

EX-107  
DATE 3/8/11  
# AB167

Constitutional Challenges to  
State Unborn Victims (Fetal Homicide) Laws

November 26, 2007

(All challenges were unsuccessful. All challenges were based at least in part on Roe v. Wade and/or denial of equal protection, unless otherwise noted.)

California

In *People v. Davis* [872 P.2d 591 (Cal. 1994)], the California Supreme Court upheld the legislature's addition of the phrase "or a fetus" to the state murder law in 1970, but held that the term "fetus" applies "beyond the embryonic stage of seven to eight weeks." (California Penal Code 187(a) says, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.") In *People v. Dennis* [950 P.2d 1035 (Cal. 1994)], the California Supreme Court upheld inclusion of fetal homicide under Penal Code 190.2(3), which makes a defendant eligible for capital punishment if convicted of more than one murder.

Georgia

A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously upheld the conviction of Richard James Smith, Sr., under Georgia's "feticide" statute. Smith argued that the law conflicted with *Roe v. Wade*, but the court rejected this assertion as "without merit." The court held: "The proposition that Smith relies upon in *Roe v. Wade* -- that an unborn child is not a "person" within the meaning of the Fourteenth Amendment -- is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus." *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987). Related state supreme court decision: *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984) (vagueness/due process challenge).

Illinois

*S. ex rel. Ford v. Ahitow*, 888 F.Supp. 909 (C.D.Ill. 1995), and lower court decision, *People v. Ford*, 581 N.E.2d 1189 (Ill.App. 4 Dist. 1991).

*People v. Campos*, 592 N.E.2d 85 (Ill.App. 1 Dist. 1992). Subsequent history: appeal denied, 602 N.E.2d 460 (Ill. 1992), habeas corpus denied, 827 F.Supp. 1359 (N.D. Ill. 1993), affirmed, 37 F.3d 1501 (7th Cir. 1994), certiorari denied, 514 U.S. 1024 (1995).

Louisiana

Re double jeopardy -- *State v. Smith*, 676 So.2d 1068 (La. 1996), rehearing denied, 679 So.2d 380 (La. 1996).

Minnesota

*State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), cert. denied, 496 U.S. 931 (1990).

Re establishment clause -- State v. Bauer, 471 N.W.2d 363 (Minn. App. 1991).

#### Missouri

In the 1989 case of Webster v. Reproductive Health Services (492 U.S. 490), the U.S. Supreme Court refused to invalidate a Missouri statute (Mo. Rev. Stat. 1.205.1) that declares that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," to the extent permitted by the Constitution and U.S. Supreme Court rulings. A lower court had held that Missouri's law "impermissibl[y]" adopted "a theory of when life begins," but the Supreme Court nullified this ruling, and held that a state is free to enact laws that recognize unborn children, so long as the state does not include restrictions on abortion that Roe forbids.

In State v. Knapp, 843 S.W. 2nd (Mo. en banc) (1992), the Missouri Supreme Court held that the definition of "person" in this law is applicable to other statutes, including at least the state's involuntary manslaughter statute.

#### Pennsylvania

On December 27, 2006, in the case of Commonwealth of Pennsylvania v. Bullock (J-43-2006), the Pennsylvania Supreme Court unanimously rejected an array of constitutional challenges to the Crimes Against the Unborn Child Act, 18 Pa. C.S. Sec. 2601 et seq., including claims based on Roe v. Wade and equal protection doctrine. Although the law applies "from fertilization until birth," a convicted killer, Matthew Bullock, had argued that U.S. Supreme Court precedents allowed such a law to apply only after the point that the baby is "viable" (able to survive indefinitely outside of the womb). The Pennsylvania justices rejected this argument, stating that "to accept that a fetus is not biologically alive until it can survive outside of the womb would be illogical, as such a concept would define fetal life in terms that depend on external conditions, namely, the state of medical technology (which, of course, tends to improve over time). . . viability outside of the womb is immaterial to the question of whether the defendant's actions have caused a cessation of the biological life of the fetus . . ."

Also: On January 24, 2003, in Commonwealth of Pennsylvania v. Corrine D. Wilcott, the Court of Common Pleas of Erie County rejected challenges asserting that the law is unconstitutionally vague, violates U.S. Supreme Court abortion cases, violates equal protection clause, and conflicts with state tort law on definition of "person."

#### Texas

In the case of Terence Chadwick Lawrence v. The State of Texas (No. PD-0236-07), issued November 21, 2007, the Texas Court of Criminal Appeals (the state's highest appellate court in criminal cases) unanimously rejected a convicted murderer's claims that the 2003 Prenatal Protection Act was unconstitutional for various reasons, including inconsistency with Roe v. Wade. In its summary of the

case, the court explained that after learning that a girlfriend, Antwonyia Smith, was pregnant with his child, defendant Lawrence "shot Smith three times with a shotgun, causing her death and the death of her four-to-six week old embryo." For this crime, Lawrence was convicted of the offense of "capital murder," defined in Texas law as causing the death of "more than one person . . . during the same criminal transaction." The court said that the abortion-related rulings of the U.S. Supreme Court have "no application to a statute that prohibits a third party from causing the death of the woman's unborn child against her will." The court noted, "Indeed, we have found no case from any state supreme court or federal court that has struck down a statute prohibiting the murder of an unborn victim, and appellant [Lawrence] cites none."

#### Utah

State of Utah v. Roger Martin MacGuire. MacGuire was charged under the state criminal homicide law with killing his former wife and her unborn child. He argued that the law, which covered "the death of another human being, including an unborn child," was unconstitutional because the term "unborn child" was not defined. The Utah Supreme Court upheld the law as constitutional, holding that "the commonsense meaning of the term 'unborn child' is a human being at any stage of development in utero. . . ." MacGuire was also charged under the state's aggravated murder statute, which applies a more severe penalty for a crime in which two or more "persons" are killed; the court ruled that this law was also properly applied to an unborn victim and was consistent with the U.S. Constitution. January 23, 2004.

#### Wisconsin

Re due process -- State v. Black, 526 N.W.2d 132 (Wis. 1994) (upholding earlier statute).