

CRIMINAL HOMICIDE AND ABORTION AMENDMENTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Carl Wimmer

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LONG TITLE

General Description:

This bill amends provisions of the Utah Criminal Code to describe the difference between abortion and criminal homicide of an unborn child and to remove prohibitions against prosecution of a woman for killing an unborn child or committing criminal homicide of an unborn child.

Highlighted Provisions:

This bill:

- ▶ provides that, for aggravated murder, the aggravating factor of the victim being under the age of 14 years does not apply to the homicide of an unborn child;
- ▶ provides that a person is not guilty of criminal homicide of an unborn child if the sole reason for the death of the unborn child is that the person refused to consent to medical treatment or a cesarean section or failed to follow medical advice;
- ▶ provides that a woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child:
 - is caused by a criminally negligent act of the woman; and
 - is not caused by an intentional, knowing, or reckless act of the woman;
- ▶ defines terms, including amending the definition of abortion to relate only to a medical procedure carried out by a physician, or through a substance used under the direction of a physician, with the consent of the woman on whom the abortion

is performed;

- describes the difference between abortion and criminal homicide of an unborn child;

- removes prohibitions against prosecution of a woman for killing an unborn child or committing criminal homicide of an unborn child;

- clarifies that a woman is not criminally liable for seeking to obtain, or obtaining, an abortion that is permitted by law; and

- makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

Utah Code Sections Affected:

AMENDS:

76-5-201, as last amended by Laws of Utah 2002, Chapter 327

76-5-202, as last amended by Laws of Utah 2009, Chapters 157 and 206

76-7-301, as last amended by Laws of Utah 2004, Chapters 90 and 272

76-7-302, as last amended by Laws of Utah 2009, Chapter 38

76-7-327, as enacted by Laws of Utah 2004, Chapter 272

76-7-314, as last amended by Laws of Utah 2009, Chapter 38

76-7-314.5, as enacted by Laws of Utah 2009, Chapter 38

ENACTS:

76-7-301.5, Utah Code Annotated 1953

REPEALS:

76-7-329, as enacted by Laws of Utah 2004, Chapter 272

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-5-201** is amended to read:

76-5-201. Criminal homicide -- Elements -- Designations of offenses.

(1) (a) ~~[A]~~ Except as provided in Subsections (3) and (4), a person commits criminal homicide if [he] the person intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of its development.

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion, as defined in Section 76-7-301.

(2) Criminal homicide is aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide.

(3) A person is not guilty of criminal homicide of an unborn child if the sole reason for the death of the unborn child is that the person:

(a) refused to consent to:

(i) medical treatment; or

(ii) a cesarean section; or

(b) failed to follow medical advice.

(4) A woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child:

(a) is caused by a criminally negligent act of the woman; and

(b) is not caused by an intentional, knowing, or reckless act of the woman.

Section 2. Section **76-5-202** is amended to read:

76-5-202. Aggravated murder.

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

(d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping;

(e) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Subsection 76-9-704(2)(e);

(f) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

(g) the homicide was committed for pecuniary gain;

(h) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

(i) the actor previously committed or was convicted of:

(i) aggravated murder under this section;

(ii) attempted aggravated murder under this section;

(iii) murder, Section 76-5-203;

(iv) attempted murder, Section 76-5-203; or

(v) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(i);

(j) the actor was previously convicted of:

(i) aggravated assault, Subsection 76-5-103(2);

- 115 (ii) mayhem, Section 76-5-105;
- 116 (iii) kidnapping, Section 76-5-301;
- 117 (iv) child kidnapping, Section 76-5-301.1;
- 118 (v) aggravated kidnapping, Section 76-5-302;
- 119 (vi) rape, Section 76-5-402;
- 120 (vii) rape of a child, Section 76-5-402.1;
- 121 (viii) object rape, Section 76-5-402.2;
- 122 (ix) object rape of a child, Section 76-5-402.3;
- 123 (x) forcible sodomy, Section 76-5-403;
- 124 (xi) sodomy on a child, Section 76-5-403.1;
- 125 (xii) aggravated sexual abuse of a child, Section 76-5-404.1;
- 126 (xiii) aggravated sexual assault, Section 76-5-405;
- 127 (xiv) aggravated arson, Section 76-6-103;
- 128 (xv) aggravated burglary, Section 76-6-203;
- 129 (xvi) aggravated robbery, Section 76-6-302;
- 130 (xvii) felony discharge of a firearm, Section 76-10-508.1; or
- 131 (xviii) an offense committed in another jurisdiction which if committed in this state
- 132 would be a violation of a crime listed in this Subsection (1)(j);
- 133 (k) the homicide was committed for the purpose of:
- 134 (i) preventing a witness from testifying;
- 135 (ii) preventing a person from providing evidence or participating in any legal
- 136 proceedings or official investigation;
- 137 (iii) retaliating against a person for testifying, providing evidence, or participating in
- 138 any legal proceedings or official investigation; or
- 139 (iv) disrupting or hindering any lawful governmental function or enforcement of laws;
- 140 (l) the victim is or has been a local, state, or federal public official, or a candidate for
- 141 public office, and the homicide is based on, is caused by, or is related to that official position,
- 142 act, capacity, or candidacy;

