



MEMORANDUM

To: All Oklahoma Law Enforcement Agencies
From: Oklahoma Attorney General¹
Date: November 21, 2023
Re: Guidance for Oklahoma law enforcement following *Dobbs v. Jackson Women's Health Org.*, *OCRJ v. Drummond*, and *OCRJ v. Oklahoma*

On June 24, 2022, the U.S. Supreme Court overruled *Roe v. Wade*, holding that the U.S. Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion.” *Dobbs v. Jackson Women's Health Org.* 142 S. Ct. 2228, 2284 (2022). In light of this decision, and following the Oklahoma Supreme Court’s decisions in *OCRJ v. Drummond*, 2023 OK 24, and *OCRJ v. Oklahoma*, 2023 OK 60, the Oklahoma Office of the Attorney General offers the following updated guidance to district attorneys and law enforcement regarding Oklahoma’s prohibition of abortion.²

First, Oklahoma district attorneys and law enforcement agencies should pursue criminal prosecution of any person who intentionally performs, attempts to perform, or assists with the performance of elective or on-demand abortion in Oklahoma, surgical or chemical.

- Section 861 of Title 21 is Oklahoma’s long-standing criminal prohibition, and it has been enforceable since the Attorney General’s Certification Letter on June 24, 2022. In *OCRJ v. Drummond*, the Oklahoma Supreme Court found that § 861 does not violate the Oklahoma Constitution. Therefore, it is still in effect and enforceable.³
- A similar law, Section 1-731.4 of Title 63, took effect on August 27, 2022. The Oklahoma Supreme Court declared that law to be unenforceable in *OCRJ v. Drummond*, but solely on the grounds that its life exception was too narrow. Thus, at this point, Section 861 is the operative abortion prohibition in Oklahoma, and it applies throughout pregnancy.
- In short, under Section 861, law enforcement should focus on ensuring that abortion-on-demand is unavailable in Oklahoma and that violators are prosecuted.

Second, there are clear instances where prosecutions should *not* be initiated:

- Oklahoma laws prohibiting abortion clearly do not allow for the prosecution or punishment of any mother for seeking or obtaining an abortion. AG Op. 2023-12.

¹ This is a guidance memorandum, not an official legal opinion from the Attorney General.

² The Office of the Attorney General offered its original guidance on August 31, 2022. This document supersedes that one, which is now outdated and should be considered withdrawn.

³ Depending on the circumstances of the crime, Oklahoma’s homicide laws may also be available. *See, e.g.*, 21 O.S. § 691; 63 O.S. § 1-732(F).



- Nor do Oklahoma abortion prohibitions apply to unintentional miscarriages and miscarriage management (such as the removal of a deceased child or the medical requirement for a Dilation and Curettage procedure), ectopic pregnancies and treatments, in vitro fertilization (IVF) and other fertility treatments, or uses or prescription of contraception, including Plan B.

Third, an abortion is only authorized under Oklahoma criminal law to save the life of the mother.

- In *OCRJ v. Drummond*, the State Supreme Court explained the exception as follows:

[A] woman has an inherent right to choose to terminate her pregnancy if at any point in the pregnancy, the woman’s physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman’s life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer during the pregnancy.

- The Supreme Court added that although “[a]bsolute certainty is not required” for the exception to apply, “mere possibility or speculation is insufficient.” Thus, as this Office explained in August 2022, this exception should be interpreted to ensure that it is not used by bad faith actors or clinics as a cover for abortion-on-demand. Further, there is no requirement that the woman be septic, bleeding profusely, or otherwise close to death; rather, if the physician reasonably deems that the continued pregnancy will jeopardize the woman’s life, this is sufficient to trigger the exception.
- Moreover, when a situation where the mother’s life is at risk arises, or where the life exception has been cited, district attorneys should generally refrain from prosecuting when no pattern or trend exists, or where evidence of criminal intent is absent or unclear.
- Medical doctors, in particular, should be given substantial leeway to treat pregnant women experiencing life-threatening or emergency physical conditions, using their reasoned medical judgment, so long as they are not unnecessarily terminating the life of the unborn child or intentionally abusing their position to facilitate elective abortions.
- Should a situation where the mother’s life is at risk arise, or where the life exception has been cited, district attorneys and law enforcement are encouraged to consult with the Office of the Attorney General before initiating prosecution.

Fourth, Oklahoma’s criminal abortion prohibitions do not contain independent exceptions for when the unborn child is conceived by rape, sexual assault, or incest.

- As previously explained, an abortion in such circumstance is only authorized under Oklahoma law if the abortion is necessary to save the life of the mother.



- In an instance of rape or sexual assault that led to abortion or an attempted abortion, however, law enforcement should focus first and foremost on identifying and prosecuting the rapist.

Fifth, Oklahoma law prohibits aiding and abetting the commission of an unlawful abortion, which may include advising a pregnant woman to obtain an unlawful abortion. *See* 21 O.S. §§ 171-172, 861.

- In enforcing this, district attorneys and law enforcement should take great care to avoid infringing on constitutional speech rights. The Oklahoma Supreme Court has held that speech that encourages “imminent lawless action” is not constitutionally protected, whereas “mere advocacy” is protected. *Edmondson v. Pearce*, 2004 OK 23, ¶ 61.
- Therefore, district attorneys and law enforcement should entirely refrain from investigating or prosecuting persons engaging in general advocacy in favor of abortion.
- District attorneys and law enforcement may consider pursuing a case, however, where a person has advised or encouraged a woman to obtain an unlawful abortion in some imminent way, especially if the third party has taken an overt or tangible action toward that goal. But, again, should such a situation arise, district attorneys and law enforcement are encouraged to consult with the Office of the Attorney General before initiating prosecution.

Also notable is that Oklahoma’s two recent civil abortion statutes were declared unconstitutional by the Oklahoma Supreme Court in *OCRJ v. Oklahoma* due to their containing the same overly narrow life exception language as Section 1-731.4. In any event, they were not enforceable by law enforcement. *See* 63 O.S. §§ 1-745.38 (SB 1503); 63 O.S. §§ 1-745.54 (HB 4327).

The Office of the Attorney General recognizes that Oklahoma law enforcement is dedicated to protecting Oklahoma citizens and has already implemented some of these changes. District attorneys with questions should contact Solicitor General Garry Gaskins (garry.gaskins@oag.ok.gov).