17-3727
Criminal

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAMANTHA FLUTE,

Appellee.

Appeal from the United States District Court
for the District of South Dakota
Northern Division

The Honorable Charles B. Kornmann
United States District Judge

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Samantha Flute was charged with involuntary manslaughter, in violation of 18 U.S.C. § 1112, after she went on a drug binge while she was 38 weeks pregnant that killed her otherwise healthy newborn four hours after he was born alive. The district court granted her pretrial motion to dismiss the indictment. The court held that an unrelated and uncharged statute, 18 U.S.C. § 1841, renders § 1112 inapplicable to Flute.

The district court erred when it reached past the charged statute and reasoned by analogy to § 1841. That statute was enacted to expand statutes like § 1112 to offer a second unit of prosecution when third party violence against a pregnant woman harms or kills her unborn child. In no way did § 1841, an expansion statute, somehow diminish the reach of § 1112. The district court erred in its interpretation of the plain language of § 1841, then it erred again when it misconstrued the legislative history of that unrelated statute. Involuntary manslaughter was appropriately charged, and the indictment should not have been dismissed.

The government believes this matter involves important legal questions and requests the parties be allowed 20 minutes each for oral argument.

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JURISDICTIONAL STATEMENT

The government appeals the district court's order of dismissal pursuant to Fed. R. Crim. P. 12(b)(3)(B)(v), granted on the ground that the indictment fails to state an offense. The district court had subject matter jurisdiction pursuant to 18 U.S.C. §§ 1112, 1153, and 3231. The district court entered its opinion and order of dismissal on November 14, 2017. DCD 37.[1] The government filed a timely notice of appeal on December 12, 2017. DCD 38. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The letters "DCD" followed by the appropriate docket number will denote the district court record.

STATEMENT OF THE ISSUE

WHETHER THE DISTRICT COURT ERRED WHEN IT DISMISSED THE INDICTMENT, FINDING THAT A MOTHER CANNOT COMMIT INVOLUNTARY MANSLAUGHTER THROUGH PRENATAL ACTS THAT CAUSE HER CHILD TO DIE AFTER BEING BORN ALIVE.

United States v. Montgomery, 635 F.3d 1074 (8th Cir. 2011)
United States v. Jungers, 702 F.3d 1066 (8th Cir. 2013)
United States v. Spencer, 839 F.2d 1341 (9th Cir. 1988)
H.R. Rep. 108-420, 2004 U.S.S.C.A.N. 533 (2004)

STATEMENT OF THE CASE

In its response to Flute's motion to dismiss, the government laid out the facts it intended to prove at trial. DCD 26. On August 19, 2016, Flute arrived in full term labor at the Coteau des Prairies Hospital in Sisseton, South Dakota. DCD 26 at 2. She gave birth to a fully developed male. *Id.* At the time of her admission, Flute tested positive for a number of prescription and over-the-counter medications. *Id.* She also tested positive for cocaine. *Id.* Baby Boy Flute died about four hours after his birth, although he was gestational for 38 weeks, well developed, normal and intact when born, with no signs of obvious injury or trauma. *Id.*

Forensic Pathologist Kenneth Snell performed an autopsy of Baby Boy Flute on August 22, 2016. *Id.* He noted no anatomic cause of death, but a number of medications and substances not medically administered during his life were detected in Baby Boy Flute. *Id.* Dr. Snell concluded the cause of death was a combined drug toxicity of several substances. *Id.*

During ongoing resuscitation efforts on Baby Boy Flute, Flute admitted to medical staff that she took three Lorazepam before arriving at the emergency room. *Id.* at 2-3. She had received a Lorazepam prescription during her only prenatal visit, which was within the same week of giving birth. *Id.* at 3. She also admitted to recently taking a few lines of hydrocodone, making reference to snorting the controlled substance. *Id.* During later law enforcement interviews, Flute admitted taking three times the daily dose of the Lorazepam, ingesting cough medicine, and snorting what she thought was hydrocodone, but it gave her a rush rather than a calming feeling, and so she surmised it was laced with cocaine. *Id.* She also admitted that she knew the drug use was against the interests of her then-unborn child, but that she was a drug addict and needed to get high. *Id.*

