

JAN 28 2009

S.B. NO. 1269

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# A BILL FOR AN ACT

RELATING TO OFFENSES AGAINST THE PERSON.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that clarification is  
2 needed to address several issues raised in the Hawaii supreme  
3 court's holding in *State v. Aiwohi*, 123 P.3d 1210 (2005). In  
4 *Aiwohi*, the issue before the court was whether a mother can be  
5 charged with manslaughter for recklessly causing the death of  
6 her newborn baby by the prenatal ingestion of crystal  
7 methamphetamine. Since Hawaii's manslaughter law requires that  
8 a defendant's conduct recklessly cause the death of "another  
9 person", the key issue before the court was the definition of  
10 "person." The court determined that "person," as used in the  
11 Hawaii Penal Code, means a human being who is born and is alive  
12 and thus does not include a fetus. Because the mother's  
13 culpable conduct, the use of crystal methamphetamine, occurred  
14 prior to her baby's birth, she could not be held criminally  
15 liable under Hawaii's manslaughter statute since her conduct was  
16 not directed at a "person." Thus, under the *Aiwohi* decision,  
17 there cannot be any criminal liability for any prenatal conduct  
18 directed against a fetus.



1           The State, however, has a compelling and legitimate  
2 interest in protecting fetal life from the point of viability.  
3 "This is so because the fetus then presumably has the capability  
4 of meaningful life outside the mother's womb. State regulation  
5 protective of fetal life after viability thus has both logical  
6 and biological justifications." *Roe v. Wade*, 410 U.S. 113, 163,  
7 93 S. Ct. 705, 732, 35 L. Ed. 2d 147, 183 (1973). Balancing the  
8 State's interest in protecting the potentiality of human life  
9 and the mother's right to reproductive autonomy, this Act  
10 defines "viable fetus" and criminalizes third party conduct  
11 against a viable fetus.

12           Specifically, this Act includes a viable fetus in the  
13 definition of "person" for purposes of the offenses of murder,  
14 manslaughter, assault, negligent homicide, and negligent injury  
15 and criminalizes third party conduct that causes the death of,  
16 or serious or substantial bodily injury to, a viable fetus. It  
17 also holds a third party culpable for causing the death of, or  
18 substantial or serious bodily injury to, a live baby when the  
19 conduct causing the death or injury occurred prior to birth but  
20 after the fetus became viable. The mother of the fetus and  
21 licensed medical personnel conducting lawful medical procedures



1 requested by the mother or necessary to save her life are not  
2 third parties who may be held criminally liable under this Act.

3 The purpose of this Act is to preserve a woman's right to  
4 choose whether or not to continue her pregnancy while  
5 criminalizing the acts of a third party who, without the  
6 mother's consent, kills or injures her viable fetus.

7 SECTION 2. Chapter 707-700, Hawaii Revised Statutes, is  
8 amended as follows:

9 1. By adding a new definition to be appropriately inserted  
10 and to read:

11 "Viable fetus" means a fetus that, at the time of the  
12 actor's conduct toward the fetus, has a reasonable likelihood of  
13 sustained survival outside the womb with or without the aid of  
14 standard medical measures; provided that the live birth or the  
15 actual survival of the fetus shall not be required for the fetus  
16 to be deemed viable."

17 2. By amending the definition of "person" to read:

18 "Person" means a human being who has been born and is  
19 alive[-]; provided that for the purposes of sections 707-  
20 701(1)(a), 707-701.5, 707-702(1)(a), 707-702.5, 707-703, 707-  
21 704(1), 707-705, 707-706, 707-710, and 707-711(1)(a) and (b),  
22 "person" shall also include a viable fetus whose death, serious



1 bodily injury, or substantial bodily injury is caused other than  
2 by:

- 3       (1) The mother of the fetus; or
- 4       (2) Licensed medical personnel conducting a lawful medical
- 5             procedure requested by the mother or necessary to save
- 6             her life."

7       SECTION 3. Chapter 707, Hawaii Revised Statutes, is  
8 amended by adding a new section to be appropriately designated  
9 and to read as follows:

10       "§707-       Viable fetus; prima facie evidence. It shall be  
11 prima facie evidence that a fetus is capable of sustained  
12 survival outside the womb with or without the aid of standard  
13 medical measures when the fetus has reached a gestational age of  
14 twenty-four weeks or greater."

15       SECTION 4. This Act does not affect rights and duties that  
16 matured, penalties that were incurred, and proceedings that were  
17 begun, before its effective date.

18       SECTION 5. Statutory material to be repealed is bracketed  
19 and stricken. New statutory material is underscored.

20       SECTION 6. This Act shall take effect upon its approval.

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INTRODUCED BY:

*[Handwritten signatures]*



S.B. NO. 1269

Norman Sakamoto



**Report Title:**

Offenses Against a Person; Viable Fetus

**Description:**

Amends the definition of "person" for purposes of offenses of murder, manslaughter, and negligent injury to provide protection for a viable fetus. Defines "viable fetus." Adds provision that gestational age of 24 weeks or greater is prima facie evidence that fetus is viable.

