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March 21, 1989

§ATTORNEY GENERAL OPINION NO. 89- 32

The Honorable Don Sallee
State Senator, First District
State Capitol, Room 128-S
Topeka, Kansas 66612

Re: Crimes and Punishments--Kansas Criminal Code; Crimes Against Persons--Criminal Abortion; Statute Unconstitutional

Synopsis: While the state may require abortions to be performed in licensed facilities from and after the first trimester, K.S.A. 21-3407 sweeps too broadly and the offending provisions cannot be severed from the rest without legislative amendment. We note that the United States Supreme Court is currently considering a case which may modify Roe v. Wade, and thus render this opinion invalid. Cited herein: K.S.A. 21-3407.

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Dear Senator Sallee:

You request our opinion regarding K.S.A. 21-3407, the criminal abortion statute, and whether any part of it remains valid in light of the court decisions in Poe v. Menghini, 339 F.Supp. 986 (D. Kan. 1972), Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and their progeny. Specifically, you are concerned with the requirement that abortions be performed in licensed facilities and question whether K.S.A. 21-3407 might be enforceable in this regard at any stage of pregnancy and under what conditions.

K.S.A. 21-3407 provides in part:

> "(2) A person licensed to practice medicine and surgery is justified in terminating a pregnancy if he believes there is substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse; and either:
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> "(a) Three persons licensed to practice medicine and surgery, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the hospital licensed by the state board of health and accredited by the joint commission on accreditation of hospitals where it is to be performed, or in such other place as may be designated by law; or
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> "(b) An emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother."

In Poe v. Menghini (1972) the United States District Court for the District of Kansas held that the provisions requiring accreditation by the joint commission on accreditation of hospitals (JCAH) and the concurrence of three physicians as to the circumstances justifying abortion were unconstitutionally restrictive. 339 F.Supp. at 994, 995. However, the court found that these two provisions could be severed since, in the court's view, their deletion would do no violence to the legislative intent "to liberalize the circumstances under which an abortion could be obtained." 339 F.Supp. at 996.

In Roe v. Wade (1973) the United States Supreme Court recognized that the state's important and legitimate interest in safe-guarding the health of a pregnant woman becomes compelling at approximately the end of the first trimester of pregnancy and thus at this point "a State may regulate the abortion procedure to the extent that the regulation

reasonably relates to the preservation and protection of maternal health." 35 L.Ed.2d at 182. See also Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, 803, 811 (1976). Further, the court held that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability . . . because the fetus then presumably has the capability of meaningful life outside the mother's womb. . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 35 L.Ed.2d at 183. Rather than finding the Texas statute before it invalid only as to abortions performed prior to viability of the fetus, however, the court struck down the statute in toto as being overbroad. 35 L.Ed.2d at 183.

In Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the United States Supreme Court considered a Georgia statute very similar to K.S.A. 21-3407. (Both were patterned after the American Law Institute's Model Penal Code, §230.3: 35 L.Ed.2d at 207; K.S.A. 21-3407, annotation.) In particular, Ga. Code §26-1202(b)(4) provided:

> "No abortion is authorized or shall be performed under this section unless
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> . . .
>
> "Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals."

In regard to this provision, the court 1) upheld the determination in Poe v. Menghini that the JCAH accreditation requirement was unconstitutional as not being reasonably related to the purposes of the statute (35 L.Ed.2d at 214); and 2) held that "[a] state may adopt standards for licensing all facilities where abortions, from and after the end of the first trimester, may or must be performed, so long as those standards are legitimately related to the objective the state seeks to accomplish, though such facilities may not be limited to licensed hospitals only." [35 L.Ed.2d at Syl. §9. See also City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 755, 763 (1983).] Rather than attempting to uphold Ga. Code §26-1202(b)(4) as validly requiring abortions

obtained after the first trimester to be performed in licensed facilities, the court struck down the hospital requirement in toto because it failed to exclude the first trimester of pregnancy. 35 L.Ed.2d at 214.

Based on the foregoing court decisions, we must conclude that while the state may require abortions to be performed in licensed facilities from and after the first trimester, K.S.A. 21-3407 sweeps too broadly and the offending provisions cannot be severed from the rest without legislative amendment. See Akron, 76 L.Ed.2d, at 713, note 37; Planned Parenthood, 49 L.Ed.2d at 813; Nyberg v. City of Virginia, 495 F.2d 1342, 1345 (2d Cir. 1974); Eubanks v. Brown, 604 F.Supp. 141, 150 (W.D. Ky. 1984). We note that the United States Supreme Court is currently considering a case which may modify Roe v. Wade, and thus render this opinion invalid. See Reproductive Health Service v. Webster, 851 F.2d 1071 (8th Cir. 1988).

Very truly yours,

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RTS:JLM:jm