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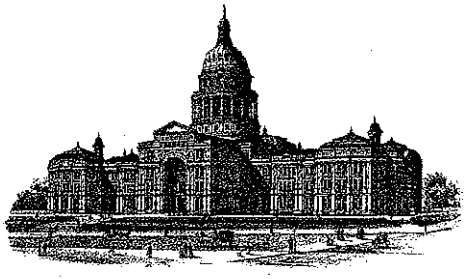

June 26, 2006

RQ-0501-GA

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML 44863-06
I.D. # 44863

Dear General Abbott:

As chair of the House Committee on State Affairs, I am requesting an Opinion from your office on the following question:

> Does a physician's failure to comply with the requirements of either § 164.052(a)(18) (restricting third-trimester abortions performed on viable unborn children) or § 164.052(a)(19) (requiring parental consent for abortions performed on unemancipated minors) of the Texas Occupations Code, as provided by § 1.42 of S.B. 419 (2005 TEX. GEN. LAWS ch 269, § 1.42) subject the physician to liability under the criminal homicide provisions of ch. 19 of the Penal Code?

S.B. 419 was passed by the 79th Legislature (Regular Session) and was thereafter signed into law by the Governor. It took effect on September 1, 2005. In the 2005-2007 Legislative Update prepared for the Texas District and County Attorneys Association, Shannon Edmonds reported that "[t]he 79th Legislature had added two new ways of committing capital murder, one by direct amendment [which is not the subject of this request for an opinion] and the other through expanding prohibited practices for doctors in the Occupations Code." Legislative Update at 3. With respect to the latter, Mr. Edmonds explained:

> The second expansion of capital murder applies to doctors who perform third trimester abortions or abortions on minors without parental consent. In 2003, by changing the definition of "individual" in § 1.07(26) to include "an unborn child" at any stage of development, the legislature expanded capital

murder to include the killing of that unborn child. The legislature also enacted § 19.06 to provide a defense for (among others) doctors performing a "lawful medical procedure," but that defense did not name abortion specifically.

In **SB 419**, the legislature amends Occupations Code § 164.052 to define the "prohibited practice" of medicine to include performing abortions during the third trimester or performing abortions on minors without the consent of a parent or without a valid court order. Violation of that section already constitutes a Class A misdemeanor under § 165.151 (General Criminal Penalty) and/or a third-degree felony under § 165.152 (Practicing Medicine in Violation of Subtitle). Therefore, because these two acts are no longer "lawful medical procedure[s]," the defense in Penal Code § 19.06 no longer applies to these types of abortions making those doctors subject to prosecution for capital murder under § 19.03(a)(8) [referring to the murder of "an individual under six years of age"]. This was undoubtedly an unintended consequence but one that law enforcement authorities should be aware of.

Id. at 3-4 (a copy of the relevant pages from the Legislative Update is enclosed).

In my judgment, Mr. Edmonds' interpretation of S.B. 419 is not supported by Texas law or well-established cannons of statutory construction. Even assuming that the offenses defined by § 164.052(a)(18) and § 164.052(a)(19) of the Occupations Code describe conduct that otherwise falls within the definition of "criminal homicide" under the Penal Code (an assumption which is debatable), that conduct is not *punishable* as criminal homicide. Section 1.03(b) of the Penal Code provides, in pertinent part, that "the punishment affixed to an offense defined outside this code shall be applicable unless the punishment is classified in accordance with this code." In other words, if an offense defined outside the Penal Code affixes a punishment that is *not* classified in accordance with the Penal Code, then that punishment applies. If, however, an offense defined outside the Penal Code affixes a punishment that *is* classified in accordance with the Penal Code (*e.g.*, a Class A misdemeanor or a third-degree felony), then the punishment for that offense is determined by the classification so specified. Performing a third-trimester abortion on a viable unborn child in violation of § 164.052(a)(18) of the Occupations Code or an abortion on an unemancipated minor without her parent's consent (or a court order authorizing the abortion) in violation of § 164.052(a)(19) of that Code is, as Mr. Edmonds noted, either a Class A misdemeanor under § 165.151 (General Criminal Penalty) and/or a third-degree felony under § 165.152 (Practicing Medicine in Violation of Subtitle).

Under the express language of § 1.03 of the Penal Code, the classification of punishments prescribed by the Occupations Code — a Class A misdemeanor or a third-degree felony — applies to conduct that violates either § 164.052(a)(18) or § 164.052(a)(19) of that Code, *not* the classification of punishments prescribed by the Penal Code for criminal homicide. This conclusion is reinforced by basic principles of statutory construction.

