RENDERED: JANUARY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

SUPREME COURT GRANTED DISCRETIONARY REVIEW: AUGUST 13, 2008
(FILE NO. 2008-SC-0095-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001561-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 06-CR-00003

INA COCHRAN — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: The Commonwealth appeals the dismissal of an indictment against Ina Cochran by the Casey Circuit Court. Upon review, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

The salient facts in this matter are largely undisputed. On January 9, 2006, Cochran was indicted by the Casey County Grand Jury for wanton endangerment in the

first degree and for being a persistent felony offender in the second degree. The Grand Jury charged

> on or about the 29th day of December, 2005, . . . [Cochran] under circumstances manifesting extreme indifference to the value of human life, [] wantonly engaged in conduct which created a substantial danger of death or serious physical injury to Cheyenne Cochran (DOB: 12/29/05) when she ingested cocaine while Cheyenne Cochran was *in utero* and thereafter gave birth to Cheyenne Cochran at such time as both the Defendant and Cheyenne were positive for cocaine. . . .

Cochran, through counsel, moved for dismissal of the indictment, relying exclusively on *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993). Pursuant to *Welch*, Cochran argued that at the time when Cheyenne ingested the cocaine Cheyenne was not a "person" for the purposes of the wanton endangerment statute. Specifically, her motion stated "[t]hat the charge of Wanton Endangerment requires that a 'person' be endangered by conduct manifesting extreme indifference to human life, and a fetus is not a 'person' for the purposes of this statutory charge." Cochran did not challenge the evidence on which the indictment was based; nor did she challenge it on any other grounds.

The Commonwealth did not cite to the trial court any additional Kentucky case law but argued that because Cheyenne was born with cocaine in her system, her mother had wantonly endangered Cheyenne as a person. During the hearing on Cochran's motion, the Commonwealth maintained that the offense to Cheyenne involved endangering her after birth because she was born with cocaine in her body. Notwithstanding the Commonwealth's argument, the hearing centered solely around *Welch* and whether Cheyenne was a person protected under the penal code at the time Cochran ingested cocaine.

The parties' having presented no other Kentucky case law to the trial court other than *Welch*, the court, ruling from the bench, determined that it was bound by the *Welch* decision and dismissed the indictment. The Commonwealth thereafter filed a timely notice of appeal.

II. ANALYSIS

The sole issue presented by the parties to the trial court was the effect of *Welch* on Cochran's indictment. Thus, the only issue before this Court is whether *Welch* remains as binding precedent. *Welch*, decided in 1993, was a five-to-two decision with Justice Wintersheimer dissenting and Justice Lambert joining in the dissent.

Welch was arrested while police were executing an arrest warrant and was found to be under the influence of drugs. She was eight months pregnant and had just injected oxycodone into her jugular vein. Approximately three weeks later, Welch gave birth to a son, who was admitted to a neonatal intensive care unit to be observed for neonatal abstinence syndrome. Welch admitted her drug use to the attending physician. A toxicology report on the baby was negative for oxycodone, but positive for nicotine and caffeine.

Beyond the toxicology report, Welch's baby suffered from symptoms diagnosed as neonatal abstinence syndrome attributed to prenatal drug abuse. The baby exhibited symptoms that included a mild fever, irritability, being tremulous and jittery, mottling of the skin and excessive crying. Neonatal abstinence syndrome carries with it the possibility of more serious complications, including convulsions and seizures that can result in cessation of breathing and permanent brain damage. *Id*. at 280.

Relevant to the case at hand, Welch was indicted for criminal abuse in the second degree pursuant to KRS[1] 508.110. This count charged that the baby had suffered abuse resulting in neonatal abstinence syndrome and that the abuse continued until the baby was released from the hospital. Welch was found guilty.

On appeal, this Court reversed the trial court's decision in *Welch*. And, upon discretionary review, the Supreme Court affirmed this Court's decision.

The Supreme Court's analysis in *Welch* relied on *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983), and *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992). As will be examined *infra*, *Hollis* has been directly overruled, and the "born alive" doctrine, relied upon by the *Hollis* and *Jones* Courts, has been determined to be an erroneous statement of Kentucky law. *See Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004).

Hollis involved a charge of murder for the death of a viable fetus. The Court applied the "born-alive" rule, deciding that the defendant could not be charged with murder because the baby died prior to birth.

