

STATE OF MARYLAND

v.

STEVEN CHASE BRIGHAM,
Defendant

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IN THE

CIRCUIT COURT FOR

CECIL COUNTY

Case No. 07-K-11-0020830

CECIL COUNTY, MD
CLERK OF COURT
JAN 27 12:28

**MOTION TO DISMISS INDICTMENT AND
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Dr. Steven Chase Brigham, by and through his undersigned counsel, hereby moves this honorable Court, pursuant to Maryland Rule 4-252, to dismiss the charges against him, and in support thereof states:

On December 28, 2011, an eleven count Indictment was filed in the Circuit Court for Cecil County charging Dr. Brigham with five counts of first degree murder, five counts of second degree murder, and one count of conspiracy to commit first degree murder. Counts one, three, five, seven and nine of the Indictment filed against Dr. Brigham allege that he "feloniously, willfully and of deliberately premeditated malice aforethought [did] kill and murder the victim aforesaid, a viable fetus." Counts two, four, six, eight and ten allege that Dr. Brigham "did feloniously and with malice aforethought, kill and murder the victim aforesaid, a viable fetus." And count eleven charges that Dr. Brigham "did conspire with Nicola Irene Riley to feloniously, willfully and of deliberately premeditated malice aforethought kill and murder the victim aforesaid, a viable fetus." All but one of the alleged viable fetuses referred to in these counts are cryptically identified by numbers whose meaning is known only to the prosecution. Furthermore, all of the counts in the Indictment cite to "CR 2-103; CJIS 2-

T= 2/14/12

0900.”¹ Maryland Annotated Code, Criminal Law Article, §2-103, upon which the prosecution relies, provides, in pertinent part:

(a) For purposes of a prosecution under this title, “viable” has the meaning stated in §20-209 of the Health—General Article.

(b) *Except as provided in subsections (d) through (f) of this section, a prosecution may be instituted for murder or manslaughter of a viable fetus.*

(c) A person prosecuted for murder or manslaughter as provided in subsection (b) of this section must have:

- (1) intended to cause the death of the viable fetus;
- (2) intended to cause serious physical injury to the viable fetus; or
- (3) wantonly or recklessly disregarded the likelihood that the person’s actions would cause the death of or serious physical injury to the viable fetus.

(d) *Nothing in this section applies to or infringes on a woman’s right to terminate a pregnancy as stated in §20-209 of the Health—General Article.*

(e) *Nothing in this section subjects a physician or other licensed medical professional to liability for fetal death that occurs in the course of administering lawful medical care.*

(f) Nothing in this section applies to an act or failure to act of a pregnant woman with regard to her own fetus.

(g) Nothing in this section shall be construed to confer personhood or any rights on the fetus.

Md. Ann. Code, Criminal Law Article §2-103 (2005, 2011 Vol.) (emphasis added).

¹ Counsel is at a complete loss in understanding to what ‘CJIS 2-0900’ refers.

A. The State of Maryland Lacks Jurisdiction to Prosecute Dr. Brigham

“[A]n offense against the laws of the State of Maryland is punishable only when committed within its territory. A person cannot be convicted here for crimes committed in another state.” *Bowen v. State*, 206 Md. 368, 375, 111 A.2d 844, 847 (1955). Putting aside for the moment the fact that the State is attempting to prosecute Dr. Brigham for performing lawful abortions, even if such a prosecution is permissible, a fact which Dr. Brigham does not concede, the place where fetal demise occurred was in New Jersey and not in Maryland thus depriving the State of territorial jurisdiction. Maryland has consistently held that “in order to satisfy the territorial jurisdiction requirement, the crime, or essential elements of it, must have occurred within the geographic territory of Maryland.” *State v. Butler*, 353 Md. 67, 78, 724 A.2d 657 (1999). Unless the State’s actual intent is to prohibit lawful abortions, the essential element of murder of a viable fetus under §2-103 is the actual death of the fetus and not the evacuation of the dead fetus. The death of the fetuses that are the subject of counts one through eight all occurred in New Jersey. Thus, Maryland lacks the necessary jurisdiction to try Dr. Brigham on these counts.

