



BILL SCHUETTE
ATTORNEY GENERAL
STATE OF MICHIGAN

May 30, 2013

The Honorable Robert Goodlatte
The Honorable Trent Franks
United States House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: Congressional letter asking questions about Michigan law and the civil rights of newborns and their mothers

To Representative Robert Goodlatte and Representative Trent Franks:

Thank you for your May 7, 2013 letter inquiring about Michigan law and its role in defending newborns and their mothers. Like all Michigan citizens, I was shocked by the story of Dr. Kermit Gosnell and his terrible crimes against newborn children and the desperate women who came to his facility. The crimes were grisly and disturbing. There is no place for such things in America.

I am heartened by the Congressional efforts to gather information from Michigan and its agencies, as well as from other states, about our efforts to protect newborn children and their mothers from similar atrocities. This is an area which is ripe for a state and federal partnership.

In your letter, you have asked five specific questions about Michigan law in its protection of the civil rights of newborns and their mothers and whether there are any legal or financial obstacles that are within the federal government's power to address. In response, I have consulted with my staff and provide the following answers:

Question:

1. In 2002 Congress enacted the Born-Alive Infants Protection Act, which provides that all federal protections for persons apply to every infant born alive. Do prosecutors in your state treat the deliberate killing of newborns, including those newborns who were delivered alive in the process of

abortion[], as a criminal offense? If so, have there been any prosecutions in your state for this crime? If the answer to the previous question is yes, please provide a log of cases, excluding any personally identifying information.

Answer:

Under Michigan law, there is no distinction between a newborn who is born in the ordinary course of a delivery and one who is born alive during the process of an abortion. See Mich. Comp. Law § 333.1072(b) (“If an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law.”). A “live birth” means the birth of child, “regardless of the duration of the pregnancy” that exhibits any “evidence of life, including, but not limited to . . . (i) breathing[;] (ii) [a] heartbeat[;] (iii) [u]mbilical cord pulsation; (iv) [d]efinite movement of voluntary muscles.” Mich. Comp. Law § 333.1071(e). Each child is protected by Michigan criminal statutes against murder and manslaughter.

There are at least four reported cases in which criminal defendants have been prosecuted for the murder of a newborn child:

- *People v. EP*, 298 Mich. App. 431; 827 N.W.2d 725 (2012).
In 2010, EP was convicted of second-degree murder when she decided to deliver her child at home, and when the child was born, she tightly wrapped the child in a towel and placed the baby in a garbage bag. The child died from asphyxiation.
- *People v. ACS*, 2011 WL 2021928 (2011).
In 2009, ACS was convicted of second-degree murder when she suffocated her newborn child.
- *People v. CTR*, 2004 WL 2291346 (2004).
In 2003, CTR was convicted of second-degree murder when she gave birth to her child, wrapped the newborn in a towel, placed the child in a laundry basket, where the child died from asphyxiation. CTR failed to inform the medical personnel of the child's location when they arrived to render aid.
- *People v. KDM*, 441 Mich. 864; 491 N.W.2d 232 (1992).
In 1990, KDM was convicted of involuntary manslaughter for failing to provide any assistance to her newborn, when the child drowned in the toilet after birth.

The list only reflects the cases that appeared in the appellate reports, but does not reflect any prosecutions that were not subject to an appeal.

Question:

2. Has the Legislature in your state enacted laws, in addition to general laws against homicide or requiring ordinary medical treatment, specifically to protect newborns delivered alive in the process of abortions? If so, how, if at all, have these laws changed prosecutorial practices?

Answer:

The Michigan Legislature enacted the "Born Alive Infant Protection Act" in 2003 under Public Act 687 in 2002. See Mich. Comp. Law § 333.1071 *et seq.* The purpose of the Act is to "to prescribe responsibilities and procedures in regard to a newborn whose live birth results from an abortion." P.A. 2002, No. 687. This statute is comprised of three sections:

- Section 1: Provides definitions of "abortion" and "live birth," Mich. Comp. Law § 333.1071;
- Section 2: Identifies legislative finding, including the finding that "[i]f an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law," Mich. Comp. Law § 333.1072;
- Section 3: Assigns the obligations of the physician "attending the abortion," requiring the physician to provide "immediate medical care" for a child born alive, Mich. Comp. Law § 333.1073.

Whether these laws have changed prosecution practices is hard to determine. There are no reported cases against a physician for a child, who is born alive during an abortion procedure and who subsequently dies based on the actions or neglect of the abortion physician. The "Born Alive Infant Protection Act" also has not been cited in any Michigan appellate case.

Question:

3. The grand jury expressed concern about Pennsylvania law[] applying a statute of limitations to infanticide by neglect that it does not apply to murder. Does your state have different statute of limitations for culpability in the death of an infant and culpability in the death of human beings in later

stage of development? If so, what is the understood rationale for that difference?

Answer:

Under Michigan, there is no statute of limitations for a charge of murder or certain other serious crimes, while the statute of limitations for manslaughter is six years. See Mich. Comp. Laws § 767.24. There is no distinction in Michigan based on the age of the victim, other than the tolling provision for criminal sexual conduct found in Mich. Comp. Laws § 767.24(2) (providing that a charge for criminal sexual conduct may be brought within 10 years of the offense or before the victim's 21st birthday, whichever is later).

Regarding the neglect of a child, the Michigan Court of Appeals has determined that the negligent failure to feed an eight-week old infant leading to the child's death supported only an involuntary manslaughter charge, and not a murder charge. See *People v. Giddings*, 169 Mich. App. 631, 634; 426 N.W.2d 732 (1988) ("we agree that proof of death by starvation, standing alone, is insufficient to infer the element of malice necessary to sustain a bindover for second-degree murder"). As a consequence, where the proper charge for the failure to assist a newborn who survived an abortion is involuntary manslaughter, this charge would be subject to a six-year statute of limitations, whereas a physician who deliberately killed a newborn would be subject to a murder charge without any time limitation.

