

**Senator Warren Hamilton**

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**Oklahoma State Senate**  
STATE OF OKLAHOMA

October 13, 2022

Honorable John M. O'Connor  
Attorney General  
The State of Oklahoma  
313 NE 21st Street  
Oklahoma City, Oklahoma 73105  
VIA EMAIL TO: [opinion.coordinator@oag.ok.gov](mailto:opinion.coordinator@oag.ok.gov)

RE: Self-Induced Abortions in Oklahoma

Dear Attorney General O'Connor:

With *Roe v. Wade* gone, the current presidential administration is now encouraging women in states that prohibit abortion clinics to self-induce their own abortions. As you are undoubtedly aware, a self-induced abortion is an act performed or administered directly by the mother herself with the intent of causing the death of her own unborn child. Calling it “a safe and effective option,”<sup>1</sup> the federal bureaucracy is advising women, among other things, to obtain abortion pills via telehealth to be delivered by U.S. mail.<sup>2</sup>

Currently, confusing information is being shared regarding the legality of these self-induced abortions in our state. On a notable Oklahoma news outlet, a representative of the ACLU of Oklahoma stated, among other things, “Abortion by mail is legal now,...all of our current abortion laws say that the person getting that abortion cannot be criminalized.”<sup>3</sup> Conversely, a prominent pro-abortion group has contradicted this, issuing an analysis of Oklahoma law that

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<sup>1</sup> <https://reproductiverights.gov/>, an official website of the U.S. Department of Health and Human Services [<https://perma.cc/G7XU-VHAS>].

<sup>2</sup> Which, incidentally, appears to violate 18 USCS § 1461 (statute of limitation is five years. 18 USCS § 3282(a)).

<sup>3</sup> Cindy Nguyen, Policy Director with the ACLU of Oklahoma (<https://www.acluok.org/en/biographies/cindy-nguyen>), on Oklahoma City News 9, *Effective Ban On Abortions May Have Allowed For Criminalized Method To Become Legal* (<https://www.youtube.com/watch?v=iqgaLygao1Q>).

states, “Oklahoma restricts people who self-manage their abortions.”<sup>4</sup> Likewise, a prominent national newspaper has reported that Oklahoma is among three states that “have laws that explicitly make it a crime to end one’s own pregnancy.”<sup>5</sup> Our own analysis, included in the Discussion section below, agrees with the conclusion that Oklahoma law generally makes a self-induced abortion a crime.

As a result of the dissemination of confusing information by some, innocent babies are very likely being killed right now in Oklahoma in direct violation of our laws at least in part because their mothers are being misled into believing that their conduct is legal under our State laws.

**Therefore, the undersigned hereby request of you, in your capacity as Oklahoma Attorney General, an official legal opinion answering the following questions of law:**

1. Does current Oklahoma law make it a crime for a mother to perform or induce an abortion upon herself to intentionally terminate her pregnancy with an intention other than to increase the probability of a live birth?
2. If the answer to question number 1 is no, is the answer yes if the mother is not under the supervision of a duly licensed physician who is board-certified in obstetrics and gynecology?
3. Is a self-induced abortion otherwise a crime in Oklahoma?
4. If the answer to question number 1, 2, or 3 is yes, could a mother who performed or induced such an abortion be lawfully charged under Oklahoma Statutes Title 21, Chapter 21 (“Attempts to Kill”), Section 652, if the elements of that crime were present?
5. If the answer to question number 1, 2, or 3 is yes, could a mother who performed or induced such an abortion be lawfully charged under an applicable section of Oklahoma Statutes Title 21, Chapter 24 (“Homicide”), if the elements of the crime were present?

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<sup>4</sup> Center for Reproductive Rights, citing 63 Okl. St. § 1-733. <https://reproductiverights.org/maps/state/oklahoma/> [<https://perma.cc/63CG-NZGY>]. See also Violet S. Rush, Note, *Religious Freedom and Self-Induced Abortion*, 54 Tulsa L. Rev. 491, 492 (2019) (“seven states currently criminalize self-induced abortion,” listing Oklahoma and citing 21 Okl. St. § 862 and 63 Okl. St. § 1-733, discussed below).

<sup>5</sup> Roni Caryn Rabin, *Some Women ‘Self-Manage’ Abortions as Access Recedes*, N.Y. Times, Aug. 7, 2022 (updated Aug. 11, 2022) (“Only three states — South Carolina, Oklahoma and Nevada — have laws that explicitly make it a crime to end one’s own pregnancy”). <https://www.nytimes.com/2022/08/07/health/abortion-self-managed-medication.html> [<https://perma.cc/B8DB-7MTT>].

