



STATE of SOUTH CAROLINA

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ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

January 10, 1997

The Honorable James S. Klauber
Member, House of Representatives
406 E. Henrietta Avenue
Greenwood, South Carolina 29649

Dear Representative Klauber:

You state that you are very concerned about partial birth abortions in light of "last year's failure by the United States Congress to ban these types of late-term abortions." You have requested an opinion as to the impact, if any, "of Whitner v. State upon the regulation of ... partial birth abortions."

LAW / ANALYSIS

In Whitner, Op.No. 24468 (July 15, 1996), the South Carolina Supreme Court addressed the question of whether "a viable fetus is a 'person' for purposes of the Children's Code." There, Whitner pled guilty to criminal child neglect, proscribed by S.C. Code Ann. § 20-7-50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of her ingestion of crack cocaine during the third trimester of pregnancy. In a petition for Post-Conviction relief, she contended that the Circuit Court lacked subject matter jurisdiction to take her plea because a viable fetus was not a "person" for purposes of § 20-7-50, which makes it a crime for a person with legal custody of a child or helpless person to neglect that person. On the other hand, the State contended that the statute "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus."

The Supreme Court in Whitner noted that "South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges." Citing cases such as Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960) and Fowler v. Woodward,

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244 S.C. 608, 138 S.E.2d 42 (1964), the Court stated that "the concept of the viable fetus as a person vested with legal rights" is well established in this State.

The Court also referenced State v. Horne 282 S.C. 444, 319 S.E.2d 703 (1984) which, unlike Hall and Fowler, had involved criminal proceedings. In Horne, the defendant stabbed his wife who was nine months pregnant, and the child died while still in the womb. In a unanimous decision, the Court held that it would be "grossly inconsistent ... to construe a viable fetus as a 'person' for the purpose of imposing civil liability while refusing to give it a similar classification in the criminal context." Thus, concluded the Horne Court, "we hold an action for homicide may be maintained in the future when the State can prove beyond a reasonable doubt the fetus involved was viable, i.e. able to live separate and apart from its mother without the aid of artificial support." 319 S.E.2d at 704. Horne thus set the stage for the Court's conclusion in Whitner.

The Whitner Court, distinguishing decisions from other jurisdictions, particularly Massachusetts, accordingly concluded that

... Hall, Fowler, and Horne were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, Horne also rested on the State's -- not the mother's -- interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly held that the states have a compelling interest in the life of a viable fetus. See Roe v. Wade, 410 U.S. 113, 165, 93 S.Ct. 705, 732, 35 L.Ed.2d 147, 183 (1973); see also Planned Parenthood v. Casey, 505 U.S. 833 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). If, as Whitner suggests we should, read Horne only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts. We decline to read Horne in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law -- protection of the viable fetus -- is radically different from that underlying the law of Massachusetts, we decline to follow the decision of

the Massachusetts Superior Court in Pellegrini. (emphasis added).

Thus, the Court held that a viable fetus is a "person" for purposes of Section 20-7-50. It is, therefore, with that premise -- that a viable unborn fetus is a "person" under South Carolina civil and criminal law -- which must be our starting point for examination of the State's power to ban the partial birth procedure. And it is certainly with that fundamental proposition in mind, that we examine this important question in the context of abortion law.

Section 44-41-20 of the Code makes an abortion a criminal act except in certain specified circumstances. Subsection (c) provides one such exception as follows:

(d)uring the third trimester of pregnancy, the abortion is performed with the pregnant woman's consent, and if married and living with her husband the consent of her husband, in a certified hospital, and only if the attending physician and one additional consulting physician, who shall not be related to or engaged in private practice with the attending physician, certify in writing to the hospital in which the abortion is to be performed that the abortion is necessary based upon their best medical judgment to preserve the life or health of the woman. In the event that the preservation of the woman's mental health is certified as the reason for the abortion, an additional certification shall be required from a consulting psychiatrist who shall not be related to or engaged in private practice with the attending physician. All facts and reasons supporting such certification shall be set forth by the attending physician in writing and attached to such certificate. (emphasis added).

