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December 2, 2015

Re: *Violations of Informed Consent Law/Pre-Trial Diversion Hearing*

Via Email: Kcotter@StJoePros.org and Facsimile (574) 235-9761

Kenneth P. Cotter, Prosecuting Attorney
County-City Building
227 West Jefferson Blvd. 10th Floor
South Bend, IN 46601

Dear Mr. Cotter:

I am again writing you as attorney for The Life Center (TLC), the TLC Advocates who filed the complaints leading to the revocation of the Women's Pavilion's license, and many other petitioners who are participants in the "Answer the C.A.L.L." campaign that began last February 18, 2015. Upon reading the press release in today's Tribune, I had my legal assistant Tom Borek do some research on your reasoning for approving of Dr. Klopfer's performance under the pre-trial diversion agreement, which, I presume, is the same reason you are not bringing charges for his admitted violations of the informed consent law, *inter alia*. I would hope you would immediately review the attached memorandum to see that there is no legal basis for characterizing violations of the informed consent law as "civil" and not your responsibility. Everything on point, and policy rationale, point to the prosecutor to be prosecuting what the legislature has defined as a crime. If not you, who?

We hope that the prosecutor will enforce the law here – starting with the retraction of the motion to dismiss -- and will investigate the other instances of illegality that have been forwarded to your office. A response would be much appreciated.

Respectfully,



Shawn F. Sullivan
Attorney for TLC Advocates and those similarly situated

- c. T. Borek
- Dr. Jennifer Borek
- E. Master
- K. DuBree
- F. Holmes
- J. Kominkiewicz
- C. Virtue

MEMORANDUM

To: Shawn Sullivan

Fr: Tom Borek *TB*

Date: December 2, 2015

Re: Do violations of I.C. §16-34-2-1.1 constitute “criminal offenses” for purposes of a pretrial diversion agreement?

I. Executive Summary

The prosecutor and the court should be immediately advised that there is no legal authority for treating violations of §16-34-2-1.1 as “civil” infractions, and all of the legal authority on point characterizes them as criminal infractions. The prosecutor’s position, as set forth in the South Bend Tribune today is clearly erroneous and should be reconsidered.

II. Facts

In order to satisfy the terms of his pretrial diversion agreement and have his misdemeanor charge dismissed, Dr. Klopfer was required to “not commit any criminal offense” during the term of the agreement. The Indiana State Department of Health (ISDH) found that the doctor committed (and admitted to) conducting ten abortions without informed consent, *i.e.*, in violation of I.C. §16-34-2-1.1. In addition, TLC Advocates have submitted written complaints alleging 51 additional violations of the same illegal circumstances. The admitted offenses as well as those alleged occurred during the term of the doctor’s pretrial diversion agreement.

III. Issue

Does a violation of I.C. §16-34-2-1.1 constitute a “criminal offense” as the term is used in the pretrial diversion agreement?

IV. Discussion

An abortion without informed consent is defined as a “criminal act” by the governing abortion statute. I.C. §16-34-2-1 (a) provides that “[a]bortion shall in all instances be a criminal act” except when performed under certain listed circumstances. One of the listed circumstances is when a physician performs the abortion with the pregnant woman’s informed consent. Accordingly, an abortion without a mothers informed consent would be a criminal act as defined by I.C. §16-34-2-1 (a). The only question then is what type of criminal act and what is the penalty.

Under the abortion statute, an abortion without informed consent is listed under Chapter 2 regarding “Criminal Penalties.” To violate the informed consent law is a Class A infraction, I.C. § 16-34-2-7(c), which is listed under “CHAPTER 2: REQUIREMENTS FOR PERFORMANCE OF

ABORTION; **CRIMINAL PENALTIES.**” It is clear, given basic statutory construction, that every penalty under Chapter 2 of the abortion law is a criminal penalty, that is why it is under the heading “criminal headings” and there is no reference to any penalties being “civil” as opposed to “criminal.”

By statute, it is the prosecutor who has the authority to prosecute “infractions” and no one else. Pursuant to I.C. § 34-28-5-1(b), “An action to enforce a statute defining an infraction shall be brought in the name of the state of Indiana by the prosecuting attorney for the judicial circuit in which the infraction allegedly took place.” Accordingly, a violation of the informed consent law, if characterized as a Class A infraction, must be brought by the prosecutor pursuant to I.C. § 34-28-5-1(b) as a criminal offense. Prosecutors prosecute crimes so if they are supposed to prosecute infractions, infractions are crimes.

The fact that a violation of a Class A infraction can result in a fine has no bearing on whether the offense is civil or criminal. The fact that a violation of the informed consent law allows for a penalty of up to \$10,000 does not make it non-criminal, as argued by the prosecutor. The prosecutor pursues the imposition of fines on a daily basis.

If a violation of the informed consent law is not prosecuted by the prosecutor, then there is no one to enforce it. The legislature designed violations of the informed consent law to fall under “criminal penalties,” in I.C. § 16-34-2-7(c), along with the other criminal violations listed therein, so that they would be prosecuted when violated. There is no other statutory authority to enforce these provisions. The prosecutor mentioned the ISDH in its analysis, but the ISDH has no prosecutorial power, and the prosecutor does not need to await the ISDH to forward criminal violations. The prosecutor can (and should) act upon any criminal violation upon learning of it, regardless of where the information originates. The fact that the prosecutor learned of the informed consent violations from concerned citizens and or their attorney(s) does not create a basis to not enforce these laws.