OPINION
73-89

May 11, 1973 (OPINION)

Mr. John O. Garaas
State's Attorney
Cass County
10 1/2 Broadway
Fargo, ND 58102

Dear Mr. Garaas:

This is in response to your letter in which you request an opinion on the position of the State of North Dakota on the matter of abortion as set forth in Chapter 12-05 of the North Dakota Century Code. You specifically request an interpretation on sections 12-25-01, 12-25-02 and 12-25-04.

The abortion issue has been of some concern in the last year or two. In 1972, an initiated measure which would have liberalized abortion was defeated by the electorate by a wide margin. On January 22, 1973, the United States Supreme Court issued its opinion involving the Texas Abortion Act. See Jane Roe et al., v. Henry Wade, 35 L. Ed. 2d. 147, 93 S. Ct. 705, and Doe v. Bolton, 35 L. Ed. 2d. 201, 93 S. Ct. 739. In the first case, the United States Supreme Court declared unconstitutional and invalid the Texas Abortion Act and in the latter, it declared invalid and unconstitutional the abortion act of the State of Georgia.

The legislature met in January of 1973. As a result of the Supreme Court decision, Senate Bill 2404 was introduced. This bill was an effort to enact legislation which would have been in harmony with the Supreme Court decision. However, the sponsors later withdrew the bill. No other bill was introduced.

The legislature also enacted House Bill 1533 which in substance provides that no hospital, clinic, doctor, nurse, technician, or person could be compelled to participate in any abortion against his or her will. Participation was left entirely discretionary with each institution or person.

The North Dakota Legislature also passed Senate Concurrent Resolution 4069 urging Congress to propose a constitutional amendment which would permit abortion only for purposes of saving the life of the mother.

This is the background of the abortion issues in North Dakota.

We are familiar with the Supreme Court decision and we recognize that the Constitution of the United States as construed by the United States Supreme Court constitutes the supreme law of the land pursuant to Article VI section 2 of the United States Constitution. We are also aware that the North Dakota Constitution, section 89, specifically provides that no legislative enactment of law of this state shall be declared unconstitutional unless four of the five judges of the Supreme Court so decide.

In the Wade and Bolton cases, the State of North Dakota was not a party to the action. The North Dakota Act, Chapter 12-25, was not per se adjudicated by the Supreme Court. Thus, it is not a matter which may be classified as res adjudicata.

The North Dakota Supreme Court, in Stockman v. Anderson, 184 N.W.2d. 54, held in substance that an opinion by a Federal District Court declaring certain portions of the North Dakota Constitution invalid and unconstitutional under the Federal Constitution was not binding on a party or person who was not a party to the action in which the opinion was rendered, even though the state participated in the action. It can be thus readily understood that Chapter 12-25 has not been declared unconstitutional or invalid by any judicial process. It is to be further observed that this can be accomplished only by a court of competent jurisdiction in the federal system or by the North Dakota Supreme Court with four of the five members concurring in the finding of invalidity or unconstitutionality.

The decision of the United States Supreme Court, however, is entitled to recognition and must be accepted as the supreme law of the land. By comparing the decision of the United States Supreme Court to the provisions of Chapter 12-25 it can be legally reasoned that under certain given facts or circumstances, a portion or all of Chapter 12-25 of the North Dakota Century Code may be declared invalid and unconstitutional. Likewise, under specific instances, facts and circumstances, certain portions or the entire act of Chapter 12-25 may be valid. In order to assist in determining which provisions of Chapter 12-25 may be valid or invalid under certain specific facts, circumstances, or conditions, it is necessary to examine the decision of the United States Supreme Court. The Supreme Court summarized its holding in the following manner:

> To summarize and to repeat:
>
> 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life saving procedure on behalf of the mother, without regard to pregnancy state and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
>   a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
>   b) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
>   c) For the stage subsequent to viability the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate

medical judgment, for the preservation of the life or health of the mother.

2. The state may define the term 'physician', as it has been employed n the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the state, and may proscribe any abortion by a person who is not a physician as so defined.

In Doe v. Bolton, post, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the state free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intraprofessional, are available.

From the decision of the United States Supreme Court, it can be readily ascertained that some provisions of Chapter 12-25 are not in harmony with the holding. Be that as it may, this office is not clothed or vested with legislative authority. We cannot rewrite or enact laws governing the conditions under which abortions may or may not be performed.

It should be noted that the Supreme Court divided the pregnancy stage into trimesters and held that during the first trimester the decision whether or not an abortion should be performed is left to the medical judgment of the pregnant woman's attending physician. After the first trimester, the state may regulate the procedures in ways that are reasonably related to maternal health. In the stage of viability, the state may even proscribe abortion except where it is necessary in the appropriate and medical judgment for the preservation for the life or health of the mother. The state may also limit the practice of performing abortions to licensed physicians.

It can be thus observed that if abortion is performed after viability has occurred, that Chapter 12-25 of the North Dakota Century Code could have application. We are therefore required to maintain a delicate balance of preserving wherever possible those statutory provisions enacted by the legislature until they are declared invalid by a competent court as provided for in the Constitutions of this state and the United States.

In addition to what has been related, Chapter 12-25 contains other provisions which are incidental and are not directly concerned with abortion. The concealing of a still birth or death is made a crime. For the first offense, one penalty is provided and for the second offense, a greater penalty is provided. (See sections 12-25-05 and 12-25-06) The soliciting of abortion is also prohibited under section 12-25-04. The Supreme Court decision did not discuss such statutory provisions. Conceivably, even though the prohibition of abortion per se up to a certain stage would be invalid, it does not necessarily follow that the state may not proscribe the solicitation. This is a related field, but can be treated as a separate activity. It does to a degree approach the prohibition against soliciting patients for medical treatment.

In the final analysis, the specific facts and circumstances in each instance would be determinative of whether or not criminal prosecutions should be instituted. We cannot as a matter of law state that no state's attorney may prosecute anyone for performing any abortion. Each state's attorney, if the situation arises, will have to evaluate the specific facts and circumstances in light of the United States Supreme Court decision and determine whether or not criminal process should be instituted.

There, however, appears to be no doubt that an abortion performed when the pregnancy has reached the viability state, that same would be illegal and unlawful under Chapter 12-25 and also under the holding of the United States Supreme Court unless it was performed to preserve the life or health of the mother. This, of course, is a fact situation.

Until the provisions of Chapter 12-25 are amended, repealed, or declared invalid by a court of competent jurisdiction, it is a provision of law which must be recognized even though under certain specific facts, situations or circumstances, the same may be found to be invalid or unconstitutional.

Sincerely yours,

ALLEN I. OLSON

Attorney General