

Testimony of Brian Patrick Lennon
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Introduction

Chairman Blackburn, Ranking Member Schakowsky, and Distinguished Members of the Select Investigative Panel, thank you for the opportunity to speak with you today about the pricing of fetal tissue. As you will see from the curriculum vitae I submitted with this written testimony, I am currently a partner at the law firm of Warner Norcross & Judd in Grand Rapids, Michigan, where I am the Chair of the firm's White Collar Crime & Internal Investigations Practice Group. For 13 years before entering private practice I was an Assistant U.S. Attorney in the Western District of Michigan, where from 2001 to 2005 I served as deputy chief of the criminal division. As a former federal prosecutor, I appreciate the opportunity to review the exhibits provided to me over the weekend by committee staff, and to provide legal analysis and opinion as to whether abortion clinics and human fetal tissue procurement businesses identified in the exhibits may have violated federal law.

I am neither a medical ethicist nor theologian. I do not currently represent, nor have I ever represented, any advocacy group on either side of the life vs. reproductive rights debate. I am not here today to advocate for any change in federal legislation. But as a former federal prosecutor, and presently a criminal defense counsel who represents both individuals and corporations in state courts throughout Michigan and federal courts throughout the United States, I hope to provide some value to this investigative panel through objective analysis of the documents provided to me by members of your staff, as well as related, publically available information, to determine whether the abortion clinics and/or the human fetal tissue procurement

business as identified in the exhibits have violated Title 42, Section 289g-2 of the United States Code.

Based on my review of the exhibits, a competent, ethical federal prosecutor could establish probable cause that both the abortion clinics and the procurement business violated the statute (42 U.S.C. § 289g-2), aided and abetted one another in violating the statute (18 U.S.C. § 2), and likely conspired together to violate the statute (18 U.S.C. § 371). In fact, for five of the six elements of the substantive offense, there is proof beyond a reasonable that both the abortion clinics and the procurement businesses violated the statute. The only element, in my opinion, where further investigation, including forensic accounting and analysis is necessary is on whether the payments made by the research institutions that ultimately received the human fetal tissue, to the procurement businesses, were “valuable consideration” or, alternatively, “reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” *See* 42 U.S.C. § 289g-2(e)(3). With respect to the abortion clinics, in my opinion, the proofs more clearly establish that the compensation they receive from the procurement businesses – a price per tissue payment -- was valuable consideration, as none of the identified services excluded from the definition of “valuable consideration” were provided by the abortion clinics.

Caveat

As a federal prosecutor, I never prosecuted any individual or entity for this crime, so my testimony today is not based on any previous case experience. Indeed, my rudimentary research over the weekend before today’s hearing failed to identify a single published or unpublished criminal case, in any federal circuit, so I suspect that no U.S. Attorney’s Office has prosecuted such a case.

Elements of the Offense – 42 U.S.C. § 289g-2

Before reviewing the exhibits, I began as I would with any criminal case evaluation, by reviewing the statute and identifying the elements of the offense. I identified the following six elements: (1) any person; (2) who knowingly; (3) acquires, receives or otherwise transfers; (4) human fetal tissue; (5) for valuable consideration; and (6) the transfer affects interstate commerce, violates the statute.

a. Any Person

“Person” is not defined in the definitions section of the statute. *See* 42 U.S.C. § 289g-2(e). The Dictionary Act, however, provides that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise. . . the words ‘person’ or ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *See* 1 U.S.C. § 1. Under federal law, corporations and most other legal entities may be criminally liable for the crimes of their employees and agents.

b. Knowingly

This is a general intent crime. As a general rule when the term *knowingly* is used in an indictment, it means the defendant knew (or was aware) of what he or she was going to do and, subject to that knowledge, engaged in the act for which he or she has been charged.

c. Acquires, Receives or Otherwise Transfers

This element is self-explanatory. Moreover, since it is set forth in the disjunctive (“or”), rather than the conjunctive (“and”), the prosecutor only needs to establish that a defendant did one of the three acts -- acquired, received or otherwise transferred the human fetal tissue at issue.

d. Human Fetal Tissue

This is defined in section 289g-1(g) as “tissue or cells obtained from a dead human embryo or fetus after a spontaneous or induced abortion, or after a stillbirth.”

e. Valuable Consideration.