B. Dr. Brigham Is Immune From Prosecution Pursuant to §2-103(e)

“[A]ll statutory interpretation begins, and usually ends, with the statutory text itself, ... for the legislative intent of a statute primarily reveals itself through the statute’s very words. *Derry v. State*, 358 Md. 325, 335, 748 A.2d 478, 483 (2000). A court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle

interpretations that limit or extend its application.” *State v. Holton*, 420 Md. 530, 541, 24 A.3d 678 (2011). The plain language of subsection (e) precludes prosecution of Dr. Brigham for fetal death resulting from a lawful abortion. Abortion is a lawful medical procedure in Maryland. Md. Ann. Code, Health – General Article, §20-209(b). Assuming *arguendo* that the State can establish that fetal demise occurred in Maryland, it nevertheless was the result of a lawful abortion.

Even if this court were to conclude that the language of the fetal homicide statute is unclear with regard to its inapplicability to lawful abortions, the legislative history of the statute unquestionably demonstrates that doctors performing lawful abortions in Maryland are immune from prosecution. The first fetal homicide bill, House Bill 398, was introduced to the General Assembly in 2004 by Delegate Charles Boutin and was fashioned after the federal “Unborn Victims of Violence Act of 2004” which sought to “[e]stablish criminal penalties for inflicting bodily injury or death on a human fetus during the commission of a federal crime of violence against a pregnant woman.” 18 USCS §1841 (108 CIS Legis. Hist. P.L. 212, April 1, 2004) (Exhibit 1). The federal law, otherwise known as “Laci and Conner’s Law” was prompted by the murder of Laci Petersen and her unborn son, Conner by her husband, Scott Petersen. Numerous documents in the bill file for House Bill 398 make it absolutely clear that it was never intended to penalize medical professionals who perform abortions.

One such document is a letter to the Honorable Joseph Vallario, Chairman of the House Judiciary Committee considering the bill, from Delegate Boutin dated March 8, 2005. Delegate Boutin notes “[House Bill 398] is clearly and solely a victim’s rights bill.

It takes care of the “Laci Peterson” issue in Maryland, while protecting a woman’s right to choose. Amendments to protect the mother or physician from any prosecution are clearly friendly.” (Exhibit 2). Moreover, there are two letters in the bill file from the Office of the Attorney General dated February 17, 2005 and April 6, 2005 explaining the limitations of the bill. In the April 6 letter, Assistant Attorney General Kathryn Rowe explains “[i]t is my view that the provision shelters physicians from criminal liability under the bill for lawful medical care, including lawful abortions, that result in the death of a fetus.” (Exhibit 3). Referring specifically to what is now §2-103(e), she notes “[i]t is my view that the main function of this provision is to protect the physician from criminal liability under the new section. Without such a provision, the plain language of the bill would allow prosecution of a physician who performs an abortion of a viable fetus for murder or manslaughter based on a lawful abortion, since the physician intends to cause the death of the viable fetus.” In the February 17 letter, Ms. Rowe explains that the bill “will not be used to erode the rights to abortion protected by Health – General Article §20-209, or rights of maternal autonomy.” (Exhibit 4).

The purpose of the fetal homicide statute as interpreted by Dr. Brigham is also supported by actions of the legislature subsequent to Dr. Brigham’s arrest and indictment. Subsequent legislation often provides insight into legislative intent regarding prior legislation. *See, e.g., State v. Marney*, 252 Md. 43, 248 A.2d 880 (1969). During the 2011 legislative session and in response to the facts in Dr. Brigham’s case, the legislature considered, and rejected, numerous bills that would have allowed the prosecution of medical professionals in circumstances similar to Dr. Brigham’s. House Bill 1024

proposed elimination of the term “viable” and instead defined a fetus as “a developing member of the species homo sapiens who has not yet been born, as established by medical test or autopsy.” House Bill 746 proposed that abortions performed in the third trimester be performed in a hospital and “certified in writing by the physician performing the abortion and one additional consulting physician to the hospital...to be necessary based on the best medical judgment of the physicians, to preserve the life or health of the woman.” House Bill 1040 proposed an amendment to the Maryland Declaration of Rights to establish that “the right to life includes all human beings – irrespective of age, health, function, physical dependency, or method of reproduction – from the beginning of their biological development.” Senate Bill 426 would have required hospitals and facilities to report information regarding abortions to the Department of Health and Mental Hygiene. And, House Bill 19 required that “if an abortion procedure is begun in the State, the entire abortion procedure must be performed in the State.” Significantly, not one of these proposed pieces of legislation was passed. But the fact that these bills were introduced strongly suggests legislative belief that the current fetal homicide bill does *not* apply to the acts of Dr. Brigham.²