## DISCUSSION

### 21 Okl. St. § 862

Since at least as early as 1893, fourteen years before it became a state, Oklahoma has had a statute prohibiting self-induced abortions.<sup>6</sup> That statute was still on the books several years after Oklahoma had become a state.<sup>7</sup> In fact, it appears to have been on the books continuously and virtually unchanged ever since, most recently as 21 Okl. St. § 862.<sup>8</sup>

In 2021, however, Senate Bill 918 (commonly known as the “trigger bill”) enacted a repeal of that statute, which repeal was configured to become effective (i.e., “triggered”) upon the occurrence of an event—the certification by your office that the United States Supreme Court had overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.<sup>9</sup> On June 24, 2022, the United States Supreme Court did so in *Dobbs v. Jackson Women’s Health Org.*<sup>10</sup> Later that same day, you issued a letter certifying that fact.<sup>11</sup> In that letter, you also expressly stated, “With this Certification Letter, S.B. 918, Ch. 308, O.S.L. 2021, as amended by S.B. 1555, Ch. 133, O.S.L. 2022, shall hereby take effect and be in full force.” As a result, it appears that 21 Okl. St. § 862 was effectively repealed by the “trigger bill.”

But as discussed below, 21 Okl. St. § 862 was not the only Oklahoma statute prohibiting self-induced abortions.

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<sup>6</sup> “Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the county jail not exceeding one (1) year, or by fine not exceeding One Thousand Dollars (\$1,000.00), or by both.” Statutes of the Territory of Oklahoma, Ch. 25, Art. 29, § 2178 (1893). [https://babel.hathitrust.org/cgi/pt?id=mdp.3511210548682\\_5&view=1up&seq=493](https://babel.hathitrust.org/cgi/pt?id=mdp.3511210548682_5&view=1up&seq=493) [<https://perma.cc/G5V4-RLK8>].

<sup>7</sup> Compiled Laws of Oklahoma, Ch. 25, Art. 29, § 2371 (1909). <https://books.google.com/books?id=4EIwAQAAAMAAJ&pg=PA635> [<https://perma.cc/P7M8-LHZA>].

<sup>8</sup> “Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the county jail not exceeding one (1) year, or by fine not exceeding One Thousand Dollars (\$1,000.00), or by both.” 21 Okl. St. § 862 (as of June 23, 2022).

<sup>9</sup> Section 1 of S.B. 918, Ch. 308, O.S.L. 2021 ([http://webserver1.lsb.state.ok.us/cf\\_pdf/2021-22%20ENR/SB/SB918%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/SB/SB918%20ENR.PDF) [<https://perma.cc/7X6H-UM4S>]), as amended by S.B. 1555, Ch. 133, O.S.L. 2022 ([http://webserver1.lsb.state.ok.us/cf\\_pdf/2021-22%20ENR/SB/SB1555%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/SB/SB1555%20ENR.PDF) [<https://perma.cc/38KG-74KD>]), repealing 21 O.S. 2011 862 (21 Okl. St. § 862). S.B. 918 was authored by Senators Treat, McCortney, Jett, Stephens, Rogers, and Taylor of the Senate, and Representatives Echols, Manger, and Roberts (Sean) of the House.

<sup>10</sup> 142 S. Ct. 2228, 2284 (2022) (“The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives”).

<sup>11</sup> <https://www.oag.ok.gov/sites/g/files/gmc766/f/certification.pdf> [<https://perma.cc/Z5C6-PPZZ>].

63 Okl. St. § 1-733<sup>12</sup>

63 Okl. St. § 1-733 (entitled “Self-Induced Abortions”) provides as follows:

No woman shall perform or induce an abortion upon herself except under the supervision of a duly licensed physician. Any physician who supervises a woman in performing or inducing an abortion upon herself shall fulfill all the requirements of this article which apply to a physician performing or inducing an abortion.

As used here, the term abortion is defined in 63 Okl. St. § 1-730(A)(1):

“Abortion” means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to remove an ectopic pregnancy, or to remove a dead unborn child who died as the result of a spontaneous miscarriage, accidental trauma, or a criminal assault on the pregnant female or her unborn child.

63 Okl. St. § 1-731(A) requires that the physician be “a physician licensed to practice medicine in the State of Oklahoma who is board-certified in obstetrics and gynecology.”

According to 63 Okl. St. § 1-730(A)(10), the phrase “inducing an abortion” means “the administration by any person, including the pregnant woman, of any substance designed or intended to cause an expulsion of the unborn child, effecting an abortion as defined above.”

As a result, it appears that 63 Okl. St. § 1-733 currently prohibits a pregnant woman from performing or inducing an abortion upon herself, including by administering any substance designed or intended to cause an expulsion of her unborn child, unless the pregnant woman is under the supervision of a physician licensed to practice medicine in the State of Oklahoma who is board-certified in obstetrics and gynecology.

Regarding whether a violation would be considered a crime, and if so what type, 63 Okl. St. § 1-733 is silent. It appears that 21 Okl. St. § 21 should apply, which says: “Where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in

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<sup>12</sup> Originally enacted in 1978 and substantially unchanged since. Laws 1978, HB 1813, c. 207, § 5, eff. October 1, 1978.

any statute, the doing of such act is a misdemeanor.”<sup>13</sup> 21 Okl. St. § 4 provides that a misdemeanor is a crime.