Jones involved a manslaughter charge for injuries sustained in a vehicular accident to a pregnant woman whose baby died postpartum. Unlike *Hollis*, in *Jones* the defendant was successfully charged because the baby was born alive and then subsequently died.

The Court in *Welch* opined that

> [t]he rationale behind both *Hollis* and *Jones* was that [the Supreme] Court would "not presume to address either metaphysical or medical questions regarding when life begins (830 S.W.2d at 878)," but simply apply the common law meaning of the word "person" in criminal homicide cases in the absence of a different statutory definition. Because the

[1] Kentucky Revised Statute.

> common law decided the question whether a person was a victim of criminal homicide on the basis of whether the victim was born alive, and the General Assembly has not decreed otherwise, we deemed it appropriate to follow the Commentary to the Model Penal Code from which our criminal homicide statutes derive, reasoning the General Assembly intended to draw the line at the same place.

Welch, 864 S.W.2d at 282.

In *Welch*, the Supreme Court noted that both *Hollis* and *Jones* dealt with a third party's inflicting injuries on a fetus and that the issue framed in *Welch* was whether a mother's self abuse, which had the effect of transmitting drugs to her baby through the umbilical cord, was a crime. Relying, in part, on the analysis in *Hollis* and *Jones*, regarding whether a viable fetus could be a victim of a crime as a "person" protected under the penal statutes, the Supreme Court in *Welch* affirmed the Court of Appeals' reversal of Welch's criminal conviction of child abuse.

The *Welch* Court also cited to the legislative intent in the Maternal Act of 1992, which was intended to provide a comprehensive plan to address the threat to healthy childbearing caused by prenatal alcohol and drug abuse. *Id*. at 283-84. This included prenatal screenings for alcohol or other substance abuse, as well as toxicology reports within eight hours of birth on both the mother and baby to determine if there was prenatal exposure to alcohol or a controlled substance. KRS 214.160. Pursuant to KRS 214.160(5), "[n]o prenatal screening for alcohol or other substance abuse or positive toxicology finding shall be used as prosecutorial evidence."

Regarding the Maternal Health Act, the *Welch* Court relied on a 1992 amendment to KRS 218A.990 which provided that

> (19) Any person who traffics in a controlled substance classified in Schedules I, II, III, IV, or V to any person who is pregnant shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than five (5) years nor more than ten (10) years, or be fined not less than ten thousand dollars ($10,000) nor more than twenty thousand dollars ($20,000), or both. Each violation shall constitute a separate offense.

Welch, 864 S.W.2d at 284 (citing KRS 218A.990).

This statutory section, however, was repealed in 1992-- before the *Welch* opinion was rendered.[2] Notwithstanding this, the *Welch* Court concluded that

> the fact KRS 218A.990 was amended to provide special punishment for the dealer who supplies drugs to a pregnant person, but not to punish the woman on the basis that she takes drugs while pregnant, that the General Assembly intends no additional criminal punishment for the pregnant woman's abuse of alcohol and drugs apart from the punishment imposed upon everyone caught committing a crime involving those substances.

Id.

Having set forth the foundation of the *Welch* decision, we now turn to case law subsequent to *Welch* and statutory analysis to determine whether its rationale remains binding precedent as the trial court concluded. Upon review, we rule that it is not.

First, in *Morris*, 142 S.W.3d 654, the Supreme Court, in 2004, revisited *Hollis*. Morris had been charged with assault in the first degree for causing injuries to a man and with two counts of wanton murder for causing the death of the man's wife and unborn child. The Court of Appeals held that the "born alive" rule precluded a homicide

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[2] While KRS 218A.990(19) was added by amendment by the 1992 General Assembly, it was also repealed in that session. *See* Legislative Research Commission Note (July 14, 1992). Pursuant to KRS 446.260, "[i]n the event of a conflict between a measure amending a statute and one repealing the same statute, the bill repealing the statute shall prevail unless the bill amending the statute specifically repeals the previous repeal."

conviction for killing an unborn child. Upon discretionary review, the Supreme Court reversed.

