

## NACDL REPORT

# **ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS: Kentucky Appendix<sup>1</sup>**

### ***I. Introduction***

Kentucky has long been a state openly hostile to the ability of women to obtain abortion services. In 1974, a year after the Supreme Court's landmark decision in *Roe v. Wade*, the Kentucky legislature passed Legislative Finding 311.710, making clear the State's intention "that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to ensure the unborn child its continued life after its abortion," and that if "the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored."<sup>2</sup>

Since that time, Kentucky has passed numerous laws affecting the ability of women to obtain an abortion within the State. Due to the volume of these "anti-abortion" laws, this report will focus only on abortion laws passed in 2019 and pending legislation. However, to provide context, it is useful to provide a brief recap of the current state of Kentucky's abortion laws.

### ***II. Recent Court and Legislative Action Regarding Abortion in Kentucky***

The last several years have proven a turbulent time for Kentucky pro-life and pro-choice advocates alike—both obtaining victories for their respective causes.

In September of 2018, after former Governor Matt Bevin attempted to shut down Kentucky's only abortion clinic, U.S. District Judge Greg Stivers ruled that a law requiring so-called "transfer agreements" between the clinic and hospital and ambulance services violates constitutional protections.<sup>3</sup> In so holding, Judge Stivers ruled in a 60-page opinion that "[t]he court has carefully reviewed the evidence presented in this case and concludes that the record is devoid of any credible proof that the challenged regulations have any tangible benefit to women's health."<sup>4</sup> "On the other hand," the court held "regulations effectively eliminate women's rights to abortions in the state. Therefore, the challenged regulations are unconstitutional."<sup>5</sup> However, in October 2020, the Sixth Circuit reversed Judge Stivers's well-reasoned opinion, holding that Kentucky's requirement that abortion facilities have transfer and transport agreements with local hospital and local ambulance services was reasonably related to the State's legitimate interest in maternal health for the purposes of determining whether the requirement violated a woman's right to abortion in light of evidence that it was sometimes necessary to transfer the patient from the abortion facility to an emergency room because of abortion-related complications.<sup>6</sup>

Only months earlier, a different panel of the Sixth Circuit reached the opposite result, upholding a lower court ruling that struck down a 2018 Kentucky law that would have required women to undergo a "fetal demise" procedure before undergoing a dilation and

evacuation — commonly referred to as D&C, the most common type of second-trimester abortion.<sup>7</sup> The State argued, in defense of its legislation, that its real intent in the passage of the law was not to prevent all second-trimester abortions but to simply make the procedure more humane.<sup>8</sup> In striking down the legislation, the Sixth Circuit held that “all those required to undergo a fetal-demise procedure will be compelled to expose themselves to the negative consequences to their health, to invest additional time in the procedure, and to subject themselves to an additional invasive and potentially experimental procedure. Thus, the district court correctly found that 100% of the relevant population would be unduly burdened by this law.”<sup>9</sup>

In December 2019, the United States Supreme Court declined to review a ruling by the Sixth Circuit Court upholding Kentucky’s forced narrated ultrasound law.<sup>10</sup> In essence, the law requires an abortion provider to subject every patient to an ultrasound, and for the patient to see a detailed description of those images, and to hear the sounds of the fetal heart tones “prior to an abortion — even if the patient objects or is covering their eyes and blocking their ears, and even if the physician believes that doing so will cause harm to the patient.”<sup>11</sup>

Recently, Kentucky Rep. Joseph Fisher amassed support for House Bill 67, which would amend the State Constitution to explicitly provide that “nothing in [Kentucky’s] Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”<sup>12</sup> The bill has more than 30 sponsors “and marks the fourth attempt

by Fischer in more than 20 years — HB 251 in 2007, HB 549 in 2010, and HB 473 in 2018 — to pass such a bill in the General Assembly according to the Legislative Research Commission.”<sup>13</sup> Though the Bill has gained momentum in the Republican-controlled legislature, the Bill is unlikely to be enacted into law in the near future as the Governor’s mansion is currently occupied by a Democrat who has recently allowed Planned Parenthood of Indiana and Kentucky to apply for a license previously denied by former Republican Gov. Matt Bevin to provide abortions at its Louisville clinic.<sup>14</sup>