A single-count indictment issued in March 2017, charged Flute with violating 18 U.S.C. §§ 1112 and 1153, using language that closely tracked § 1112:

> Between on or about August 19, 2016, and August 20, 2016, in Agency Village, in Indian country, in the District of South Dakota, Samantha Flute, an Indian, unlawfully killed a human being, Baby Boy Flute, without malice, in the commission of a lawful act in an unlawful manner which might produce death. Such act was committed in a grossly negligent manner, with actual knowledge that her conduct was a threat to the life of another and with actual knowledge that would reasonably enable her to foresee the peril to which her act subjected another, to wit: Samantha Flute did unlawfully kill Baby Boy Flute by ingesting prescribed and over-the-counter medicines in a grossly negligent manner, and did thereby commit the crime of involuntary manslaughter, in violation of 18 U.S.C. §§ 1153 and 1112.

DCD 2.

In June 2017, Flute filed her motion to dismiss the indictment. DCD 24. She admitted that she gave birth to a baby boy on August 20, 2016, and that the baby died shortly after birth. DCD 25 at 1. She urged that, even if she had done what is alleged—prenatal ingestion of drugs in a grossly negligent manner that ultimately killed her son after he was born alive—such "conduct is not prohibited by federal law." DCD 24. Flute reasoned that 18 U.S.C. § 1841(c)(3) "expressly bars the prosecution of any woman with respect to her unborn child." DCD 24. Moreover, she argued that her unborn child was not a "human being" when the alleged acts were committed, as that phrase is used in the federal manslaughter statute, citing 1 U.S.C. § 8(c). *Id.* But she also conceded that the baby was a "human being" when he died. DCD 25 at 6. She claimed the "critical point" was "that the statute is not meant to apply to acts that took place before the child was born." *Id.* To the extent there was ambiguity, she sought lenity. DCD 25 at 7.

Alternatively, she argued that the federal involuntary manslaughter statute is unconstitutionally vague as applied in this case, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. DCD 25 at 8-10. Flute claimed she could not have reasonably known at the time she ingested drugs that she could be prosecuted for involuntary manslaughter. DCD 25 at 9.

In response, the government argued that § 1841 was inapplicable, and that the

indictment and statute provided Flute adequate notice. DCD 26. The government argued that § 1841(a) is inapplicable because it deals exclusively with those who cause the death of an unborn child, but Baby Boy Flute was born alive. *Id.* at 4. The government further argued that the involuntary manslaughter indictment is neither vague nor indefinite, and that there was no ambiguity as to whether Baby Boy Flute was a human being when he died, having been born alive. *Id.* at 5-9.

In her reply brief, Flute again argued that § 1841 bars her prosecution. DCD 27 at 1-3. She contrasted cases relied upon by the government, and she reiterated her argument that § 1112 is void for vagueness as applied to her. DCD 4-7.

No hearing was held regarding the motion to dismiss. On November 14, 2017, the district court issued an opinion and order dismissing the indictment. DCD 37.

The court began its opinion by recognizing that, for an indictment to be valid, it must allege the defendant performed acts that, if proven, constitute a violation of the charged law. DCD 37 at 1 (*citing United States v. Hedaithy*, 392 F.3d 580, 589 (3rd Cir. 2004) (additional citations omitted)). The court determined its first question was "whether conduct toward a baby *in utero* is actionable as a federal criminal offense. In other words, the Court must determine whether Baby Boy Flute is within the class of victims Congress intended to protect under 18 U.S.C. § 1112." *Id.*

That statute reads:

> Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary—Upon a sudden quarrel or heat of passion. Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

It is undisputed that Flute was indicted for Involuntary Manslaughter by killing a human being without malice, through the commission, without due caution and circumspection, of a lawful act which might produce death.[2] 18 U.S.C. § 1112(a).

