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August 7, 1989

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ATTORNEY GENERAL OPINION NO. 89- 98

The Honorable Mike Hayden  
Governor of Kansas  
State Capitol, 2nd Floor  
Topeka, Kansas 66612

Re: Crimes and Punishments -- Kansas Criminal Code;  
Crimes Against Persons -- Criminal Abortion; Effect  
of Webster v. Reproductive Health Services on  
K.S.A. 21-3407.

Synopsis: While the United States Supreme Court in Webster v. Reproductive Health Services appears to invite further reconsideration of cases such as Roe v. Wade and Doe v. Bolton, until the Court overrules these cases, or modifies them in ways pertinent to the Kansas legislation, it is our opinion that K.S.A. 21-3407 remains unconstitutional and unenforceable in its current form. Cited herein: K.S.A. 21-3407.

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Dear Governor Hayden:

You request our opinion on the following question:

"What effect, if any, does the decision issued by the Supreme Court of the United States, styled Webster v. Reproductive Health Services, have on current Kansas law (e.g., K.S.A. 21-3407) regarding

abortion services provided either by private or public entities?"

In Webster v. Reproductive Health Services, 57 U.S.L.W. 5023 (U.S. July 3, 1989), the Court considered four provisions of a Missouri statute regulating the performance of abortions: 1) the preamble; 2) the prohibition on the use of public facilities or employees to perform abortions; 3) the prohibition on public funding of abortion counseling; and 4) the requirement that physicians conduct viability tests prior to performing abortions.

With regard to the preamble, which contains "findings" by the Missouri legislature that "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," Mo. Rev. Stat. §§ 1.205.1(1),(2) (1986), the court held that it does not by its terms regulate abortion and until such time as it is improperly applied it is merely a permissible expression of a value judgment. Therefore, the Court declined to pass on the preamble's constitutionality. Reproductive Health Services, 57 U.S.L.W. at 5027.

In considering the prohibition on the use of public facilities or employees to perform abortions, the court noted that "the State's decision here to use public facilities and staff to encourage child birth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" Reproductive Health Services, 57 U.S.L.W. at 5028, citing Harris v. McRae, 448 U.S. 297, 315, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). "Just as Congress' refusal to fund abortions in McRae left 'an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all,' Id., at 317, Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all." Further, the Court stated "[n]othing in the Constitution requires States to enter or remain in the business of performing abortions. Nor . . . do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions." Id. at 5028. Thus, the Court upheld Missouri's restrictions on the use of public employees and facilities for the performance of nontherapeutic abortions.

The issue of the prohibition of public funding of abortion counseling was dismissed with prejudice because the appellees conceded there was no case or controversy before the Court on this question. The state's interpretation of the provision as not applicable to the physician but rather to persons responsible for expending public funds led appellees to concede that they were not adversely affected by the provision.

The final provision considered by the Court required that physicians conduct viability tests prior to performing abortions. Mo. Rev. Stat. § 188.029. A companion provision, not challenged by appellees, provided that a presumption of viability arises at 20 weeks. Mo. Rev. Stat. § 188.029. The Court construed the provision in question as requiring testing only as useful to making subsidiary findings as to viability, i.e. to refute the presumption. The Court found that the provision was "concerned with promoting the State's interest in potential human life," and that, in accordance with Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), this interest becomes compelling at the time of viability. "After viability, when the State's interest in potential human life was held to become compelling, the State '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.'" Reproductive Health Services, 57 U.S.L.W. at 5030, citing Roe v. Wade, 410 U.S. at 165. However, the Court recognized that, "to the extent that section 188.029 regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination of whether a particular fetus is viable," arguably in contravention of the Court's ruling in Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and that to the extent such viability tests increase the cost of second trimester abortions, their validity may be questioned under Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). For this reason the Court modified Roe v. Wade (upon which Akron and Colautti and like cases were predicated) to the extent of renouncing its trimester framework. 57 U.S.L.W. at 5030, 5031. The Court also brought into question the use of "viability" as the point at which a state's interest in protecting potential human life becomes compelling. 57 U.S.L.W. at 5030. However, since the Missouri statute established viability as the point at which the state's interest in potential life must be safeguarded, the Court found it unnecessary and inappropriate to use the case before it to reconsider Roe v. Wade in its

entirety. The state statute involved in Roe was substantially different in that it made it a crime to perform an abortion, except when the mother's life was at stake, regardless of the stage of pregnancy.

The Kansas statute, K.S.A. 21-3407, provides as follows:

"(1) Criminal abortion is the purposeful and unjustifiable termination of the pregnancy of any female other than by a live birth.

(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;

(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

(b) An emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother.

(3) For the purpose of this section pregnancy means that condition of a female from the date of conception to the birth of her child.

(4) For the purpose of subsection (2) of this section all illicit intercourse with

a female under the age of sixteen (16) years shall be deemed felonious.


(5) Criminal abortion is a class D felony."

K.S.A. 21-3407 is more like the Texas statute considered in Roe v. Wade than the Missouri provisions considered in Webster v. Reproductive Health Services. It outlaws the performance of abortion, except in limited circumstances, regardless of the stage of pregnancy. Other regulatory provisions in K.S.A. 21-3407 are identical to provisions of a Georgia statute which was struck down in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 20 (1973). See Attorney General Opinion No. 89-32. The Kansas statute contains no provisions similar to those of the Missouri statute considered in Reproductive Health Services. Thus, while the United States Supreme Court appeared to invite further reconsideration of cases such as Roe v. Wade and Doe v. Bolton, until the Court overrules these cases or modifies them in ways pertinent to the Kansas legislation, it is our opinion that K.S.A. 21-3407 remains unconstitutional and unenforceable in its current form.

Very truly yours,



ROBERT T. STEPHAN  
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Julene L. Miller  
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