

Exhibit G

EXPERT REPORT OF MICHAEL BLONIGEN

At the request of the Plaintiffs, I have reviewed §§35-6-120 et. seq., Wyo. Stats. 1977, as amended (2023). The purpose of the review was to determine whether these statutes provide adequate guidance to prosecutors as to what acts are criminal and which are not; whether a lack of guidance could lead to inconsistent prosecutions based on the personal biases of prosecutors; and the particular impact of the statutes on individuals who are the victims of sexual assault or incest. As will be explained below, it is my conclusion that the language of the statutes is inconsistent and provides no clear guidance as to the scope of key terms found in the statutes. The statutes, whether intentionally or not, place significant burdens on the victims of crime, particularly minors, without a clear rationale as to why those burdens should exist. As a result, there is a high danger of disparate standards of prosecution being applied by the State. The matters discussed herein are not intended to cover all issues the 2023 act presents to prosecutors and potential defendants, and this report may be supplemented in the future.

BACKGROUND OF THE WRITER

I am a 1977 graduate of Hot Springs County High School in Thermopolis, Wyoming. I obtained a Bachelor of Arts with Honors in History from the University of Wyoming in 1980. I graduated from law school at the University of Wyoming College of Law in 1983. I was admitted to the practice of law in Wyoming in 1983. I have also been admitted to practice in the United States District Court for the District of Wyoming and the Tenth Circuit Court of Appeals.

In September of 1983 I accepted a position as an Assistant Attorney General in the Criminal Division of the Wyoming Attorney General's Office. My primary duties were the representation of the State of Wyoming in criminal appeals, assisting County Attorneys with criminal prosecution and representation of the State of Wyoming in post-conviction relief matters in the State and Federal Courts.

In July 1985 I accepted a position as an Assistant District Attorney with the Office of the District Attorney for the Seventh Judicial District. My primary duties were the representation of the State in all criminal matters, both felony and misdemeanor. I also acted as a Special Assistant United States Attorney from

1999-2003. My duties included charging, litigating and trying criminal cases and also occasionally included appellate work.

In December 2003 I was appointed to fill the unexpired term created by the resignation of my predecessor as District Attorney. I was reelected to that position in 2004, 2006, 2010 and 2014. During this time, I continued to prepare and try cases. I was also responsible for overseeing an office of over 20 people. I also oversaw the juvenile court litigation. I was involved in founding and expanding various programs including juvenile diversion programs, juvenile probation programs and the Child Advocacy Center which deals with physical and sexual abuse of children. I left office in January 2019 and worked briefly as a special prosecutor in various Wyoming counties. In November 2019 I returned to the Office of the District Attorney as an Assistant District Attorney and again served as a Special Assistant United States Attorney before retiring in April 2022. I have served as a special prosecutor in Park, Hot Springs, Big Horn, Sublette, Campbell, Sweetwater, Sheridan, Albany and Laramie Counties.

I have tried well over two hundred (200) jury trials including homicide, child abuse, child sexual abuse, sexual assault, arson, narcotics offenses, drug trafficking, public corruption, assault and property offenses. I have extensive experience in trying cases in State and Federal Court. I also have extensive experience working with the Wyoming State Legislature on legislative matters.

From 2001-2003 I served as one of eight assistant prosecutors on the Board of Directors for the National District Attorneys Association. From 2010 to 2019 I served as a full board member for the National District Attorney's Association. In 2011 I was selected as a Fellow of the American College of Trial Lawyers and served as Wyoming State Director for that group for three years. I also served two years as President of the Wyoming County and Prosecuting Attorney's Association.

During my career I have spoken to or taught numerous professional groups including the Wyoming State Bar, the Wyoming Judicial Conference, the Wyoming County and Prosecuting Attorneys Association, the National Advocacy Center, the National District Attorneys Association, the American Bar Association and numerous law enforcement groups. These presentations covered numerous subjects including trial practice, sexual assault, arson, ethics of prosecution, cold

case homicide investigations, police shooting investigations, and domestic violence.