(m) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(n) the homicide was committed:

(i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered; or

(ii) by means of any weapon of mass destruction as defined in Section 76-10-401;

(o) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(p) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(q) the victim was a person held or otherwise detained as a shield, hostage, or for ransom;

(r) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death;

(s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind; or

(t) the victim, at the time of the death of the victim:

(i) was younger than 14 years of age[-]; and

(ii) was not an unborn child.

(2) Criminal homicide constitutes aggravated murder if the actor, with reckless

indifference to human life, causes the death of another incident to an act, scheme, course of conduct, or criminal episode during which the actor is a major participant in the commission or attempted commission of:

- (a) child abuse, Subsection 76-5-109(2)(a);
- (b) child kidnapping, Section 76-5-301.1;
- (c) rape of a child, Section 76-5-402.1;
- (d) object rape of a child, Section 76-5-402.3;
- (e) sodomy on a child, Section 76-5-403.1; or
- (f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.

(3) (a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony.

(b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable by imprisonment for life without parole or by an indeterminate term of not less than 20 years and which may be for life.

(c) (i) Within 60 days after arraignment of the defendant, the prosecutor may file notice of intent to seek the death penalty. The notice shall be served on the defendant or defense counsel and filed with the court.

(ii) Notice of intent to seek the death penalty may be served and filed more than 60 days after the arraignment upon written stipulation of the parties or upon a finding by the court of good cause.

(d) Without the consent of the prosecutor, the court may not accept a plea of guilty to noncapital first degree felony aggravated murder during the period in which the prosecutor may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).

(4) (a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(c) This affirmative defense reduces charges only as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder.

(5) (a) Any aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense does not merge with the crime of aggravated murder.

(b) A person who is convicted of aggravated murder, based on an aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Section 3. Section **76-7-301** is amended to read:

76-7-301. Definitions.

As used in this part:

(1) (a) "Abortion" means:

(i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum[, and includes any and all procedures undertaken to kill a live unborn child and includes all procedures undertaken to produce a miscarriage.] through a medical procedure carried out by a physician or through a substance used under the direction of a physician;

(ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician; or

(iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.

(b) "Abortion" does not include:

(i) removal of a dead unborn child[-];

(ii) removal of an ectopic pregnancy; or

(iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless:

(A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and

(B) the physician is unable to obtain the consent due to a medical emergency.

(2) "Medical emergency" means that condition which, on the basis of the physician's good faith clinical judgment, so threatens the life of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

(3) (a) "Partial birth abortion" means an abortion in which the person performing the abortion:

(i) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(ii) performs the overt act, other than completion of delivery, that kills the partially living fetus.

(b) "Partial birth abortion" does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion.

(4) "Physician" means:

(a) a medical doctor licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act[; a physician in the employment of the government of the United States who is similarly qualified, or];

(b) an osteopathic physician licensed to practice osteopathic medicine under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act[-]; or

(c) a physician employed by the federal government who has qualifications similar to

a person described in Subsection (4)(a) or (b).

(5) "Hospital" means:

(a) a general hospital licensed by the Department of Health according to Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act~~[-and includes]; and~~

(b) a clinic or other medical facility to the extent that such clinic or other medical facility ~~[provides]~~ is certified by the Department of Health as providing equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the Department of Health. ~~[It shall be the responsibility of the Department of Health to determine if such clinic or other medical facility so qualifies and to so certify.]~~

Section 4. Section **76-7-301.5** is enacted to read:

76-7-301.5. Relationship to criminal homicide.