Mr. Edmonds suggests that the conduct proscribed by the Occupations Code also falls within the definition of criminal homicide under the Penal Code. If that suggestion is correct, then there is an irreconcilable conflict as to *which* classification of punishments applies (that specified by the Occupations Code for violation of the provisions thereof or that specified by the Penal Code for criminal homicide). The Code Construction Act addresses this problem:

> If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

TEXAS GOV'T CODE § 311.026(b) (West 2005). For purposes of this analysis, the "general provision" is the definition of criminal homicide in the Penal Code, *see* TEXAS PENAL CODE § 19.01 (West Supp. 2005), and the "special provision[s]" are the offenses described in §§ 164.052(a)(18) (restricting third-trimester abortions performed on viable unborn children) and 164.052(a)(19) (requiring parental consent for abortions performed on unemancipated minors) of the Occupations Code. Section 311.026(b) provides that the special provisions (the offenses described by the Occupations Code) prevail as an exception to the general provision (the definition of criminal homicide in the Penal Code), "unless the general provision is the later enactment and the manifest intent is that the general provision prevail." TEXAS GOV'T CODE § 311.026(b). The special provisions (those added by S.B. 419) were enacted later in time than the general provision (the definition of criminal homicide). Thus, the punishments prescribed by the Occupations Code, not those prescribed for criminal homicide by the Penal Code, apply to conduct that violates §§ 164.052(a)(18) and 164.052(a)(19). *See Avery v. State*, 963 S.W.2d 550, 554 (Tex. Ct. App. Houston [1st Dist.] 1997) (special provision enacted later in time prevails over general provision enacted earlier). The interpretation offered by Mr. Edmonds — that a violation of § 164.052(a)(18) or § 164.052(a)(19) of the Occupations Code would subject a physician to prosecution for capital murder (or any other type of murder) under the provisions of the Penal Code — cannot be reconciled with other rules of statutory construction. In construing a statute, a court may consider among other matters the object sought to be attained by the statute, the legislative history of the statute and the consequences of a particular construction of the statute. *See* TEXAS GOV'T CODE § 311.023(1), -(3) and -(5) (West 2005). In amending the Occupations Code in 2005, the Texas Legislature was concerned with providing appropriate criminal penalties for a physician's failure to comply with restrictions on the performance of third-trimester abortions performed on viable unborn children or his failure to obtain the consent of a parent of an unemancipated minor (or a court order) before performing an abortion upon her, certainly not to subject a physician to prosecution for capital murder, a consequence which Mr. Edmonds acknowledges would have been "unintended" and,

therefore, outside the scope of the law. There is no evidence — and Mr. Edmonds identifies none — that the Legislature *intended* to bring such conduct within the scope of the criminal homicide statutes and to so interpret the provisions of S.B. 419 would be unreasonable. It is another basic principle of statutory construction that in enacting a statute, "a just and reasonable result is intended." TEXAS GOV'T CODE § 311.021(3) (West 2005). Mr. Edmonds' interpretation is neither.

Conclusion and Request for Opinion

For the foregoing reasons, I respectfully request an Opinion from your office on whether a physician who violates either § 164.052(a)(18) or § 164.052(a)(19) of the Occupations Code would be subject to prosecution for criminal homicide under the provisions of the Penal Code.

Thank you for your consideration in this matter.

Sincerely,

David Swinford
Chairman, House Committee on State Affairs

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2005–2007 LEGISLATIVE UPDATE

HIGHLIGHTING CHANGES TO TEXAS LAWS, AS AMENDED THROUGH THE 2005 REGULAR SESSION OF THE 79TH LEGISLATURE

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The Texas District & County Attorneys Association provides training and technical assistance to more than 4,000 state prosecutors and their staff members through regular training seminars and conferences. It hosts the largest annual gathering of prosecutors in the nation, provides technical assistance to the law enforcement community, and serves as a legislative resource in criminal law manners.

The Texas District & County Attorneys Association is committed to service and invites input from its members regarding better ways to serve the offices it represents and the people of the State of Texas.

Caveat

This book is intended to be a guide and is intended to provide accurate and current information about criminal law. It is, however, sold with the intention that TDCAA is not engaged in rendering legal or other professional advice. Each reader must be responsible for his or her own legal research. Because lawyers must be responsible for their own research and because the law is constantly changing, TDCAA and its employees do not warrant, either expressly or impliedly, that the information in this volume has not been subject to change, amendment, reversal, or revision.