### ***III. 2019 Legislative Session—Abortion Restrictions***

Importantly, the Kentucky legislature has taken measures in the past to ensure their abortion statutes redefine the meaning of “Human being.” Under Kentucky’s abortion legislation, a “‘Human being’ means any member of the species homo sapiens from fertilization until death,” and “‘Viability’ means that stage of human development when the life of the unborn child may be continued by natural or life-supportive systems outside the womb of the mother.”<sup>15</sup> Indeed, it was the clear intention of the legislature that the aforementioned definitions apply to other sections of the State Code, stating that these definitions apply not only to abortion statutes, but to all the “laws of the Commonwealth unless the context otherwise requires.”<sup>16</sup>

The legislature has also proscribed all abortions with the exception of abortions performed for health emergencies suffered by the mother because of the pregnancy, after a fetus is considered “viable.” In relevant part, section 311.720, the Kentucky Code provides

that “no abortion shall be performed or prescribed knowingly after the unborn child may reasonably be expected to have reached viability, except when necessary to preserve the life or health of the woman.”<sup>17</sup>

Interestingly enough, the subjective viability standard adopted by the legislature closely tracks the central tenets adopted by the Supreme Court in *Roe v. Wade* and *Planned Parenthood v. Casey*.<sup>18</sup> However, in all likelihood, the subjective viability standard will have little to no effect given all of the other “fetal personhood” measures passed during Kentucky’s recent legislative sessions—most particularly, a series of laws aimed at criminalizing and limiting certain activities associated with abortion passed in 2019. The following is a brief breakdown of the key statutes and their provisions.

*A. Wholesale Ban on Abortion (Codified at KRS § 311.772)*<sup>19</sup>

Section 311.772 is what has become commonly known as a “triggering statute” and only takes effect upon “any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973), restoring to the Commonwealth of Kentucky the authority to prohibit abortion; or by the “adoption of an amendment to the United States Constitution which, in whole or in part, restores to the Commonwealth of Kentucky the authority to prohibit abortion.”<sup>20</sup>

In the event that *Roe v. Wade* is overturned, a violation of this all-out prohibition is a felony and punishable by up to five years imprisonment and up to a \$10,000.00 fine.<sup>21</sup>

The Act explicitly exempts from criminal prosecution the woman on whom the

procedure is performed.<sup>22</sup> The Act also retains the exemption for abortions when in a physician's "reasonable medical judgment" it is necessary to prevent "substantial risk of death due to a physical condition [caused by the pregnancy], or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman."<sup>23</sup>

The Act has not been challenged because it has never gone into effect.

*B. House Bill 5: Abortion 'Discrimination' Bill (Codified at KRS § 311.731)<sup>24</sup>*

Section 311.731 bans a physician from performing an abortion if he or she has "knowledge" that the patient is seeking the procedure, "in whole or in part," because of the gender, race, or disability of the fetus.<sup>25</sup> Importantly, the law is much broader than similar laws found in other states, as the physician need only "know" that the patient's decision is based *in part* on a prohibited classification. Arkansas, by comparison, only forbids a physician from performing an abortion when the physician has "knowledge" that the *sole* basis for the procedure is the woman's belief that her fetus suffers from Down syndrome.<sup>26</sup>

The Kentucky Abortion "Discrimination" statute also provides for a private cause of action against an offending physician who performs the procedure while also mandating that the State Medical Board revoke the physician's medical license.<sup>27</sup> In addition to providing civil penalties, the legislature also amended the "Penalties" provision of the statute to make a violation of section 311.731 a Class D felony punishable by up to five years' imprisonment.<sup>28</sup>

Like the wholesale ban, section 311.731 provides that “[a] pregnant woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of [this] subsection ... is not guilty of violating [this] subsection ... or of attempting to commit, conspiring to commit, or complicity in committing a violation of [this] subsection.”<sup>29</sup>