The statute defines "abortion" in § 44-41-40 (a) as

the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

Certain aspects of the abortion statute have been held to be constitutionally suspect, see e.g. Floyd v. Anders, 440 F.Supp. 535 (D.S.C.1977), vacated without opinion 440 U.S.

445, 99 S.Ct. 1200, 59 L.Ed.2d 449. However, the "life or health of the woman" exception remains intact.

The so-called "partial birth" process is technically known as a "dilation and extraction" procedure or "D & X". Such procedure, considered to be "disturbing by many [if not most] people's standards", 109 Harv. L. Rev. 1463 (April 1996),

... is performed predominantly (if not exclusively) during the advanced stages of pregnancy because it is only necessary when the fetus's skull has grown too large to be otherwise removed. In order to facilitate passage through the birth canal, the procedure involves a partial breech delivery of the fetus, insertion of a suction device into its skull; and the subsequent removal of the skull's contents.

Id. Dr. Martin Haskell is probably the most prominent practitioner of this procedure. His "D & X" technique is summarized in Women's Med.Prof.Corp. v. Voinovich, 911 F.Supp. 1051, 1066 (S.D.Ohio) as consisting of this chronological sequence:

[o]n the first and second days of the procedure, Dr. Haskell inserts dilators into the patient's cervix. On the third day, the dilators are removed and the patient's membranes are ruptured. Then, with the guidance of the ultrasound, Haskell inserts forceps into the uterus, grasps a lower extremity, and pulls it into the vagina. With his fingers, Haskell then delivers the other lower extremity, the torso, shoulders, and the upper extremities. The skull, which is too big to be delivered, lodges in the internal cervical os. Haskell uses his fingers to push the anterior cervical lip out of the way, then presses a pair of scissors into the base of the fetal skull. He then forces the scissors into the base of the skull, spreads them to enlarge the opening, removes the scissors, inserts a suction catheter, and evacuates the skull contents. With the head decompressed, he then removes the fetus completely from the patient.

Haskell has estimated that 80% of the D & X procedures he performs between 20 and 24 weeks "are purely elective." See Hearings on H.R. 1833 Before the Senate Judiciary Committee, 104th Cong., 1st Sess. (Nov. 17, 1995) Transcript at p.13.

Recently, there have been legislative efforts to ban this procedure because of its excessively cruel nature and the fact that many physicians consider it serves little purpose. In the Partial Birth Abortion Ban Act of 1995 (H.R.1833 as amended), Congress defined "partial birth abortion" as an

abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

H.R.1833, which passed the Congress, but was vetoed by President Clinton, prohibited partial birth abortions as defined except where

necessary to save life of the mother whose life is endangered by a physical disorder, illness or injury: Provided, that no other medical procedure would suffice for that purpose.

The State of Ohio also recently banned partial birth abortions. O.R.C. § 2919.15 (A) defined the "D & X" procedure as

the termination of human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. 'Dilation and extraction procedure' does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

Ohio barred this procedure except where "all other available abortion procedures would pose a greater risk to the health of the pregnant woman ...". This provision was litigated in the Voinovich case and will be discussed below.

We turn now to an examination of constitutional restrictions which might be deemed to apply to the regulation of the partial birth procedure. Of course, Roe v. Wade, supra set the constitutional standard, but the decision of Planned Parenthood v. Casey is now recognized as also constituting a seminal case in this area. In Casey, the Court stated:

[w]e also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment,

for the preservation of the life or health of the mother. Roe v. Wade, 410 U.S. at 164-165, 35 L.Ed.2d 147, 93 S.Ct. 705.

Casey discarded Roe's trimester analysis in favor of the "undue burden" test. A state statute thus must have neither "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S.Ct. at 2820-21. In addition, Casey concluded that, following viability, the State's interest in protecting the child outweighs the woman's interest in procuring an abortion subject only to the medical determination that a post-viability abortion is necessary to preserve the life or health of the mother. After viability, Casey concluded that "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." 112 S.Ct. at 2817. Accordingly, "regulations which apply only to post-viability abortions are presumptively valid, unless they have an adverse impact on the life or health of the pregnant woman." Women's Medical Profess. Corp. v. Voinovich, 911 F.Supp. at 1060.