It is clear beyond cavil that the fetal homicide law may not be used by the State to impose liability on a physician who performs an abortion and may not be used in any manner that would interfere with a woman’s right to choose an abortion. It is directed

² Indeed, the fiscal and policy notes associated with many of these bills referred directly to the circumstances surrounding Dr. Brigham’s arrest.

solely at punishing those who engage in acts of violence against a pregnant woman with the intent to cause the death of her viable fetus.

C. Dr. Brigham is Immune From Prosecution Pursuant to Md. Ann. Code, Health General Article, §20-209(d)

§20-209 of the Health-General Article, entitled “State interference with abortions,” also provides immunity against prosecution for Dr. Brigham. Specifically, §20-209(d) provides “[t]he physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician’s best medical judgment in accordance with accepted standards of medical practice.” The Indictment in this case makes no allegation that pierces the broad immunity afforded Dr. Brigham under this statute.

D. Application of Md. Ann. Code, Criminal Law Article §2-103 to Abortion Procedures as Performed by Dr. Brigham Unconstitutionally Burdens a Woman’s Right to an Abortion and Unconstitutionally Interferes with a Doctor’s Good Faith Judgment as to the Necessity for the Procedure.

In *Stenberg v. Carhart*, 530 U.S. 914, 921, (2000), the United States Supreme Court distilled the current law regarding abortions and a state’s right to regulate them:

Three established principles determine the issue before us. We shall set them forth in the language of the joint opinion in *Casey*. First, before “viability ... the woman has a right to choose to terminate her pregnancy.” [*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)] *Id.*, at 870, 112 S.Ct. 2791 (plurality opinion).

Second, “a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability” is unconstitutional. *Id.*, at 877, 112 S.Ct. 2791. An “undue burden is ... shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial

obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Ibid.*

Third, “ ‘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.’ ” *Id.*, at 879, 112 S.Ct. 2791 (quoting *Roe v. Wade*, *supra*, at 164-165, 93 S.Ct. 705).

With these principles in mind, it is clear that §2-103 of the Criminal Law Article may not constitutionally be applied to abortions. Thus, §2-103 as applied in this case is unconstitutional and the charges against Dr. Brigham must be dismissed. “If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional...” *Women’s Med. Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997). In an as-applied challenge “the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.” *Ada v. Guam Soc’y of Obstetricians and Gynecologists*, 506 U.S. 1011, 1012, 113 S.Ct. 633, 634, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir.1992).

In *Stenberg* the court addressed the constitutionality of Nebraska’s law banning partial birth abortions. The court found the law unconstitutional for two reasons: first, because it failed to provide an exception for the health of the mother; and second, because it “impose[d] an undue burden on a woman’s ability” to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself.” *Stenberg v. Carhart*, *supra* 530 U.S. at 930. As stated most succinctly by Justice Ginsburg in her concurrence in *Stenberg*:

A state regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” violates the Constitution. *Casey*, 505 U.S., at 877, 112 S.Ct. 2791 (plurality opinion). Such an obstacle exists if the State stops a woman from choosing the procedure her doctor “reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty.” *Ante*, at 2617 (STEVENS, J., concurring); see *Casey*, 505 U.S., at 877, 112 S.Ct. 2791 (“means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it”).

