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Opinion No. 10-69

Constitutionality of including a non-viable fetus as a victim of certain crimes

QUESTION

Senate Bill 3699 would amend Tenn. Code Ann. § 39-13-107 and § 39-13-214 to include a non-viable fetus as a victim for purposes of assaultive offenses and criminal homicide. Are these proposed amendments constitutionally defensible?

OPINION

Yes.

ANALYSIS

Senate Bill 3699 would amend Tenn. Code Ann. § 39-13-107(a), which defines victims for purposes of assaultive crimes, and Tenn. Code Ann. § 39-13-214(a), which defines victims for purposes of criminal homicide. The proposed amendments delete the viability requirement for fetuses as victims and instead define a victim to include "a fetus of a human being, regardless of viability . . . ." The amendments do not delete subsection (c) of either statute, which provides that "[i]t is the legislative intent that this section shall in no way affect abortion, which is legal in Tennessee."

The majority of states, as well as the federal government, have enacted some form of "feticide" statutes. *See generally*, Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 Pace L. Rev. 43 (2008). Twenty-four states have adopted feticide laws that encompass all stages of fetal development. *Id.* at 56. The prevailing rule is that feticide statutes do not violate the federally recognized right of privacy of a woman to terminate a pregnancy as provided in *Roe v. Wade*, 410 U.S. 113, 156-59 (1973), so long as they do not infringe that right. Fleming, *supra,* at 63. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Court considered a Missouri statute, the preamble of which declared that life begins at conception and that the laws of Missouri should be interpreted to extend all the rights of persons to unborn children, subject to the federal constitution and contrary state law. *Id*. at 504 n.4. The Court held that a state is free to enact laws that recognize unborn children, so long as the state does not include abortion restrictions forbidden by *Roe*. *Id.* at 506-07; Fleming,

supra, at 63. Accordingly, because the proposed amendments do not infringe on a woman's federally protected right to obtain an abortion, it is the opinion of this office that the amendments are constitutionally defensible against a challenge based on the right of privacy. *See also generally*, Joanne Pedone, Note, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 Col. J.L. & Soc. Probs. 77 (2009).

Due process challenges to feticide statutes have generally asserted that such statutes are void for vagueness. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Such challenges to feticide statutes in other jurisdictions appear to have taken two forms. The first argument is that it would be unreasonable to charge an intentional or knowing crime when neither the defendant nor the mother was aware of the pregnancy. Fleming, *supra*, at 65. However, most courts have rejected this argument by applying the transferred-intent doctrine to hold that a defendant is liable for his actions, even when harming someone other than the intended victim. *Id.*

The same argument, if applied to Tennessee's assaultive and homicide offenses, likely would fail in the courts for a different reason. The history of the common law doctrine of transferred intent in Tennessee is unclear, specifically as applied to first-degree murder. *State v. Millen*, 988 S.W.2d 164, 166 (Tenn. 1999). In *Millen*, the court reviewed Millen's first-degree murder conviction where Millen, irritated by a member of a rival gang and intent on seeking revenge, shot repeatedly at the car in which his intended target was riding. But rather than hitting his intended target, Millen shot and killed a 14-year-old girl on her way home from school. *Id.* at 165. The trial court had instructed the jury on the doctrine of transferred intent, and the jury had found Millen guilty of premeditated murder. *Id.* The Supreme Court faulted the trial court for instructing on transferred intent, concluding that the common law doctrine had little application under Tennessee's modern statutory law, but nevertheless upheld the conviction. *Id.* at 167-68.

Millen explained that, under the facts presented, the jury had no need to rely on transferred intent in order to convict Millen of first-degree murder. *Id.* at 168. At the time of the offense, first-degree murder was defined, in pertinent part, as "[t]he intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1991). The Code further specified, in pertinent part, that a "person acts intentionally with respect to. . . a result of the conduct when it is the person's conscious objective or desire to. . . cause the result." Tenn. Code Ann. § 39-11-302(a) (1991). Accordingly, the State did not have to show that Millen's conscious objective was to kill a specific individual, only that he intended a specific result—the death of "another." *Id.* at 168. *Millen*, however, refused to adopt a broad ruling applicable to all assaultive or homicide offenses, making clear that whether this type of analysis applied would depend on the specific wording of the statutory offense as well as on the facts presented. *Id.* at 167. Thus, whether a particular assaultive or homicide offense would withstand this type of due process challenge would depend on the statutory wording and the facts, but, under the reasoning of *Millen*, it is clear that most convictions would survive such a challenge.