I have been requested to provide expert opinions on five different occasions in the last three years and have testified once in the case of *Bd. of Prof. Resp. v. Hinckley*, 503 P.3d 584 (Wyo. 2022). My fee for the present review is \$150.00 per hour, plus expenses.

MATERIALS REVIEWED

This matter does not involve review of litigation documents or discovery. Rather, this is a review of statutes and constitutional provisions with a view toward the difficulties presented in any criminal prosecution under Wyo. Stats. 1977, as amended, Wyo. Stats. §35-6-120 through § 35-6-138, Wyo. Stat. § 35-6-120 (chemical abortion ban).

LEGISLATIVE HISTORY

In 2022, the Wyoming State Legislature enacted a statute intended to regulate abortion care in Wyoming. This included the creation of statutes that penalized providing or receiving abortion care in most circumstances. The statutes are fraught with inconsistent and vague language, were enacted without compliance with Wyoming Statutes Title 6, and failed to provide meaningful guidance as to when abortion care was banned and when it would be allowed. The enforcement of the statute was eventually enjoined by the Court leaving the 1977 statutory scheme (as amended) in place.

In 2023 statutes were passed which repealed and replaced the vast majority of then existing statutory scheme. The previous definitional and criminal liability sections of the statute were repealed, and a new set of statutes was enacted. Wyo. Stats. 1977, as amended, Wyo. Stats. §§35-6-120 through 35-6-138 (2023).

ANALYSIS

One of the difficulties in determining the scope of criminal liability in the 2023 abortion statutes is the failure to connect the statutes to Title 6 of the Wyoming Statutes which establish the State's Criminal Code. This is particularly true because the abortion statutes fail to discuss the statutes' connections to any inchoate offenses. This issue has been dealt with in two ways by past criminal

statutes. One way is to place the criminal provisions in Title 6 using the definitions from the source title in defining criminality. The child abuse and child endangerment statutes are examples of this approach. The other approach is to place inchoate offenses with the criminal provisions. This approach is followed in the Controlled Substances Act. An additional step could have been to cross reference Title 6 consistently throughout the act. The 2023 act fails to consistently apply any of these approaches.

In this case the statutes are silent as to inchoate offenses. Inchoate offenses in Title 6 are not limited to offenses listed in that act. Attempt refers to “the crime” attempted. Wyo. Stats. 1977, as amended, Wyo. Stat. §6-1-301. Accessory before the fact refers to “a felony”. Wyo. Stats. 1977, as amended, Wyo. Stat. §6-1-201. Solicitation refers to “a felony”. Wyo. Stats. 1977, as amended, Wyo. Stat. §6-1-302. Conspiracy refers to “a crime”. Wyo. Stats. 1977 as amended, Wyo. Stat. §6-1-303. These terms are not limited to Title 6.

In the new abortion statutes, a felony is created for administering, prescribing or selling any pregnant woman any medicine, drug or other substance with the specific intent causing or abetting an abortion. Wyo. Stat. § 35-6-123(a)(1). The term “abetting”, unlike the provisions of Title 6, provides no definition of abetting and what it may entail. Subsection (a)(ii) contains identical language if a person “use[s] or employ[s] any instrument, device means or procedure” upon a pregnant woman or with the same intent. It should be noted that the statute only states abetting is a crime and does not use the broader language of the accessory before the fact language. The 2023 act could have cross referenced the definition found in the Title 6 as they did in defining sexual assault and incest but the act only references abetting. Do they mean the same thing? We don’t know. This is but one example of the inconsistent and incomplete language employed in defining criminal offenses under the statute.

The application of the felony statute is further complicated by Wyo. Stat. §35-6-120 which covers abortion by chemical or pharmaceutical means. (same number as the first section of the new general abortion statutory scheme: §§35-6-120-138) This offense is defined as a misdemeanor, yet the same conduct could be charged as a felony under Wyo. Stat. §35-6-123. The medication abortion statute also, like the general abortion statutes, provides that the woman upon whom the

chemical abortion is performed or attempted is immune from prosecution. It does not address whether immunity exists if she is the one who administers the chemical substance. The same language is used in the felony penalty section found at Wyo. Stat. §35-6-125. The same question hangs in the air. What if the pregnant woman performs or administers the abortion herself? Is she subject to prosecution or not? Who “performs” a medication abortion?

