



# MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

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May 31, 2013

Hon. Bob Goodlatte  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515-3951

Hon. Trent Franks  
Chairman  
Subcommittee on the Constitution and Civil Justice  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, DC 20515-3951

Via Overnight UPS

BY EMAIL TO: [john.coleman@mail.house.gov](mailto:john.coleman@mail.house.gov)  
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Dear Chairman Goodlatte and Chairman Franks:

Thank you very much for your letter dated May 7, 2013, regarding abortionist Kermit Gosnell, who now stands convicted of murder. Thank you, too, for your efforts to confront the horrific events and practices that have been exposed as a result of the Gosnell investigation and trial. I am glad to have the opportunity to respond to your inquiries made as part of your nationwide exploration, and I would be happy to follow up with you should you desire more information or assistance.

Your description of matters surrounding abortionist Gosnell's practice seems entirely accurate from my understanding of the public record. You are right that the atrocities that have been revealed "shock the conscience." The facts recited by the grand jury and as reported at the trial reflect a heartless business enterprise that preyed upon the most vulnerable members of our society, including women as to whose wellbeing Gosnell was at best "indifferent" (to quote a recent article by Noemie Emery).

As a preface to my responses to your specific inquiries, I should note that in Ohio, as is not the case under the governing structure in various other states, the Attorney General does not have original prosecutorial jurisdiction over most criminal offenses. Ohio vests the powers and responsibilities of prosecution for most offenses in the Prosecuting Attorneys separately elected in each of Ohio's 88 counties. Each Prosecuting Attorney's office pursues its own criminal cases, maintains its own files, and keeps its own prosecutorial records: They are not centralized in this Office, and hence there is not a statewide log of cases. As the State's Attorney General, I

am empowered to enter into a case at the request of a county Prosecuting Attorney, or of the Governor or General Assembly, and to participate in investigations at the request of local authorities. I am fully prepared to provide the assets and expertise of our Office on any appropriate request regarding such cases.

Further, this Office defends appropriate state statutes from constitutional challenge. Ohio's General Assembly has responded over the years to various court rulings on topics related to the subject of your inquiries and has enacted (or reenacted in amended form) certain protections designed to safeguard women's health and infants as I will describe below. Currently, for example, on an issue perhaps tangentially related to your inquiry, we are engaged in what has been very long-running litigation involving the defense of Ohio's statute regulating mifepristone abortions according to the terms of the federal Food and Drug Administration approval of that drug. The constitutionality of that Act now has been affirmed in most regards, with one claim left for court resolution.

Those introductory comments inform my responses below to the areas of your specific inquiries:

**1 and 2) The deliberate killing of newborns is absolutely a criminal offense in Ohio.**

For example, and in addition to the panoply of protections encompassed by the federal Born-Alive Infants Protection Act, it is "abortion manslaughter," a first degree felony, purposely to "take the life of a child born by attempted abortion who is alive when removed from the uterus of the pregnant woman." Ohio Revised Code ("ORC") 2919.13(A). Moreover, it is abortion manslaughter for any person who performs an abortion to fail to take "the measures required by the exercise of medical judgment in light of the attending circumstances to preserve the life of a child who is alive when removed from the uterus of the pregnant woman." ORC 2919.13(B). For another example, the crime of "partial birth feticide," involving the performance of partial birth abortion, is a second degree felony under Ohio law. ORC 2919.151.

**3) Ohio's legislatively established statute of limitations provides no limitations period for aggravated murder and murder – including the unlawful termination of another's pregnancy (with statutory exceptions for abortions conducted with actual consent); establishes a six-year limitations period for most felonies (including the abortion manslaughter and partial birth feticide crimes referenced above); and provides a twenty-year limitations period for certain other death crimes including voluntary and involuntary manslaughter (again including unlawful termination of another's pregnancy, but with the abortion exceptions), but not including reckless or negligent homicide, etc.**

It is aggravated murder purposely and with prior calculation and design to cause the death of another or the unlawful termination of another's pregnancy (with statutory exceptions for abortions conducted with actual consent). ORC 2903.01; 2903.09. It also is aggravated murder purposely to cause the death of another who is under 13 years of age. *Id.* It is murder purposely to cause the death of another or the unlawful termination of another's pregnancy (again with the statutory exceptions for abortions conducted with actual consent). Ohio has no limitations period for aggravated murder or murder. ORC 2901.13(A)(2).

The general statute of limitations period for a felony in Ohio is six years. ORC 2901.13(A)(1)(a). Certain specified offenses, including certain but not all criminal felonies resulting in death, have a 20-year limitations period. Thus, for example, voluntary and involuntary manslaughter, both defined to encompass the unlawful termination of another's pregnancy under the specified conditions, but both with specified statutory exceptions for abortions performed with the actual consent of the mother, have 20-year limitations periods, while reckless homicide and negligent homicide (both again encompassing unlawful termination of another's pregnancy under the specified conditions, but both again linked to the statutory exceptions for abortions performed with the actual consent of the mother) do not. ORC 2901.13; 2903.03; 2903.04; 2903.041; 2903.05.

These limitations periods do not run during statutorily defined periods, including when the corpus delicti remains undiscovered, when the accused purposely avoids prosecution, and otherwise. ORC 2901.13. The limitations periods result from legislative policy choices, and Ohio does not have all the same sort of "legislative history" records that the United States Congress preserves. It does appear to me that your inquiry identifies an area that may be appropriate for further state legislative consideration.

**4) As noted above, this Office does not have original jurisdiction over prosecutions of criminal cases involving death or serious bodily harm to the mother that results from abortion.**

To the best of my knowledge, the Ohio Attorney General's Office has not had such a case. I would take the prosecution of any such case upon appropriate referral under our jurisdictional statutes as described above, and would prosecute appropriately to the full extent of the law.

**5) Ohio's former ban on post-viability abortions was ruled unconstitutional by federal courts in 1997. Effective October 20, 2011, Ohio enacted a new statutory system protecting women and their children against the dangers of abortion after viability. My office is not aware of legal considerations that should impede appropriate prosecutions under these new statutes.**

Ohio Revised Code 2919.17(A) now specifies that: "No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman when the unborn child is viable." The statute creates an exception where "in the physician's good faith medical judgment .... [t]he abortion was necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." ORC 2919.17(B)(1)(b). That exception is further defined by parameters that include conditions for written certification and review and require appropriate determination of other available methods that could provide the best opportunity for the unborn child to survive. The statute also creates a rebuttable presumption that an unborn child of at least 24 weeks gestational age is viable. ORC 2919.17(E).

Further, ORC 2919.18 as effective October 20, 2011 provides that except in medical emergency, "no physician shall perform or induce or attempt to perform or induce an abortion on a pregnant woman after the beginning of the 20th week of gestation unless, prior to the performance [of that

act], the physician determines, in the physician's good faith medical judgment, that the unborn child is not viable" after performing and recording specified examination and tests.

I believe this statutory system is constitutionally sound, and my Office will defend it vigorously and appropriately against any legal challenge.

Again, I very much appreciate your nationwide inquiry. Thank you for providing me the opportunity to participate in your vitally important work by responding to these questions. Please feel free to correspond further if I may be of additional help.

Very respectfully yours,

A handwritten signature in blue ink, appearing to read "Mike DeWine". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Mike DeWine  
Ohio Attorney General

cc: Hon. John Conyers, Jr. (Ranking Member)  
Hon. Jerrold Nadler (Ranking Member, Subcommittee)