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# Recent Developments: Kilmon v. State: A Pregnant Woman's Intentional Ingestion of Cocaine Cannot Form the Basis for a Conviction under Section 3-204(a)(1) of the Criminal Law Article for the Reckless Endangerment of Her Later-Born Child

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## RECENT DEVELOPMENT

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### ***KILMON V. STATE: A PREGNANT WOMAN'S INTENTIONAL INGESTION OF COCAINE CANNOT FORM THE BASIS FOR A CONVICTION UNDER SECTION 3-204(A)(1) OF THE CRIMINAL LAW ARTICLE FOR THE RECKLESS ENDANGERMENT OF HER LATER-BORN CHILD.***

**By: Jason Weintraub**

In a consolidated case, the Court of Appeals of Maryland held that a pregnant woman's prenatal ingestion of cocaine does not form the basis for a conviction under section 3-204(a)(1) of the Criminal Law Article for the reckless endangerment of her later-born child. *Kilmon v. State*, 394 Md. 168, 905 A.2d 306 (2006). The Court concluded Maryland's reckless endangerment statute, as outlined in Maryland Criminal Law Article section 3-204(a)(1) (2006), was not designed with the legislative intent to hold pregnant women criminally liable for the prenatal ingestion of cocaine. *Kilmon*, 394 Md. at 183, 905 A.2d at 315.

The first of the two consolidated cases began in June, 2004, when Regina Kilmon ("Kilmon") gave birth to her son at Easton Memorial Hospital. At the time of birth, a drug screening of the child revealed 675 nanograms per milliliter of cocaine in his system; 375 nanograms per milliliter above minimum sensitivity levels. In August, 2004, Kilmon was charged in the Circuit Court for Talbot County with second-degree child abuse, contributing to child delinquency, reckless endangerment, and possession of a controlled dangerous substance. All charges were based on evidence that Kilmon ingested cocaine while pregnant. Kilmon pled guilty to reckless endangerment and was sentenced to four years in prison. The Court of Special Appeals granted her application for leave to appeal. However, the Court of Appeals granted certiorari before proceedings commenced.

In the second case, Kelly Lynn Cruz ("Cruz") was admitted to Easton Memorial Hospital in January, 2005, complaining of stomach pains. Hospital records indicated she was twenty-nine weeks pregnant. Cruz gave birth to a three-pound, two-ounce baby boy. Drug screenings given to both the newborn and the mother at the

hospital tested positive for cocaine. In April, 2005, Cruz was charged in the Circuit Court for Talbot County with second-degree child abuse, contributing to child delinquency, reckless endangerment, and possession of a controlled dangerous substance.

In Cruz's case, the Circuit Court for Talbot County found her guilty of reckless endangerment and imposed a sentence of five years in prison, with two-and-a-half years suspended in favor of supervised probation and drug treatment. Cruz appealed to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted certiorari prior to any proceedings by the intermediate appellate court. The Court consolidated the Kilmon and Cruz appeals to consider the common issue of whether the intentional ingestion of cocaine, while pregnant, violates Md. Criminal Law Code Ann. section 3-204(a)(1). *Kilmon*, 394 Md. at 121, 905 A.2d at 308.

Section 3-204(a)(1) makes it a misdemeanor for an individual to "engage in conduct that creates a substantial risk of death or serious physical injury to another." *Kilmon*, 394 Md. at 173, 905 A.2d at 308. The State argued that the appellants' prenatal ingestion of cocaine recklessly endangered their children immediately upon and after their births, and such conduct specifically falls under the purview of section 3-204(a)(1). *Kilmon*, 394 Md. at 173, 905 A.2d at 309. However, the State avoided the controversial debate regarding the classification of an embryo or fetus as a person by noting in its briefs that the "person" harmed by the appellant's conduct was the child, after the child's live birth. *Id.*