In Casey, the Court reviewed the Pennsylvania abortion statute which defined the term "medical emergency" for various uses therein. A "medical emergency" was deemed by Pennsylvania law as

that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman so as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

It was argued to the Court that "such definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks." 120 L.Ed.2d at 716 (emphasis added). The Court noted that

[i]f the contention were correct. we would be required to invalidate the restrictive operation of the provision, for the essential holding of Roe forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.

In the end, however, the Court sustained the validity of the aforementioned definitions as constitutional, relying upon the Third Circuit's analysis. In the lower court, the question

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was whether women having the condition of preeclampsia, inevitable abortion or prematurely ruptured membrane were being denied their right to an abortion under the statutory definition. If left untreated, it was documented that these conditions could produce death or "substantial and irreversible impairment of a major bodily function."

Thus, the Court of Appeals construed the statutory definition as being applicable to these three conditions. Reasoned the Court of Appeals,

... we read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. We believe it should be interpreted with that objective in mind. While the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance, we decline to construe "serious" as intended to deny a woman the uniformly recommended treatment for a condition that can lead to death or permanent injury. (emphasis added).

The United States Supreme Court adopted this reasoning of the Court of Appeals, stating that

[w]e ... conclude that, as construed by the Court of Appeals the medical emergency definition imposes no undue burden on a woman's right.

120 L.Ed.2d at 717.

Therefore, Casey confirms that the State is far from powerless in legislatively defining and limiting what constitutes the "health of the mother". The statutory definition of "serious risk of substantial and irreversible impairment of major bodily function", when deemed to include other conditions which the Third Circuit and Supreme Court found to be "significant health risks", was held to be constitutionally sustainable. Moreover, the Third Circuit expressly noted that the State was not constitutionally required to accept "negligible risks to life or health or significant risks of only transient health problems" as an "excuse for noncompliance" with its efforts to protect a viable fetus.

The South Carolina General Assembly has adopted a definition of "medical emergency" identical to that upheld by the Supreme Court in Casey. See § 44-41-320(1).

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Thus, the issue here is the interpretation of South Carolina's abortion laws as applied to the partial birth procedure in light of the fact that a viable fetus is deemed by our Supreme Court to be a "person" in South Carolina for purposes of the homicide laws. Secondly, the question is whether a prohibition of the partial birth procedure is constitutional under Casey.

During the hearings before Congress on H.R.1833, Nancy G. Romer, a practicing obstetrician and gynecologist and a fellow of the American Board of Obstetrics and Gynecology, as well as a professor in those fields at Wright State University, told the Senate Judiciary Committee that

[i]n my medical judgment this procedure [D & X or partial birth abortion] offers no advantage in safety nor efficiency over other methods of termination In my medical judgment, legislation to prohibit the D & X procedure or partial birth abortion does not present a substantial barrier to women seeking late-term abortion. There is no medical evidence that this procedure is safer nor necessary to provide comprehensive health care to women. As currently practiced, it does not meet medical standards set by ACOG nor has it been adequately proven to be safe or efficacious."

Hearings before the Senate Judiciary Committee, 104th Cong. 1st Sess. (Nov. 17, 1995)
Transcript at p.112.

Indeed, in the opinion of Pamela Smith, M.D., Board Certified in Obstetrics and Gynecology,

... since the partial birth abortion procedure requires three days of forceful dilation of the cervix, the mother could develop cervical incompetence in subsequent pregnancies, resulting in spontaneous second trimester pregnancy losses and necessitating the placement of a cerclage (stitch around the bottom the womb) to enable her to carry a baby to term. It is therefore a fact that this procedure represents a risk to future fertility of the patient. It does not represent the safest way for the patient to maintain her fertility, as abortion advocates proclaim.