The second due process argument is that a statute criminalizing harm to a non-viable fetus is impermissibly vague because, until a fetus is viable, it cannot suffer death. Fleming, *supra*, at 65. In *Commonwealth v. Bullock*, 913 A.2d 207 (Pa. 2006), the Pennsylvania Supreme Court rejected this argument, holding that "viability outside of the womb is immaterial to . . . the question of whether the statute is vague in proscribing the killing of an unborn child." *Id.* at 213. Moreover, there is an abundance of case law holding that the state has an interest in protecting fetal life. *Id.* at 214. The United States Supreme Court has affirmed that states have an "important and legitimate interest" in protecting fetal life at all stages, even if that interest only becomes "compelling" at viability. *Roe v. Wade*, 410 U.S. at 163; *accord*, *People v. Davis*, 7 Cal. 4th 797, 30 Cal. Rptr. 2d 50, 872 P.2d 591, 597 (1994) (observing that *Roe* "does not hold that the state has no legitimate interest in protecting the fetus until viability"); *State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990) (noting that the state's interest in protecting "the potentiality of human life" includes protection of the unborn child, "whether an embryo or a nonviable or viable fetus"). Accordingly, it is the opinion of this office that the proposed legislation is constitutionally defensible against this type of claim as well.

Finally, equal protection challenges in other jurisdictions have not been successful. Fleming, *supra*, at 66-67. Tennessee Courts have held that the Tennessee Constitution confers "essentially the same protection" as the Equal Protection Clause of the United States Constitution. *State v. Tester*, 879 S.W.2d 823, 827-28 (Tenn. 1994). While the Equal Protection Clause assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Because the proposed amendment does not burden "fundamental" or "important" rights, and does not make a suspect or quasi-suspect classification, it is subject to rational-basis review. *Tester*, 879 S.W.2d at 828; *Bullock, supra*, 913 A.2d at 216. Under this standard, if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld. *Tester*, 879 S.W.2d at 828.

Other jurisdictions have held that feticide statutes bear a reasonable relationship to a legitimate state purpose because they are aimed at protecting fetal growth. *Bullock, supra*, 913 A.2d at 216. In *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987), the court upheld a Georgia feticide statute, rejecting the defendant's claim that his life sentence for feticide violated equal protection because he was being treated differently than someone who violated Georgia's criminal abortion statute, which prescribed a lesser sentence. *Id.* at 1388. The court concluded that a rational basis for the statute existed because "[r]etribution is a legitimate goal of the criminal law." *Id.* at 1388. This same reasoning provides a rational basis for any disparity between potential sentences arising from the application of the proposed amendments and Tenn. Code Ann. § 39-15-201, Tennessee's criminal abortion statute, the violation of which is only a Class C felony.

In *Bullock, supra*, the defendant asserted that he was being treated differently than a mother who voluntarily aborted her own child. *Bullock, supra*, 913 A.2d at 216. The Pennsylvania Supreme Court held that:

> Simply put, the mother is not similarly situated to everyone else, as she alone is carrying the unborn child. Under prevailing jurisprudence of the United States Supreme Court, the fact of her pregnancy gives her (and only her) certain liberty interests in relation to the termination of that pregnancy that the Legislature could reasonably have sought to avoid infringing by exempting her from criminal liability under this particular statute.

Id; see also Fleming, *supra*, at 66-67. The same reasoning furnishes an additional rational basis for any differences in potential sentences for assaultive or homicide offenses as a result of the application of the proposed amendments and those under the criminal abortion statute. Accordingly, for these reasons, it is the opinion of this office that the proposed amendments are also constitutionally defensible against an equal protection challenge.

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