertaken while pregnant versus those undertaken after a child is born. *Id.*; *see also Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill.1988) (“It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother.”). The State seeks to deem illegal new conduct that has never been prohibited by the legislatures or courts, and for which Ms. Stewart could not have had notice of potential culpability: the furnishing of drugs ingested 10-14 days before childbirth to a child via the umbilical cord during the flash of time after the child was born but before the cutting of the umbilical cord. As with *Osmus*, Ms. Stewart’s prosecution derives from actions undertaken during pregnancy but rests on a statute that does not encompass pregnancy-related conduct. Statutory and common law do not permit the State to relocate Ms. Stewart’s conduct from pregnancy to post-birth to fit within the state’s child endangerment statute.

District and Circuit Courts in Wyoming have consistently ruled that these types of charges cannot be sustained under Wyoming law. The same type of child endangerment charge at issue here was dismissed in *State v. Foust*, No. 05-6062 (Wyo.Dist.Ct.-9th Sept. 21, 2005) by Judge Young. Ms. Foust and her infant both tested positive for

methamphetamine at the time of the infant's birth. Ms. Foust was then charged with child endangerment. The State alleged that Ms. Foust gave drugs to her child via the umbilical cord before it was severed. The Court ruled that the plain language of the statute and obvious legislative intent precluded the child endangerment statute from encompassing a fetus or unborn child. Judge Young stated, "W.S. § 6-4-405 is clear and unambiguous and this Court gives the term 'child' its plain and ordinary meaning, which does not include an unborn child or fetus. In addition, the legislature had clearly indicated when a statute applies to a fetus or unborn child and failed to include such language in W.S. § 6-4-405. Given the language of W.S. § 6-4-405, the use of the term fetus and unborn child in several other Wyoming statutes, and the fact that a bill would have addressed Ms. Foust's conduct was considered and withdrawn by Representative Hinchey, the Court cannot and will not stretch W.S. § 6-4-405 to conduct the legislature has not clearly proscribed." *Id.* At 05-6062 at p. 5.

Likewise, in *State v. Pfannenstiel*, No. 1-90-8CR, Albany County, Judge Denhardt dismissed the child abuse charges, finding that the charges could not be sustained under applicable Wyoming law when a woman was charged for drinking excessive amounts of alcohol while pregnant. Similarly, in *State v. Farrell*, No. CR-98-75 (Wyo. Dist. Ct.-3d Oct. 2, 1998) (Ryckman, J), the Court dismissed the charges against Ms. Farrell when the State alleged her infant tested positive at birth for methamphetamines. On appeal, the Third Judicial District held that "[t]he common law of the State of Wyoming does not allow for prosecution by a fetus against its mother" and that Ms. Farrell was "without notice that her conduct constituted child abuse or violated any other provision of the

Wyoming Statutes." The Circuit Court here provided no justification for departing from this settled case law and allowing the prosecution against Petitioner to proceed.

D. Other State Courts Have Rejected Efforts to Judicially Expand State Laws to Permit Prosecutions Under Similar Circumstance

Other state courts have rejected the prosecution of mothers for allegedly transmitting drugs to their newborn infants via the umbilical cord in writs filed in their courts. In *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994), the newborn infant tested positive for amphetamine and methamphetamine shortly after birth. Just as Respondent argues here, the prosecution in *Encoe* contended that the mother administered drugs to her child through the umbilical cord in the period between birth and the severing of the cord. Ms. Encoe admitted that she had used drugs during her pregnancy and was then charged with one count of Willfully Endangering a Child as the Result of Child Abuse, in violation of Nevada law (NRS 200.508(1)). The court concluded that "if the Nevada legislature intended to criminalize prenatal substance abuse it would have enacted a statute to that effect. Thus, the district court properly granted [the mother's] petition for writ of habeas corpus because her conduct is not subject to prosecution under NRS 200.508." *Id.* at 597-598. The *Encoe* Court observed:

Penal statutes should be so clear as to leave no room for doubt as to the intention of the legislature, and where a reasonable doubt does exist as to whether the person charged with violation of its provisions is within the statute, that doubt must be resolved in favor of the individual. * * *

We conclude that prosecuting a mother for the delivery of a controlled substance to her child through the umbilical cord is a strained and unforeseen application of NRS 200.508.