The court noted the applicable federal manslaughter statute codified a common-law term, "human being," without otherwise defining it. DCD 37 at 2. The general practice when a term is undefined is to give the term its common-law meaning. *Id.* (*citing United States v. Harlan*, 815 F.3d 1100, 1106 (8th Cir. 2016) (*quoting United States v. Turley*, 352 U.S. 407, 411 (1957)). The court concluded that the common-law term, "human being," encompassed the so-called "born alive rule," allowing the prosecution of one who assaulted an unborn child only if the child is born alive then later dies of the fetal injuries. *Id.* (*citing* Clarke Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal

[2] It is also undisputed that Flute is an Indian whose relevant acts (and Baby Boy Flute's death) all occurred within the exterior boundaries of the Lake Traverse Reservation of the Sisseton Wahpeton Oyate, and thus she is otherwise subject to federal criminal jurisdiction.

Anachronisms, 21 Val. U. L. Rev. 563 (1987)).

The court also recognized that the Ninth Circuit Court of Appeals, in *United States v. Spencer*, 839 F.2d 1341 (9th Cir. 1988), observed that the federal murder statute, 18 U.S.C. § 1111, was enacted in 1908 as part of the Major Crimes Act.[3] DCD 37 at 2. At that time, "'it was well-established in common law that murder was the killing of one human being by another, and that an infant born alive that later died as a result of fetal injuries was a human being.'" *Id.* (quoting *Spencer*, 839 F.2d at 1343). Thus, the district court concluded that Baby Boy Flute was within the class of victims historically protected under § 1112. *Id.*

The district court next noted that, in 2002, Congress enacted the Born-Alive Infants Protection Act, codified at 1 U.S.C. § 8. DCD 37 at 3. That statute states, "[i]n determining the meaning of any Act of Congress,…the words "person," "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8(a).

The term "born alive" is defined as "a member of the species homo sapiens" following:

> the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or

[3] 18 U.S.C. § 1111 contains the same phrase used in § 1112: "the unlawful killing of a human being."

> extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

1 U.S.C. § 8(b). It also specifies that it is not intending to confer or expand any legal rights or status to *in utero* children. 1 U.S.C. § 8(c).

As noted by the district court, the enactment of 1 U.S.C. § 8 was intended by Congress to provide protection for infants born in connection with partial birth abortions. DCD 37 at 3. Given that Baby Boy Flute was born alive before he died, nothing about that definition of "human being" found at 1 U.S.C. § 8 diminished the government's ability to prosecute Flute under § 1112, and the district court did not hold otherwise. *Id.* In other words, it appears that the district court would have approved of the government's use of § 1112 to prosecute Flute had the law remained as it was in 2002 following the passage of 1 U.S.C. § 8.

But "[i]n 2004, Congress enacted the Unborn Victims of Violence Act, also known as Laci and Conner's Law, Pub. L. 108-212." DCD 37 at 3. That statute was codified at 18 U.S.C. § 1841. As explained by the district court, § 1841 refers to a long list of federal crimes, and states that whoever engages in such a crime that "causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section." 18 U.S.C. § 1841(a)(1).

The district court cited this Court's decision in *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011), stating that § 1841 "recognizes unborn children as a class of victims not previously protected under federal law." *Montgomery*, 635 F.3d at 1086. As noted by the district court, "[i]nvoluntary manslaughter under § 1112 is specifically listed as one such federal offense for which an unborn child could not previously be considered a victim." DCD 37 at 3. The district court further reasoned that § 1841 is not a free-standing criminal statute, but rather expands the class of protected victims for a range of other statutes. DCD 37 at 4. The court acknowledged that Flute was not charged under § 1841, but found its passage to be "instructive for determining whether a pregnant woman can be charged with violating 18 U.S.C. § 1112." *Id.*

A subsection found at 18 U.S.C. § 1841(c)(3) is the sole reason for the district court's dismissal of this case. That subsection, along with its prefatory clause, states, "[n]othing in this section shall be construed to permit the prosecution of any woman with respect to her unborn child."

After discussing a passage from the legislative history of 18 U.S.C. § 1841(c), the district court held that § 1841 created "a class of persons who cannot be prosecuted under the federal criminal statutes for injury caused to an unborn child. The 2004 Act is 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." DCD 37 at 4.