... In short, there are absolutely no obstetrical situations encountered in this country which require a partially delivered

human fetus to be destroyed to preserve the life or health of the mother. (emphasis added).

1995 WL 686004 (F.D.C.H.) (Nov. 17, 1995) at p. 5. Moreover, Jean A. Wright, M.D., M.B.A., Associate Professor of Pediatrics and Anesthesia at Emory University, concluded before the House Judiciary Committee on March 21, 1996:

The scientific literature reviewed above and my clinical experience .. lead me to believe that:

1. The anatomical and functional processes responsible for the perception of pain have developed in human fetuses that may be considered for "partial birth abortions". ...
2. It is likely that the threshold for such pain perception is lower than of older preterm newborns, full-term newborns, and older age groups. Thus, the pain experienced during "partial birth abortions" by the human fetus would have a much greater intensity than any similar procedure performed in older age groups.
3. Current methods for providing maternal anesthesia during "partial birth abortions" are unlikely to prevent the experience of pain and stress in the human fetuses before their death occurs after partial delivery.

1996 WL 148762 (F.D.C.H.) (March 21, 1996) at p. 5.

The partial birth abortion procedure "is used from 20 to 40 weeks of pregnancy." Testimony of Keri Harrison, Assistant Counsel to House of Representatives Judiciary Committee (March 21, 1996) 1996 WL 148779 (F.D.C.H.). Dr. Frank Boehm, Director of Obstetrics at Vanderbilt University Medical Center recently wrote that there are "no medical circumstances in which a partial-birth abortion is the only safe alternative." Boehm, "Partial-Birth Abortion Stirs a Medical Debate," Wash. Times, May 6, 1996.

Legal scholars have stated that the partial-birth process places the partially-born child, which is "manipulat[ed] ... into and partly out of, the birth canal to die a painful and gruesome death", in a "constitutional twilight zone between full constitutional recognition and incomplete recognition" Testimony of Douglas W. Kmiec, Professor of Constitutional Law, University of Notre Dame to Senate Judiciary Committee

(November 17, 1995) 1995 WL 695984 (F.D.C.H.) at p. 3. Professor Kmiec thus distinguishes the partial-birth procedure from abortion generally, referencing a number of authorities which have concluded that to kill a child while it is being born, but before birth is completed, is homicide.

Professor Kmiec noted that a leading treatise on criminal law, Perkins on Criminal Law, p.30 (2d ed.1969) states that

[a] more advanced view, ..., based upon practical considerations rather than the literal meaning of the phrase viable child it is to be regarded as having been born alive for the purpose of the law of homicide. This draws the line between stillborn and born alive, limiting the former to those instances in which the fetus is dead before birth starts. Where such is not the fact, ..., under this view, the killing of a viable child shall have the same consequences whether it is during the birth process or after its completion.

Supra. Professor Kmiec further references the fact that Texas possesses a statute prohibiting the taking of a child's life during "parturition" or the act of giving birth, and that the "Texas Attorney General has opined that this statute is unaffected by the Supreme Court's abortion decisions since, unlike an abortion, the statute applies only to those situations in which the victim is in the process of being born." Supra at 4.

Kmiec noted also that in Roe v. Wade, the Texas parturition statute was not constitutionally challenged. 410 U.S. at 118, n.1. He argued that the U.S. Supreme Court's notation in Roe "is best explained" by a decision of the California Court of Appeals, People v. Chavez, 77 Cal.App.2d 621 (1947), where the mother was tried for the murder/manslaughter of her child, killed in the process of being born alive. Said the Chavez Court,

[b]eyond question, it is a difficult thing to draw a line and lay down a fixed general rule There is not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby.

77 Cal.App.2d at 624, 176 P.2d 92, 94. Thus, the partial-birth process, because of its unique nature, is viewed at least by some constitutional scholars, as distinguished from an abortion, because in a partial-birth procedure, the child is, literally, in the process of being "born" when its life is ended.

As stated earlier, Casey makes it clear that the State may constitutionally proscribe post-viability abortions except where necessary to protect the life or health of the mother. Moreover, Casey concludes that a State's regulation of abortions is not invalid unless such regulation places an "undue burden" upon the woman.