Id.

As in Nevada, the Wyoming legislature has evinced no intent to have its child endangerment statute apply to conduct undertaken during pregnancy. As the Court in *Encoe* described, a contrary ruling, unmoored from the plain language and unambiguous legislative of a statute, threatens to unleash a wide variety of prosecutions at odds with current state law. In the *Encoe* Court's words:

To hold otherwise would ascribe to the legislature the intent to criminalize the conduct of women who ingest any substance that has the potential to harm a fetus. This would open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins.

Id. at 598. In support of its conclusion, the Nevada Court cited a Kentucky Supreme Court decision holding:

If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new "crimes." In short, the District Attorney's interpretation of the statutes, if validated, might lead to a "slippery slope" whereby the law could be construed as covering the full range of a pregnant woman's behavior [thereby creating] a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.

Id. at 598 (quoting *Commonwealth v. Welch*, 864 S.W.2d 280, 293 (Ky. 1993)).

The *Encoe* and *Welch* rulings from Nevada and Kentucky are consistent with those of other states' courts addressing the same issue in nearly identical contexts, all of which recognized that "if their respective state legislatures intended to include a pregnant woman's drug use among the type of conduct that is criminally prohibited, they would have done so expressly." *Id.* at 599.

The Oregon case of *State v. Cervantes*, 223 P.3d 426 & 223 P.3d 427 (Or.App. 2009), is also on point. There, the defendant had ingested methamphetamine during her

pregnancy; the newborn tested positive for methamphetamines; and the defendant was prosecuted under the Oregon child endangerment statutes. The defendant moved to dismiss on the grounds that the statutes did not apply to the behavior alleged by the State. The State argued that the statutes did apply because the drugs ingested by the defendant during pregnancy passed to the child at birth. The Oregon Court of Appeals rejected the State's argument and refused to convert conduct undertaken during pregnancy into conduct endangering a child because the child was attached to an umbilical cord after birth. The Court found *at the time the defendant ingested the drug*, the child had not yet been born, and was therefore a fetus. Since the statutes only applied in cases involving harm to "another person," alleged harm to the fetus fell outside the scope of the statutes. The court held, "[b]ecause a conviction under [applicable Oregon statutes] requires a defendant to have engaged in conduct that, *at the time of engaging in the conduct*, created a risk of serious injury to 'another person,' the indictment in this case failed to allege facts sufficient to constitute that crime." *State v. Cervantes*, 223 P.2d 426, 436 (Or. App. 2009) (emphasis added). Similarly, the Wyoming Supreme Court held that the predecessor statute to the current child endangerment statute, W.S. §58-101, applied only to "a really living child" and "hence has no possible connection" to conduct that occurred "prior to the birth of the child." *State v. Osmus*, 276 P.2d at 486.

In addition, the Florida Supreme Court held in *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992), that cocaine allegedly passing through the umbilical cord after birth but before the cord was cut did not violate the statutory prohibition against adult delivery of controlled substance to minor. The Court held that the Florida legislature did not intend

for its child abuse and neglect statutes to support criminal prosecution of women for drugs ingested during pregnancy, determining that “the Legislature expressly chose to treat the problem of drug dependent mothers and newborns as a public health problem and that it considered but rejected imposing criminal sanctions.” *Id.* at 1293. The Court further noted that it could “find no case where ‘delivery’ of a drug was based on an involuntary act such as diffusion and blood flow.” *Id.* at 1292.