Applying lenity, the court held "the current state of federal criminal law compels the conclusion that [Flute] cannot be prosecuted for the death of her child based upon injury that occurred *in utero*." DCD 37 at 4-5. Finally, the district court discussed its view that the resulting dismissal was compelling because Flute was charged under the portion of § 1112 that does not require an allegation of a separate unlawful act. DCD 37 at 5. The court expressed concerns about a "very slippery slope" in which pregnant women would be charged for consuming alcohol, driving negligently, undergoing chemotherapy, or neglecting appropriate pre-natal care. DCD 37 at 5. The district court did not address Flute's void-for-vagueness argument.

SUMMARY OF THE ARGUMENT

Neither Flute nor the district court cited anything within § 1112 or any precedent interpreting § 1112 to support the dismissal of this indictment. Instead, the court focused on a subsection of an uncharged, unrelated statute. In so doing, it abandoned canons of Rule 12 analysis and of statutory interpretation.

That other statute, § 1841, was designed to expand the charges and consequences applicable to individuals, other than the pregnant woman herself or her medical providers, who commit crimes of violence against a pregnant woman. It plainly *expands* federal protection to unborn children. The district court

misconstrued § 1841 to accomplish just the opposite, eliminating federal protection of a born-alive victim, Baby Boy Flute, even though the court agreed Samantha Flute could have been charged under § 1112 before § 1841 was enacted.

The particular exemption that led to this dismissal, found at 18 U.S.C. § 1841(c)(3), is by its plain terms confined to charges brought under § 1841; it in no way prohibited prosecuting Flute under other sections of the federal code. The plain language and the legislative history of § 1841 are in full accord that the statute never to be used in the way it was by the district court.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT DISMISSED THE INDICTMENT BY REACHING PAST THE CHARGED STATUTE AND MISCONSTRUING 18 U.S.C. § 1841, AN UNRELATED EXPANSION STATUTE THAT IN NO WAY SUBTRACTED PROTECTIONS FROM ELSEWHERE IN THE FEDERAL CRIMINAL CODE.

A. Standard of Review.

This Court reviews "de novo a district court's dismissal of an indictment for failure to state an offense." *United States v. Steffen*, 687 F.3d 1104, 1109 (8th Cir. 2012) (*citing United States v. Hirsch*, 360 F.3d 860, 863 (8th Cir. 2004)). "'An indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense[.]'" *United States v. Hernandez*, 299 F.3d 984, 992 (8th Cir. 2002) (quoting *United States v. Fleming*, 8 F.3d 1264, 1265 (8th Cir. 1993)).

B. The District Court Erred When it Bypassed the Charged Statute and Turned Instead to 18 U.S.C. § 1841, an Uncharged, Unrelated, Self-Confined Statute.

"'An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution.'" *Steffen*, 687 F.3d at 1109 (quoting *Fleming*, 8 F.3d at 1265). "'Our starting point in interpreting a statute is always the language of the statute itself.'" *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013) (*quoting United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997).

To sufficiently indict involuntary manslaughter under the United States Code, as charged here, the government must allege an "unlawful killing of a human being without malice," "without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a). This Court has explained that "the physical element of involuntary manslaughter, however, remains the same as the physical element for murder: unlawfully causing the death of another." *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992). That comports with the plain language of § 1112(a), which requires that, unless and until a human being's life has ended, the statute has not been violated. *See* 18 U.S.C. § 1112(a) ("Manslaughter is the unlawful *killing* of a human being…" (emphasis added)).

Neither Flute nor the district court has claimed that the indictment insufficiently alleged a violation of § 1112 by failing to state one or more of the elements, nor can such a claim be made given that the indictment largely tracks the statutory language. *See generally* DCD 25, DCD 37, and DCD 2. Instead, the argument was that Flute's alleged actions, if proven, failed to constitute a violation of § 1112. DCD 37 at 1 (*citing United States v. Hedaithy*, 392 F.3d 580, 589 (3rd Cir. 2004) (additional citations omitted)).