In analyzing the issue in *Morris*, the Court detailed the history of the common law regarding the killing of an unborn child. The Court's analysis revealed that the "born alive" rule was developed as a requirement "'to prove that the unborn child was alive and that the material acts were the proximate cause of death, because it could not otherwise be established if the child was alive in the womb at the time of the material acts.'" *Id.* at 657 (citation omitted). The Court determined that as first applied in Kentucky in *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W.2d 1014 (1936), "the 'born alive' rule pertained to the sufficiency of the evidence needed to support a conviction of homicide, not the interpretation of a statute." *Morris*, 142 S.W.3d at 657 (citation omitted).

As pointed out in *Morris*, when *Jackson* was decided, murder was a common law offense and only the penalty was set out by statute. *Morris*, 142 S.W.3d at 658. When Kentucky adopted the Kentucky Penal Code, effective January 1, 1975, "common law offenses were abolished and all offenses, including homicides, were thereafter to be defined by statute." *Id.* (citing KRS 500.020(1)).

KRS 500.080, which sets forth the definitions for the Kentucky Penal Code, provides that "[a]s used in the Kentucky Penal Code," "'person' means a human being. . . ." *Id*. (citing KRS 500.080(12)). The *Morris* Court determined that the plurality decision in *Hollis* was based on faulty analysis as the opinion "inaccurately reported that '[t]he statute makes no effort to define the word 'person. . . '" *Id.* (citing *Hollis*, 652 S.W.2d at 63). The *Morris* Court went on to state that it did "not know why the *Hollis* plurality

chose to ignore the existence of KRS 500.080(12) and KRS 507.010, both of which define 'person' as 'a human being,' and instead employed a common law evidentiary requirement as the definition of 'person.'" *Id*. at 658-59. The Court then clarified that the *Hollis* plurality erred when it relied upon the Model Penal Code's definition of "human being," which was not adopted by the drafters of the Kentucky Penal Code. *Id*. at 659.

The Court in *Morris* then explained that the killing of an unborn child gives rise to a civil cause of action for wrongful death. *Id*. at 660 (citing KRS 411.130).

> The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word "person" is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being. It should be pointed out that there is a definite medical distinction between the term "embryo" and the phrase "viable fetus." The embryo is the fetus in its earliest stages of development, but the expression "viable fetus" means the child has reached such a state of development that it can presently live outside the female body as well as within it. A fetus generally becomes a viable child between the sixth and seventh month of its existence, although there are instances of younger infants being born and surviving.
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> *Mitchell v. Couch*, Ky., 285 S.W.2d 901, 905 (1955) (citing William J. Cason, May Parents Maintain an Action for the Wrongful Death of an Unborn Child in Missouri? The Case for the Right of Action, 15 Mo. L.Rev. 211, 218 (June 1950)). *See also Rice v. Rizk*, Ky., 453 S.W.2d 732, 735 (1970). Whether a fetus was viable when killed is just as provable by competent evidence as whether a child was born alive or stillborn. *See Jackson*, 96 S.W.2d at 1016 ("The testimony of the physicians together with that of the accused, establishes beyond cavil,

> doubt, or question" that the child was born alive.).

Id.

Upon this analysis, the *Morris* Court determined that it is "inherently illogical to recognize a viable fetus as a human being whose estate can sue for wrongful death and who cannot be consensually aborted except to preserve the life or health of the mother, but not as a human being whose life can be nonconsensually terminated without criminal consequences." *Id.*

Based on faulty analysis and inherent problems in *Hollis*, the *Morris* Court specifically overruled both *Hollis* and the "born alive" rule upon which the *Jones* Court also had relied. Moreover, the Supreme Court in *Morris* explicitly decided under Kentucky law (1) a "viable fetus is a 'human being' for purposes of KRS 500.080(12)," (2) that the definition in KRS 500.080(12) of "person" as "always" having meant "human being," and (3) that KRS 500.080(12) "by its very language applies to all penal code offenses." *Id*. at 658-60. Accordingly, the Supreme Court decided that all viable fetuses were "persons" protected under the penal statutes.

Although *Welch* has not yet been revisited by the Supreme Court, under *Morris*, the decision in *Welch* now lacks foundation. Just as the *Hollis* plurality was criticized in *Morris* for its failure to construe KRS 500.080(12) in its analysis, the *Welch* Court also made this same error.