*C. Senate Bill 9: The Fetal Heartbeat Bill* <sup>30</sup>

The Kentucky Fetal Heartbeat Bill amends several preexisting statutory provisions and requires that all abortion providers attempt to determine whether there is a detectable fetal heartbeat before an abortion can proceed,<sup>31</sup> and bans all abortions at the point when a fetal heartbeat can be detected, which can occur as early as six weeks.<sup>32</sup> Indeed, the six-week cutoff is earlier than some women first realize they are pregnant.<sup>33</sup>

Any person who violates the “heartbeat ban” “is guilty of a Class D felony” punishable by up to five years’ imprisonment.<sup>34</sup> Like the preceding bills, the “heartbeat bill” provides that a woman on whom an abortion is performed is neither guilty of the substantive offense, nor conspiring to commit the substantive offense.<sup>35</sup> Moreover, the Bill gives the State Medical Board the discretion to suspend or deny re-registration of a physician’s medical license for up to five years if he or she violates the Act.<sup>36</sup>

In 2019, U.S. District Judge David Hale issued a temporary order barring the law from taking effect, in response to a suit filed by the ACLU representing the state’s only remaining abortion clinic.<sup>37</sup> Judge Hale found that “Plaintiffs have shown a strong

likelihood of success on the merits of their Fourteenth Amendment Due Process challenge to Senate Bill 9” and that “[t]he fundamental right to privacy contained in the Due Process Clause of the Fourteenth Amendment includes the right to choose to have an abortion, subject to certain limitations.”<sup>38</sup> Judge Hale further held that “[t]he Supreme Court has stated in no uncertain terms that ‘[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.’”

Accordingly, the court held that “enforcement of Senate Bill 9 would effectively ban the vast majority of abortions in the Commonwealth of Kentucky.”<sup>39</sup>

*D. Senate Bill 50: The “Abortion Reversal” Bill* <sup>40</sup>

The “Abortion Reversal” Bill requires doctors to tell patients seeking a medically induced abortion that the procedure can be reversed. The Bill also requires physicians who perform the procedure to report all medically induced abortions to the State.

There do not appear to be any criminal sanctions that accompany a violation of this Code section.

**IV. *General Criminal Liability***

The Kentucky legislature has explicitly codified the “crime” of killing an unborn fetus. Kentucky code § 507A.020 provides in relevant part that a person is guilty of “fetal homicide” when “with intent to cause the death of an unborn child or with the intent necessary to commit an offense under KRS 507.020(1)(a), he causes the death of an unborn

child.”<sup>41</sup> Moreover, such an offense is classified as a capital offense.<sup>42</sup> However, criminal liability has been greatly expanded by the State’s Supreme Court.

The Kentucky Penal Code defines “person” as “a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government, or a governmental authority.”<sup>43</sup> The issue of whether an unborn fetus qualifies as person was first decided by the Kentucky Supreme Court in 1983 in *Hollis v. Commonwealth*.<sup>44</sup> In *Hollis*, the Court held that killing a viable fetus, alleged to be 28 to 30 weeks old, by assaulting a pregnant mother could not support murder indictment; until the fetus was born alive and existing separate from its mother, the fetus was not a “person,” as that word is used in context of criminal homicide statutes and could not have status as victim of criminal homicide.<sup>45</sup>

Twenty-one years later, the Kentucky Supreme Court ruled that an unborn viable fetus was a human being, within meaning of penal code and specifically, the homicide statutes, expressly overruling *Hollis*.<sup>46</sup> In *Commonwealth v. Morris*, the defendant was indicted on one count of assault in the first degree, KRS 508.010(1)(b), for causing severe injuries to one of the passengers involved in an automobile accident, and on two counts of wanton murder, KRS 507.020(1)(b), for causing the deaths of a pregnant mother and her unborn child. A post-mortem examination revealed that the child was a viable fetus that would have been born healthy had she not sustained a fatal brain injury in the collision. Morris was sentenced to concurrent terms of ten years in prison for each conviction and appealed

only the conviction arising from the death of the unborn child. On appeal, the Kentucky Supreme Court explicitly overruled its prior precedent and judicially modified the meaning of the term “person” for purposes of the entire penal code, and the homicide statutes in KRS 500.080(12) and KRS 507.010, in particular.<sup>47</sup> Specifically, the court held:

“KRS 500.080(12) which, by its very language, applies to all penal code offenses . . . It is inherently illogical to recognize a viable fetus as a human being whose estate can sue for wrongful death and who cannot be consensually aborted except to preserve the life or health of the mother, but not as a human being whose life can be nonconsensually terminated without criminal consequences. Thus, we overrule *Hollis* and hold that a viable fetus is a ‘human being’ for purposes of KRS 500.080(12) and the KRS Chapter 507 homicide statutes.”<sup>48</sup>

Interestingly, in *Commonwealth v. Cochran*, the Kentucky Supreme Court reversed the conviction of a woman charged with wanton endangerment of her child based on having ingested illegal drugs while pregnant, which created a substantial danger of death or serious physical injury to the fetus.<sup>49</sup> The court held that by separately enacting the Maternal Health Act, which found it necessary to treat the problem of alcohol and drug use during pregnancy solely as a public health problem, the General Assembly had determined that the conduct alleged in the indictment, namely the defendant's giving birth to a child who tested positive for cocaine, did not constitute a crime and was invalid on its face.<sup>50</sup> Somewhat surprisingly, the court also held that “we recognized that the application of the criminal abuse statutes to

a woman's conduct during pregnancy, “could have an unlimited scope and create an indefinite number of new ‘crimes.’... a ‘slippery slope’ whereby the law could be construed as covering the full range of a pregnant woman's behavior—a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.”<sup>51</sup>

However, the decision in *Cochran* offers no meaningful protection from criminal prosecutions to those individuals that cause harm to a “person” i.e., a fetus. There are hundreds of criminal statutes in Kentucky that deal with “harm to persons,” and unless and until the legislature or the Kentucky Supreme Court exempts from prosecution persons charged with committing those crimes, the potential for embarking on that proverbial “slippery slope” in the context of abortions remains alive and well.

## V. *Third-Party Criminal Liability*

### A. *Accomplice Liability*

In Kentucky, a person is guilty of an offense committed by another person under section 502.020 of the Kentucky Penal Code when, with the intention of promoting or facilitating the commission of the offense, he or she:

- (1) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (2) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.”<sup>52</sup>

In the abortion context, the “offense” is the termination of a woman’s pregnancy or the “death” of a fetus. Thus, when two or more persons assist one another in the commission of a crime, each is an accomplice, and each is criminally liable for the conduct of the others. As is generally the case, Kentucky makes no distinction between the criminal liability of a principal and an accomplice. Specifically, section 502.020(1) of the Penal Code provides:

In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person ... it is no defense that:

- (1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct; or
- (2) The offense in question, as defined, can be committed only by a particular class or classes of persons, and the accused, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.<sup>53</sup>

As such, the father of the fetus, the extended family and friends of the expectant parents, as well as any person who assists a pregnant woman along the way in seeking or obtaining an abortion could be prosecuted as an accomplice to the underlying abortion code violation.

*B. Criminal Attempts & Criminal Conspiracy*

Kentucky, like most states, also criminalizes attempts to commit a crime. In relevant part, section 506.010 (1) of the Penal Code states:

“(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

- (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
- (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.”<sup>54</sup>

Importantly, the Penal Code also provides that “a person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person....”<sup>55</sup> In other words, literally anyone who engages in conduct that assists a woman seeking to terminate a pregnancy could risk prosecution under Kentucky’s criminal attempt statute if *Roe v. Wade* is overturned.<sup>56</sup>

Additionally, in Kentucky, a person is guilty of criminal conspiracy if “having the intention of promoting or facilitating the commission of a crime,” he agrees with one or more persons that “at least one of them will engage in conduct constituting that crime, or an attempt or solicitation to commit such a crime.”<sup>57</sup> And though the legislature has exempted from prosecution women upon whom an abortion is performed, the law provides no protection to those who agree to aid a woman seeking to terminate a pregnancy. Moreover, it is well established that the commission of a substantive offense and conspiracy to commit such an offense are separate crimes. Thus, persons can be prosecuted for both the substantive crime and conspiracy to commit that crime without being put twice in jeopardy.”<sup>58</sup>