Rather than confining its Rule 12 analysis to an analysis of § 1112, the district court reached to § 1841, a statute separate and uncharged. The court itself observed that the enactment of § 1841 did not alter the statutes enumerated within it, including § 1112. "The Act merely extended the reach of the current federal criminal statutes to protect a new class of victims." DCD 37 at 4. By its own reasoning, the district court borrowed from § 1841, an extension statute, to shrink the coverage of § 1112.

This Court has once before disposed of an attempt to use § 1841 to define a separate statute's coverage. Similarly, the attempt was to define the coverage of one of the enumerated statutes found at § 1841(b)(1). *Montgomery*, 635 F.3d at 1086. In *Montgomery*, the government argued that Congress expanded "the term 'person' to include the unborn in its enactment of the Unborn Victims of Violence Act of 2004. 18 U.S.C. § 1841." *Id.* This Court rejected that argument, holding that § 1841 nowhere defined "person," and that its defined terms are expressly

limited only to § 1841. *Id.* Thus, this Court held that § 1841 served no useful role in defining the coverage of a separate statute, which in *Montgomery* was the federal kidnapping statute at 18 U.S.C. § 1201(a). *Id.*

A review of § 1841 supports *Montgomery*'s circumscribed reading of it. At multiple places, § 1841 states that it is concerned only with "this section." *See* 18 U.S.C. §§ 1841(a)(1), (a)(2)(B), (a)(2)(D), (c), and (d). Moreover, as stated in *Montgomery*, § 1841 *expands* pre-existing federal coverage by including "unborn children as a class of victims not previously protected under federal law and criminalizes the killing or injuring of unborn children during the commission of certain federal offenses." *Montgomery*, 635 F.3d at 1086 (*citing* H.R. 108-420, 108th Cong. (2004)). Nothing within the text of § 1841 evinces an intention to *restrict* the coverage of other statutes, like § 1112.

"'[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.'" *Dean v. United States*, 556 U.S. 568, 572 (2009), (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). As this Court reasoned in *Jungers*, "[h]ad Congress intended to exclude purchasers from § 1591(a)(1)'s blanket prohibition of sex-trafficking acts or limit its application to suppliers, it could have done so

expressly." *Jungers*, 702 F.3d at 1075. "'Congress knows how to craft an exception [or impose a status requirement] when it intends one.'" *Id.* (*quoting Jonah R. v. Carmona*, 446 F.3d 1000, 1007 (9th Cir. 2006)).

Those canons of construction should have been applied here, however, the district court divined a class of defendants it deemed excluded from prosecution under § 1112, despite nothing so expressed by Congress. If Congress wanted to restrict § 1112 to exclude defendants like Flute, it could have amended § 1112. Alternatively, if Congress sought to restrict other statutes' coverage through § 1841, it could have said that within § 1841. The district court erred when, without basis in the text of either statute, it co-opted § 1841 to impute an exception into § 1112.

C. The District Court Misconstrued 18 U.S.C. § 1841.

The district court exacerbated its error of using § 1841 to define the coverage of § 1112 when it misconstrued the plain meaning of § 1841. If Congress's intent "can be clearly discerned from the statute's language, the judicial inquiry must end." *United States v. Behrens*, 644 F.3d 754, 755 (8th Cir. 2011) (internal marks omitted). So long as the disposition required by the text is not absurd, "'the sole function of the courts'" is to enforce the plain language of a statute according to its terms. *Jungers*, 702 F.3d at 1069 (*quoting Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)). The rule of lenity is inapplicable unless there is first a finding of statutory ambiguity. *See Moskal v. United States*, 498 U.S. 103, 107-08 (1990).

1. Section 1841 Concerns Only Victims Who Die Before Birth.

Baby Boy Flute was not part of the new class of previously excluded victims under § 1841; he was already protected by federal law before that statute was passed. As stated in *Montgomery* and by the district court, § 1841 is on its face an expansion statute, expanding federal coverage to a new class of previously excluded victims. That new class of previously excluded victims is defined in § 1841's initial sentence:

> **18 U.S.C. § 1841. Protection of unborn children**
>
> **(a)(1)** Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes ***the death of***, or bodily injury (as defined in section 1365) to, ***a child, who is in utero*** at the time the conduct takes place, is guilty of a separate offense under this section.

