



# Mom's Prenatal Drug Abuse Sustains Federal Manslaughter Indictment in Newborn's Death

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## What Happened

[United States v. Flute](#) involves a [rare](#) federal manslaughter prosecution based on the death of a newborn caused by a mother's prenatal negligence. The [indictment](#) charging manslaughter by an Indian in Indian country in violation of [18 U.S.C. § 1112](#) (the federal manslaughter statute) and [18 U.S.C. § 1153](#) (the Indian Country Major Crimes Act) was [dismissed](#) by the trial court and ordered reinstated in a July 5, 2019, split [decision](#) of the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit). Both the trial and appellate court decisions turn on statutory interpretation and how two recently enacted statutes designed to protect unborn children affect the federal manslaughter statute. Because the case involves conduct occurring during a pregnancy, the two issues dealt with in the decisions are whether the manslaughter statute contemplates: (1) a born-alive child victim and (2) the child's mother as defendant.

## Background

Samantha Flute, an American Indian, was charged with "unlawfully killing Baby Boy Flute by ingesting prescribed and over-the-counter medicines in a grossly negligent manner." It is alleged that, in the hours before giving birth in the 38<sup>th</sup> week of her pregnancy, on August 19, 2016, the defendant ingested three times her prescribed dose of an anxiety drug and some cough medicine. There is also some indication that she inhaled a snort of hydrocodone, laced, as she came to believe, with cocaine. According to the pathologist's report, the toxic mix of drugs caused the death of the infant who was born alive but died four hours later.

## District Court *Flute*

The U.S. District Court for the Northern District of North Dakota, referring to two federal appellate court decisions ([United States v. Spencer](#) and [United States v. Jumper](#)), [concluded](#) that the manslaughter statute applies to the death of a born-alive infant that was caused by an injury occurring *in utero*. Nonetheless,

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the court held that a mother may not be prosecuted under the statute for conduct occurring while the child is in the womb because of how 1 U.S.C. § 8(a) (Born-Alive Infants Protection Act or Born-Alive Act) and 18 U.S.C. § 1841 (Unborn Victims of Violence Act or Unborn Children Act) interact with the manslaughter statute, 18 U.S.C. § 1112. On the issue of whether conduct occurring before a child is actually born may be prosecuted under the manslaughter statute, the court ruled in the affirmative. Its reasoning took into account the language of the manslaughter statute and that of the Born-Alive Act. The federal manslaughter statute condemns the “killing of a human being,” and the Born-Alive Act defines “human being” for purposes of federal statutes to mean “every infant member of the species homo sapiens who is born alive at any stage of development.” From this, the court **concluded** that “conduct toward a baby *in utero* is actionable as the federal criminal offense of involuntary manslaughter” if the baby is born alive.

On the question of whether the mother could be indicted for such an offense, the district court invoked 18 U.S.C. § 1841 and **held** that it eliminates the authority of the federal government to prosecute a mother for injuring her unborn child *in utero*. Section 1841 criminalizes the killing or injuring of unborn children during the commission of any of over 60 other offenses (predicate offenses) without regard to whether the child is born alive. A prosecution under the section 1841, therefore, must include prosecution under one of the listed predicate offenses, such as manslaughter under 18 U.S.C. § 1112. Moreover, 18 U.S.C. § 1841(c) states that “[n]othing in this section shall be construed to permit the prosecution . . . of any woman with respect to her unborn child.”

The district court reached its decision based on its analysis of the legislative history and intent behind section 1841(c) despite noting that the defendant had not been charged under 18 U.S.C. § 1841. According to the court, “the passage of that statute is instructive in determining whether a pregnant woman can be charged with . . . [manslaughter] for conduct occurring *in utero* when the child is thereafter born alive.” The court identified a passage in the **legislative history** of section 1841(c) as support for a broad interpretation of the exemption as a means of what Congress envisioned—“protecting a mother’s constitutional right and interest in having a baby from unwanted intrusion by third parties.” Accordingly, the court **characterized** the statutory language exempting mothers from prosecution under 18 U.S.C. § 1841(c) as “a clear statement from Congress that the federal assault and murder statutes cannot be applied to the pregnant woman herself for any actions she takes with respect to her unborn child.”