CONTENTS

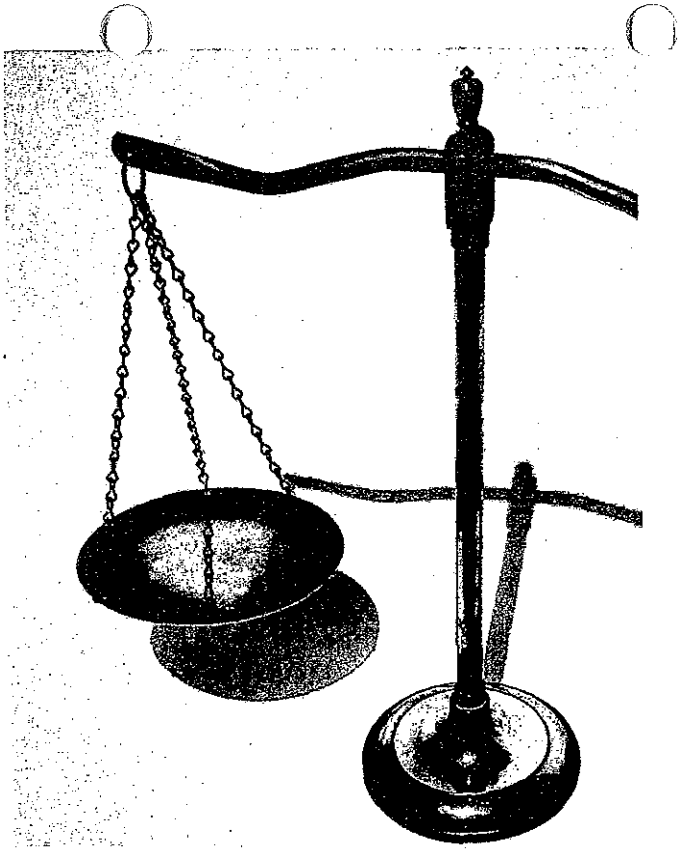
EDITOR'S NOTE

This publication summarizes the changes made by the 79th Legislature in its regular session to the codes and statutes that affect law enforcement and prosecution. It is not a verbatim recital of the laws but a summary designed to alert the reader that certain laws have changed. Before acting on any purported change, the reader should always consult the complete text of the law.

Generally, the Penal Code, Health & Safety Code, Transportation Code, Family Code, Government Code, and Local Government Code changes summarized in this update are effective **Sept. 1, 2005.** This means that they are effective for offenses occurring on or after Sept. 1, 2005. Generally, an offense is committed after the effective date of the change if *all* the elements of the offense occur after that date.

Most of the Code of Criminal Procedure changes are effective Sept. 1, 2005, and will apply to cases pending on that date.

WARNING! The effective date discussion above is the general rule. We have tried to note when an amendment takes place on a date other than Sept. 1, but the reader should always consult the effective date language in a law before relying on that law.



CHAPTER

1

Criminal and Civil Code Changes

where no culpable mental state is required), §6.02 supplies a culpable mental state of intentional, knowing, or reckless intent. This requirement, however, previously did not apply to municipal ordinances, many of which are strict liability offenses.

HB 970 adds subsection (f) to §6.02, which provides that municipalities or counties may not create strict liability offenses for crimes punishable by fines of more than $500. While most city and county ordinances are punishable only as Class C misdemeanors (with fines up to $500), Local Gov't Code §54.001 allows local governments to impose fines up to $2,000 for crimes involving fire safety, zoning, or public health and sanitation. These are the types of offenses that must now include a culpable mental state.

CHAPTER 8. GENERAL DEFENSES TO CRIMINAL RESPONSIBILITY

§8.07. AGE AFFECTING CRIMINAL RESPONSIBILITY

HB 1575 expands the group of Transportation Code offenses over which the juvenile court has jurisdiction. Previously, §8.07 listed five specific Transportation Code offenses over which the juvenile court had jurisdiction. HB 1575 eliminates the list and instead gives juvenile courts jurisdiction over any Transportation Code offense for which the juvenile could face jail or prison time.

SB 60 amends §8.07 by implementing the U.S. Supreme Court's March 2005 decision in *Roper v. Simmons*, 125 S.Ct. 1183, that the 8th Amendment prohibits execution of anyone who was 17 or younger when he committed capital murder. The bill changes the relevant age in subsection (c) to prohibit capital punishment for anyone younger than 18 (rather than 17) when he committed the offense.

This change, combined with a similar change in Family Code §51.02, means that juvenile courts now have jurisdiction over any traffic violation—such as racing—that could result in jail time for an adult.