Moreover, the *Welch* Court relied on a 1992 amendment to KRS 218A.990, determining that because a pregnant woman was not included within its penalties, she could not be prosecuted for abusing drugs while carrying a viable fetus. 864 S.W.2d at

284. The *Welch* Court concluded that the amendment showed legislative intent that a pregnant woman could not be charged with injuries she inflicts on her unborn child. However, this amendment was repealed prior to the *Welch* decision. *Id*.

The foundation of *Welch* crumbling under the weight of *Morris* and having relied on a repealed statutory section, we respectfully pause to point out that in *Welch* there was evidence beyond toxicology reports or prenatal screenings to prove that the baby had been exposed to drugs. It was reported that the baby suffered from symptoms of neonatal abstinence syndrome, which could result in brain damage. Welch's baby exhibited symptoms of a mild fever and mottling of the skin, and was irritable, tremulous, jittery and cried excessively.

Nothing in KRS 214.160 prevents evidence of a baby born with symptoms of having ingested illegal or controlled substances through the umbilical cord of the pregnant mother from being used as prosecutorial evidence. Had the General Assembly so intended, it would have included this restriction in KRS Chapter 214 or in the penal code. However, noticeably absent from KRS Chapter 214 and other statutory sections are legislative mandates that a mother cannot be prosecuted for ingesting drugs while pregnant where there is evidence of prenatal drug abuse beyond the toxicology reports or prenatal screenings administered pursuant to KRS 214.160.

Notwithstanding this, Cochran argues that her case is distinguishable from *Morris* because the danger to the child was created by the mother, rather than by a third party. However, she fails to explain how the potential harm to the child is lessened regardless of who causes the endangerment to the child.

The statute under which Cochran was indicted, KRS 508.060(1), provides that

> [a] person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

Applying the definition of "person" as set forth in *Morris* and KRS 500.080(12), Cheyenne is a person under KRS 508.060(1). Neither KRS 500.080(12) nor KRS 508.060(1) carves out an exception for a pregnant woman, or anyone for that matter. Accordingly, the term "person" at the beginning of KRS 508.060(1) included Cochran as a pregnant woman. Therefore, Cochran was properly charged and indicted with wanton endangerment.

Cochran also relies on the Fetal Homicide Act, enacted in 2004, to support the dismissal of her indictment.[3] In KRS 507A.010, the definition section under the Act, "[u]nborn child" is defined as a "member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency." KRS 507A.010(1)(c). Included under KRS 507A.010(3) is a provision that "[n]othing in this chapter shall apply to any acts of a pregnant woman that caused the death of her unborn child." Cochran claims that because this Act includes an exception for pregnant women it

[3] The Fetal Homicide Act, as its name implies, applies only to actions that result in the death of an "unborn child" as that act defines the term. Although Cochran did not bring this issue before the trial court, we will review it because *Hollis*, *Jones* and *Morris* involved homicides. It is a natural extrapolation to review homicide cases and law where the issue involves the legal status of a viable fetus under criminal offense statutes.

shows legislative intent she should be excluded from the penal code for ingesting cocaine on or near the day Cheyenne was born.[4]

Morris provides instruction on this. The Court in *Morris* explained that the statute under its review used the term "person," not "unborn child," which is the term used in the Fetal Homicide Act. 142 S.W.3d at 661. "Since the human being that [was] the subject of [*Morris*] was a viable fetus, it [was] unnecessary to address in [*Morris*] whether killing a nonviable fetus would violate KRS 507.040. Presumably, future homicides of nonviable fetuses will be prosecuted under KRS Chapter 507A." *Id*. Consequently, the *Morris* Court interpreted KRS Chapter 507A to address situations where a nonviable fetus was the victim of a homicide. Pursuant to the *Morris* decision, KRS 500.080(12) already included viable fetuses as persons entitled to protection under the penal code. We agree.

We note, nonetheless, that Cochran argues that under KRS 507A.010(3),[5] she would have escaped criminal charges if she had ingested so much cocaine that Cheyenne died. This argument lacks logic and merit. Under *Morris's* instruction, Cheyenne, as a person, was protected under the penal code and deserving of the full protections under it.

Next, Cochran argues that construing KRS 508.060 to prohibit her conduct violates the "fair notice" requirements under both the State and federal Constitutions, citing to Sections 2 and 11 of the Kentucky Constitution and the Fourth and Fifth

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[4] Cochran did not present this argument before the trial court. Nonetheless, because it is part of the analysis in *Morris*, we will pause to review it.