Id. at 952. The state’s interpretation of §2-103 as applicable to the abortions performed by Dr. Brigham interferes with a woman’s right to choose to abort a nonviable fetus because the statute leaves the determination of viability to the “best medical judgment of the attending physician.” If a doctor determines that the fetus is not viable, for whatever reason, and the state disagrees with that determination, under their theory, the doctor can be charged with fetal homicide. This interpretation clearly chills the exercise of a woman’s constitutional right to an abortion of a nonviable fetus and leaves the determination of viability to the whims of the state and individual prosecutors who “seek to chip away at the private choice shielded by *Roe v. Wade*...” *Id.*

Furthermore, the state’s use of §2-103 in the context of abortion procedures, be they pre-viability or post-viability, directly interferes with the best medical judgment of the attending physician based on the particular facts of the case before the physician and his or her good faith judgment of the need for an abortion to protect the life or health of the woman or because the fetus is affected by genetic defect or serious deformity or abnormality. There is not a point at which a doctor’s judgment regarding the necessity

for a given abortion procedure is universally and unanimously accepted among medical professionals. As the court recognized in *Stenberg*:

The word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," ..., cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion—differences of a sort that the American Medical Association and American College of Obstetricians and Gynecologists' statements together indicate are present here.

For another thing, the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary.

Id. at 937. Surely if medical professionals cannot always agree on when a particular abortion procedure is necessary or in the interest of protecting the mother's life or health, the State of Maryland's prosecutors stand in no better position to make such a determination.

E. Charging Dr. Brigham With Murder and Conspiracy Infringes Upon a Woman's Right to Terminate Her Pregnancy in Violation of Md. Ann. Code, Criminal Law Article, §2-103(d).

§2-103(d) unequivocally and without exception states that “[n]othing in this section applies to or infringes on a woman’s right to terminate a pregnancy as stated in §20-209 of the Health—General Article.” The Health—General Article in turn provides:

(b) Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:

- (1) Before the fetus is viable; or
- (2) At any time during the woman’s pregnancy, if:

- (i) The termination procedure is necessary to protect the life or health of the woman; or
- (ii) The fetus is affected by genetic defect or serious deformity or abnormality.

It is patently clear from these statutes that the murder and conspiracy charges filed against Dr. Brigham represent an effort by the state to interfere with a woman’s right and decision to terminate her pregnancy. By bringing these charges, the state has placed a chilling effect on doctors who perform abortions and thus will inhibit women from finding doctors willing to perform lawful abortions even if the procedure is necessary to protect the life or health of the woman.

CONCLUSION

For the reasons presented, Dr. Brigham respectfully requests that the charges against him be dismissed.

Respectfully Submitted



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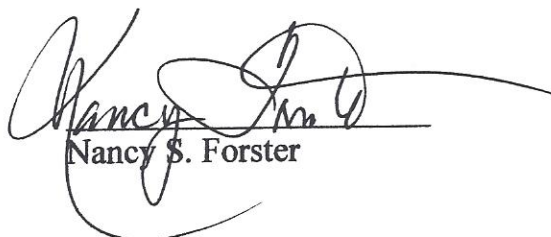
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205 East Main Street
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Attorneys for Steven Brigham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of January, 2012, a copy of the foregoing Motion to Dismiss Indictment and Memorandum in Support of Motion to Dismiss Indictment was mailed to: Ellis Rollins III, State's Attorney for Cecil County, Courthouse, 129 E. Main Street, Elkton, Maryland 21921.



Nancy S. Forster

STATE OF MARYLAND

v.

STEVEN CHASE BRIGHAM,
Defendant

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IN THE

CIRCUIT COURT FOR

CECIL COUNTY

Case No. 07-K-11-002-083

ORDER

Upon consideration of the foregoing Motion to Dismiss Indictment and Memorandum of Law in Support of Motion to Dismiss Indictment, it is on this ____ day of _____, 2012, hereby

ORDERED that the eleven count Indictment against Dr. Steven Chase Brigham be dismissed.

Judge

EXHIBIT 1

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4 CIS PL 108212; 108 CIS Legis. Hist. P.L. 212

LEGISLATIVE HISTORY OF: P.L. 108-212**TITLE:** Unborn Victims of Violence Act of 2004 or Laci and Conner's Law

CIS-NO: 2004-PL108-212

DOC-TYPE: Legislative History

DATE: Apr. 1, 2004

LENGTH: 3 p.

ENACTED-BILL: 108 H.R. 1997 Retrieve Bill Tracking report

STAT: 118 Stat. 568

CONG-SESS: 108-2

SUMMARY:

"To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes."