The Maryland Court of Appeals likewise held that potential injury to a fetus caused by the defendant's ingestion of cocaine while pregnant could not form the basis for a reckless endangerment conviction with respect to child later born alive. *Kilmon v. State*, 905 A. 2d 306 (Md. App. 2006). The *Kilmon* court noted that the prosecution's theory had the potential to render criminal “not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature.” *Id.* at 311. For instance, the court held, pregnant women could face prosecution for ingesting *legal* drugs, smoking, drinking, failing to maintain a proper diet, failing to seek available prenatal care, failing to wear a seatbelt while driving, exercising too much or too little, or even skiing or horseback riding. *Id.* The court thus concluded that the legislature could not have possibly intended for the reckless endangerment statute to apply to prenatal drug ingestion by a pregnant woman. *Id.* at 315.

Finally, the Arkansas Supreme Court held that a defendant could not be prosecuted for introduction of a controlled substance into the body of another person where her alleged drug use occurred prior to childbirth. *Arms v. State*, 2015 Ark. 364,

471 S.W.3d 637 (2015). Focusing on the “narrow window of time when the child was outside the womb, but still attached to the placenta by the umbilical cord,” the court held that the statute at issue could did not “criminalize the passive bodily processes that results in a mother’s use of a drug entering her unborn, or newborn child’s system.” *Id.* at 642. As “courts cannot, through construction of a statute, create a criminal offense that is not in express terms created by the Legislature,” the Arkansas Supreme Court reversed and dismissed the defendant’s conviction. *Id.* at 642-43.

Like the statutes at issue in the aforementioned cases, Wyoming Statute § 6-4-403 makes no mention of a fetus or unborn child. When the language of a statute is clear, there is no room to impose another meaning. *Hayes v. State*, 599 P.2d 559 (Wyo. 1979). The statute only mentions “child” and cannot be expanded to include a fetus or unborn child. As the drugs were allegedly consumed during pregnancy, 10-14 days prior to birth, Ms. Stewart did not “knowingly sell, give or otherwise furnish” drugs to a child.

V. The Ends of Justice Require That Petitioner’s Relief be Granted

The issue before the Court is squarely one of law, not fact: Does Wyoming Statute 6-4-403 apply to a woman who is pregnant and ingests drugs and then purportedly “furnishes” them to her newborn through the umbilical cord? Questions of law are within the sole province of the Court. Under no set of facts could Ms. Stewart be found guilty of child endangerment, as the child endangerment statute at issue here—like those in Nevada, Kentucky, Oregon, Florida, Maryland, and Arkansas, *see supra*—plainly does not apply to the ingestion of drugs during pregnancy. An immediate appeal will materially advance resolution of this case, and the several other cases currently before the

Laramie County Circuit Court involving these exact charges and nearly identical circumstances.

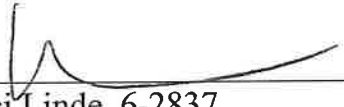
CONCLUSION

Wyoming Statute Section § 6-4-403 makes no mention of a fetus or unborn child. The child endangering statute criminalizes “knowingly” “furnish[ing]” drugs to a “child.” When, as here, the language of a statute is clear, there is no room to impose another meaning. *Hayes v. State*, 599 P.2d 559 (Wyo. 1979). The Wyoming legislature has chosen not to address the issue of pregnancy and drug use through criminal law, rejecting numerous bills that have been introduced over the years. Moreover, Wyoming courts and other state courts have dismissed similar cases. Ms. Stewart is entitled to review to clarify this issue.

CERTIFICATION

Petitioner certifies that this petition is not interposed for the purposes of delay. Petitioner further certifies that no notice of entry of the order sought to be reviewed was provided.

RESPECTUFLY SUBMITTED this 30th day of October, 2020.



Marci Linde, 6-2837
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309 West 20th St., Ste 2100
Cheyenne, WY 82002
307.221.4128

CERTIFICATE OF SERVICE

I, Marci Linde, Assistant Public Defender, Laramie County, Wyoming, do hereby certify that I served a true and correct copy of the within and foregoing Petition for Writ of Review this 30th day of October, 2020, by depositing a copy:

Baend Buus
District Attorney's Office
310 W. 19th St., Ste. 200
Cheyenne, WY 82001

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