[5] The constitutionality of KRS 507A.010(3) is not properly before this Court.

Amendments of the United States Constitution.[6] We disagree. Certainly, Cochran is entitled to fair notice of what conduct is illegal. *See Morris*, 142 S.W.3d at 663 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354-55, 84 S.Ct. 1697, 1703, 12 L. Ed. 2d 894 (1964)) ("A 'fair warning' violation occurs '[w]hen a[n] . . . unforeseeable state-court [sic] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect [being] to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.'").

Although *Welch* has not been revisited by the Supreme Court, the decision in *Morris*, construing a viable fetus as a person for purposes of the entire penal code, was rendered in 2004 -- a year and half before Cochran ingested the cocaine that served as the basis for the charge of wanton endangerment. Accordingly, at that time the penal code, as interpreted by the Kentucky Supreme Court, included viable fetuses as protected persons, giving fair notice to Cochran that her conduct could result in criminal charges.

The final argument proposed by Cochran is that allowing her indictment to proceed would violate her due process and equal protection rights under Sections 2, 3 and 11 of the Kentucky Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.[7] She contends that she is being treated differently because the Fetal Homicide Act protects a pregnant woman from acts that result in the death of her unborn child and because abortion laws allow a woman to abort her child.

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[6] Cochran also did not raise this issue before the trial court; nonetheless, we address it briefly.
[7] Once again, Cochran did not raise this issue before the trial court.

As to Cochran's contention regarding the constitutionality of the Fetal Homicide Act, that issue is not properly before this Court.[8] And, regarding abortion laws, even *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), did not grant a woman the unfettered guarantee to an abortion at any time and certainly not to one on the day a woman gives birth. Accordingly, Cochran's equal protection and due process arguments are without merit.

We pause to point out that as the record in the case stands before us we do not know the evidence on which the Commonwealth relied to bring the indictment. When an indictment is valid on its face, "'[t]here is no authority for the use of the summary judgment procedure in a criminal prosecution, and . . . the evidence [can] not properly be considered on the motion[] to dismiss." *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky. App. 1995) (quoting *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (1972)).

KRS 214.160(5) prohibits prenatal screenings or positive toxicology findings, if they are administered under KRS 214.160(2) or (3), from being used as prosecutorial evidence. Presently, we do not know whether the evidence against Cochran rests solely on testing done pursuant to KRS 214.160. Nonetheless, whether or not we agree with this statutory mandate, it is not within our discretion to ignore the General Assembly's power to pass legislation and set forth the public policy of this Commonwealth.

Cochran, however, did not challenge the evidence relied upon by the Commonwealth for the indictment before the trial court, and any objection to a defect in the indictment is therefore waived. *See Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky.

[8] Again, this issue was not before the trial court. Nor did Cochran notify the Attorney General of her challenge to the constitutionality of this statute.

1996). Moreover, that issue is not argued in the parties' briefs. Even so, if the evidence on which the Commonwealth relies is **solely** toxicology tests taken pursuant to KRS 214.160, Cochran may have a foundation for a motion to suppress. However, dismissing the indictment at the present stage is premature.

The well-reasoned opinion in *Hamilton* sums up our decision in regard to the evidence forming the basis of the indictment, wherein the Court stated that

> [r]eview of the indictment shows that it charges an offense to which, theoretically, the appellee could be found guilty. Apparently, the prosecutor believes that there is evidence to support a conviction. We assume that the prosecutor is well aware of his status as a representative, not merely of an ordinary party to a controversy, but of all of the people of this Commonwealth, and of his high ethical "duty to protect the innocent just as much as . . . prosecute the guilty." *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308 (1931). As in any criminal prosecution, the interest of the people of this Commonwealth is that justice be done and certainly not that any citizen be unjustly brought to trial, let alone convicted.

Hamilton, 905 S.W.2d at 85.

For the reasons as stated, we reverse the trial court's decision that Cochran's indictment must be dismissed.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURRING: We are faced with a serious question as to the legal foundation for the indictment returned in this case. The issue before us is not whether the baby was a "person." That issue has been directly determined and settled by *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004). Instead, the focus of our review should be whether the mother was properly indicted for

wanton endangerment when the clear statutory language of the Maternal Act of 1992 appears to negate and indeed to forbid the basis for her indictment:

> **No** prenatal screening for alcohol or other substance abuse or positive **toxicology finding** shall be used as prosecutorial evidence.