Establishes criminal penalties for inflicting bodily injury or death on a human fetus during the commission of a Federal crime of violence against a pregnant woman.

CONTENT-NOTATION: Fetal injury or death during commission of Fed crime, criminal penalties estab

BILLS: 106 H.R. 2436; 106 S. 1673; 107 H.R. 503; 107 S. 480; 108 S. 146; 108 S. 1019; 106 H. Res. 313; 107 H. Res. 119; 108 H. Res. 529

DESCRIPTORS:

HOMICIDE; LACI AND CONNER'S LAW; PREGNANCY; SENTENCES, CRIMINAL PROCEDURE; UNBORN VICTIMS OF VIOLENCE ACT; VIOLENCE; 108 PL 212

REFERENCES:**DEBATE:**

145 Congressional Record, 106th Congress, 1st Session - 1999

Sept. 30, House consideration and passage of H. Res. 313 and H.R. 2436, p. H9040.

EXHIBIT 2

CHARLES R. BOUTIN
House Chief Deputy Minority Whip
Legislative District 34A
Harford and Cecil Counties

Health and Government
Operations Committee

Nursing Home Oversight Committee

Health Insurance Subcommittee

Health Facilities, Equipment
and Products Subcommittee

Long-Term Care Subcommittee

House Chairman, Republican PAC

House Chairman, Sportsmen's Caucus



The Maryland House of Delegates

ANNAPOLIS, MARYLAND 21401-1991

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District Office
38 West Bel Air Avenue
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410-273-5920

March 8, 2005

The Honorable Joseph Vallario
Chairman
Judiciary Committee
121 Lowe House Office Building
Annapolis, MD 21401

Re: HB 398 – Fetal Homicide

Mr. Chairman:

Thank you very much for the time allowed me to present this important bill.

As I indicated in the hearing, this is clearly and solely a victim's rights bill. It takes care of the "Laci Peterson" issue in Maryland, while protecting a woman's right to choose.

Amendments to protect the mother or physician from any prosecution are clearly friendly. I am available at any time to answer any remaining questions.

I urge a favorable report.

Yours very truly,

A handwritten signature in black ink, appearing to read "Charles R. Boutin".

Charles R. Boutin
Delegate, District 34A

CRB/kbm

Cc: All Committee Members

EXHIBIT 3

J. JOSEPH CURFAN, JR.
ATTORNEY GENERAL

DONNA HILL STATON
Deputy Attorney General



ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

BONNIE A. KIRKLAND
KATHRYN M. ROWE
SANDRA J. COHEN
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 6, 2005

The Honorable Leo E. Green
2E Miller Senate Building
Annapolis, Maryland 21401-1991

Dear Senator Green:

You have asked for advice concerning House Bill 398, "Murder and Manslaughter - Viable Fetus." Specifically, you have asked about the effect of a provision of the bill stating that the provisions of the bill do not subject a physician for liability for fetal death that occurs in the course of administering lawful medical care. You have also asked whether this provision would provide immunity for the physician for injuries sustained by a woman as a result of malpractice in the performance of an abortion. It is my view that the provision shelters physicians from criminal liability under the bill for lawful medical care, including lawful abortions, that result in the death of a fetus. The section would also provide protection from an attempt to impose civil liability for the death of a fetus, arguing that the bill creates a duty to the viable fetus based. As such, the section reflects the protection from liability that exists in current law. Because the provision applies only to liability related to "fetal death," it would have no effect on the liability of a physician for injuries to a woman during an abortion or other lawful medical care.

House Bill 398 adds a new section to the Criminal Law Article permitting prosecution for the murder or manslaughter of a viable fetus if the defendant intended to cause the death of a viable fetus, intended to cause serious physical injury to the viable fetus, or wantonly or recklessly disregarded the likelihood that his or her actions would cause the death of or serious physical injury to the viable fetus. The bill further provides that:

Nothing in this section subjects a physician or other licensed medical professional to liability for fetal death that occurs in the course of administering lawful medical care.