The one decision where the constitutionality of a ban upon partial-birth abortions has been litigated is Womens Medical Professional Corp. v. Voinovich, supra. There, the Ohio provision, referenced above, was challenged. The Court noted that

... only one case has considered the propriety of a ban on a specific abortion procedure. In Planned Parenthood of Missouri v. Danforth 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court struck down a ban on the second-trimester abortion method of saline amniocentesis. The Court reasoned that, because the method was commonly used and was safer than other available methods, it failed to serve the stated purpose of protecting maternal health. The Court concluded that, given that there were no safe, available alternatives to the banned method, the ban was "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority" of second trimester abortions. Accordingly, the ban was held to be unconstitutional.

The Women's Medical Court thus concluded that the "reasoning in Danforth suggests that a state may act to prohibit a method of abortion, if there are safe and available alternatives." Danforth had stated that the State's statutory ban upon the use of saline amniocentesis "would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth." Since the District Court in Women's Medical found that the "D & X procedure appears to have the potential of being a safer procedure than all other available abortion procedures, this Court holds that the Plaintiff has demonstrated a likelihood of success or showing that the state is not constitutionally permitted to ban the procedure." 911 F.Supp. at 1070.

There is sharp disagreement with the District Court's conclusion, however. This issue, as well as the Court's findings that other portions of the Ohio law are unconstitutional, are on appeal to the Sixth Circuit. This Office joined in as amicus curiae in a Brief contesting the District Court's findings. Moreover, unlike Danforth, where Missouri sought to ban a method of abortion which is "the one most commonly used nationally by physicians after the first trimester and which is safer with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth", the partial-birth procedure is rarely used and considered by many experts to be unsafe.

In addition, constitutional scholars testified as to the validity of H.R. 1833. It will be recalled that this Bill sought to define the partial-birth procedure as one where a person sought to "partially vaginally deliver[] a living fetus before killing the fetus and completing the delivery" where necessary to save the life of the mother whose life is endangered by a physical disorder, illness or injury and no other medical procedure would suffice."

Professor Smolin of Cumberland Law School testified that Congressional "prohibition of partial-birth abortions would leave in place the current standard and dominant methods of abortion during the second half of pregnancy." Rather than a prohibition of abortion, therefore, "[t]he proposed ban ... is a true regulation", concluded Professor Smolin. He opined that

[u]nder Planned Parenthood v. Casey, previability regulations of abortions are constitutional so long as they do not constitute an undue burden on the abortion liberty. See 112 S.Ct. at 2819-21. The essence of the undue burden test is the question of whether the law, on its face, places a "substantial obstacle" on the women's liberty that effectively deprives her of the right to make the ultimate decision of whether or not to abort. See *id.* Given the existence of several standard abortion techniques for previability abortions, other than partial-birth abortions, it is clear that this prohibition would not constitute an undue burden

Upon viability, the state can proscribe some abortions, because "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the right of the woman." Casey, 112 S.Ct. at 2817; see also Roe v. Wade, 410 U.S. 113, 163-164 (1973). The proposed ban on partial-birth abortions is merely a

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regulation of abortion, and therefore is, in its application to the abortion of viable fetuses, well within the constitutional limit.

1995 WL 365906 (F.D.C.H.) [June 15, 1995], pp. 3-4.

Professor Kmiec viewed the proposed federal legislation to be constitutional as well. Noting that while the proposed Bill banned partial-birth abortions at any stage of viability, "logic and the medical testimony submitted to the House reveals that the procedure is largely, if not exclusively, employed after viability." He opined that

[t]he claim that a woman by an unfettered choice to any abortion technique disregards the basic constitutional fact and acknowledgment of Casey that there are two lives in the balance throughout the pregnancy and especially late in the term where partial-birth abortions are performed. [112 S.Ct. at 2816]. The holding that a state cannot "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health" cannot be transmuted into the proposition that a state cannot interfere with a woman's choice to under[go] a particular abortion procedure. [Id. at 2822]. Even in Roe the Court explicitly rejected the argument that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." [410 U.S. at 153].