The court buttressed its rationale by **speculating** on the problems that would be raised otherwise, claiming that “[i]f defendant’s actions amount to a federal crime then by extension, pregnant women could be charged with assault if they consume alcohol during pregnancy. . . . [or] if they use chemotherapy to treat cancer and thus cause injury or death to their unborn child.”

### **Appellate Court *Flute***

The two-judge majority on the Eighth Circuit reversed. Like the trial court, the appellate court **held** that “the language of the manslaughter statute plainly encompasses the death of a born-alive child” caused by conduct while the child is in the womb. Unlike the trial court, however, the appellate court majority did not read 18 U.S.C. § 1841 as providing categorical immunity from federal prosecution for a mother’s conduct affecting her unborn child. Instead, it held that, because 18 U.S.C. § 1841 states that “[n]othing in *this section* may be construed to permit the prosecution of a woman with respect to her unborn child,” the statute confers immunity only for a violation of 18 U.S.C. § 1841, not for a violation of the predicate offenses. According to the majority, therefore, the immunity is confined to offenses against unborn children specifically added by enactment of 18 U.S.C. § 1841 and does not extend to offenses against born-alive children in violation of a predicate statute.

The majority **chided** the trial court for disregarding one of the court’s earlier opinions, **United States v. Montgomery**, which had determined that 18 U.S.C. § 1841 did not expand the definition of “person” to include unborn children. According to the majority, *Montgomery* “determined that “§ 1841 has no

applicability or reach beyond its own provisions.” The majority opinion also indirectly criticized the trial court and proclaimed that the “task [of judges] does not involve passing judgment on the wisdom of a given statutory provision or opining on how that statute may be used in the future. Those questions are best left for the legislative body, not the judicial branch.”

In [dissent](#), Circuit Judge Colloton, proceeded from the premise, based on his analysis of common law authorities and early American treatises and compilations of case law, that “Congress has not adopted a manslaughter statute that imposes criminal liability on a mother for prenatal conduct that results in the tragic death of her child.” He [maintains](#) that, in codifying the manslaughter statute in 1909, “Congress did not coin any new term; it simply criminalized the traditional offense of ‘manslaughter’ and gave it the common-law definition that dates to Blackstone.” According to Judge Colloton, the federal manslaughter statute “is [best understood](#) as incorporating . . . [the] common law meaning of manslaughter.” Moreover, he [cites](#) various English and American common law authorities as recognizing that, unlike a third party, under the common law, “a mother was not liable for manslaughter based on prenatal neglect that resulted in the death of a child born alive.” He further contends that neither the Born-Alive Act nor [18 U.S.C. § 1841](#) alters this. The majority opinion [retorted](#) that “[t]he dissent’s recitation of the meaning of common law manslaughter ‘does not fit’ with the express definitions Congress provides,” invoking a Supreme Court [case](#) cautioning against giving a common law term its established meaning when that meaning “does not fit.”

### **What’s Next?**

Unless the defendant seeks and the Supreme Court grants review, the trial court will reinstate the indictment and schedule the case for trial. Among the issues at trial will be whether the conduct of the defendant meets the standard for involuntary manslaughter—i.e., whether, by exceeding her prescribed dosage of prescription drugs she was sufficiently negligent to be convicted; the extent to which her action was affected by her status as a drug addict; the extent to which she is responsible for ingesting the cocaine; and the extent to which an illegal substance, not charged in the indictment, caused the death of the child.

### **Issues for Congress**

Because this case involves statutory interpretation of the interaction between the traditional language used in the federal murder and manslaughter statutes codified in 1909 and recently enacted statutes designed to provide federal protection for unborn children, Congress may wish to reevaluate the extent to which women may be prosecuted for negligent conduct affecting their unborn children who are born alive.

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