KRS 214.160(5) (Emphases added.) Thus, since she was indicted for wanton endangerment based on her drug use during pregnancy and she did not admit to the charges, she appears to qualify for the protection of this statute. Her indictment rested **solely** on toxicology reports from the appearance of the record before us.

Indeed, she may be chargeable with separate offenses relating to her own drug use – but not for the wanton endangerment of her baby. There is no ambiguity in the statutory language. If there were, the rule of lenity would dictate that any ambiguity be construed in favor of the accused. "The rule of lenity requires any ambiguity in a statute to be resolved in favor of a criminal defendant." *White v. Commonwealth,* 178 S.W.3d. 470, 484 (Ky. 2005).

While the majority opinion correctly observes that KRS 218A.990(19) was both enacted and repealed during the 1992 session of the General Assembly, it fails to recognize that the amendment was not a penalty for pregnant women but rather for anyone "who traffics in a controlled substance . . . to any person who is pregnant . . . ." Its focus was upon drug dealers or supplies – not the pregnant women, who remained then and still remain under the ambit of KRS 214.260.

It is not our proper purview to question the wisdom of clearly expressed legislative intent. There is no specter more tragic than that of a baby born suffering from drug abuse and withdrawal. Nevertheless, the General Assembly expressly directed (with

the mandatory ***shall***) that a toxicology finding not be used as prosecutorial evidence. Perhaps its public purpose was to encourage a mother to be forthcoming about her drug use during pregnancy in order to obtain necessary and critical care for the unborn child or the newly born baby. Her candor could indeed be pivotal as to whether a child might more rapidly receive life-saving neonatal medical care. Regardless of its reasoning as to public policy, the General Assembly unequivocally created this exception to prosecution for Ina Cochran under the circumstances of this case.

The majority opinion correctly notes that the trial court misconstrued *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993), as to the definition of *person*. However, that is not the issue in this case. While I believe that the trial court properly questioned the validity of the indictment, it did so for the wrong reason. It also acted prematurely by effectively granting a summary dismissal without making findings as to its evidentiary basis. This court discussed the Kentucky rule for dismissals of indictments in *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky.App. 1995) as follows:

> The law in Kentucky concerning the dismissal of indictments is clear. The rule is that:
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> > [t]here is no authority for the use of summary judgment procedure in a criminal prosecution, and it is our opinion that the evidence could not properly be considered on the motions to dismiss. [*Hamilton* quoting *Commonwealth v. Hayde*n, Ky., 489 S.W.2d 513, 516 (1972).]
> >
> > If the indictment is valid on its face and conforms to the requirements of RCr 6.10, the Commonwealth is given the burden of proving all the elements of the crime .... It is premature for the trial court to weigh the evidence prior to trial to determine if the Commonwealth can or will meet that burden.

In addition to case law, Kentucky Rule of Criminal Procedure (RCr) 5.10 also addresses the sufficiency of the evidentiary basis of an indictment:

> The grand jurors shall find an indictment where they have received what they believe to be sufficient evidence to support it, but no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment.

Thus, the sufficiency of the indictment cannot be summarily challenged by a pre-trial dismissal, but the sufficiency of the evidence upon which it rests must be examined at trial:

> RCr 5.10 provides that no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment. Once the defendant has been indicted, the issue of sufficiency of the evidence is to be determined at trial.

Russell v. Commonwealth, 992 S.W.2d 871, 874 (Ky.App. 1999).

While I harbor grave reservations as to the lack of a statutory foundation for this indictment, I believe that the proper procedural vehicle would be to remand this matter to the trial court for an examination of the actual statutory and evidentiary bases for the indictment. If the court's inquiry reveals that the indictment rested solely on evidence excluded by KRS 214.160(5), the court must then dismiss it. Neither we nor the trial court can presume that other evidence **might** exist to properly support an indictment. That was – and remains – the burden of the Commonwealth, which has not been met in this case. It may also be a matter for the General Assembly to revisit and to clarify if it so desires. But we may not rewrite statutes nor may we make assumptions to bootstrap the duties of the Commonwealth.

Therefore, I would remand this case to the Casey Circuit Court for additional proceedings consistent with this separate concurrence.

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