1995 WL 695984, supra, at p. 10. Professor Kmiec further argued to the Senate Judiciary Committee that the partial-birth procedure has not been proven to be safe for the mother. He stated that

[a] woman is entitled to a post-viability abortion only when her life or health is threatened by a continuation of her pregnancy. She is not entitled to a post-viability abortion without this threat. [Id. at 282]. In the House Hearing on this legislation, Dr. Pamela Smith, Director of Medical Education at Mt. Sinai Hospital, stated that in her extensive years of professional experience in obstetrics and gynecology, she has "never encountered a case in which it would be necessary to deliberately kill the fetus in [the partial-birth] manner in order

to save the life of the mother." [House Hearing Transcript at 38]. But even were we to conjure up such a life threatening case, the legislation allows for the procedure to be used without criminal or civil penalty if a doctor can reasonably demonstrate that he or she reasonable believe it was more likely than not that only a partial-birth abortion could save the life of the mother.

[e]ven if Casey could be read as an entitlement to a specific abortion procedure, premised exclusively on the health interest of the mother, the partial-birth abortion procedure would not qualify. The partial-birth abortion technique, itself, is not necessarily safe even for the mother. As Dr. Smith relates, the claims of safety are not substantiated. [House Hearing Transcript, supra, at 35]. The data for a safety evaluation is [not] available, id., and even with the small sampling that exists, there is evidence of severe hemorrhaging, id, and infectious cardiac complications, id. The Congressional Research Service similarly reveals that "little information, if any, has been published in the medical literature on the [partial-birth] procedure" [CRS Report, supra at 6].

1995 WL 695984 (F.D.C.H.), supra, at p. 11.

The Attorney General of Nebraska has also concluded that a properly-drafted statute banning partial birth abortions would pass constitutional muster. Op. Atty. Gen. of Nebraska, Op.No. 96043 (May 29, 1996). The Attorney General wrote:

[t]he legal issue presented is whether partial birth abortions can constitutionally be banned. The answer is clearly yes, provided the statute does not impose an "undue burden" on women seeking abortions before viability of the fetus.

In sum, we believe that a partial-birth abortion statute could be drafted that would meet constitutional requirements under applicable decisions of the United States Supreme Court.

As referenced above, in South Carolina under Horne (and Whitner), the killing of a viable fetus is already proscribed by the State's homicide laws. See, cases discussed in

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Whitner. This is distinct from virtually every other state in the Union, which typically requires that a child be "born alive" to constitute a "person". But in this State a viable fetus is a "person", entitled to the State's protection. While the Horne case did not involve homicide in the context of a physician performing an abortion, still Horne, as well as Whitner must now be construed as part of South Carolina's abortion statutes. This is particularly so in light of Whitner's language that Horne is not to be read merely as the vindication of a mother's interest in her unborn, viable child, but instead as the protection of the child itself from conduct which would end its life by killing, stabbing or "other means." It would make no sense to protect the unborn, viable fetus through civil and criminal liability both from conduct by the mother, as well as third parties, but not when an abortion is involved, which is not constitutionally protected.

After viability, and consistent with Roe and Casey, State law only permits an abortion to be performed for the "life or health" of the mother. Section 44-41-20 (c). As noted above, it has been estimated that 80% of partial-birth abortions between 20 and 24 weeks are "elective" in nature. Moreover, the "D & X" procedure is more of a "partial birth" than an abortion. Unlike other abortion techniques in the "D & X" method the child is already present in the birth canal. As Dr. Smith has testified, in this process, the baby is only one step removed from actual birth:

[i]f, by chance, the cervix is floppy or loose and the abortionist does not keep a good grip, he may encounter the dreadful "complication" of delivering a live baby -- undoubtedly a constitutional "person" with an inalienable right to life. Thus, the practitioner must take great care to insure that the baby does not move those additional few inches that would transform its status from one of an abortus to that of a living human child.