Question:

4. Have you or your predecessors prosecuted any criminal cases in which a woman has died or suffered from serious complications as a result of an abortion? If so, please provide a log of such cases, excluding any personally identifying information.

Answer:

The only reported cases in Michigan in which a physician was charged with manslaughter for the death of a woman during the provision of an abortion occurred before the change in federal law under *Roe v. Wade*, 410 U.S. 113 (1973). See, e.g., *People v. Holcomb*, 360 Mich. 362, 370; 103 N.W.2d 457 (1960) (affirming conviction for manslaughter for a physician who performed illegal abortion on woman resulting in her death). See also Mich. Comp. Law § 750.14 (defining as manslaughter the causing of death of a woman during an abortion). There are no reported cases of such a criminal prosecution in Michigan after *Roe*.

The Department of Attorney General did, however, in 2007 bring a disciplinary licensure action against a physician who failed to maintain adequate equipment at his facility in which a woman died during an abortion. See Attachment A, Administrative Complaint, No. 43-06-102963, p. 3. The allegation was that the facility was not equipped with "EKG monitor, oxygen, pulse oximeter, automatic blood pressure/pulse monitor with an alarm, [defibrillator] or other resuscitation equipment available." *Id.* The woman had died from cardiac arrest following receiving anesthesia during an elective abortion. *Id.* at p. 4.

As a consequence of the disciplinary action, the physician entered a consent order and was subject to a \$10,000 fine after the Bureau of Health Professions ensured that his three facilities offering abortion services that administered anesthesia were properly equipped and met Michigan's standard of care for such facilities. See Attachment B, Consent Order, p. 1.

Question:

5. This Gosnell case has also raised concerns about the effectiveness of state laws that limit, or purport to limit, abortions late in pregnancy. If your state has such a limit, have abortions performed after the statutory limit been prosecuted in your state? If so, please provide a log of such cases, excluding any personally identifying information. If not, are there legal considerations that have prevented such prosecutions from proceeding?

Answer:

Before *Roe*, Michigan statutory law prohibited abortion throughout the duration of pregnancy, making it a felony to cause an abortion unless "necessary to preserve the life" of the mother. Mich. Comp. Law § 750.14. See also *People v. Bricker*, 389 Mich. 524, 529; 208 N.W.2d 172 (1973) ("[i]t is the public policy of the state to proscribe abortion."). Based on the Supremacy Clause and the U.S. Supreme Court's decision in *Roe v. Wade*, this general protection of the unborn has been "subordinated" to federal constitutional requirements. *Bricker*, 389 Mich. at 529.

Nevertheless, this prohibition on abortion still applies "after viability where necessary, in [the physician's] medical judgment to preserve the life or health of the mother." *Bricker*, 389 Mich. at 530. The definition of viability "clearly" includes an unborn child of 28 weeks gestation. See *People v. Higuera*, 244 Mich. App. 429, 442; 625 N.W.2d 444 (2001).

There is only one reported case in which a physician was charged with performing an illegal abortion because it occurred after viability in Michigan:

- *People v. Higuera*, 244 Mich. App. 442, 446; 625 N.W.2d 444 (2001).

The Attorney General brought a charge against a physician, alleging that he performed an abortion on a woman with an unborn child of 28-weeks gestation without medical justification as stated in the complaint:

Jane Doe advised Complainant that she was further quite surprised when Dr. Higuera advised her after performing the first stage of a 2 day abortion procedure that this procedure was capable of inducing labor. Dr. Higuera then warned Jane Doe that if she went into labor before returning to his clinic the next day for completion of the abortion process she should not go to a hospital or call 911 emergency service because "they" (the hospital) would deliver a live baby for her. Jane Doe recalled that she was shocked by this statement because that was the first indication which she had that her baby was at an age where it could survive on its own. [*Id.* at n. 14.]

There is no record of any other prosecutions for illegal abortions in Michigan since *Roe*.

In addition to its criminal prosecutions related to your five questions, the Michigan Department of Attorney General has also worked in tandem with its state agencies to ensure that facilities that perform abortions have met the regulatory requirements of state law. These licensing and regulatory requirements are designed to protect the public health for women and others who seek services from these facilities and their physicians.

For example, in 2011, my office filed a quo warranto action against two abortion facilities in Lansing and Saginaw, Michigan because they were improperly incorporated and not permitted by law to provide medical services to the public. See Attachment C, Quo Warranto Complaint, Case No. 11-1507. The investigation began in response to allegations that one of the facilities improperly disposed of medical records and fetal remains in a dumpster with ordinary trash. The investigation subsequently revealed that the facilities failed to have licensed physicians as incorporators, which is a necessary requirement of Michigan law for the protection of patient safety. As a consequence, the quo warranto complaint sought to dissolve these two corporations, and it successfully resulted in their closure in November 2011.

One of the core functions of government is to ensure the health and protection of our citizens and to safeguard innocent human life. The prosecution of Dr. Gosnell has served as a reminder of the important role that the government serves in achieving these ends. One of the hallmarks of a just society is how it treats its weakest and most vulnerable members.

Thank you again for seeking this information. If there is any further information that I may provide, or any other assistance that I may provide, I stand at the ready.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Schuette". The signature is stylized with a large, looped initial "B" and a cursive "S" and "U".

Bill Schuette
Attorney General

WDS/er