Therefore, it appears that 63 Okl. St. § 1-733 generally makes self-induced abortion a crime in the State of Oklahoma, which not only prohibits such conduct on its own but also affects the application of at least two other State criminal laws, discussed hereafter.

21 Okl. St. § 652

Among other things, 21 Okl. St. § 652 provides as follows:

C. Any person who commits any assault and battery upon another, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes,<sup>14</sup> by means of any deadly weapon, or by such other means or force as is likely to produce death, or in any manner attempts to kill another, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes,<sup>15</sup> or in resisting the execution of any legal process, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.

D. The provisions of this section shall not apply to:

1. Acts which cause the death of an unborn child if those acts were committed during a **legal abortion** to which the pregnant woman consented; or
2. Acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

E. Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child **unless the mother has committed a crime** that caused the death of the unborn child.

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<sup>13</sup> See also 21 Okl. St. § 6 (“Every other crime is a misdemeanor”). See 21 Okl. St. § 10 regarding what penalty range would be available for our State’s justice system to consider (“imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment”).

<sup>14</sup> 63 Okl. St. § 1-730 defines an “unborn child” as “the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus.”

<sup>15</sup> See *id.*

(emphasis added).

Subsection (D)(1) provides an exception for a “legal abortion.” And subsection (E) could be interpreted to create an exception for the mother unless the mother has committed a crime. But unless the pregnant woman is under the supervision of a physician licensed to practice medicine in the State of Oklahoma who is board-certified in obstetrics and gynecology neither of these exceptions should apply because 63 Okl. St. § 1-733 generally makes a self-induced abortion a crime for the mother, which also makes it an illegal abortion.

Consequently, it appears that under this current statute, “any person,” including a mother, who commits any assault and battery upon an unborn child, by means of any deadly weapon, or by such other means or force as is likely to produce death, or in any manner attempts to kill an unborn child, shall upon conviction be guilty of a felony punishable by imprisonment not exceeding life, if committed via a self-induced abortion, unless the pregnant woman is under the supervision of a physician licensed to practice medicine in the State of Oklahoma who is board-certified in obstetrics and gynecology.

21 Okl. St. § 691

21 Okl. St. § 691 provides as follows:

- A. Homicide is the killing of one human being by another.
- B. As used in this section, “human being” includes an unborn child, as defined in Section 1-730 of Title 63 of the Oklahoma Statutes.
- C. Homicide shall not include:
  - 1. Acts which cause the death of an unborn child if those acts were committed during a **legal abortion** to which the pregnant woman consented; or
  - 2. Acts which are committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.
- D. Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child **unless the mother has committed a crime** that caused the death of the unborn child.

(emphasis added).

Pursuant to the same reasoning discussed above regarding 21 Okl. St. § 652, these abortion exceptions to the prohibitions against homicide should not generally apply to a self-induced abortion. Unless the pregnant woman is under the supervision of a physician licensed to practice medicine in the State of Oklahoma who is board-certified in obstetrics and gynecology, neither of these exceptions should apply because 63 Okl. St. § 1-733 generally makes a self-induced abortion a crime for the mother, which also makes it an illegal abortion.

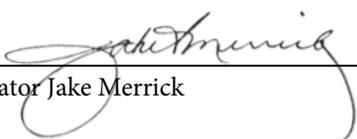
Therefore, it appears that under Chapter 24 of Title 21, Oklahoma Statutes, the willful killing of an unborn human being, even by the mother, should be considered criminal homicide in Oklahoma if committed via a self-induced abortion, unless the pregnant woman is under the supervision of a physician licensed to practice medicine in the State of Oklahoma who is board-certified in obstetrics and gynecology (of course, regarding 63 Okl. St. § 1-733, 21 Okl. St. § 652, and 21 Okl. St. § 691, other defenses, justifications, etc. may apply in specific cases).

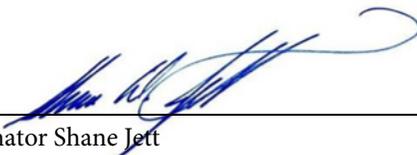
#### CONCLUSION

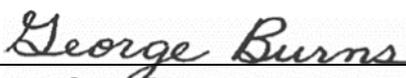
We find the foregoing to present reason for serious concern. As our State's chief law enforcement official, we turn to you to provide clarity to this critical issue. Because of the nature of this matter, we would respectfully urge you to issue an opinion clarifying the law without delay. The futures of women who may be misled by confusing information are at stake. Most urgently, the very life and death of innocent children hang in the balance.

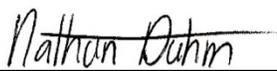
Respectfully,

  
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Senator Warren Hamilton

  
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Senator Jake Merrick

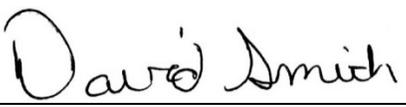
  
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Senator Shane Jett

  
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Senator George Burns

  
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Senator Nathan Dahm

  
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Representative Tom Gann

  
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Representative Wendi Stearman

  
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Representative David Smith