Section 289g-2(e)(3) defines “valuable consideration” by describing what it is not. It “does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control or storage of human fetal tissue.” There are several statutes that similarly define “valuable consideration.” These include 42 U.S.C. § 274e, pertaining to the sale of human organs, and the Uniform Anatomical Gift Act, as well as several state statutes -- specifically, Wisconsin, Nevada, Colorado & Nebraska. If “valuable consideration” is every payment for something other than this exhaustive list of delineated services, then any access, finder, or referral fee; payment for advertising or marketing; bonuses paid for more desired organs or tissues, or for increased volume; and any profit could meet this element of the statute.

f. Transfer Affects Interstate Commerce.

Here the statute provides that the definition of “interstate commerce” is the meaning set forth in 21 U.S.C. § 321, which “means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.” On this point the statute is clear – the human fetal tissue must affect interstate commerce in order for the statute to be violated. Consequently, for any human fetal tissue procured in California and sent by the procurement business to a California research facility, there would be no violation of 42 U.S.C. § 289g-2. This is analogous to a situation where a convicted felon in the Commonwealth of Massachusetts possesses a firearm made in Massachusetts. While it may be illegal to do so under

Massachusetts law, it would not be a violation of 18 U.S.C. § 922g (the federal felon-in-possession statute), because the government would be unable to prove the interstate nexus element of the offense; that is, that the firearm crossed state lines. Intrastate transfers of any procured human fetal tissue -- even if knowingly acquired, received or otherwise transferred for profit -- does not appear to violate the statute. Basically, if the human fetal tissue at issue crosses state lines, then this element is met.

The Pricing of Fetal Tissue is Key to Determining “Valuable Consideration”

Prosecutors and juries prefer clearly defined and established elements of an offense. There is no dispute that five of the six elements of the offense are clearly defined. Moreover, based on the exhibits provided, in my opinion, a competent and ethical federal prosecutor could establish five of the six elements of the offense beyond a reasonable doubt. Specifically, no one can dispute that: (1) individuals and both business entities; (2) knowingly; (3) acquired, received, or otherwise transferred; (4) human fetal tissue; (5) which crossed states lines. As for the final element, whether individuals or persons received “valuable consideration,” for doing this, that element and those proofs are more nuanced.

Before identifying the key exhibits and points that establish “valuable consideration,” there are a number of assumptions I had to make while reviewing the exhibits. First, because the documents were redacted, I assumed that the same California-based procurement business identified in the exhibits were procuring the human fetal tissue from and making payments to the California-based abortion clinics identified in Exhibits D1 through D3. My second assumption is that the same human fetal tissue procured in California was sent to research facilities in Massachusetts and Illinois, as indicated in exhibit C4. Third, I assumed that all the documents would be deemed admissible under the Federal Rules of Evidence. And fourth, I assumed that

the government's case would include testimony from cooperating or compelled employees or former employees of the various abortion clinics and/or human fetal tissues procurement companies – whom prosecutors commonly refer to as “storytellers” -- and possibly other evidence to support what the documents purport to inform.

a. The Abortion Clinics

The marketing materials that the procurement business provides to the abortion clinics explicitly states that financial profits will result from this partnership. (*See* Ex. B2 & B3). Additionally, the Middleman Turnkey Business Flow Chart (Ex. C1) indicates that procurement business pays the clinic “per tissue;” not a reasonable payment for any of the listed services in the statute. This “price per sample” business model is also supported by the payments to the various abortion clinics as set forth in exhibits D1 through D3. If a federal prosecutor can establish that these abortion clinics are not providing services for the “transportation, implantation, processing, preservation, quality control or storage of human fetal tissue,” as these services are provided by the procurement business's embedded technicians, then these per tissue payments appear to be “valuable consideration” in violation of the statute. In fact, if the abortion clinic incurs no identifiable cost but is simply providing the procurement business with access to what would otherwise be discarded, then the “payments per tissue” are pure profits, in violation of both the letter and spirit of the legislation.