18 U.S.C. § 1841(a)(1) (emphasis added).

As is relevant here, the statute only applies to conduct that causes "the death of" a "child, who ***is*** in utero at the time the conduct takes place[.]" *Id. (emphasis added)*.[4] The use of the present tense—"*is* in utero"—is critical. For the statute to

[4] The dismissed indictment does not implicate a need to analyze the "bodily injury" component of 18 U.S.C. § 1841 because it alleges that a crime requiring death occurred. But the government agrees that, generally speaking, a pregnant woman cannot be prosecuted federally for causing bodily harm inflicted on her unborn child, if that harm does not cause post-natal death to a child born alive. If, for example, the underlying charge were assault against the unborn child under 18 U.S.C. § 111, that statute uses the term "person," as defined by 1 U.S.C. § 8 to mean a post-birth child. Thus, an assault to an "unborn child" could only be prosecuted because of 18 U.S.C. § 1841's extension of protection to that class of victims. And the pregnant mother is exempt under that extension statute.

apply to the conduct of a defendant in Flute's situation, it would say instead "causes the death of . . . a child who *was* in utero at the time the conduct *took* place[.]" What might ordinarily be a subtle distinction—the difference between "is" or "was"—is acutely important in the context here. The whole purpose of § 1841 was to expand protection to those who are "carried in the womb." 18 U.S.C. § 1841(d). Whether the victim is or was in utero is the distinction that triggers the entire statute.

That present-tense meaning of "child, who is in utero" is bolstered when that phrase is later defined as "a member of the species homo sapiens, at any stage of development, ***who is carried in the womb***." 18 U.S.C. § 1841(d) (emphasis added). Again, if Congress intended § 1841 to apply to a born-alive victim like Baby Boy Flute, that term would be defined as one "who *was* carried in the womb." Under its plain terms, § 1841 has no application where the death was not of a child who *is* carried in the womb. Flute's conduct caused the "death of" Baby Boy Flute after he was born alive, no longer "carried in the womb." Flute's conduct did not cause the "death of" a "child, who is in utero," as is plainly required for § 1841 to apply.

The district court and Flute seem at times to assume that the crime is alleged to have been completed when Flute ingested intoxicants, before Baby Boy Flute was born. That is inaccurate. The general axiom discussed above—that death must occur for manslaughter to be a completed offense—is both a logical requirement (until a death results, involuntary manslaughter does not even require an otherwise

unlawful act) and is one that has been discussed by various authorities.

Judge Learned Hand long ago explained, "[i]n short, if the crime, as homicide, be defined to include some consequences of the act, it may be argued and has been generally decided that the crime takes place only where the consequences occur. The crime is the consequence when produced by human agency whether near or far." *Daeche v. United States*, 250 F. 566, 570 (2d. Cir. 1918) (internal citations omitted).

This "crime of consequence" distinction has also been addressed by state courts, where the nuances of involuntary manslaughter statutes are more commonly confronted. *See State v. Taylor*, 31 La.Ann. 851 (1879) (holding that "his death completed a crime, which—until it occurred—was not a manslaughter, and which—before that date—could not, as such, have been made known to, investigated, or prosecuted by a public officer."); *People v. Rehman*, 62 Cal.2d 135, 138-39 (1964) ("It is obvious that the offense of manslaughter had not been committed until the victim died. Until death occurred, there was no manslaughter; and before the moment of death, defendant could not have been investigated and prosecuted for manslaughter."); *Brockway v. State*, 138 N.E. 88 (1923) (overruled on other grounds by *State v. Carrier*, 235 Ind. 456 (1956)) ("[t]he crime that we are here talking about is a composite one. The stroke does not make the crime. The death does not make the crime. It is the composition of the two."). The dismissed indictment alleged that Flute violated § 1112(a) when Baby Boy Flute died, not before.

2. The Plain Language of the Exemption for Pregnant Women Under 18 U.S.C. § 1841(c)(3) does not Eliminate Prosecutorial Authority from other Sections of the Federal Criminal Code.