In support of its argument that a pregnant woman's reckless conduct which harms her unborn child should be punishable under section 3-204(a)(1), the State noted that a third-party is criminally liable for an injury committed while a child is in utero, but later born alive. *Kilmon*, 394 Md. at 175, 905 A.2d at 310 (citing *Williams v. State*, 77 Md. App. 411, 550 A.2d 722 (1988), *aff'd*, 316 Md. 617, 561 A.2d 216 (1989)). In *Williams*, the defendant shot a woman who was nine months pregnant with a bow and arrow. *Id.* The mother died as a result of the injury; her child was born alive, but died shortly thereafter. *Id.* The Maryland Court of Appeals held that the defendant could be convicted of two counts of manslaughter, one for the mother and one for the child born alive. *Id.* The State notes that the "born alive" rule, and its application to the crime of common law manslaughter, was upheld by the Court of Appeals in *Williams* just prior to the enactment of the reckless endangerment statute in 1989. *Kilmon*, 394 Md. at 176, 905 A.2d at 311. As a result, the State argues

that the General Assembly, in enacting section 3-204(a)(1), meant to “criminalize conduct committed by anyone, including a pregnant woman, that recklessly endangers the later-born child.” *Id.*

According to the Court, whether the General Assembly intended to include the conduct of a pregnant woman who might endanger her child is unclear, as the reckless endangerment statute does not specifically address such behavior. *Kilmon*, 394 Md. at 177, 905 A.2d at 311. As a result, other factors must be considered in absence of clear legislative intent. *Id.* Based on the State’s arguments, the application of the statute to the conduct of pregnant women “could well be construed to include 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.” *Kilmon*, 394 Md. at 177, 905 A.2d at 311. According to the Court, if the State’s position were to prevail, a pregnant woman’s criminal liability for actions ranging from failing to maintain a proper diet, to avoiding proper prenatal medical care, would depend entirely on the aggressiveness of a particular prosecutor. *Kilmon*, 394 Md. at 178, 905 A.2d at 312.

To further its argument that the Maryland General Assembly did not intend to consider the ingestion of cocaine by pregnant women a criminal act under section 3-204(a)(1), the Court also looked to the history of failed legislation. *Kilmon*, 394 Md. at 178, 905 A.2d at 312. In 1990, four legislative proposals attempted to classify physical injuries to an unborn child that resulted from a mother’s use of controlled dangerous substances as criminal child abuse. *Kilmon*, 394 Md. at 179, 905 A.2d at 312. Subsequently, all of those bills failed. *Id.* In the 2004 legislative session, the Unborn Victims of Violence Act was introduced to criminalize actions that “recklessly create a substantial risk of death or serious physical injury to an unborn child.” *Kilmon*, 394 Md. at 180, 905 A.2d at 313. Similar to previous attempts at criminalizing pregnant women’s drug use, the legislation failed. *Id.*

Over the course of sixteen years of legislative history, the Court noted that the General Assembly has failed to impose criminal penalties for a pregnant woman’s ingestion of controlled substances, due to the effects such ingestion might have on the child, either before or after birth. *Kilmon*, 394 Md. at 181, 905 A.2d at 314. The Court deferred to the way in which the General Assembly dealt with the issue of prenatal ingestion of illegal drugs, specifically its desire to provide drug treatment programs for pregnant women, and the

termination of parental rights as a mechanism if these women failed to properly care for their child. *Id.* at 182, 905 A.2d at 314. The Court noted that incarcerating drug-addicted pregnant women had proven “ineffective in other States in deterring either that conduct or addiction generally on the part of pregnant women.” *Kilmon*, 394 Md. at 182, 905 A.2d at 314. As such, in light of the way in which the Maryland General Assembly had addressed this issue, the Court held it was not the legislative intent that section 3-204(a)(1) of the Criminal Law Article apply to the prenatal drug ingestion of pregnant women. *Kilmon*, 394 Md. at 183, 905 A.2d at 315.

The Court in *Kilmon* upheld the longstanding view in Maryland that drug-addicted mothers need access to treatment, not punishment. While a pregnant mother’s ingestion of drugs may in fact be reckless in nature, the Court’s decision to provide treatment, instead of incarceration, may give mothers and their children a greater chance at overcoming such terrible addictions.