(1) This part does not apply to the killing or attempted killing of a live unborn child in any manner that is not an abortion.

(2) The killing or attempted killing of a live unborn child in a manner that is not an abortion shall be punished as provided in Title 76, Chapter 5, Part 2, Criminal Homicide.

Section 5. Section **76-7-302** is amended to read:

76-7-302. Circumstances under which abortion authorized.

(1) As used in this section, "viable" means that the unborn child has reached a stage of fetal development when the unborn child is potentially able to live outside the womb, as determined by the attending physician to a reasonable degree of medical certainty.

(2) An abortion may be performed in this state only by a physician ~~[licensed to practice medicine under Title 58, Chapter 67, Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act].~~

(3) An abortion may be performed in this state only under the following circumstances:

283 (a) the unborn child is not viable; or
284 (b) the unborn child is viable, if:
285 (i) the abortion is necessary to avert:
286 (A) the death of the woman on whom the abortion is performed; or
287 (B) a serious risk of substantial and irreversible impairment of a major bodily function
288 of the woman on whom the abortion is performed;
289 (ii) two physicians who practice maternal fetal medicine concur, in writing, in the
290 patient's medical record that the fetus has a defect that is uniformly diagnosable and uniformly
291 lethal; or
292 (iii) (A) the woman is pregnant as a result of:
293 (I) rape, as described in Section 76-5-402;
294 (II) rape of a child, as described in Section 76-5-402.1; or
295 (III) incest, as described in Subsection 76-5-406(10) or Section 76-7-102; and
296 (B) before the abortion is performed, the physician who performs the abortion:
297 (I) verifies that the incident described in Subsection (3)(b)(iii)(A) has been reported to
298 law enforcement; and
299 (II) complies with the requirements of Section 62A-4a-403.
300 ~~[(4) Notwithstanding any other provision of this section, a woman who seeks to have,~~
301 ~~or obtains, an abortion for herself is not criminally liable.]~~
302 Section 6. Section **76-7-314** is amended to read:
303 **76-7-314. Violations of abortion laws -- Classifications.**
304 ~~[(1) Notwithstanding any other provision of law, a woman who seeks to have or~~
305 ~~obtains an abortion for herself is not criminally liable.]~~
306 ~~[(2) A woman upon whom a partial birth abortion is performed may not be prosecuted~~
307 ~~under Section 76-7-326 or 76-7-329 for a conspiracy to violate Section 76-7-326 or 76-7-329.]~~
308 ~~[(3)]~~ (1) A willful violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-310.5,
309 76-7-311, or 76-7-312 is a felony of the third degree.
310 ~~[(4)]~~ (2) A violation of Section 76-7-326 ~~[or 76-7-329]~~ is a felony of the third degree.

[~~(5)~~] (3) A violation of Section 76-7-314.5 is a felony of the second degree.

[~~(6)~~] (4) A violation of any other provision of this part is a class A misdemeanor.

Section 7. Section **76-7-314.5** is amended to read:

76-7-314.5. Killing an unborn child.

(1) A person is guilty of killing an unborn child if the person causes the death of an unborn child by performing an abortion of the unborn child in violation of the provisions of Subsection 76-7-302(3).

~~[(2) Notwithstanding any other provision of this section, a woman who seeks to have, or obtains, an abortion for herself is not criminally liable.]~~

(2) A woman is not criminally liable for:

(a) seeking to obtain, or obtaining, an abortion that is permitted by this part; or

(b) a physician's failure to comply with Subsection 76-7-302(3)(b)(ii) or Section 76-7-305.

Section 8. Section **76-7-327** is amended to read:

76-7-327. Remedies for father or maternal grandparents.

(1) The father, if married to the mother at the time she receives a partial birth abortion, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include:

(a) money damages for all injuries, psychological and physical, occasioned by the violation of Section 76-7-326 [~~or 76-7-329~~]; and

(b) statutory damages equal to three times the cost of the partial birth abortion.

Section 9. **Repealer.**

This bill repeals:

Section **76-7-329, Person unauthorized to perform abortions -- Penalties.**

Section 10. **Effective date.**

If approved by two-thirds of all the members elected to each house, this bill takes effect

339 upon approval by the governor, or the day following the constitutional time limit of Utah
340 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
341 the date of veto override.