It is not hard to envision the prosecution of individuals who give advice to or aid women seeking abortions, or of those who staff clinics or aid healthcare providers performing abortions, or even of family members and friends who help pregnant women leave the State to obtain abortions that would be illegal if performed in Kentucky under any of the State’s third-party liability statutes.

## **VI. Conclusion**

If Kentucky’s anti-abortion legislation survives current constitutional challenges, the near wholesale criminalization of abortion in Kentucky can be expected to reverse national reform efforts to reduce overcriminalization and mass incarceration, and the collateral

consequences of conviction that that disproportionately affect economically disadvantaged communities and communities of color.

---

<sup>1</sup> Zachary A. Deubler, Esq., DiMuroGinsberg PC (2020). [Is this a complete citation? Add city and state?]

<sup>2</sup> Ky. Rev. Stat. Ann. § 311.710 (West).

<sup>3</sup> *EMW Women’s Surgical Ctr., P.S.C. v. Glisson*, No. 3:17-CV-00189-GNS, 2018 WL 6444391, at \*17 (W.D. Ky. Sept. 28, 2018), rev'd in part, vacated in part sub nom. *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020). *Judge Strikes Down Kentucky Law That Put State’s Last Abortion Clinic at Risk of Closure*, Los Angeles Times (Sep. 28, 2018), available at: <https://www.latimes.com/nation/nationnow/la-na-kentucky-abortion-clinic-20180928-story.html>

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, 2018 WL 6444391, at \*19.

<sup>6</sup> *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020).

<sup>7</sup> Kentucky H.B. 454 (2018).

<sup>8</sup> *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 807 (6th Cir.), *reh’g en banc dismissed*, 831 F. App’x 748 (6th Cir. 2020).

<sup>9</sup> *Id.*, at 809-10.

<sup>10</sup> *EMW Women’s Surgical Center, P.S.C., et al. v. Adam Meier*, (17-6151, 17-6183) (Dec. 9, 2019); docket available at: <https://www.supremecourt.gov/docket/docketfiles/html/public/19-417.html>; Ky. Rev. Stat. Ann. § 311.727 (West).

<sup>11</sup> *Supreme Court Declines to Hear Challenge to Unethical Kentucky Abortion Law*, ACLU KENTUCKY, (Dec. 9, 2019) available at: <https://www.aclu-ky.org/en/news/supreme-court-declines-hear-challenge-unethical-kentucky-abortion-law>.

<sup>12</sup> Kentucky H.B. 67 (2020).

<sup>13</sup> *Committee Backs Changing State Constitution to Block Kentuckians’ Right to an Abortion*, Lexington Herald Leader (Feb. 20, 2020), available at: <https://www.kentucky.com/news/politics-government/article240464381.html>.

<sup>14</sup> *Id.*

---

<sup>15</sup> Ky. Rev. Stat. Ann. § 311.720 (West).

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> Ky. Rev. Stat. Ann. § 311.780 (West).

<sup>18</sup> *Planned Parenthood of Southeastern. Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992). “We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy... viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe v. Wade*, 410 U.S., at 163, 93 S.Ct., at 731.”

<sup>19</sup> House Bill 148, available at: <https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb148/bill.pdf>

<sup>20</sup> Ky. Rev. Stat. Ann. § 311.772 (West).

<sup>21</sup> Ky. Rev. Stat. Ann. § 311.772(3)(b) (West).

<sup>22</sup> Ky. Rev. Stat. Ann. § 311.772(5) (West).

<sup>23</sup> Ky. Rev. Stat. Ann. § 311.772(4)(a) (West).

<sup>24</sup> House Bill 5, available at: <https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb5/bill.pdf>

<sup>25</sup> Ky. Rev. Stat. Ann. § 311.731(2) (West).