The particular subsection under which the district court directed dismissal is found at § 1841(c)(3), exempting from prosecution "any woman with respect to her unborn child." The prefatory language to that subsection states "[n]othing in *this section* shall be construed *to permit* the prosecution—[.]" 18 U.S.C. § 1841(c) (emphasis added). Thus, the admonishment is plainly that the passage of § 1841 is not intended to grant a new right to prosecute the enumerated categories that did not exist before § 1841 was passed.

Nothing in § 1841 speaks of eliminating any pre-existing abilities to prosecute under other statutes. Congress quite simply did not do what the district court read in, and the court erred when it construed from § 1841's conscribed, limited language, that

> the Act also created a class of persons who cannot be prosecuted under the federal criminal statutes for injury caused to an unborn child. The 2004 Act is 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.

DCD 37 at 4.

As the district court observed, "Congress is free to define or re-define the reach of the federal criminal statutes." DCD 37 at 4. "Had Congress intended to exclude [those situated like Flute from § 1112] it could have done so expressly." *Jungers*, 702 F.3d at 1075. If Congress had actually wanted to use § 1841 as a vehicle to send a "clear statement" prohibiting prosecutions like this one, it could have done so expressly within § 1841. Congress could have also amended the federal murder and manslaughter statutes directly. The district court misconstrued the plain language of § 1841 when it held that it somehow defined or re-defined § 1112.

D. The District Court Mischaracterized 18 U.S.C. § 1841's Legislative History.

When a statute's meaning is clear, "we need not resort to the statute's legislative history to interpret what is meant[.]" *United States v. Balentine*, 569 F.3d 801, 805 (8th Cir. 2009). There was no reason for the district court to go beyond the plain language of § 1841, delving into its legislative history. Having done so, the district court erred in its construal of that history.

As the district court explained, the general purpose of § 1841 was to close a perceived inadequacy in federal law that "'would allow an unborn child to be killed or injured during the commission of a violent federal crime without any legal consequence whatsoever[.]'" DCD 37 at 3-4 (quoting Testimony of Rep. Steve

Chabot, July 8, 2003, 2003 WL 21526342). In other words, the purpose of § 1841 was to expand the reach of federal law by extending "the reach of the current federal criminal statutes to protect a new class of victims." DCD 37 at 4. The district court already concluded that Baby Boy Flute was within the class of victims protected by § 1112 during the nearly 100 years between when it and § 1841 were passed. DCD 37 at 2. Yet, it reasoned that Baby Boy Flute lost the protection of § 1112 when Congress enacted § 1841, a statute intended to expand federal law to protect more broadly.

Specifically, the district court narrowed in on the legislative history of the exemption regarding "any woman with respect to her unborn child," found at § 1841(c)(3). It quoted a passage from that history, stating that the exemptions under § 1841(c) "'would rectify the current injustice in Federal law by protecting a mother's constitutional right and interest in having a baby from unwanted intrusion by third parties.'" DCD 37 at 4 (*quoting* H.R. Rep. 108-420, 4, 2004 U.S.S.C.A.N. 533, 534 (2004) ("House Judiciary Committee Report").

A review of that particular portion of the legislative history reveals that the quoted passage is part of a sentence summarizing the three paragraphs that precede it. Those paragraphs comprise a section subtitled the "Purpose and Summary" of the legislation. The bulk of that section discusses that the Act is designed to "fill the void in Federal Law" perceived to exist because one who commits a federal

crime of violence against a pregnant woman receives no additional charge or punishment for killing or injuring the unborn child. *See* House Judiciary Committee Report at 534. The purpose was to create two chargeable offenses when an expectant mother is the victim of an enumerated federal felony during which her unborn child is also killed or injured. *Id.*; *see also* 18 U.S.C. § 1841(a) ((“[w]hoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes. . .is guilty of a *separate* offense[.]” (emphasis added)).

The “Purpose and Summary” section describes the exemption found at § 1841(c)(3) as intending to ensure that the Act “does not apply to, nor in any way affect nor alter the ability of a woman to have an abortion.” *Id.* at 534. Thus, when read in context, the passage quoted by the district court is summarizing that the intent of § 1841 is to allow an additional unit of prosecution regarding third party harm to an unborn child, while neither expanding nor reducing a woman’s abortion rights. *Id.* There is simply no mention of an intention to exempt pregnant women from prosecution under § 1112, nor from any other statutes aside from § 1841 itself.