The prosecutor is then faced with a felony statute that has the following essential elements.

1. The act must be done “knowingly”. That is the acts constituting the offense must be done with knowledge. This means the person must intentionally commit the acts constituting the offense. This term does not mean the person knows his acts violate the law. He must simply do those acts in a knowing manner.
2. The person must act with the specific intent to cause or abet an abortion.
3. The State must prove the abortion care would be illegal, not falling within any exception. The State must prove the care is not covered by any of the exceptions. Therefore, the State must prove beyond a reasonable doubt that none of the exceptions found in §35-6-124 applies.

Interestingly, there is no requirement that any abortion actually occurred. Without some definition of abetting, it is almost impossible to determine whether the broader definition of Title 6 applies. As such, any person involved in any step of abortion care would possibly be subject to prosecution depending on how broadly the local prosecutor defined the term abetting. This increases the likelihood that prosecution will be brought for improper reasons including personal political and religious beliefs.

The National District Attorneys Association – National Prosecution Standards, (Third Edition updated 2009) and the ABA Criminal Justice Standards – Prosecution Functions (Fourth Edition updated 2017) preclude such considerations in charging decisions. For example, ABA Standard 3-1.6 “Improper Bias Prohibited” states that, among other prohibited basis, a prosecutor may not consider religion, sex, or partisan, political, or personal considerations in charging decisions or other official actions. Also, under the NDAA standards, political and personal considerations are improper considerations in nearly all aspects of the

prosecutor's duties, including investigation and charging decisions. NDAA 4-1.4 Factors Not to Consider; NDAA 3-1.2 Fairness in Investigations.

THE EXCEPTIONS OF §35-6-124 AND CLARITY IN CRIMINAL LIABILITY

The difficulties described above pale in comparison to the difficulties accompanying the application of the exceptions to the ban on abortion care that are an integral part of any criminal prosecution under the 2023 act. There are three exceptions, each with its own problems.

The first exception is found in Wyo. Stat. §35-6-124(a)(i). This exception legalizes abortion care when, in the physician's reasonable medical judgment, such care is necessary to prevent the death of a pregnant woman, or the woman faces a substantial risk of death due to physical condition or the serious and permanent impairment of a life sustaining organ. This exception is silent on mental health conditions and/or the danger of self-harm. As such it employs a different definition of life-threatening harm than the definition found in Wyo. Stat. §35-6-120(b)(iii) (medication ban). That section specifically states a risk to mental health or self-harm is not considered life threatening and therefore does not create an exception. This subsection also uses a different term of "imminent peril". This term is not found in the language contained in the exception found in the general abortion statute. Like the 2022 act, there is a failure to consistently apply language and terms throughout the statutes. The prosecutor is given unclear guidance as to what qualifies as care that is proper or improper under the exception.

The second exception found in Wyo. Stat. §35-6-124(a)(ii) makes little sense as an actual exception. A medical treatment which accidentally or unintentionally causes the death of a fetus is not done knowingly. An abortion was never intended. Since the criminal prosecution requires a specific intent to abort a pregnancy, and since the statute only bans intentional acts, there is no exception to be had.

The most concerning exception is that which applies to women whose pregnancy is the result of sexual assault, incest or in the case of a minor, sexual abuse. The language of the exception creates a mere illusion of protection for victims of sexual assault and is so lacking in guidance that a medical provider, and a prosecutor, could only guess as to what is required under the exception.

In the exception found in Wyo. Stat. §35-6-124(a)(iii) abortion care may be provided if the pregnancy is the result of incest or sexual assault. Reference is made to those terms as defined in Title 6. The definition of sexual assault in turn references the numerous Wyoming statutes defining sex crimes against adults and minors. As anyone involved in the criminal justice system knows, these statutes proscribe a myriad of sexual conduct based on how the sexual abuse or assault was accomplished, the age of the perpetrator, the age of the victim and the type of sexual conduct involved. There are literally dozens of ways to violate these laws even if a pregnancy would not result.