CHAPTER 12. PUNISHMENTS

§12.31. CAPITAL FELONY

SB 60 changes a sentence of life imprisonment for capital murder to life without parole. For offenses committed before Sept. 1, 2005, a capital murder defendant will still be eligible for a death sentence or a sentence of life (with parole available after serving 40 calendar years).

§12.44. REDUCTION OF STATE JAIL FELONY PUNISHMENT TO MISDEMEANOR PUNISHMENT

HB 2296 amends subsection (b) to require the consent of the prosecuting attorney before a judge may authorize a state jail felony to be prosecuted as a Class A misdemeanor.

CHAPTER 19. CRIMINAL HOMICIDE

§19.03. CAPITAL MURDER

The 79th Legislature added two new ways of committing capital murder, one by direct amendment and the other through expanding prohibited practices for doctors in the Occupations Code.

In response to recent murders targeting judges across the country, **SB 1791** makes the retaliatory murder of any Texas judge a capital offense. (Note, however, that murder committed in the course of retaliation against a public servant [which includes judges] was already a capital crime under §19.02(a)(2).)

The second expansion of capital murder applies to doctors who perform third trimester abortions or abortions on minors without parental consent. In 2003, by changing the definition of "individual" in §1.07(26) to include "an unborn child" at any stage of development, the legislature expanded capital murder to include the killing of that unborn child. The legislature also enacted §19.06 to provide a defense for (among others) doctors performing a "lawful medical procedure," but that defense did not name abortion specifically.

In **SB 419**, the legislature amends Occupations Code §164.052 to define the "prohibited practice" of medicine to include performing abortions during the third trimester or performing abortions on minors without the consent of a parent or without a valid court order. Violation of that section already constitutes a Class A misdemeanor under §165.151 (General Criminal Penalty) and/or a third-degree felony under §165.152 ()racticing Medicine in Violation of Subtitle).Therefore, because these two acts are no longer "lawful medical procedure[s]," the defense in Penal Code §19.06 no longer applies to these types of abortions, making those doctors subject to prosecution for capital murder under §19.03(a)(8). This was undoubtedly an unintended consequence but one that law enforcement authorities should be aware of.

CHAPTER 21. SEXUAL OFFENSES

§21.01. DEFINITIONS

SB 6 (the omnibus bill to reform child and adult protective services in Texas) makes several changes to state law concerning marriage, bigamy, incest, and other offenses allegedly committed by certain polygamist sects. In that vein, the bill creates a new subsection (4) to define "spouse" to mean "a person to whom a person is legally married under Subtitle A, Title 1, Family Code, or a comparable law of another jurisdiction." This definition applies only for the purposes of Chapter 21 (Sexual Offenses), and the only sections in that chapter in which the term "spouse" is used are §§21.11 (Indecency with a Child) and 22.12 (Improper Relationship between Educator and Student).

While there is no single definition of "spouse" or "legally married" in the referenced portions of the Family Code, this new definition does cover all possible legal marriages in Texas, including informal marriages (also known as common-law marriage). Note, however, that this definition differs from the commonly-accepted Penal Code definition of spouse—such as the one in §22.011(c)(2) (Sexual Assault)("a person who is legally married to another")—by accepting as valid "a comparable law of another jurisdiction." This may have an unintended consequence if interpreted to include marriage laws that differ from the laws in Texas. However, the plain reading of the statute would include a person recognized as a spouse under the marriage laws of another state, federal law, and the laws of a foreign country—even for marital relationships that are not legally recognized in Texas.

CHAPTER 22. ASSAULTIVE OFFENSES

§22.01. ASSAULT

SB 91 expands the types of family violence offenses punishable as third-degree felonies to include assaults involving dating violence. The bill also expands the enhancement provisions for prior offenses to include:

- prior family violence convictions other than assault (specifically, assaults, sexual assaults, kidnapping and aggravated kidnapping, and indecency with a child), including those involving a dating relationship; and
- out-of-state assault convictions.

§22.011. SEXUAL ASSAULT

SB 6 (the CPS reform bill) makes one change to the three-year-rule affirmative defense in subsection (e). Previously, a defendant needed to show:

- he was not more than three years older than the victim at the time of the offense;
- he was not required to register for life as a sex offender; or
- he did not have any prior reportable sexual assault convictions or adjudications; and
- the victim was 14 or older.

SB 6 adds an additional requirement to this affirmative defense: There must not be a relationship between the defendant and victim that could be prosecuted as bigamy under §25.01.

Continuing the bigamy reference, an amendment to subsection (f) now elevates sexual assault to a first-degree felony if the victim was someone "whom the [defendant] was prohibited from marrying or