b. The Procurement Business

In my opinion, a deeper analysis of the procurement company's financials is necessary in order to establish the “valuable consideration” element beyond a reasonable doubt. An ethical federal prosecutor should not seek an indictment unless he or she can reasonably expect to prove all the elements of the offense beyond a reasonable doubt – not just establish probable cause in

order to obtain an indictment. Because the procurement business does in fact incur costs “associated with the transportation, implantation, processing, preservation, quality control or storage of human fetal tissue,” a forensic account would be essential to breaking down the company’s financials and the actual costs associated with the procurement business’ acquisition, receipt, and transfer of the human fetal tissue it brokers. As a prosecutor, I would not want the success of my case hinging on a jury determination of which costs, for which tissues, are “reasonable” or not. Moreover, while the clinic growth strategy and revenue growth charts (Exs. B4 & B5) establish significant growth of the business, more is needed to determine whether the business is covering its increased costs or in fact profiting from its acquisition, receipt, and transfer of human fetal tissue.

Other Theories of Criminal Liability

a. Aiding and Abetting

Title 18, section 2(a) of the United States Code, states: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” Generally, aiding and abetting does not need to be specifically alleged or cited. Instead, it is an alternative theory of culpability. If, however, the procurement business was charged as an aider and abettor, the prosecution would first need to establish that the crime was committed by the abortion clinic. Second, that the procurement business helped or encouraged the abortion clinic to commit the crime. And third, that the procurement business intended to help commit or encourage the crime.

Based on the limited exhibits provided, this aiding and abetting theory would, in my opinion, be a stronger theory of culpability for the procurement business. From the marketing materials provided by the procurement business to the abortion clinics, there is arguably proof

beyond a reasonable doubt that the procurement business “aided and abetted” the abortion clinics to profit from the interstate transfer of human fetal tissue.

b. Conspiracy

Title 18, section 371, of the United States Code states: “If two or more persons conspire either to commit any offense against the United States, . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.” A conspiracy is an illegal agreement that a defendant knowingly joins. Additionally, a defendant must have performed or caused someone to perform one or more overt acts for the purpose of advancing or helping the conspiracy succeed.

Based on the limited exhibits reviewed and the strength of the substantive case against the abortion clinics, pursuing a conspiracy count against the procurement business, rather than a substantive count, may be a stronger theory of culpability as it relates to the procurement business.

Conclusion

In my opinion, and assuming the validity and admissibility of the exhibits provided to me, there is sufficient evidence to launch a federal grand jury investigation targeting the abortion clinics and the procurement business identified in the exhibits for potential violations of 42 U.S.C. § 289g-2, aiding and abetting violations of the statute, and conspiracy to violate the same. As for the substantive offense, proof that the abortion clinics received valuable consideration for their role in the transfer of human fetal tissue is, in my opinion, strong. As to the procurement business, further investigation is necessary to establish this element beyond a reasonable doubt.

Based on my experience, federal prosecutors take pride in protecting the most vulnerable among us. The federal prosecutors I proudly served with at the U.S. Attorney's Office in the Western District of Michigan and in the Eastern District of Virginia did not shy away from the tough cases, and they put their personal politics aside when asked to evaluate cases for prosecution. Evidence, or the lack thereof, not politics, should determine whether a U.S. attorney empanels a grand jury to investigate abortion clinics and human fetal procurement businesses in their districts.

Again, I thank you Chairman Blackburn, Ranking Member Schakowsky, and Distinguished Members of the Select Investigative Panel for allowing me this opportunity to provide my perspective on this issue. I welcome your questions.