If the victim is an adult the sexual assault must be “report[ed]” but that term is not defined. The report must be written. This begs the question of what is a report to law enforcement? Does the report have to meet a certain standard? What if all the elements of the offense are not mentioned in the report? Does a perpetrator have to be identified? How far does the health care provider have to go in assessing that report? What if the report uses terms like suspected sexual assault or refers to a statute as second degree or third-degree sexual assault or sexual abuse – does the provider have to know the difference between sexual intrusion and sexual contact?

There is no logical connection between health care and the physical condition of the mother and fetus that is accomplished through a police report. Yet the prosecutor is not given any guidance as to what a report is and what it must contain to meet the requirements of the exception. Even if a report is made, who is to obtain the report? Remember that prior to the filing of an information charging a person with one of these crimes, public officials, including the police, are not to release any information likely to identify the victim or perpetrator of a sexual assault. Wyo. Stats. 1977, as amended, Wyo. Stat. §6-2-319. Police agencies could refuse access to the report or heavily redact the report. An adult victim of sexual assault and her care provider are not given any guidance, and substantial hurdles exist to obtaining care. The prosecutor who must determine if the exception is met is given no guidance.

Sexual assault is already a crime which is heavily underreported. The barriers to reporting present in the abortion statutes are likely to further impede the number of assaults reported to the police. Moreover, the requirement of

written reports is out of step with current police work. Currently, and has been the case for several years, written reports are often incomplete or insubstantial, and may not provide sufficient information to a health care provider. Rather, reports are usually set forth in digital media such as video, audio recording, body cameras.

These issues are nothing as compared to burdens placed on minor victims of sexual assault and abuse. To come within the exemption, the minor victim cannot even be the reporting party. The report must be made by the minor's parents or guardian. Guardianship is a term defined by law. It does not encompass the vast array of people caring for children including but not limited to stepparents, grandparents, siblings, foster parents or state agencies such as the Department of Family Services. In addition, the statute uses the term "the parent" not "a parent". There was a definition in the 1977 and 2022 statutes indicating this meant both parents. The term is not defined in the 2023 statute. There is no provision for the child to seek care through a court ordered attorney or physical custodian.

Based on my training and experience this language will result in the failure to provide abortion care to significant numbers of victims of childhood sexual abuse. The most obvious case is the case where the child's father has impregnated a child. It seems unlikely the perpetrator will report themselves and it is common for parents of sexual abuse victims to shelter others who may sexually abuse children. The number of cases where parents protect grandparents, uncles, boyfriends and family friends are too many to count. In addition, reporting the assault to the police in cases of pregnancy would probably result in the collection of irrefutable DNA evidence which would lead to the prosecution of the perpetrator. The reporting requirement creates the real possibility that a minor victim will have to carry a child to term that is the result of her being subjected to sexual assault.

There is no provision for a court to appoint a guardian ad litem for the child or for the appointment of a person who can represent the child victim. Such persons are not guardians as defined by statute. A person holding a durable power of attorney for healthcare would not be a proper reporting party. None of these issues should impact what appropriate medical care should be provided to a victim. The courts will determine the application, if any, of Article 1, Section 38(a)

of the Wyoming Constitution to this statute. However, the prosecutor should always be aware of potential constitutional issues. That provision specifically provides for the healthcare decisions to be made by parents, guardians or ***“legal representative of any other natural person shall have the right to make health care decisions for that person.”*** The language in this exception is inconsistent with the language of the statute.

The prosecutor must now guess as to whether a report is sufficient under the law and whether that report is being made by a qualified person under the statute.

CONCLUSION

The 2023 abortion act clearly subjects individuals to criminal prosecution under circumstances where the standards governing prosecution of the crime are vague, incomplete and inconsistent. It is axiomatic that the accused is entitled to fair notice of what the law prohibits and what it allows. Equally, a prosecutor should apply the law fairly and without basing prosecution on individual political or personal beliefs. The 2023 act presents a high likelihood that prosecution decisions may be made for improper purposes. The act leaves prosecutors, like healthcare providers and pregnant women, guessing at the scope and effect of the law.

RESPECTFULLY SUBMITTED THIS 2nd DAY OF AUGUST 2023.


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