<sup>26</sup> Ark. Code Ann. § 20-16-2003(a).

<sup>27</sup> Ky. Rev. Stat. Ann. § 311.731 (5) & (6) (West).

<sup>28</sup> Ky. Rev. Stat. Ann. § 311.990 (24) (West).

<sup>29</sup> Ky. Rev. Stat. Ann. § 311.731 (7) (West).

<sup>30</sup> Senate Bill 9, available at: <https://apps.legislature.ky.gov/recorddocuments/bill/19RS/sb9/bill.pdf>

<sup>31</sup> Ky. Rev. Stat. Ann. § 311.7704 (West).

<sup>32</sup> Ky. Rev. Stat. Ann. § 311.7706 (1) (West)

<sup>33</sup> Jessica Ravitz, *Reasons a Woman May Not Know She’s Pregnant at Six Weeks*, CNN (May 9, 2020), available at: <https://www.cnn.com/2019/05/09/health/pregnancy-at-six-weeks/index.html>.

<sup>34</sup> Ky. Rev. Stat. Ann. § 311.990 (23) (West).

<sup>35</sup> Ky. Rev. Stat. Ann. § 311.7706 (4) (West).

---

<sup>36</sup> Ky. Rev. Stat. Ann. § 311.595 (23) & (24) (West).

<sup>37</sup> Deborah Yetter, *Kentucky's Only Abortion Clinic Resumes Seeing Patients as "Fetal Heartbeat Law" Blocked*, Courier Journal (Mar. 15, 2019), available at: <https://www.courier-journal.com/story/news/politics/ky-legislature/2019/03/15/judge-blocks-kentuckys-fetal-heartbeat-abortion-law/3181971002/>; *EMW Women's Surgical Center, P.S.C. et al v. Meier*, 3:19-cv-00178-DJH (W.D.K.Y 3.15.19)(TRO).

<sup>38</sup> *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869 (1992)).

<sup>39</sup> *Id.* .

<sup>40</sup> Senate Bill 50, available at: <https://apps.legislature.ky.gov/recorddocuments/bill/19RS/sb50/bill.pdf>

<sup>41</sup> Ky. Rev. Stat. Ann. § 507A.020 (West).

<sup>42</sup> Ky. Rev. Stat. Ann. § 507A.020 (2) (West).

<sup>43</sup> Ky. Rev. Stat. Ann. § 500.080 (West).

<sup>44</sup> *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

<sup>45</sup> *Id.* at 62.

<sup>46</sup> *Commonwealth v. Morris*, 142 S.W.3d 654, 660 (Ky. 2004).

<sup>47</sup> *Id.* at 662.

<sup>48</sup> *Id.* at 660. (Emphasis added). The court also held that its decision to overrule *Hollis* and criminalize the killing of a viable fetus cannot be applied retrospectively to Appellee's conduct without violating the "fair warning" requirement of the Due Process Clause. *Id.* at 663.

<sup>49</sup> *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010).

<sup>50</sup> *Id.* at 229.

<sup>51</sup> *Cochran v. Commonwealth.*, 315 S.W.3d 325, 328 (Ky. 2010).

<sup>52</sup> Ky. Rev. Stat. Ann. § 502.020 (1) (West).

<sup>53</sup> Ky. Rev. Stat. Ann. § 502.030 (West).

<sup>54</sup> Ky. Rev. Stat. Ann. § 506.010 (1) (a-b) (West).

<sup>55</sup> Ky. Rev. Stat. Ann. § 506.010 (3) (West).

<sup>56</sup> See *United States v. Dolt*, 27 F.3d 235 (6th Cir. 1994). Criminal attempt requires that defendant intend to engage in criminal conduct and that he commit an overt act that is a substantial step toward commission

---

of offense; defendant must go beyond preliminary activities and undertake conduct unequivocally in furtherance of crime.

<sup>57</sup> Ky. Rev. Stat. Ann. § 506.040 (West).

<sup>58</sup> *Arnett v. Meade*, 462 S.W.2d 940 (Ky. 1971).