As for “born alive” children like Baby Boy Flute, the district court acknowledged that no such “gap” existed when § 1841 was passed because those children were already covered. In particular, it acknowledged *United States v. Spencer*, 839 F.2d 1341 (9th Cir. 1988), in which the court analyzed the common-law footing of 18 U.S.C. § 1111, the federal murder statute in which appears the

same phrase used in § 1112: "the unlawful killing of a human being." Spencer assaulted a pregnant woman, the woman's child was delivered via emergency caesarean section, lived for ten minutes, then died from the injuries inflicted in utero. *Spencer*, 839 F.2d at 1342. Like here, federal jurisdiction was premised on the Major Crimes Act, 18 U.S.C. § 1153. *Id.*

The Ninth Circuit reasoned that the common law term "human being," codified into § 1111, encompassed "an infant born alive that later died as a result of fetal injuries[.]" *Id.* at 1343. Citations in *Spencer* include various state decisions that detail the common law history. *Id.* Spencer's conviction was affirmed. Congress's gap-filling intention was simply not implicated by § 1841 as applied to "born alive" victims like Spencer's victim or Baby Boy Flute—as the district court acknowledged and as *Spencer* demonstrates, they were already protected prior to the passage of § 1841.

The issue is detailed in the legislative history in a section entitled "Current Federal Law." House Judiciary Committee Report at 535-36. Citing *Spencer*, it explains that the "born alive rule" was a rule that "provides that a criminal may be prosecuted for killing an unborn child *only* if the child was born alive after the assault and later died as a result of the fetal injuries." *Id.* at 535 (emphasis added); see also DCD 37 at 2. Thus the "born alive rule" limited prosecution only to situations in which the child lived through birth. The report explains that § 1841 abolishes that

rule to eliminate the exclusion of unborn children from protection. House Judicial Committee Report at 536-37. Nowhere does it say that the passage of § 1841 was intended to do what the district court concluded here: that it also eliminated protection for a class of victims, like Baby Boy Flute, who were protected up until its passage. The district court noted that the legislative history of § 1841 indicates that it was intended to eliminate the "born alive rule." DCD 37 at 4. While that is correct, it does not follow that § 1841 thereby eliminated the ability to prosecute defendants like Flute. Instead, § 1841 eliminated the limits of the "born alive rule" by expanding protection to an additional class of victims without subtracting those already covered.

The district court erred when it construed from § 1841's legislative history that Congress was somehow intending to create a "class of persons who cannot be prosecuted under federal criminal statutes" or that Congress was issuing a "clear statement" that the federal murder and manslaughter statutes are not applicable to those like Flute. DCD 37 at 4. Nothing in the legislative history reveals such a purpose.

CONCLUSION

With no expressed directive from Congress to do so, the district court should not have bypassed the charged statute to search elsewhere in the federal code for a prohibition on prosecuting Flute under § 1112. Having taken that first erroneous

step, the district court then misconstrued the plain language of § 1841, an uncharged statute that is unrelated when the allegations are that the manslaughter was of a born-alive child. The plain terms of the particular subsection that provided the basis for the district court's dismissal in no way spread to other parts of the federal code a prohibition on prosecuting defendants situated like Flute. The district court erred again when it analyzed the legislative history of § 1841. Congress's clear intent was to expand federal protection to include coverage of unborn children, not to eliminate existing coverage of born-alive victims like Baby Boy Flute.

Based on the foregoing, the government respectfully requests this Court reverse the district court's November 14, 2017 Opinion and Order dismissing the indictment.

Respectfully submitted this 30th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,184 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

The undersigned attorney for Appellant United States of America hereby certifies that Appellant's Brief was filed electronically with the Clerk of the Eighth Circuit Court of Appeals on the 30th day of March, 2018, and service was made upon Appellee's attorney by the following method:

Edward Albright – via e-filing

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