It is my view that the main function of this provision is to protect the physician from criminal liability under the new section. Without such a provision, the plain language of the bill would allow prosecution of a physician who performs an abortion of a viable fetus for murder or manslaughter based on a lawful abortion, since the physician intends to cause the death of the viable fetus. The provision would also have the effect of protecting a physician who performs a lawful abortion of a viable fetus from civil liability in which a person claimed a duty to the viable fetus based on the

The Honorable Leo E. Green
April 6, 2005
Page 2

provisions of the bill. As such, the provision ensures that the bill does not eliminate the protections for physicians in current law. *See*, Health - General Article § 20-209(d).

You have also asked whether the provision would adversely affect the ability of a woman to sue for injuries resulting from malpractice in the course of an abortion. The provision provides protection only from "liability for fetal death." As a result, it could not have any impact on the ability of a woman to sue for her own injuries arising from medical care that resulted in the death of a fetus.

Finally, it is my view that the provision would not affect the availability of a survival or wrongful death action for death of a viable fetus arising from malpractice in the performance of lawful medical procedures other than abortions. This cause of action is available under current law. *Smith v. Borelli*, 370 Md. 227, 234-235 (2002). The provision in House Bill 398 provides only that "this section" does not subject a physician to liability. It does not purport to have any effect on liability under pre-existing law. Therefore, it is my view that the provision would not affect the liability of a physician for malpractice resulting in the death of a viable fetus in medical procedures other than abortion.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Rowe', with a long horizontal flourish extending to the right.

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
green28.wpd

EXHIBIT 4

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

DONNA HILL STATON
Deputy Attorney General



ROBERT A. ZARNOCH
Assistant Attorney General
Council to the General Assembly

BONNIE A. KIRKLAND
KATHRYN M. ROWE
SANDRA J. COHEN
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 17, 2005

The Honorable Charles R. Boutin
326 Lowe House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Boutin:

You have asked for advice concerning a proposed amendment to House Bill 398, "Homicide - Victim - Viable Fetus." Specifically, you have asked whether the amendment, which would specifically state that the provisions of the bill may not be construed to confer personhood or any rights upon the fetus, could provide a defense to a charge of murder, manslaughter or unlawful homicide brought under the provisions of the bill. It is my view that the proposed amendment would not bar any prosecution contemplated by the bill.

House Bill 398 would provide that "a prosecution may be instituted for murder, manslaughter, or unlawful homicide, whether at common law or under this Title, for a act or omission that: (1) occurred while the victim was a viable fetus; and (2) caused the death of the victim." The bill specifies that it does not apply to or infringe on a woman's right to terminate a pregnancy as stated in § 20-209 of the Health - General Article. It also expressly does not subject a physician to prosecution for a decision to perform an abortion under that section.

The proposed amendment would add that "[n]othing in this section shall be construed to confer personhood or any rights upon the fetus." It is my view that this language cannot be read to bar prosecution for the killing of a viable fetus where such a prosecution is expressly permitted by the plain language of a statute.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. *Bowie v. Park and Planning*, 384 Md. 413, 426 (2004). In determining the legislative intent, it is necessary to read the language of the statute in context and in relation to all of its provisions. *Selig v. State Highway Administration*, 383 Md. 655 (2004). When this approach is applied to House Bill 398 as it would appear with the proposed amendment, the intent to allow prosecution for the killing of a viable fetus is clear, and is not adversely affected by the much more general language of the amendment, which is apparently intended to provide additional assurance that the bill will not be used to erode the rights to abortion protected by Health - General Article § 20-209, or rights of maternal autonomy.

THE OFFICE OF ATTORNEY GENERAL
PAGE 03/03

The Honorable Charles R. Boutin
February 17, 2005
Page 2

This conclusion is consistent with the law from other states. Defendants charged with the killing of a fetus under comparable provisions in other states have argued that the State cannot punish the killing of a fetus because a fetus is not a person, or is not a human being. These claims have uniformly been rejected. *People v. Taylor*, 14 Cal.Rptr.3d 550, 555 (Cal.App. 2004); *People v. Davis*, 872 P.2d 591 (Cal. 1994); *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991); *People v. Ford*, 581 N.E.2d 1189 (Ill.App. 1991). Similarly, it is my view that language stating that a fetus is not a person and has no rights does not bar the State from exerting its interest in the protection of fetal life by punishing a person who kills a fetus.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
boutin03.wpd