1995 WL 686004 (F.D.C.H.) [November 17, 1995] at p. 2.

Finally, the "partial-birth" procedure has not been documented as one which would be used to preserve the life or health of the mother except perhaps in the most extreme cases. Indeed, as indicated, there is considerable evidence that, notwithstanding the District Court's conclusion in Women's Medical, the "D & X" procedure is unsafe to the woman's physical health. At best, it is not proven safe or effective. Dr. Smith has stated that

[p]artial birth abortion is not a standard of care for anything.
In fact, partial-birth abortion is a perversion of a well-known

technique used by obstetricians to deliver breech babies when the intent is to deliver the child alive. However, as the enclosed references in Williams Obstetrics readily document, this technique is rarely used in this country because of the well-known associated risks of maternal hemorrhage and uterine rupture.

Id. at pp. 3-4. Dr. Smith also concluded that, in her well-qualified medical judgment, "there are absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life or health of the mother." supra at p. 5. And Dr. Warren Hern, the author of Abortion Practice, the leading textbook on abortion standards and procedures, stated in the November 20, 1995 issue of American Medical News ("Outlawing Abortion Method") that turning the fetus to a breach position is "potentially dangerous" and that he "would dispute any statement that this is the safest procedure to use." Dr. Hern warned that "you have to be concerned about causing amniotic fluid embolism or placental abruption if you do that."

Courts in other jurisdictions have held in certain situations that physicians may be subject to prosecution for aborting a fetus born alive. See, e.g. State v. Buck, 200 Or. 87, 262 P.2d 495 (1953); Commonwealth v. Edelin, 371 Mass. 497, 359 N.E.2d 4 (1976); Doe v. Deschamps, 461 F.Supp. 682 (D.Mont. 1976) [Montana statute upheld]; Planned Parenthood, supra [Court noted that a "criminal failure to protect a live born infant will be subject to prosecution in Missouri under the State's criminal statutes." 428 U.S. at 83-84]. While it is true that these cases were generally speaking in terms of a live birth, in light of Horne and Whitner, in this State any post-viability abortion which is not performed for the preservation of the life or health of the mother, or which uses a technique which may actually do injury or harm to the mother is suspect and subject to criminal penalties.

CONCLUSION

Based upon the foregoing, it is my opinion that a post-viability "partial birth" abortion is illegal under South Carolina law. It is our understanding that most such procedures are performed after viability. While there may be a rare circumstance where such technique must be performed after viability to preserve the life of the mother, typically, there are other alternatives available which are safer to the mother and which would preserve the life of the child. South Carolina law, which declares that a viable, unborn fetus is a "person" does not sanction the use of this procedure after viability unless it is absolutely necessary to preserve the life or health of the mother. Moreover, our abortion statute does not, in the large majority of cases, protect this procedure because

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this technique is, typically, not performed to preserve the life or health of the mother. Again, based upon the legal and medical authorities which state that this procedure is not justified to preserve the life or health of the mother and can actually be harmful to the mother, I am persuaded that the partial birth procedure is, and should be subject to criminal prosecution in South Carolina. This Office will not stand idly by and tolerate this form of infanticide. It is not acceptable. In short, the criminal laws of South Carolina do not sanction partial birth abortions in this State.

Accordingly, I am placing physicians on notice herein that this Office will take whatever steps are necessary to protect the lives of a viable, unborn fetus which may be subjected to this procedure in South Carolina. We will prosecute any physician where a partial-birth abortion is performed upon a viable fetus where convinced that such procedure was not absolutely necessary to protect the mother. In almost no instance which I can envision would this procedure fall within this exception.

Moreover, I would recommend that the General Assembly move expeditiously to enact comprehensive legislation which would prohibit such a procedure in South Carolina altogether. I would recommend that the Ohio statute and federal law (attached herein) be used as a model. As demonstrated herein, it is my opinion that legislation can be enacted prohibiting such procedure even prior to viability which can be sustained consistent with the decisions of the United States Supreme Court.

Sincerely,


Charles Molony Condon
Attorney General

CMC/ph
Attachment