



State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
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JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

May 29, 2013

The Honorable Bob Goodlatte
U.S. Congressman
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-3951

The Honorable Trent Franks
U.S. Congressman
Chairman
Subcommittee on the Constitution and Civil Justice
2138 Rayburn House Office Building
Washington, DC 20515-3951

Dear Congressmen Goodlatte and Franks:

This letter is in response to your inquiry dated May 7, 2013 regarding Louisiana's infant protection statutes. I am hopeful that this information will be helpful to assist the committee with its oversight.

- 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 prosecutions in your state treat the deliberate killing of newborns, including those newborns who were delivered alive in the process of abortions, 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.**

Response:

Yes. Any person delivered alive (i.e. completely expelled from the body of its mother) is a living person protected by Louisiana law. As such, the deliberate (i.e. "intentional") killing of a living person would be covered by Louisiana's homicide statutes. There would be no distinction between a child that was delivered alive during an abortion, provided that the child was, in fact, delivered alive.

Louisiana also outlaws the intentional killing of a child during delivery under Louisiana Revised Statute 14:87.1. This statute states:

LA R.S. 14§87.1. Killing a child during delivery

Killing a child during delivery is the intentional destruction, during parturition of the mother, of the vitality or life of a child in a state of being born and before actual birth, which child would otherwise have been born alive; provided, however, that the crime of killing a child during delivery shall not be construed to include any case in which the

death of a child results from the use by a physician of a procedure during delivery which is necessary to save the life of the child or of the mother and is used for the express purpose of and with the specific intent of saving the life of the child or of the mother.

Whoever commits the crime of killing a child during delivery shall be imprisoned at hard labor in the penitentiary for life.

Added by Acts 1973, No. 74, §1.

At this time our office is not aware of any prosecutions for this crime in the State of Louisiana. We are however, in communication with our state district attorneys who have original jurisdiction in Louisiana.

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?**

Response:

In 2007, Louisiana enacted a criminal statute, Louisiana Revised Statute 14:32.11 which outlawed a procedure commonly referred to as a "partial birth abortion." The statute states:

LA R.S.14§32.11. Partial birth abortion

A. Any physician who knowingly performs a partial birth abortion and thereby kills a human fetus shall be imprisoned at hard labor for not less than one nor more than ten years, fined not less than ten thousand nor more than one hundred thousand dollars, or both. This Section shall not apply to a partial birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

B. For purposes of this Section, the following words have the following meanings:

(1) "Partial birth abortion" means an abortion in which:

(a) The person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an

overt act that the person knows will kill the partially delivered living fetus; and

(b) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

(2) "Physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state in which the doctor performs such activity, or any other individual legally authorized by this state to perform abortions, provided, however, that any individual who is not a physician or not otherwise legally authorized by this state to perform abortions, but who nevertheless directly performs a partial birth abortion, shall be subject to the provisions of this Section.

C.(1) A defendant charged with an offense under this Section may seek a hearing before the Louisiana State Board of Medical Examiners on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. The report of the board shall be discoverable.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit such a hearing to take place.

D. A woman upon whom a partial birth abortion is performed shall not be subject to prosecution for a violation of this Section as a principal, accessory, or coconspirator thereto.

Acts 2007, No. 477, §1, eff. July 12, 2007.

However, if what is considered a "partial birth abortion" involves a fetus that is viable, Louisiana Revised Statute 14:87.5 – "Intentional failure to sustain life and health of aborted viable infant" could possibly be applicable. This law states:

LA R.S. 14§87.5. Intentional failure to sustain life and health of aborted viable infant

The intentional failure to sustain the life and health of an aborted viable infant shall be a crime. The intentional failure to sustain the life and health of an aborted viable infant is the intentional failure, by any

physician or person performing or inducing an abortion, to exercise that degree of professional care and diligence, and to perform such measures as constitute good medical practice, necessary to sustain the life and health of an aborted viable infant, when the death of the infant results. For purposes of this Section, "viable" means that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supporting systems. Any person who commits the crime of intentional failure to sustain the life and health of an aborted viable infant shall be imprisoned at hard labor for not more than twenty-one years.

Added by Acts 1977, No. 406, §1.

At this time our office has no information on how these laws have changed any prosecutorial practices.

3. **The grand jury expressed concern about Pennsylvania law's applying a statute of limitation to infanticide by neglect that it does not apply to murder. Does your state have different statutes of limitations for culpability in the death of an infant and culpability in the death of human beings in later stages of development? If so, what is the understood rationale for that difference?**

Response:

Yes. The statute of limitations for the two factual circumstances you have submitted are different. While there is no time limit for instituting prosecution of an offender accused of the intentional killing of a child delivered alive, the time limit for instituting a prosecution for someone committing a "partial birth abortion" is six years from the date of the alleged offense.

The distinction is based upon the punishment for the crime. The first factual situation submitted would be defined by statute as murder while the second fact pattern would not. As a general rule the punishment for murder in Louisiana is either death, or life imprisonment without the benefit of probation, parole, or suspension of sentence. Any statute which carries that penalty provision is not subject to a time limit for the institution of prosecution.

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

Response:

Our office has no record of a prosecution with the fact pattern you have presented.

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?

Response:

Louisiana has passed Revised Statute 14:87 which outlaws all abortions.

LA R.S. 14§87. Abortion

A.(1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:

- (a) Administering or prescribing any drug, potion, medicine or any other substance to a female; or*
 - (b) Using any instrument or external force whatsoever on a female.*
- (2) This Section shall not apply to the female who has an abortion.*

B. It shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:

- (1) The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a stillborn child.*
- (2) The physician terminates a pregnancy for the express purpose of saving the life, preventing the permanent impairment of a life sustaining organ or organs, or to prevent a substantial risk of death of the mother.*
- (3) The physician terminates a pregnancy by performing a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.*

C. As used in this Section, the following words and phrases are defined as follows:

- (1) "Physician" means any person licensed to practice medicine in this state.*
- (2) "Unborn child" means the unborn offspring of human beings from the moment of fertilization until birth.*

D.(1) Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years and shall be

fined not less than ten thousand dollars nor more than one hundred thousand dollars.

(2) This penalty shall not apply to the female who has an abortion.

Amended by Acts 1964, No. 167; Acts 1991, No. 26, §2; Acts 2006, No. 467, §2.

However, this statute has been declared unconstitutional. Regarding "late term abortions," Louisiana Revised Statute 40:1299.30.1E.(1) outlaws abortions where the fetus has been fertilized for twenty (20) weeks or more.

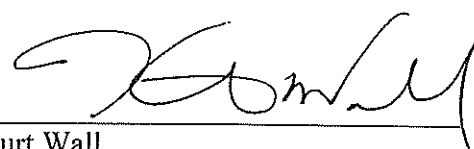
At this time our office has no record of any prosecutions related to the above mentioned statutes. We are also unaware of any legal considerations that may have limited such prosecutions from proceeding. Although the Attorney General's Office does not have original criminal jurisdiction in Louisiana, we have discussed this report with the Louisiana District Attorney's Association.

Again, I hope this information is useful for your oversight requirements. Please feel free to contact me should you have any additional questions.

Sincerely,

**JAMES D. "Buddy" CALDWELL
ATTORNEY GENERAL
STATE OF LOUISIANA**

By: _____


Kurt Wall
Director, Criminal Division
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