STATE OF KANSAS
Tenth Judicial District
OFFICE OF DISTRICT ATTORNEY
Steve Howe, District Attorney

# PRESS RELEASE

********PRESS CONFERENCE TODAY AT 2:30 AT THE JOHNSON COUNTY DISTRICT ATTORNEY'S OFFICE********

From: Steve Howe
(Olathe, KS)

Date: August 17, 2012

## PLANNED PARENTHOOD STATEMENT

**Kansas Attorney General Derek Schmidt and Johnson County District Attorney Steve Howe announce that the remaining 32 misdemeanor counts in the case of *State v. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., 07CR2701* have been dismissed.**

**General Schmidt and District Attorney Howe have consulted with each other during the pendency of the case. In an effort to bring transparency to this high profile case, we are providing the following information to explain our reasons for this decision.**

**In October, 2007, a 107- count complaint was filed against Planned Parenthood in Johnson County District Court. These charges were based on documents obtained by the Kansas Attorney General's Office in 2004-2006. The AG's efforts to obtain these documents have been well-documented by the Supreme Court of Kansas.**

**Numerous counts have already been dismissed due to decisions made years ago:**

**MAKING A FALSE INFORMATION CHARGES AND FAILURE TO MAINTAIN RECORDS, COUNTS 1 THRU 49;**

**These charges were dismissed in November, 2011, because the KDHE records upon which they were based had been destroyed approximately six years previously. These included 23 felony counts.**

**FAILURE TO DETERMINE VIABILITY AND UNLAWFUL LATE TERM ABORTION, COUNTS 53, 57, 59, 60, 61, 62, 63, 65, 68, 72, 74, 76, 78, 82, 84, 86, 88, 89, 93, 97, 99,100, 101,102, 103 and 105;**

**These 26 misdemeanor charges were dismissed because they were filed in 2007, outside the Statute of Limitations. There were no facts which would toll the running of the Statute of Limitations.**

**FAILURE TO DETERMINE VIABILITY AND UNLAWFUL LATE TERM ABORTION, COUNTS 50, 51, 52, 54, 55, 56, 58, 64, 66, 67, 69, 70, 71, 73, 75, 77, 79, 80, 81, 83, 85, 87, 90, 91, 92, 94, 95, 96, 98, 104, 106, and 107;**

**All of the remaining counts are based on activity that took place in 2003.**

***Failure to Determine Viability is a charge based on K.S.A. 65-6703(b). The pertinent parts of the statute are:***

> **(1) Except in the case of a medical emergency, prior to performing an abortion upon a woman, the physician shall determine the gestational age of the fetus according to accepted obstetrical and neonatal practice and standards applied by physicians in the same or similar circumstances. If the physician determines the gestational age is less than 22 weeks, the physician shall document, as part of the medical records of the woman, the basis for the determination.**

> **(2) If the physician determines the gestational age of the fetus is 22 or more weeks, prior to performing an abortion upon the woman, the physician shall determine if the fetus is viable by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age of the fetus and shall enter such findings and determinations of viability in the medical record of the woman.**

***Unlawful Late Term Abortion is derived from the same statute*, *K.S.A. 65-6703(a):***

> **No person shall perform or induce an abortion when the fetus is viable unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion and both physicians determine that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman.**

**CHPP's position was that all fetuses of the gestational age of 22, 23, or 24 weeks were not viable. The complaint, as filed in 2007, contends that CHPP should have made an individualized determination of viability pursuant to the language of *K.S.A. 65-6703(b)(2).* That requirement is not included within the statutory language.**

**A plain reading of *K.S.A. 65-6703(b)(2)* also does not require a medical test or medical examination separate and apart from the determination of gestational age in determining viability.**

**Criminal statutes are strictly construed against the State. The rule of statutory interpretation is that the court must give ordinary meaning to ordinary words and statutes should not be read to add language that is not found in it or to exclude language found in it.**

**The next step of our analysis was to determine if CHPP made a determination of viability by "using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances. "**

***K.S.A. 65-6703 contains the following internal definition of "viability:"***

> **5(e) As used in this section, "viable" means that stage of fetal development when it is the physician's judgment according to accepted neonatal standards of care and practice applied by physicians in the same or similar circumstances that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures.**

**We have done extensive research on the accepted standards in the medical community for determining the viability of a fetus. We have reviewed the opinions of a number of doctors which were obtained during this investigation and have consulted with a fetal medicine expert. None of the doctors who have reviewed the evidence have disagreed with CHPP's finding of gestational age. The only disagreements concerned whether additional tests were required or needed in order to confirm its determination of fetal viability.**

**The United States Supreme Court has said that reasonable medical debate should not subject individuals to criminal prosecution.** ***Colautti v. Franklin 439 U.S. 379, 99 S. Ct. 675 (1979) and Planned Parenthood v. Danforth, 428 U.S. 52, 96 S. Ct. 2831 (1976)***

**At 22 to 24 weeks of fetal development, a determination of viability depends *primarily* upon gestational age. The ultrasound measurements used to determine gestational age conformed to accepted medical standards. Contrary to what *K.S.A. 65-6703(b)(2)* requires, there are no other "medical examinations" or "medical tests" for viability, other than those used to determine gestational age. The statute does not preclude using gestational age for a determination of viability.**

**The State then examined whether medical research supported CHPP's belief that a fetus between 22 to 24 weeks of gestational age was not viable. Neonatal medical specialists, who are in the life-saving business, deal with viability issues every day. This office consulted with such specialists in an effort to determine at what point there is a "reasonable probability that the life of the child can be continued outside the mother's womb with natural or artificial life-supportive measures." Our research revealed the following mortality rates for premature babies are generally deemed to be:**

**22 weeks: nearly 100% mortality rate**
**23 weeks: 90% mortality rate**
**24 weeks: 70% mortality rate**

**This is for children who are wanted by their parents and who are given the best medical care. These mortality rates are used by "physicians in the same or similar circumstances" as CHPP. Their use in determining viability was appropriate.**

**Our office sought to define the term "reasonable probability." It is not defined in the abortion statute. It is not defined in the criminal law. The term "reasonable probability" is used in civil cases, particularly in medical malpractice cases. The terms 'probably' and 'more likely than not' are synonymous.**

**The question then becomes, is it "more likely than not" that the life of the child could be sustained under the statutory terms? Given the mortality rates of 70%, 90% and 100%, the answer is no.**

**Based upon the above information, the Kansas Attorney General and Johnson County District Attorney make the following determinations:**

- **CHPP's determination of gestational age was within accepted practices in the medical community.**
- **The 2003 Kansas statute governing abortions does not require additional testing to determine viability.**
- **The 2003 definition of viability, coupled with the statutory standard of reasonable probability, precludes the State from meeting its burden of proof.**
- **The remaining disputes between experts in the medical field amount to a reasonable medical debate which the U.S. Supreme Court had declared unacceptable grounds for criminal prosecution.**